

**UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION**

Nevada Irrigation District	)	
	)	
Yuba-Bear Hydroelectric Project	)	P-2266-102
	)	

**FOOTHILLS WATER NETWORK’S REQUEST FOR REHEARING OF ORDER ON  
WAIVER OF WATER QUALITY CERTIFICATION**

Pursuant to Federal Power Act (FPA) section 313(a) and the Federal Energy Regulatory Commission’s (Commission) Rules of Practice and Procedure, *see* 18 C.F.R. § 385.713, the Foothills Water Network and its member organizations petition for rehearing of the “Order on Waiver of Water Quality Certification,” 171 FERC ¶ 61,029 (Order), issued in the relicensing of Nevada Irrigation District’s (NID) Yuba-Bear Project (Project).

At NID’s request, the Order finds that the California State Water Resources Control Board (State Water Board) waived its authority under section 401(a)(1) of the Clean Water Act (CWA)<sup>1</sup> to issue water quality certification for the relicensing of the Project. This finding is based on the Commission’s recently adopted interpretation of the one-year deadline for a State to act on a request for water quality certification (§ 401 request) under CWA section 401. Under the Commission’s interpretation, a State waives its authority to certify an activity (§ 401 authority) if an applicant withdraws and resubmits a § 401 request and the State does not act on the withdrawn request within one year. This interpretation reverses the Commission’s longstanding position that an applicant’s withdrawal-and-resubmittal of a request triggers a new one-year period for the State to act. The Commission’s new interpretation of section 401 is not supported let alone compelled by the statute or court precedent interpreting the statute, is an

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<sup>1</sup> 33 U.S.C. § 1341.

inequitable result under the facts at issue here, and likely will result in degradation of water quality over the term of any new license.

## **I.** **PETITIONERS**

The Foothills Water Network is a consensus-based coalition of conservation groups. Its member organizations include American Rivers, American Whitewater, California Sportfishing Protection Alliance, Friends of the River, Gold Country Fly Fishers, Northern California Council Federation of Fly Fishers, Save Auburn Ravine Salmon and Steelhead, Sierra Club, South Yuba River Citizens League, and Trout Unlimited. We refer to Foothills Water Network and its member organizations collectively as the “Network” or “Petitioners.”

The Network has substantial interests in the outcome of this proceeding, which may determine whether the Project will be conditioned to comply with state water quality standards, including the designated beneficial uses of municipal and domestic water supply, irrigation, stock watering, power, contact recreation, canoeing and rafting, other noncontact recreation, cold freshwater habitat, cold spawning, and wildlife habitat, over the term of the new license.

The Network is party to the underlying proceeding, having filed a timely, unopposed joint motion to intervene in the relicensing proceeding.<sup>2</sup> The Network also filed timely comments in response to NID’s request that the Commission “confirm” that the State Water Board had waived its 401 authority in connection with the relicensing of the Project. The

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<sup>2</sup> See “Motion to Intervene of Foothills Water Network, American Rivers, American Whitewater, California Sportfishing Protection Alliance, Friends of the River, Gold Country Fly Fishers, Northern California Council Federation of Fly Fishers, Ophir Property Owners Association, Save Auburn Ravine Salmon and Steelhead, Sierra Club, South Yuba River Citizens League, and Trout Unlimited, P-2266-102,” eLibrary no. 20120731-5146 (Jul. 31, 2012).

description of the individual member organizations and their respective interests are stated in the Network's joint Motion to Intervene.

## **II.** **BACKGROUND**

The Project occupies lands and waters of the Middle and South Forks of the Yuba River and Bear River in Sierra, Nevada, and Placer Counties, California.

The Project originally was licensed on May 1, 1963. That license expired on April 30, 2013. NID has been operating on annual licenses since then.

On November 8, 2010, NID filed its Draft License Application.<sup>3</sup> On January 31, 2011, the Commission issued a notice of deficiency regarding the draft.<sup>4</sup> On March 17, 2011, NID filed its Updated Study Report.<sup>5</sup> NID filed its new license application on April 11, 2011, *see* eLibrary no. 20110415-5018 *et seq.* Commission Staff noticed its acceptance of the application on January 19, 2012, *see* eLibrary no. 20120119-3065.

As required by the Commission's rules of practice and procedure, *see* 18 C.F.R. § 5.23, NID filed a § 401 request with the State Water Board<sup>6</sup> on March 15, 2012.<sup>7</sup> NID's § 401 request acknowledged that the California Environmental Quality Act (CEQA) applied to the certification proceeding.<sup>8</sup> NID stated that it would act as a lead agency<sup>9</sup> for purposes of preparing the

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<sup>3</sup> *See* eLibrary 20101108-0035.

<sup>4</sup> *See* eLibrary 20110131-3028.

<sup>5</sup> *See* eLibrary 20110317-5086.

<sup>6</sup> Cal. Water Code § 13160.

<sup>7</sup> *See* letter from Ron Nelson, General Manger, NID, to Thomas Howard, Executive Director, State Water Board, eLibrary no. 20120316-5172 (Mar. 15, 2012).

<sup>8</sup> *Id.* at 2; *see also* Cal. Code Regs. tit. 23, § 3856(f).

environmental document required under CEQA for the proposed project.<sup>10</sup> The State Water Board acknowledged receipt of the application for certification.<sup>11</sup>

As noted by the Order, NID withdrew-and-resubmitted its § 401 request on March 1, 2013, just short of one year after it had filed the first request.<sup>12</sup> NID's resubmission relied on the same information as the first request. NID reaffirmed its commitment to act as the lead agency and prepare the CEQA document necessary for the State Water Board's decision on the § 401 request.<sup>13</sup> The State Water Board acknowledged receipt of the resubmission and stated, "NID's [March 1, 2013] letter initiates a one-year deadline from the date it was received for the [State Water Board] to act on the request for certification" and "[t]he new deadline for certification action is February 28, 2014."<sup>14</sup>

Commission staff issued a draft environmental impact statement (EIS) on May 17, 2013.<sup>15</sup> The draft EIS stated that a certification decision was anticipated by March 1, 2014.<sup>16</sup>

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<sup>9</sup> "Where a project is to be carried out or approved by more than one public agency, one public agency shall be responsible for preparing an EIR [Environmental Impact Report] or negative declaration for the project. This agency shall be called the lead agency." Cal. Code Regs. tit. 14, § 15050.

<sup>10</sup> NID had affirmed its intent to be CEQA lead agency as early as the Pre-Application Document (April 2008): "Major State of California laws that apply to Relicensing of the Project include: the California Endangered Species Act (CEQA) ... NID plans to be the Lead Agency for CEQA compliance and anticipates that the SWRCB will be a Responsible Agency for the purpose of issuing a Section 401 CWA water quality certificate for the Project." eLibrary no. 20080411-5029, p. ES-5. *See also* NID, Board of Directors Minutes (Mar. 23, 2011), available at [https://nidwater.com/documents/board\\_minutes/2011/Wk%20Copy%20of%20Minutes%2003-23-2011.pdf](https://nidwater.com/documents/board_minutes/2011/Wk%20Copy%20of%20Minutes%2003-23-2011.pdf) (last accessed May 15, 2020) ("Be Lead Agency in CEQA Process - Must File Application for 401 Certificate with SWRCB, within 45 days of FERC's REA Notice").

<sup>11</sup> *See* letter from Jeffrey Parks, State Water Board, to Ron Nelson, NID (Mar. 29, 2012), eLibrary no. 20120404-5180, p. 1.

<sup>12</sup> *See* letter from Remleh Scherzinger, General Manger, NID, to Thomas Howard, Executive Director, State Water Board, eLibrary no. 20130316-5172 (Mar. 1, 2013).

<sup>13</sup> *See id.*

<sup>14</sup> *See* letter from Jeffrey Parks, State Water Board, to Remleh Scherzinger, General Manager, NID, eLibrary no. 20130404-5180 (Mar. 27, 2013).

<sup>15</sup> *See* eLibrary 20130517-4001.

In comments on the draft EIS, the State Water Board clarified the status of the certification proceeding.<sup>17</sup> It stated that compliance with CEQA was a prerequisite to a final certification decision and that the CEQA process likely would not be finished by spring 2014.<sup>18</sup> This report reflected the fact that NID had not yet initiated the CEQA process. Accordingly, the State Water Board opined, “[t]he most likely action will be that the [l]icensees will withdraw and resubmit their respective applications for water quality certifications before the one-year deadline if the [Board] is not ready to issue its water quality certifications. Otherwise, the State Water Board will deny certification without prejudice.”<sup>19</sup> At that time, and indeed up until 2019, the Commission’s practice was to treat resubmitted § 401 requests as new requests for purposes of the State’s duty to act within one year.<sup>20</sup>

The Commission issued its final EIS on December 19, 2014.<sup>21</sup> The final EIS evaluates the Project’s impacts on water temperature in the Middle Yuba River and the related impacts on the designated use of coldwater habitat downstream.<sup>22</sup> The Final EIS explained that even with proposed measures, including increased flow releases, the project operations may contribute to

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<sup>16</sup> *Id.* at 7.

<sup>17</sup> State Water Board, Comments on Draft Environmental Impact Statement for the Drum-Spaulding Hydroelectric Project, Federal Energy Regulatory Commission Project No. 2310 and the Yuba-Bear Hydroelectric Project, Federal Energy Regulatory Commission Project No. 2266, eLibrary no. 20130822-5161 (Aug. 22, 2013) (“State Water Board’s Draft EIS Comments”).

<sup>18</sup> *Id.*

<sup>19</sup> State Water Board’s Draft EIS Comments, p. 1.

<sup>20</sup> *See, e.g., Pacificorp*, 149 FERC ¶ 61038, 61172 (Oct. 16, 2014).

<sup>21</sup> FERC, Final Environmental Impact Statement for Hydropower License, Upper Drum-Spaulding Hydroelectric Project, Project No. 2310-193 – California; Lower Drum Hydroelectric Project, Project No. 14531-000 – California; Deer Creek Hydroelectric Project, Project No. 14530-000 – California; Yuba-Bear Hydroelectric Project, Project No. 2266-102 – California, (Dec. 2014), eLibrary no. 20141219-4003 (Final EIS).

<sup>22</sup> Final EIS, § 3.3.2.

non-compliance with water quality standards.<sup>23</sup> The Final EIS does not resolve the issue of what minimum flows are necessary to meet water temperature standards and designated beneficial uses, specifically the protection of coldwater habitat, in the Middle Yuba River.<sup>24</sup>

NID has withdrawn and resubmitted a § 401 request annually since 2013.<sup>25</sup> NID withdrew each § 401 request within one year of filing. The State Water Board has acknowledged receipt of each request and treated each as a new request for purposes of its duty to act within one year. The State Water Board's responses in 2016, 2017, and 2018 advised NID that, "[i]f the information necessary for compliance with CEQA is not provided to the State Water Board, staff may recommend denial of certification without prejudice. (Cal. Code Regs., tit 23, 3837(b)(2)."

NID did not provide the information for compliance with CEQA.

On January 25, 2019, the State Water Board denied without prejudice the § 401 request filed by NID on January 29, 2018. It stated that, "[i]n order to maintain an active certification application, NID will need to request certification for the [p]roject."<sup>26</sup>

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<sup>23</sup> Final EIS, p. 257 ("Even with these proposed minimum streamflow increases, model results indicate that summer water temperatures in some key project-affected stream reaches could approach stressful levels for cold water aquatic species including resident rainbow trout, particularly during warmer years."), p. 849 ("Proposed minimum flow and spill cessation measures would improve seasonal and inter-annual flow variability to better mimic natural flow variability in some project-affected reaches; however, inter-basin transfer of water via project facilities to meet water delivery commitments and contracts under legally established water rights would continue to reduce overall natural flow and variability in many project reaches.").

<sup>24</sup> *Id.* at 853.

<sup>25</sup> See letter from Remleh Scherzinger, NID, to Kimberley Bose, Commission Secretary, re: Yuba-Bear Hydroelectric Project, FERC Project No. 2266-102 – California, Section 401 Water Quality Certification, eLibrary no. 20190219-5133 (Feb. 19, 2019) (NID Request for Waiver), App. B (correspondence between NID and State Water Board concerning water quality certification for the Yuba-Bear Project).

<sup>26</sup> Letter from Eileen Sobeck, State Water Board, to Remleh Scherzinger, NID, eLibrary no. 20190205-0043 (Jan. 25, 2019), pp. 1-2.

NID has not resubmitted a request for certification. It has not initiated environmental review under CEQA, which is a prerequisite under state law to the State Water Board's certification decision.

On February 19, 2019, NID requested that the Commission "confirm" the State Water Board had waived its § 401 authority in connection with the relicensing of the Project.<sup>27</sup> The request relied on the U.S. Court of Appeals for the D.C. Circuit's (D.C. Circuit) decision in *Hoopa Valley Tribe v. Federal Energy Regulatory Commission (Hoopa Valley)*.<sup>28</sup>

On March 5, 2019, the Network filed comments opposing NID's request for the Commission to find waiver.<sup>29</sup> The State Water Board also filed comments in opposition and asked that the Commission deny the request to find waiver.<sup>30</sup>

On April 16, 2020, the Commission granted NID's request, relying on *Hoopa Valley* and its own precedent to find that the State Water Board had waived its § 401 authority.

The Network's Request for Rehearing follows.

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<sup>27</sup> NID Request for Waiver, p. 1.

<sup>28</sup> *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. Apr. 26, 2019), *reh'g denied*, No. 14-1271, 2019 WL 3928669 (D.C. Cir. Apr. 26, 2019), and *cert. denied sub nom. California Trout v. Hoopa Valley Tribe*, 140 S. Ct. 650, 205 L. Ed. 2d 410 (2019).

<sup>29</sup> See Answer of Foothills Water Network to February 19, 2019 "Request" of Nevada Irrigation District to Confirm Waiver of Water Quality Certification Yuba-Bear Hydroelectric Project, P-2266-102, eLibrary no. 20190305-5216 (Mar. 5, 2019).

<sup>30</sup> See State Water Board, Response to Nevada Irrigation District's Waiver Request of 401 Water Quality Certification for The Yuba-Bear Hydroelectric Project, Federal Energy Regulatory Commission Project No. 2266, Nevada, Placer, and Sierra Counties, eLibrary no. 20190319-5027 (Mar. 19, 2019) (State Water Board Response to Waiver Request).

**III.**  
**STATEMENT OF ISSUES**

**Issue 1. Whether the Commission Erred in Interpreting Section 401 to Require the State Water Board to Act within One Year of the Original § 401 Request Regardless of NID's Actions.**

**Statutes**

16 U.S.C. § 1536(a)(2)  
33 U.S.C. § 1251  
33 U.S.C. § 1341(a)(1)

**Regulations**

50 C.F.R. § 402.14

**Cases**

*Alabama Rivers Alliance v. FERC*, 325 F.3d 290 (D.C. Cir. 2003)  
*Constitution Pipeline Co. v. N.Y. State Dep't of Env'tl. Conserv.*, 868 F.3d 87 (2d Cir. 2017)  
*Constitution Pipeline Co.*, 168 FERC ¶ 61,129 (2019)  
*Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009)  
*Hardt v. Reliance Standard Life Ins.*, 560 U.S. 242 (2010)  
*Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019)  
*KEI (Maine) Power Management (III) LLC*, 171 FERC ¶ 62,043 (2020)  
*McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (2019)  
*Nat'l Fuel Gas Supply Corp. Empire Pipeline, Inc.*, 164 FERC ¶ 61084 (Aug. 6, 2018)  
*N.Y. Dep't of Env'tl. Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018)  
*Pacificorp*, 149 FERC ¶ 61,038 (2014)  
*Placer County Water Agency*, 169 FERC ¶ 61,046 (2019)  
*S.D. Warren Co. v. Me. Bd. of Env'tl. Protection*, 547 U.S. 370 (2006)  
*Southern California Edison Co.*, 170 FERC ¶ 61,135 (2020)

**Issue 2. Whether NID Is Entitled to the Relief Sought Despite its Unclean Hands.**

**Statutes**

33 U.S.C. § 1341(a)(1)

**Regulations**

Cal. Code Regs. tit. 14, § 15002



### **Cases**

*Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383 (1944)  
*McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995)  
*Millennium Pipeline Co., L.P. v. Gutierrez*, 424 F. Supp. 2d 168 (D.D.C. 2006)  
*Northbay Wellness Group, Inc. v. Beyries*, 789 F.3d 956 (9th Cir. 2015)  
*Rocky Mountain Natural Gas Co. v. FERC*, 114 F.3d 297 (D.C. Cir. 1997)  
*Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982)

### **Issue 3. Whether the State Water Board’s Deadline to Act on NID’s § 401 Requests Was or Should Have Been Equitably Tolled.**

#### **Statutes**

33 U.S.C. § 1341(a)(1)

#### **Cases**

*Barrish & Sorenson Hydroelectric Co., Inc.*, 68 FERC ¶ 62,161 (1994)  
*Bowden v. United States*, 106 F.3d 433 (D.C. Cir. 1997)  
*Bull S.A. v. Comer*, 55 F.3d 678 (D.C. Cir. 1995)  
*Cent. Vt. Pub. Serv., Co.*, 113 FERC ¶ 61,167 (2005)  
*Jarrell v. U.S. Postal Serv.*, 753 F.2d 1088 (D.C. Cir. 1985)  
*Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750 (2016)  
*Pacificorp*, 149 FERC ¶ 61038 (2014)  
*RidgeWood Maine Hydro Partners, L.P.*, 77 FERC ¶ 62,201 (1996)

### **Issue 4. Whether the Commission’s Disagreement with State Procedures for Implementing Section 401 is an Appropriate Basis for Finding Waiver.**

#### **Statutes**

33 U.S.C. § 1341(a)(1)  
Cal. Pub. Resources Code § 15096  
Cal. Pub. Resources Code § 15108  
Cal. Pub. Resources Code § 21165

#### **Regulations**

18 C.F.R. § 4.34(b)(5)  
Cal. Code Regs. tit. 23, § 3856(f)  
*Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters*, 56 Fed. Reg. 23108-01 (May 20, 1991)

#### **IV.** **STANDARD OF REVIEW**

The standards of review for the Commission’s orders are stated in FPA section 313(b) and Administrative Procedures Act (APA) section 10(e), 5 U.S.C. § 706.<sup>31</sup> Under the FPA, the Commission’s findings “as to the facts, if supported by substantial evidence, shall be conclusive.<sup>32</sup> Under the APA, the Court “shall hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, abuse of discretion, or otherwise not in accordance with the law; . . . (D) without observance of procedure required by law; [or] (E) unsupported by substantial evidence . . . .”<sup>33</sup>

#### **V.** **ARGUMENT**

The Order concludes that the State Water Board waived its § 401 authority with respect to the relicensing of NID’s Yuba-Bear Project.<sup>34</sup> In reaching that conclusion, the Commission relies on an expanded reading of the *Hoopa Valley* decision and subsequent Commission precedent finding waiver of § 401 authority in other proceedings. The Commission’s interpretation of the state’s duty to act within one year under Section 401 in the face of an applicant’s unilateral and voluntary withdrawal-and-resubmittal of § 401 requests and its failure to comply with procedural prerequisites to the State’s certification decision is not supported by the plain text of CWA section 401 or the *Hoopa Valley* decision. In addition to being

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<sup>31</sup> *Wisconsin Pub. Power v. FERC*, 493 F.3d 239, 256 (D.C. Cir. 2007); *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) Commission's factual findings are reviewed under the deferential arbitrary and capricious standard.

<sup>32</sup> 16 U.S.C. § 825I(b).

<sup>33</sup> 5 U.S.C. § 706.

<sup>34</sup> Order, p. 12.

inconsistent with the law, the Commission’s finding of waiver in these circumstances would lead to an inequitable result.

**A. The Commission Erred in Interpreting Section 401 to Require the State Water Board to Act within One Year of the Original § 401 Request Regardless of NID’s Actions.**

Section 401 requires that any applicant for a federal license to conduct an activity “which may result in any discharge into the navigable waters” of a State must first obtain a water quality certification from that State.<sup>35</sup> However, if a State “fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of [section 401] shall be waived with respect to such federal application.”<sup>36</sup> “[S]tate certifications under section 401 are essential in the scheme to preserve state authority to address the broad range of pollution that threatens our nation’s waters.”<sup>37</sup> Congress provided the States with this power to ensure that “[n]o State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements.”<sup>38</sup>

Under Section 401, when a license applicant submits a § 401 request, the certifying State has one year to “act” on the request.<sup>39</sup> The plain text of the statute provides that § 401 authority is waived only if a State fails or refuses to act on a request for certification within one year of

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<sup>35</sup> 33 U.S.C. § 1341(a)(1).

<sup>36</sup> *Id.*

<sup>37</sup> *S.D. Warren Co. v. Me. Bd. of Env'tl. Protection*, 547 U.S. 370, 386 (2006).

<sup>38</sup> *Ibid.* (quoting 116 Cong. Rec. 8984 (1970)).

<sup>39</sup> 33 U.S.C. § 1341(a)(1).

that request.<sup>40</sup> The statute on its face does not define what constitutes a state’s failure or refusal to act. It does not address whether the withdrawal-and-resubmittal of a § 401 request can cause the state’s failure to act within the meaning of the statute. The D.C. Circuit considered this issue in *Hoopa Valley* and found the applicant’s use of the withdrawal-and-resubmittal pursuant to a formal agreement with the State to delay the § 401 certification proceeding and related relicensing, and thus can cause waiver of the State’s authority.

*Hoopa Valley* involved the relicensing of PacifiCorp’s Klamath Hydroelectric Project (P-2082). The Hoopa Valley Tribe, an intervenor to the relicensing, petitioned the Commission for a declaratory order finding, in part, that the States of Oregon and California had each waived their § 401 authority with respect to the relicensing.

The Commission rejected the tribe’s argument that the States have waived certification.<sup>41</sup> It stated that Section 401 “speaks solely to state action or inaction, rather than the repeated withdrawal and refiling of applications.”<sup>42</sup> Thus, the Commission concluded, “[b]y withdrawing its applications before a year has passed, and presenting the states with new applications,” PacifiCorp gave the states “new deadlines.”<sup>43</sup> The Commission further explained, “[t]he record

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<sup>40</sup> *Id.* See also *Hardt v. Reliance Standard Life Ins.*, 560 U.S. 242, 251 (2010) (court “must enforce plain and unambiguous statutory language according to its terms”); *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175 (2009) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”) (citation omitted).

<sup>41</sup> *PacifiCorp*, 149 FERC ¶ 61038, 61172 (Oct. 16, 2014).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* This reading is in accord with *N.Y. Dep’t of Envtl. Conservation v. FERC*, where the U.S. Court of Appeals for the Second Circuit found that waiver occurs if states fail to act on a request (whether complete or incomplete) within one year, but not if the applicant triggers a new review period by withdrawing the request and resubmitting a request in its place before the one-year deadline. 884 F.3d 450 (2d Cir. 2018). The court also cited with approval one of its decisions where the “applicant for a Section 401 certification had withdrawn its application and resubmitted at the Department’s request—thereby restarting the one-year review period.” *Id.* at 456 n.35 (citing *Constitution Pipeline Co. v. N.Y. State Dep’t of Envtl. Conserv.*, 868 F.3d 87, 94 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 1697 (2018)). See also *Nat’l Fuel Gas Supply Corp. Empire Pipeline, Inc.*, 164 FERC ¶ 61084, \*10 (Aug. 6,

does not reveal that either state has in any instance failed to act on an application that has been before it for more than one year.”<sup>44</sup> The tribe appealed the Commission’s decision to the D.C. Circuit, which reversed.

The D.C. Circuit started by agreeing with the Commission’s analysis on rehearing that “[i]mplicit in the statute’s reference ‘to act on *a request* for certification,’ the provision applies to a specific request.”<sup>45</sup> The court also agreed the waiver provision “cannot be reasonably interpreted to mean that the period of review for one request affects that of any other request.”<sup>46</sup>

However, the D.C. Circuit found the Commission had acted arbitrarily and capriciously when it found that PacifiCorp’s resubmissions constituted independent requests subject to a new period of review.<sup>47</sup> Instead, the court found that the resubmissions could not be new requests because PacifiCorp and the States had entered into a written agreement *not* to process the § 401 requests while PacifiCorp and other parties pursued an alternative path to decommission rather than relicense the lower project dams:

This case presents the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification. PacifiCorp’s withdrawals-and-

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2018) (“Only if an applicant withdraws and refiles an application, no matter how formulaic or perfunctory the process, does the certifying agency’s new ‘receipt’ of the application restart the one-year waiver period under section 401(a)(1).”).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1104 (italics in original).

<sup>46</sup> *Id.*

<sup>47</sup> The court expressly declined to determine what would constitute generally a new request sufficient to restart the one-year clock:

The record does not indicate that PacifiCorp withdrew its request and submitted a wholly new one in its place, and therefore, we decline to resolve the legitimacy of such an arrangement. We likewise need not determine how different a request must be to constitute a “new request” such that it restarts the one-year clock.

*Id.*

resubmissions were not just similar requests, they were not new requests at all. The [Klamath Hydropower Settlement Agreement] makes clear that PacifiCorp never intended to submit a “new request.” Indeed, as agreed, before each calendar year had passed, PacifiCorp sent a letter indicating withdrawal of its water quality certification request and resubmission of the very same ... *in the same one-page letter ... for more than a decade.* Such an arrangement does not exploit a statutory loophole; it serves to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.<sup>48</sup>

The court acknowledged that the statute does not define “failure to act” or “refusal to act,” but found the States’ efforts, *as dictated by the Klamath Hydropower Settlement Agreement*, to constitute such failure and refusal within the plain meaning of these phrases.<sup>49</sup> It admonished the States for their “deliberate and contractual idleness” in contravention of their duty to act under Section 401.

The court recognized that “the waiver provision was created “to prevent a State from indefinitely delaying a federal licensing proceeding.”<sup>50</sup> In the Klamath relicensing, the final EIS had issued on November 16, 2007<sup>51</sup> and consultation under the Endangered Species Act (ESA) had ended in Biological Opinions issued on December 3, 2007<sup>52</sup> and December 21, 2007.<sup>53</sup> In that case, the relicensing application would have been ripe for action, except for the States’ outstanding certification decisions, if the Commission had wanted to set it for decision. The

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<sup>48</sup> *Id.* (italics in original; underline added).

<sup>49</sup> *Id.* at 1104.

<sup>50</sup> *Id.* at 1105.

<sup>51</sup> FERC, “Final Environmental Impact Statement for the Klamath Hydro Project under P-2082,” eLibrary no. 20071116-4001 (Nov. 16, 2007).

<sup>52</sup> U.S. Fish and Wildlife Service, “Biological Opinion on the Effects of the Klamath Hydroelectric Project on the endangered Lost River and Shortnose Suckers,” eLibrary no. 20071203-5089 (Dec. 3, 2007).

<sup>53</sup> NMFS, “Biological Opinion for the Klamath Hydroelectric Project License (FERC No. 2082-027),” eLibrary no. 20080107-0070 (Dec. 21, 2007).

court also highlighted how this “scheme” injured the interests of the Hoopa Valley Tribe, a third party who was interested in expediting the Commission’s decision on relicensing.

As discussed below, the facts that led the D.C. Circuit to find waiver of the States’ § 401 authority in the *Hoopa Valley* case simply are not present here. The D.C. Circuit clarified that its decision was fact specific.<sup>54</sup> The Order does not provide adequate basis for the Commission’s reliance on *Hoopa Valley* to find waiver under these different circumstances. The Commission has not simply applied the *Hoopa Valley* decision; it has expanded it to find waiver under an entirely different set of facts.

**1. There Was No Agreement between NID and the State Water Board.**

The Order quotes the *Hoopa Valley* court’s holding that “a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year.”<sup>55</sup> It then proceeds to read the significance of an actual agreement out of the court’s holding.

The existence of a written agreement between the applicant and the States *not* to process the § 401 requests was central to the court’s analysis in *Hoopa Valley*. The court agreed the statute could not “be reasonably interpreted to mean that the period of review for one request affects that of any other request.”<sup>56</sup> However, in the court’s view, the written agreement between PacifiCorp and the States to delay indefinitely the States’ action on any § 401 request prevented

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<sup>54</sup> “This case presents the set of facts in which a licensee entered into a written agreement with the reviewing states to delay water quality certification.” *Hoopa Valley*, 913 F.3d at 1104.

<sup>55</sup> Order, ¶ 18.

<sup>56</sup> *Hoopa Valley*, 913 F.3d at 1104.

PacifiCorp’s resubmissions from being new requests at all.<sup>57</sup> In other words, how could PacifiCorp’s resubmissions be considered “new requests” for purposes of triggering a new period of review if under a separate formal agreement PacifiCorp had asked the States not to act on the request, and the States had agreed? According to the court, the agreement evinced a clear intent of PacifiCorp and the States to prevent a decision on the § 401 requests for relicensing while the parties were pursuing an alternative to relicensing, namely partial project decommissioning. It was this “*contractual idleness*” that constituted a refusal to act by the States, resulting in waiver of their § 401 authority.

By contrast, there was no written agreement here, a fact the Order largely ignores. The Order instead suggests there may have been an implied agreement between NID and the State Water Board. The Order points to the Commission’s decision in *Placer County Water Agency*, where it held “that a formal agreement between a licensee and a state was not necessary to support a finding of waiver; rather, the exchanges between the entities could amount to an ongoing agreement.”<sup>58</sup> There the Commission referred to such arrangement as a “functional agreement.”<sup>59</sup>

We disagree that the Commission’s precedent finding waiver in other proceedings on the novel basis of “functional agreements” are authoritative on this issue. It is well-established the Commission’s interpretation of the CWA is not entitled to deference.<sup>60</sup> Further, the Commission has provided insufficient evidence to demonstrate the existence of any agreement here.

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<sup>57</sup> *Id.*

<sup>58</sup> Order, ¶ 19.

<sup>59</sup> *Id.*

<sup>60</sup> *See, e.g., Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003) (the Commission’s interpretation of Section 401 is entitled to no deference by the court because the Environmental Protection Agency,



Rather than point to an express agreement, the Order cites perfunctory correspondence between NID (withdrawing-and-resubmitting its § 401 request) and the State Water Board (acknowledging receipt) to find an implied agreement or an implied refusal to act resulting in waiver of the State’s § 401 authority to condition a 30- to 50-year license to comply with state water quality standards.<sup>61</sup> This is an extreme result given the correspondence simply does not show an agreement.

The Commission stretches to interpret this correspondence as an agreement for purposes of finding the State has waived its § 401 authority. It does not explain how this interpretation of the statute or facts furthers the general purpose of the CWA, which is to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters,” or is consistent with the specific purpose of Section 401 to give States primary authority in protecting water quality against potential degradation by federally approved projects.<sup>62</sup>

Aside from the correspondence, the Order does not cite to any other specific evidence of an agreement between NID and the State Water Board, not even a functional one. An agreement is an “act of two or more persons who unite in expressing a mutual and common purpose with the view of altering their rights and obligations. A coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done....”<sup>63</sup> For example, in *Hoopa Valley* it was shown that PacifiCorp and the States had a common purpose of wanting to defer action on the § 401 requests and prevent the Commission’s action on relicensing while

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not the Commission, is charged with administering the CWA, and judicial review of the Commission's interpretation of Section 401 is *de novo*).

<sup>61</sup> Order, pp. 10-11.

<sup>62</sup> 33 U.S.C. § 1251.

<sup>63</sup> Black’s Law Dictionary, 2d Edition.

they pursued partial decommissioning of the project. By contrast, the Commission has not shown that NID and the State Water Board ever had a mutual or common purpose here that would be served by inaction on the § 401 requests.

The record does not show the State Water Board was unwilling to act on NID's § 401 request once NID submitted the CEQA document that was a prerequisite under state procedures to the State Water Board's action.<sup>64</sup> The State Water Board's courtesy notices regarding the approaching one-year deadline only show the State Water Board's intent to avoid waiver of its authority, not a mutual intent to withhold action for some common purpose.

The fact that the State Water Board did not object to NID's withdrawal-and-resubmittals is not evidence of a common purpose or agreement. According to the Commission's position, for most of the time the relicensing has been pending, such action was within an applicant's discretion and did not affect the State's § 401 authority, so there was no reason for the State Water Board to object to NID's withdrawal. The State Water Board made clear that it was prepared to deny a § 401 request without prejudice if NID did not elect to withdraw the request or submit the CEQA document.<sup>65</sup> The resubmissions do not explain NID's purpose in failing to timely comply with CEQA in order to advance the processing of its § 401 request, so it is unclear how the State Water Board could join in NID's purpose even if it did not object to NID's withdrawal.

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<sup>64</sup> NID Request for Waiver, App. B.

<sup>65</sup> See NID Request for Waiver, App. B (State Water Board's responses to § 401 requests in 2016, 2017, and 2018).

The Commission also argues “the state’s reason for delay [is] immaterial.”<sup>66</sup> This blanket statement is unsupported by *Hoopa Valley*. According to the D.C. Circuit, the record in *Hoopa Valley* showed the States’ intent was to delay certification and prevent the Commission’s action on relicensing and harshly criticized the States’ “deliberate and contractual idleness.”<sup>67</sup> By contrast, the record does not show the State Water Board had any inimical intent here.

Unlike *Hoopa Valley*, where there was a written agreement committing the States not to act on the applicant’s § 401 requests, the circumstances here are more analogous to those in *KEI (Maine) Power Management (III) LLC*.<sup>68</sup> There the Commission incorporated the State’s § 401 certification into the new license even though the applicant had withdrawn the original § 401 request and resubmitted substantially the same request, and the State issued certification more than one year after the original request was submitted.<sup>69</sup> As here, there was no written agreement between the applicant and the State, and the applicant voluntarily withdrew-and-resubmitted the § 401 request without objection from the State.

The fact that NID used withdraw-and-resubmit to avoid denial of its § 401 request and the State Water Board did not object, does not constitute the kind of formal agreement (“contractual idleness”) that the *Hoopa Valley* court found objectionable and is not a reasonable basis for finding waiver here.

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<sup>66</sup> Order, ¶ 28.

<sup>67</sup> *Hoopa Valley*, 913 F.3d at 1104.

<sup>68</sup> 171 FERC ¶ 62,043 (Apr. 15, 2020), ¶ 34.

<sup>69</sup> *See id.*

**2. The Certification Proceeding Has Not Delayed the Commission’s Relicensing Decision.**

The D.C. Circuit in *Hoopa Valley* found the applicant’s and States’ written agreement not to act had delayed the relicensing, effectively wresting control of the relicensing proceeding from the Commission.<sup>70</sup> The Order (¶ 18) alleges the State Water Board’s efforts here similarly prejudiced the Commission: “In fact, ‘[b]y shelving water quality certifications, the states usurp FERC’s control over whether and when a federal license will issue. Thus, if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC’s jurisdiction to regulate such matters.’”

However, the § 401 certification proceeding for the Yuba-Bear Project has not contributed to any delay in the relicensing proceeding. The license is not ripe for final decision because the Commission has not yet complied with its duties under ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2), to consult with the National Marine Fisheries Service (NMFS) regarding the Project’s potential adverse effects on federally listed spring-run Chinook salmon, Central Valley steelhead, and green sturgeon.

The Commission’s final EIS for the relicensing of the Upper Drum-Spaulding, Lower Drum, Deer Creek, and Yuba Bear Projects (December 2014) describes the Commission’s decision to delay consultation in order to take a watershed approach:

We conclude that the interbasin transfer of flows associated with the Upper Drum-Spaulding, Lower Drum, Deer Creek, and Yuba-Bear Projects may adversely affect the Central Valley spring-run Chinook salmon DPS [Distinct Population Segment] (*O. tshawytscha*), Central Valley steelhead DPS, and southern DPS of the green sturgeon downstream of Englebright dam. Project dams on the Middle Yuba and South Yuba Rivers divert water from the river to many canals and conduits where power generation occurs and where water is delivered to NID and Placer County Water Agency (PCWA) at

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<sup>70</sup> *Hoopa Valley*, 913 F.3d at 1104.

many points along the system. These diversions, in combination with operations of the Yuba River Project, have the potential to cumulatively affect listed species. We will initiate formal consultation on the Upper Drum-Spaulding, Lower Drum, Deer Creek, and Yuba-Bear Projects after our evaluation of recommended measures, including flow releases, associated with relicensing of the Yuba River Project.<sup>71</sup>

Commission staff first evaluated “recommended measures” for the Yuba River Project in the draft EIS for the relicensing of the Yuba River Development Project (May 2018) and completed its evaluation in the final EIS for the same proceeding (January 2019).<sup>72</sup> In its comments on the draft EIS for the Yuba River Development Project, NMFS found the Commission’s evaluation of recommended measures in the draft EIS did not satisfy the requirements for a biological assessment under the ESA.<sup>73</sup> Commission staff is preparing, but has not completed, a subsequent biological assessment which is necessary to initiate formal consultation with NMFS.<sup>74</sup>

In sum, Commission staff’s decision to combine ESA consultation for the Yuba-Bear and associated upper watershed projects with consultation for the lower watershed Yuba River Development Project has delayed consultation and thus relicensing by five and a half years to date.

Since *Hoopa Valley* was decided, the Commission has cited the loss of control over the timing of license issuance as a reason for finding waiver of § 401 authority in other

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<sup>71</sup> Final EIS, pp. 9-10.

<sup>72</sup> FERC, Draft Environmental Impact Statement for Hydropower License, Yuba River Development Project, Project No. 2246-065 – California (May 2018), eLibrary no. 20180530-3011; FERC, Final Environmental Impact Statement for Hydropower License, Yuba River Development Project, Project No. 2246-065 – California, eLibrary no. 20190102-3000 (Jan. 2019).

<sup>73</sup> See Final EIS for Yuba River Development Project, p. B-33.

<sup>74</sup> 50 C.F.R. § 402.14.

proceedings.<sup>75</sup> For example, in its order finding waiver in *Southern California Edison* the Commission stated: “[t]his coordination between the state and [Southern California Edison] is sufficient to find waiver as it prejudiced the Commission by delaying our licensing proceeding.”<sup>76</sup> There, however, the Commission alleged *actual harm* to its authority. The instant Order finds, rather, only *potential* harm: “withdrawal and resubmission could be used to indefinitely delay ...” (Order at 18, *supra*). Lack of actual delay clearly distinguishes the instant relicensing proceeding from *Hoopa Valley*.

### **3. No Third Party Has Claimed Injury.**

In *Hoopa Valley* the D.C. Circuit found that the written agreement between the applicant and states *not* to act on the § 401 requests resulted in delay that had injured a third party, namely the Hoopa Valley Tribe.<sup>77</sup>

Here, there is no third party claiming injury. There is no evidence that the party seeking waiver, NID, has been harmed by its own withdrawal-and-resubmittals of the § 401 requests. To the contrary, the record indicates that NID has benefited from deferring its compliance with state law procedures and now stands to benefit even more by entirely avoiding compliance with conditions the State Water Board deems necessary to protect water quality over the term of any new license. As discussed in Section V.C, *infra*, NID was responsible for complying with state

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<sup>75</sup> See e.g., 169 FERC ¶ 61,046 Placer County Water Agency *Order Denying Hearing* at ¶ 18; 168 FERC ¶ 61,129 Constitution Pipeline *Order on Voluntary Remand* at ¶ 34; 168 FERC ¶ 61,185 McMahan Hydroelectric, LLC *Order Issuing New License* at ¶ 37.

<sup>76</sup> 170 FERC ¶ 61,135 Southern California Edison *Declaratory Order on Waiver of Water Quality Certification* at ¶ 26. In fact, consultation with the U.S. Fish and Wildlife Service for the Southern California Edison’s Big Creek projects and their effects on Yosemite toad and Sierra Nevada yellow-legged frog may still be outstanding. See FERC staff Memoranda regarding presence of ESA species and critical habitats on each of the six projects, eLibrary nos. 20200512-3003, 20200512-3004, 20200512-3005, 20200512-3006, 20200512-3007, 20200512-3008 (May 12, 2020).

<sup>77</sup> *Hoopa Valley*, 913 F.3d at 1105.

law procedures for implementing Section 401, which included preparing and submitting an environmental document under CEQA to the State Water Board. It failed to do so. At no time did it object to this responsibility, explain its failure to timely comply, or allege any other harm stemming from its withdrawal-and-resubmittal of § 401 requests.

The absence of any disenfranchised third-party injured by NID’s withdrawal and resubmission of § 401 requests distinguishes this case from *Hoopa Valley* and makes waiver inappropriate here.

**B. NID Is Not Entitled to the Relief Sought Due to its Unclean Hands.**

The Order interprets the holding in *Hoopa Valley* broadly to apply to the circumstances here, namely where there was no agreement between the applicant and State and where the applicant’s actions prevented the State from acting. As discussed above, the Order’s interpretation of *Hoopa Valley* to apply here is not supported, let alone compelled, by the plain text of the statute. Thus, the Commission is not just acting in law. Accordingly, the Order should have considered whether the clean hands doctrine should apply to avoid waiver.

Under the equitable doctrine of unclean hands, an entity asking for equitable relief “must come with clean hands.”<sup>78</sup> Unclean hands is an applicable consideration in Commission

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<sup>78</sup> *Northbay Wellness Group, Inc. v. Beyries*, 789 F.3d 956, 959 (9th Cir. 2015), quoting *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944); see also *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360 (1995) (“suitor who engaged in his own reprehensible conduct in the course of the transaction at issue must be denied equitable relief because of unclean hands”); *Republic Molding Corp. v. B. W. Photo Utilities*, 319 F.2d 347, 349 (9th Cir. 1963) (“What is material is not that the plaintiff’s hands are dirty, but that he dirtied them in acquiring the right he now asserts, or that the manner of dirtying renders inequitable the assertion of such rights against the defendant.”).

proceedings,<sup>79</sup> and Section 401's one-year period for state action on a § 401 request is subject to equitable defenses.<sup>80</sup>

Here, NID comes to the Commission with unclean hands.

Similar to the requirements under the National Environmental Policy Act, under CEQA, a public agency like NID or the State Water Board cannot carry out or approve a project which may have a significant effect upon the environment without first undertaking environmental analysis of the proposed project.<sup>81</sup> In its correspondence with the State Water Board, NID repeatedly stated its commitment to be the lead agency for purposes of preparing the environmental document under CEQA that would support NID's decision to implement the project<sup>82</sup> and the State Water Board's decision to certify the project: "NID intends to be the Lead Agency for the purpose of compliance with the requirements of the California Environmental Quality Act, and will coordinate with the Board and other responsible agencies."<sup>83</sup>

As lead agency, NID was in control of the CEQA schedule. In the eight years since it filed its first § 401 request, NID did not complete the CEQA document the State Water Board needed to issue a certification. Rather than complete the CEQA document, NID chose to

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<sup>79</sup> *Rocky Mountain Natural Gas Co. v. FERC*, 114 F.3d 297, 299 (D.C. Cir. 1997).

<sup>80</sup> *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) (Title VII timeliness deadlines are not jurisdictional); *Millennium Pipeline Co., L.P. v. Gutierrez*, 424 F. Supp. 2d 168, 176-77 (D.D.C. 2006) (Coastal Zone Management Act's statutory waiver deadline was "subject to waiver, estoppel and equitable tolling.").

<sup>81</sup> Cal. Code Regs. tit. 14, § 15002.

<sup>82</sup> In contrast, Placer County Water Agency (PCWA) acting as lead agency completed CEQA within 6 months of the issuance of the Commission's draft EIS for the Middle Fork American Project, having conducted scoping concurrent with the initiation of the relicensing proceeding. See Notice of Availability of Draft CEQA Supplement to the FERC Draft EIS for the Middle Fork American River Project (FERC Project No. 2079-069), eLibrary no. 20121206-5062 (Dec. 6, 2012), p. 1.

<sup>83</sup> Letter from Ron Nelson to Thomas Howard, "Yuba-Bear Hydroelectric Project FERC Project No 2266-096 – California Application for Water Quality Certificate," eLibrary no. 20120404-5180 (Mar. 15, 2012), p. 2.



withdraw-and-resubmit its § 401 request. NID now argues that the State Water Board should bear the consequences for NID's failure to prepare the CEQA document.

The Commission should not promulgate a new policy based on an expansive reading of the *Hoopa Valley* decision that allows NID to benefit from its failure to comply with state law procedures by avoiding compliance with the CWA. The Commission appears to dismiss the importance of NID's actions and disposition in this proceeding by suggesting that the State Water Board "ignores [its] own role in the process."<sup>84</sup> This is a false equivalency. As stated in Section V.A.1, *supra*, the record does not show that the State Water Board entered into an express or implicit agreement with NID to not act on certification or played any other deleterious role that would warrant waiver of its § 401 authority over a 30- to 50-year activity. To the contrary, the record shows that NID failed without justification to comply with the requirements of the State's procedures for implementing Section 401. To grant NID's request for waiver under these circumstances is contrary to concepts of equity. Moreover, it defeats the purpose of the CWA: the protection of water quality.

**C. The State Water Board's Deadline to Act on NID's § 401 Requests Was or Should Have Been Equitably Tolled.**

The Order does not consider whether the one-year deadline under Section 401 was or should have been tolled to avoid waiver in this relicensing proceeding. Given the circumstances of this case, it should have been.

During the majority of time NID's license application and § 401 requests were pending, the Commission took the position that withdrawal-and-resubmittal of a § 401 request, regardless

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<sup>84</sup> Order, ¶ 28.

of the circumstances, triggered a new one-year period for the state to act.<sup>85</sup> In its response to NID’s request for waiver, the State Water Board stated that it relied on the Commission’s position.<sup>86</sup> The Order dramatically reverses that position, going beyond the *Hoopa Valley* decision to invalidate withdrawal-and-resubmittal even where there was no agreement between the applicant and State to delay certification, the applicant acted voluntarily, withdrawal-and-resubmittal did not delay the relicensing proceeding, and no third-party has claimed injury. The Order makes a new policy pronouncement that any withdrawal-and-resubmittal of a § 401 request that causes the State not to issue a certification within one year of the original request results in waiver of the State’s § 401 authority. As stated above, the Commission’s interpretation is not compelled by *Hoopa Valley* or the plain text of the statute. It “is an application of Commission policy, not judicial precedent,” and as such, it should not be applied “retroactively in a manner that deprives states of certification authority even though they were acting to preserve that authority in a manner consistent with Commission precedent.”<sup>87</sup> The Order should have considered the deadline equitably tolled under the facts of this case.

Statutory deadlines are equitably tolled “if the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.”<sup>88</sup> Equitable tolling is especially appropriate here because

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<sup>85</sup> *Pacificorp*, 149 FERC ¶ 61038, 61172 (Oct. 16, 2014); see also *Barrish & Sorenson Hydroelectric Co., Inc.*, 68 FERC ¶ 62,161, 64,258 (Aug. 12, 1994); *Ridgewood Maine Hydro Partners, L.P.*, 77 FERC ¶ 62,201, 64,425 (Dec. 27, 1996); *Cent. Vt. Pub. Serv. Co.*, 113 FERC ¶ 61,167, 61,653 at P 19 (Nov. 17, 2005).

<sup>86</sup> See State Water Board Response to Waiver Request, op. cit., p. 3 (“Consistent with logic and Commission precedent, the State Water Board has recognized that an applicant’s decision to withdraw its request for certification before expiration of the certification period eliminates any need to approve or deny the withdrawn request.”)

<sup>87</sup> See “State Water Resources Control Board’s Request for Rehearing of April 16, 2020 Declaratory Order On Waiver of Water Quality Certification,” (May 15, 2020), p. 11.

<sup>88</sup> *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 755 (2016).

the State Water Board relied on the Commission’s determinations that an applicant’s withdrawal-and-resubmittal of a § 401 request commenced a new one-year certification period.<sup>89</sup> The State Water Board acted diligently to protect its authority against inadvertent waiver for failure to act on any request pending for one year. The Commission should have applied the doctrine of equitable tolling to avoid subjecting the State Water Board to the inequitable consequences of applying an after-the-fact bright-line rule that would find waiver any time an applicant has withdrawn and resubmitted a certification application with a State’s knowledge.

**D. The Commission’s Challenge to State Procedures for Implementing Section 401 is Inappropriate.**

The Order faults the State Water Board for relying on a procedure for implementing Section 401 that often takes more than one year.<sup>90</sup> This challenge to the State of California’s procedures for implementing its § 401 authority is without merit and otherwise an inappropriate basis for finding the State waived its § 401 authority.

Section 401 empowers the states to establish procedures for noticing and conducting hearings on § 401 requests: “Such State ... shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.”<sup>91</sup>

In contrast to the Order, the Commission has pointedly deferred to the States’ discretion to adopt procedures to implement Section 401 in the past. In 1991, the Commission amended its

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<sup>89</sup> *Bowden v. United States*, 106 F.3d 433, 438 (D.C. Cir. 1997) (equitable tolling is appropriate where a party is “misled about the running of a limitations period ... by a government official’s advice upon which they reasonably relied”); *Jarrell v. U.S. Postal Serv.*, 753 F.2d 1088, 1092 (D.C. Cir. 1985); accord *Bull S.A. v. Comer*, 55 F.3d 678, 681 (D.C. Cir. 1995).

<sup>90</sup> Order, ¶ 28.

<sup>91</sup> 33 U.S.C. § 1341(a)(1).

rules to provide that the clock under Section 401 would begin when “the certifying agency received a written request for certification.”<sup>92</sup> The Commission explained that this rule was intended to fully preserve the procedural requirements of state agencies:

Under both the old and the new regulations, there is no issue of whether state agency procedural requirements apply; clearly they do, and they must be complied with. The sole issue is who has the responsibility for determining whether the applicant has complied with those procedural requirements. The amended regulation places that responsibility squarely where it belongs, and where the Commission always intended it to be: on the state agencies responsible for implementing those procedural requirements.

The amendment to the regulations does not undermine the ability of state agencies to make this decision. If an applicant fails to comply with a state agency’s procedural requirements, the agency has the power to deny the request for certification, and that denial is binding on this Commission. The denial can be issued without prejudice to the applicant’s refile of an application that complies with the agency’s requirements.<sup>93</sup>

As stated in Sections II, V.A.3, and V.B, *supra*, California’s procedures require environmental review under CEQA prior to the State Water Board’s action on a § 401 request.<sup>94</sup> For projects where multiple public agencies are involved, the public agency with primary authority for the project is generally designated as the lead agency. Here, NID committed to serve as lead agency for purposes of undertaking the environmental analysis and preparing the environmental document under CEQA.<sup>95</sup> As a responsible agency, the State Water Board was required to comply with CEQA “by considering the [Environmental Impact Report] or Negative Declaration prepared by the Lead Agency and by reaching its own conclusions on whether and

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<sup>92</sup> 18 C.F.R. § 4.34(b)(5).

<sup>93</sup> Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters, 56 Fed. Reg. 23108, 23,127 (May 20, 1991).

<sup>94</sup> Cal. Code Regs. tit. 23, § 3856(f).

<sup>95</sup> Cal. Pub. Resources Code § 21165 (Lead Agency; Preparation of Impact Report).

how to approve the project involved.”<sup>96</sup> The record shows that NID did not comply with these state procedures.

The Commission’s criticism that “[t]he state’s reliance on a regulatory process (i.e., CEQA) over which it has potentially limited control over timing and that often takes more than one year to complete does not excuse compliance with the CWA” is unfounded here.<sup>97</sup> As stated above, the Commission has not shown the State Water Board’s actions ran afoul of the statute. Further, there is nothing inherently inconsistent between the time it takes to comply with CEQA and the one-year period for the State to act on a § 401 request.<sup>98</sup> As NID’s consultant explained, the State Water Board’s review of a complete § 401 request and environmental analysis under CEQA can occur concurrently.<sup>99</sup> In a report to the Board of Directors, NID’s consultant anticipated initiating CEQA within 45 days of the Commission’s Notice of Readiness for Environmental Analysis in late 2011 or early 2012 and completing CEQA within a year.<sup>100</sup> Based on our review of the record, NID has not explained why it still has not initiated CEQA nine years after this report.

The Commission lacks authority under the FPA or CWA to invalidate the procedures enacted by the State, and its disagreement with such procedures is not a legitimate basis for finding waiver under section 401.

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<sup>96</sup> Cal. Pub. Resources Code § 15096 (Process for a Responsible Agency); *see also* Cal. Code Regs. tit. 14, §15381.

<sup>97</sup> Order, ¶ 28.

<sup>98</sup> Cal. Pub. Resources Code § 15108 (Completion and Certification of EIR).

<sup>99</sup> *See* NID, Board of Directors Minutes (Apr. 13, 2011), *available at* [https://nidwater.com/documents/board\\_minutes/2011/Wk%20Copy%20of%20Minutes%2004-13-2011.pdf](https://nidwater.com/documents/board_minutes/2011/Wk%20Copy%20of%20Minutes%2004-13-2011.pdf), p. 81 (last accessed May 15, 2020).

<sup>100</sup> *See id.*

**VI.**  
**RELIEF REQUESTED**

The Network requests that the Commission reverse its determination that the State Water Board waived its § 401 authority for purposes of this relicensing, direct NID to complete the CEQA document that is necessary for the State Water Board to act on a certification request, and direct NID to submit a new request for water quality certification within 30 days of NID's certification of the final CEQA document.

**VII.**  
**CONCLUSION**

The Network respectfully requests that the Commission reverse the Order's finding that the State has waived its § 401 authority and grant the requested relief.

Dated: May 15, 2020

Respectfully submitted,



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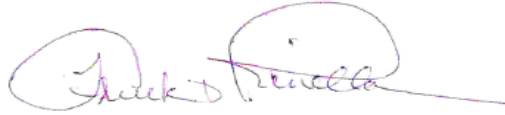
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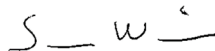
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**DECLARATION OF SERVICE**

**Nevada Irrigation District's Yuba-Bear Hydroelectric Project (P-2266-102)**

I, Tiffany Poovaiah, declare that I today caused the attached "Foothills Water Network's Request for Rehearing of Order on Waiver of Water Quality Certification" to be served by electronic mail, or by first-class mail if no e-mail address is provided, to each person on the official service list compiled by the Secretary in this proceeding.

Dated: May 15, 2020

By:



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