

FEDERAL ENERGY REGULATORY COMMISSION

Yuba County Water Agency )
Yuba River Development Project )
P-2246-065

FOOTHILL 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 Commission’s 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 Yuba County Water Agency’s (YCWA) Yuba River Development Project (Project).

At YCWA’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)1 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an activity (§ 401 authority) if an applicant withdraws and resubmits a § 401 request and the State does not act on the withdrawn request within one year.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 by the statute or court precedent interpreting the statute, is an inequitable result under

1 33 U.S.C. § 1341.

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 Outdoors, California Sportfishing Protection Alliance, Friends of the River, Gold Country Fly Fishers, Northern California Council of Fly Fishers International (formerly Northern California Council Federation of Fly Fishers), Sierra Club Mother Lode Chapter, 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 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 YCWA’s request that the Commission determine 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” by Foothills Water Network, Adventure Connection, American Rivers, American Whitewater, California Outdoors, California Sportfishing Protection Alliance, Gold Country Fly Fishers, Nevada City Rancheria, Northern California Council Federation of Fly Fishers, Sierra Club, South Yuba River Citizens League, Tributary Whitewater Tours, And Trout Unlimited, P-2246, (Aug. 25, 2017), eLibrary no. 20170825-5266. See also “Motion to Intervene” by Friends of the River, (Aug. 25, 2017), eLibrary no. 20170825-5244.

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 Yuba River, Middle Yuba River and Oregon Creek in Yuba County, California.

The Project originally was licensed May 16, 1963. That license expired on April 30, 2016. YCWA has been operating on annual licenses since then.

On December 2, 2013, YCWA filed its Draft License Application, *see* eLibrary 20131202-5098. On April 28, 2014, YCWA filed its Final License Application.<sup>3</sup> On June 5, 2017 YCWA made an amendment to its Final License Application, *see* eLibrary no. 20170605-5050 *et seq.*<sup>4</sup> Commission Staff noticed its acceptance of the application on June 26, 2017, *see* eLibrary no. 20170626-3039.

As required by the Commission's rules of practice and procedure, *see* 18 C.F.R. § 5.23, YCWA filed a request for water quality certification under CWA Section with the State Water Board<sup>5</sup> on August 24, 2017.<sup>6</sup> YCWA's § 401 request acknowledged that the California Environmental Quality Act (CEQA) applied to the certification proceeding.<sup>7</sup> YCWA stated that

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<sup>3</sup> *See* eLibrary 20140428-5073.

<sup>4</sup> *See* eLibrary 20170605-5050.

<sup>5</sup> Cal. Water Code § 13160.

<sup>6</sup> *See* Yuba County Water Agency Application for 401 Water Quality Certification to the State Water Board for the Yuba River Development Project, eLibrary no.20170825-5210 (Aug. 25, 2017), Petition for Waiver Determination (Petition for Waiver) Appendix B at 7, eLibrary no.20190822-5016 (Aug. 22, 2019).

<sup>7</sup> *Id.* at 2; *see also* *City of Davis v. Coleman*, 521 F.2d 661, 672 (9th Cir. 1975).

it would act as a lead agency<sup>8</sup> for purposes of preparing the environmental document required under CEQA for the proposed project.<sup>9</sup> It stated that it would coordinate with responsible agencies like the State Water Board. Under CEQA, responsible agencies rely on the lead agency's CEQA document for purposes of issuing their discretionary approvals of a proposed project.<sup>10</sup> The State Water Board acknowledged receipt of the application for certification.<sup>11</sup>

The State Water Board proactively inquired about the status of the CEQA document in an email to YCWA on July 25, 2018.<sup>12</sup> Staff from the Water Board made it clear that without completion of a CEQA document the application for water quality certification was incomplete.<sup>13</sup> YCWA and Water Board staff proceeded to correspond via electronic mail, with the Water Board staff providing guidance to YCWA as to when to submit a new application for 401 certification. Water Board staff described YCWA's failure to provide information necessary to comply with CEQA, a precondition to any certification decision, and the opportunity to withdraw and resubmit a 401 request to avoid denial of certification:

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<sup>8</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 or negative declaration for the project. This agency shall be called the lead agency." Cal. Code Regs. tit. 14, § 15050.

<sup>9</sup> YCWA affirmed its intent to be CEQA lead agency as early as the Pre-Application Document (November 2010): "... eLibrary no. 20101105-5207, p. 4-11 ("For this Project, [YCWA] plans to be the Lead Agency for CEQA compliance and anticipates that the SWRCB will be a Responsible Agency under CEQA for the purpose of issuing a Section 401 Water Quality Certificate for the Project.")

<sup>10</sup> Cal. Code Regs. tit. 14, §§ 15051, 15367.

<sup>11</sup> See California Board September 21, 2017 Letter Confirming Receipt of Water Quality Certification Application at 1 (filed with the Commission on October 2, 2017).

<sup>12</sup> See July 25, 2018 Email from Mr. Philip Choy, California Board to Mr. Geoff Rabone, Yuba County, and Mr. Jim Lynch, Consultant to Yuba County. Yuba County August 22, 2019 Petition for Waiver Determination (Petition for Waiver) Appendix B at 7. Direct and proactive communication with applicants and permit holders is consistent with Commission Staff's approach. See Office of Energy Project's Department of Hydropower and Compliance, *Compliance Handbook* (2015), p. 2 ("... DHAC staff may contact licensees/exemptees by telephone/email to provide guidance and warnings of possible non-compliance matters, when appropriate.")

<sup>13</sup> *Id.*

“YCWA’s water quality certification action date for the Yuba River Development Project (FERC No. 2246) is August 24, 2018. A final CEQA document for the Project has not been filed; therefore, the State Water Board cannot complete the environmental analysis of the Project that is required for certification. Please submit a withdraw/resubmit of the certification application as soon as possible. Let me know if you have any questions.”<sup>14</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>15</sup>

YCWA withdrew and resubmitted its § 401 request on August 3, 2018, just short of one year after it had filed the first request.<sup>16</sup> YCWA’s resubmission relied on the same information as the first request. YCWA 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>17</sup> The State Water Board acknowledged receipt of the resubmission.<sup>18</sup>

The Commission issued its final EIS January 2, 2019.<sup>19</sup> Several contested measures not adopted by staff in the final EIS potentially fall under the State’s 401 authority. Most important to the Network among these is a measure proposed jointly by the Network, the California Department of Fish and Wildlife and the US Department of Fish and Wildlife for improved flows for the North Yuba River downstream of New Bullards Bar Dam. The flows would create

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<sup>14</sup> See citation in Petition for Waiver, p. 3. For full text, see Petition for Waiver, Appendix B, pdf pp. 20-21. Email from Philip Choy, State Water Board, to Geoff Rabone, YCWA, and Jim Lynch, HDR (July 25, 2018, 9:24 am).

<sup>15</sup> See, e.g., *Pacificorp*, 149 FERC ¶ 61038, 61172 (Oct. 16, 2014).

<sup>16</sup> See YCWA’s second application for certification is included as part of Appendix B of its Petition for Waiver, pdf pp. 22 ff., eLibrary no. 20190822-5016 (August 22, 2019).

<sup>17</sup> See *id.*

<sup>18</sup> See California Board August 22, 2018 Letter Confirming Receipt of Water Quality Certification Application at 1, eLibrary no. 20180828-0006 (Aug. 27, 2018).

<sup>19</sup> FERC, Draft Environmental Impact Statement for Hydropower License, Yuba River Development Project, Project No. 2246-065 – California (May 2018), eLibrary no. 20180530-3011 (DEIS); FERC, Final Environmental Impact Statement for Hydropower License, Yuba River Development Project, Project No. 2246-065 – California (Jan. 2019), eLibrary no. 20190102-3000 (FEIS).

4 miles of reliable cold water habitat in August in the upper main Yuba River, downstream of the confluence of the North Yuba River and the Middle Yuba River.<sup>20</sup>

YCWA withdrew and resubmitted a § 401 request once. YCWA withdrew the original § 401 request within one year of filing. The State Water Board acknowledged receipt of the resubmitted request and treated it as a new request for purposes of its duty to act within one year. YCWA did not provide the information for compliance with CEQA.

On July 31, 2019, the State Water Board denied YCWA's application without prejudice, explaining: "YWA is the CEQA lead agency for the Project and has not begun the CEQA process."<sup>21</sup>

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

On August 22, 2019, YCWA requested that the Commission determine the State Water Board had waived its 401 authority in connection with the relicensing of the Project.<sup>22</sup> The request relied on the U.S. Court of Appeals for the D.C. Circuit's (D.C. Circuit) decision in

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<sup>20</sup> See Comments of Foothills Water Network on the Yuba River Development Project DEIS (July 30, 2018), p. 46, eLibrary no. 20180730-5138. See also YCWA Response to REA Comments, p. 109, Figure 10; State Water Board, Comments on Ready for Environmental Analysis and Preliminary Terms and Conditions for Yuba River Development Project, Federal Energy Regulatory Commission Project No. 2246 (Aug. 25, 2017), eLibrary no. 20170825-5276.

<sup>21</sup> Letter from Eileen Sobeck, State Water Board, to Curt Aikens, Yuba County Water Agency, July 31, 2019. Included as Appendix A of Petition for Waiver, pdf pp. 11-12 (filed with the Commission on August 1, 2019).

<sup>22</sup> See August 22, 2019 Letter of Michael A. Swiger, Counsel, Yuba County Water Agency, to Secretary Bose, eLibrary no. 20190822-5016 (Petition for Waiver).

*Hoopa Valley Tribe v. Federal Energy Regulatory Commission (Hoopa Valley)*.<sup>23</sup> YCWA filed a supplement to its request September 4, 2019.<sup>24</sup>

On October 4, 2019, the Network filed comments opposing YCWA's request for the Commission to find waiver.<sup>25</sup>

On March 3, 2020, the Commission issued a Notice of Petition for Waiver Determination in the docket for P-2246-065, requesting comments on YCWA's August 22, 2019 request. The Notice treated YCWA's request as a "petition."<sup>26</sup> In response, YCWA filed comments in support of its request for finding of waiver. The Network filed comments opposing YCWA's request once again, as did the State Water Board and the California Department of Fish and Wildlife (CDFW).<sup>27</sup> YCWA then filed an answer to the responses in opposition.<sup>28</sup> On May 18, 2020 the Commission granted YCWA's request, relying on *Hoopa Valley* and its own precedent to find that the State Water Board had waived its water quality certification authority under Section 401.

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<sup>23</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>24</sup> See Supplement to Request for Determination of Waiver of Section 401 Water Quality Certification of Yuba County Water Agency under P-2246, to Secretary Bose, eLibrary no. 20190904-5045 (Sep. 4, 2019).

<sup>25</sup> See Response in Opposition of Foothills Water Network to August 22, 2019 "Request" of Yuba County Water Agency to Confirm Waiver of Water Quality Certification Yuba River Development Project, P-2246-065. (Oct. 4, 2019), eLibrary no. 20191007-5004.

<sup>26</sup> See FERC, Notice of Petition for Waiver Determination, P-2246- 065, eLibrary no. 20200303-3032.

<sup>27</sup> See Response in Opposition of Foothills Water Network to Petition for Waiver Determination of Yuba County Water Agency for Yuba River Development Project, P-2246-065. (Apr. 2, 2020), eLibrary no. 20200402-5095; see also State Water Board, Response to Yuba County Water Agency's Waiver Request of 401 Water Quality Certification for The Yuba River Development Hydroelectric Project, Federal Energy Regulatory Commission Project No.2246, Yuba County, eLibrary no. 20200402-5044 (Apr. 2, 2020) (State Water Board Response to Waiver Request); Comment of California Department of Fish and Wildlife under P-2246-065, Notice of Petition for Waiver Determination, eLibrary no. 20200326-5188 (Mar. 26, 2020) (CDFW Response to Waiver Request).

<sup>28</sup> See Response Comments of the Yuba County Water Agency to Comments on Petition for Waiver Determination under P-2246, eLibrary no. 20200417-5201 (Apr. 17, 2020). The Commission rejected this answer as impermissible and a violation of Commission Rule 213(a). See 18 C.F.R. § 385.213(a)(2).

The Network's Request for Rehearing follows.

### **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 YCWA's Actions.**

#### **Statutes**

16 U.S.C. § 1536(a)(2)  
33 U.S.C. § 1251  
33 U.S.C. § 1341(1)(a)  
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. Apr. 26, 2019)  
*KEI (Maine) Power Management (III) LLC*, 171 FERC ¶ 62,043 (2020)  
*McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (2019)  
*Nevada Irrigation District*, 171 FERC ¶ 61,029 (2020)  
*N.Y. Dep't of Env'tl. Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018)  
*Pacificorp*, 149 FERC ¶ 61,038 (2014)  
*Pacific Gas & Electric Company*, 170 FERC ¶ 61,232 (2020)  
*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 YCWA Is Entitled to the Relief Sought Due to its Unclean Hands.**

#### **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 Equity Requires the Commission to Toll Its Interpretation of Section 401's One-Year Deadline in this Case.**

**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 CEQA is an Appropriate Basis for Finding Waiver.**

**Statutes**

Cal. Pub. Resources Code § 15096  
Cal. Pub. Resources Code § 15108  
Cal. Pub. Resources Code § 21165

**Issue 5. Whether the Commission's Disagreement with State Procedures for Implementing Section 401 is an Appropriate Basis for Finding Waiver.**

**Regulations**

18 C.F.R. § 4.34(b)(5)  
56 Fed. Reg. 23108, 23,127

**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>29</sup> Under the FPA, the Commission’s findings “as to the facts, if supported by substantial evidence, shall be conclusive.<sup>30</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>31</sup>

**V.**  
**ARGUMENT**

The Order concludes that the State Water Board waived its 401 authority with respect to the relicensing of YCWA’s Yuba River Development Project.<sup>32</sup> In reaching that conclusion, the Commission relies on the *Hoopa Valley* decision and subsequent Commission precedent finding waiver of certification authority in other proceedings. At issue in this case is 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 state law procedural prerequisites to the State’s certification decision.

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<sup>29</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>30</sup> 16 U.S.C. § 825l(b).

<sup>31</sup> 5 U.S.C. § 706.

<sup>32</sup> Order, p. 13.

**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 YCWA’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>33</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>34</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>35</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>36</sup>

Under Section 401, when a license applicant submits a § 401 request, the certifying State has one year to “act” on the request.<sup>37</sup> The plain text of Section 401 provides that state certification is waived only if a State fails or refuses to act on a request for certification within one year of that request.<sup>38</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

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<sup>33</sup> 33 U.S.C. § 1341(1)(a).

<sup>34</sup> *Id.*

<sup>35</sup> *S.D. Warren Co. v. Me. Bd. of Env’tl. Protection*, 547 U.S. 370, 386 (2006).

<sup>36</sup> *Ibid.* (quoting 116 Cong. Rec. 8984 (1970)).

<sup>37</sup> 33 U.S.C. § 1341(a)(1).

<sup>38</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).

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 that the applicant’s use of the withdrawal-and-resubmittal pursuant to a formal agreement with the State to defer certification and delay relicensing can cause waiver.

*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 certification authority with respect to the relicensing.

The Commission rejected the tribe’s argument that the States have waived certification.<sup>39</sup> It noted that Section 401 “speaks solely to state action or inaction, rather than the repeated withdrawal and refiling of applications.”<sup>40</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>41</sup> The Commission further noted, “[t]he record 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>42</sup> The tribe appealed the Commission’s decision to the D.C. Circuit, which reversed.

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<sup>39</sup> *Pacificorp*, 149 FERC ¶ 61038, 61172 (Oct. 16, 2014).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* This reading is in accord with *N.Y. Dep’t of Env’tl. 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 Env’tl. Conserv.*, 868 F.3d 87, 94 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 1697 (2018)).

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

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>43</sup> The court also agreed that the waiver provision “cannot be reasonably interpreted to mean that the period of review for one request affects that of any other request.”<sup>44</sup>

However, the D.C. Circuit found that 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>45</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-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>46</sup>

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<sup>43</sup> *Id.* at 1104.

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

<sup>45</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.*

<sup>46</sup> *Id.* (italics in original; underline added).

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>47</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>48</sup> In the Klamath relicensing, the final EIS had issued on November 16, 2007<sup>49</sup> and consultation under the Endangered Species Act had ended in Biological Opinions issued on December 3, 2007<sup>50</sup> and December 21, 2007.<sup>51</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 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’ certification authority in the *Hoopa Valley* case are not present here and the Order does not provide adequate basis for the Commission’s reliance on *Hoopa Valley* to find waiver under these circumstances.

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<sup>47</sup> *Id.* at 1104.

<sup>48</sup> *Id.* at 1105.

<sup>49</sup> FERC, “Final Environmental Impact Statement for the Klamath Hydro Project under P-2082,” 20071116-4001.

<sup>50</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>51</sup> NMFS, “Biological Opinion for the Klamath Hydroelectric Project License (FERC No. 2082-027),” eLibrary no. 20080107-0070 (Dec. 21, 2007).

**1. There Was No Agreement between YCWA 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>52</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>53</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 PacifiCorp’s resubmissions from being new requests at all. 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? 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. It instead suggests there may have been an implied agreement between YCWA and the State Water Board. The Order points to the Commission’s decision in *Placer County Water Agency*, where it

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<sup>52</sup> Order, ¶ 14.

<sup>53</sup> *Hoopa Valley*, 913 F.3d at 1104.

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>54</sup> There the Commission referred to such an arrangement as a “functional agreement.”<sup>55</sup> The Order goes on to cite the decision in *Southern California Edison*, where the Commission went even further to hold that a series of emails “demonstrated the state’s coordination with the licensee and was sufficient to support a waiver finding.”<sup>56</sup>

We disagree that the Commission’s decisions 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>57</sup> Further, the Commission has provided insufficient evidence to demonstrate the existence of any agreement here.

Rather than point to an express agreement, the Order cites perfunctory correspondence between YCWA (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 30-50 year license to comply with state water quality standards.<sup>58</sup> This correspondence simply does not show an agreement.

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<sup>54</sup> Order, ¶ 15.

<sup>55</sup> *Id.*

<sup>56</sup> Order, ¶ 16. The citation does not direct the reader to supporting argument that would establish foundation but rather directs the reader to the Commission’s prior conclusion. Similarly, *Southern California Edison* at ¶ 27, cites in turn to *Constitution Pipeline* at ¶ 30, which in turn cites to *Placer County Water Agency*. The sole basis for finding agreement in *Placer County Water Agency* was the existence of correspondence between the State Water Board and the applicant. See *Constitution Pipeline, LLC* 168 FERC ¶ 61,129, *Placer County Water Agency*, 169 FERC ¶ 61,056, *Southern California Edison*, 170 FERC ¶ 61,135.

<sup>57</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 entitled to no deference by the court because the Environmental Protection Agency, and not the Commission, is charged with administering the CWA, and judicial review of the Commission’s interpretation of Section 401 is *de novo*).

<sup>58</sup> Order, pp. 5-9.



The Commission stretches to interpret this correspondence as an agreement for purposes of finding the State has waived its authority to condition the operation of the Project over the next 30-50 years to comply with state water quality standards. It does not explain how this interpretation 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>59</sup>

Aside from the correspondence, the Order does not cite to any other specific evidence of an agreement between YCWA 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>60</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 they pursued partial decommissioning of the project. By contrast, the Commission has not shown that YCWA 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 YCWA’s § 401 request once YCWA submitted the CEQA document that was a prerequisite to the State Water Board’s action.<sup>61</sup> The State Water Board’s courtesy notice regarding the approaching one-year

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<sup>59</sup> 33 U.S.C. § 1251.

<sup>60</sup> Black’s Law Dictionary 2d Edition.

<sup>61</sup> YCWA Petition for Waiver, App. B.

deadline only shows the State Water Board’s intent to avoid waiver of its authority, not a mutual intent to withhold action for some common purpose.

Instead, the Commission alleges the State Water Board was “complicit” in delaying issuing 401 certification.<sup>62</sup> However, the Commission has not cited any evidence of wrongdoing. Further, the allegation that the State Water Board was “complicit,” suggests the Commission also views YCWA’s actions here as wrong. This raises the question of why the Commission is not challenging YCWA’s diligent prosecution of the license application.

The fact that the State Water Board did not object to YCWA’s withdrawal-and-resubmittals is not evidence of a common purpose or agreement, or that they were “complicit” in YCWA’s actions in any way. 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 certification authority, so there was no reason for the State Water Board to object to the applicant’s withdrawal. The Board made clear that it was prepared to deny a 401 request without prejudice if YCWA did not elect to withdraw the request or submit the CEQA document.<sup>63</sup> In fact, it fulfilled that promise on July 31, 2019. YCWA’s resubmission does not explain the agency’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 Water Board could join in this purpose even if it did not object to the YCWA’s withdrawal.

The Commission also argues “the state’s reason for delay [is] immaterial.”<sup>64</sup> This blanket statement is unsupported by *Hoopa Valley*. According to the D.C. Circuit, the record in *Hoopa*

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<sup>62</sup> Order, ¶¶ 21-22.

<sup>63</sup> See NID Request for Waiver, App. B (State Water Board’s responses to 401 requests in 2016, 2017 and 2018).

<sup>64</sup> Order, ¶¶ 17-18, 25; citing *Nevada Irrigation District*, 171 FERC ¶ 61,029 (2020).

*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>65</sup> By contrast, the record does not show the State Water Board had any inimical intent here.

Rather than *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>66</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. 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 YCWA used withdrawal and resubmittal 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.

## **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>67</sup> The Order (¶ 14) alleges the State Water Board’s efforts here similarly prejudiced the Commission: “In fact, ‘[b]y shelving water quality certifications, the states usurp

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<sup>65</sup> *Hoopa Valley*, 913 F.3d at 1104.

<sup>66</sup> 171 FERC ¶ 62,043 (Apr. 15, 2020), ¶ 34.

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

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 certification proceeding for the Yuba River Development 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 NMFS regarding the Project’s potential adverse effects on federally-listed spring-run Chinook salmon, Central Valley steelhead, and green sturgeon.

Commission staff released the draft EIS for the Yuba River Development Project in May 2018.<sup>68</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>69</sup> Commission staff acknowledged NMFS’s determination in the final EIS.<sup>70</sup> Commission staff is preparing but has not completed a subsequent biological assessment, which is necessary to initiate formal consultation with NMFS.<sup>71</sup>

In sum, Commission staff’s delay in preparing a biological assessment to inform ESA consultation for the Yuba River Development Project has delayed consultation and thus relicensing by almost two years to date.

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<sup>68</sup> FERC, Draft Environmental Impact Statement for Hydropower License, Yuba River Development Project, Project No. 2246-065 – California (May 2018), eLibrary no. 20180530-3011.

<sup>69</sup> See The U.S. Department of Commerce’s, NOAA Fisheries, West Coast Region’s Comments on the Federal Energy Regulatory Commission’s Draft Environmental Impact Statement and Federal Power Act Section 10(j) Inconsistency Letter for the Yuba River Development Project (P-2246-065) (July 27, 2018), eLibrary no. 20180727-5187, p. 8.

<sup>70</sup> See FERC, Final Environmental Impact Statement for Hydropower License, Yuba River Development Project No. 2246-065 – California (Jan. 2019), eLibrary no. 20190102-3000, p. B-33.

<sup>71</sup> 50 C.F.R. § 402.14.

In this regard, the Commission’s argument in footnote 64 of the Order, suggesting that the Commission could issue a license for the Yuba River Development Project prior to completion of ESA consultation, is unpersuasive. It is an understatement for the Order to argue that the Commission “generally does not issue a license prior to ESA consultation.”<sup>72</sup> We know of no instance in which the Commission has issued a *hydropower* license prior to completion of a required ESA consultation, and the Order does not cite to one. In the absence of a hydropower example, the Order cites to a case in 2015 in which the Commission “conditionally” approved a gas pipeline prior to completion, not of ESA consultation, but of approvals under the Clean Air Act. The example is thus inapposite in several particulars, including the fact that the Commission’s general sequencing of gas pipeline approvals is different than it’s sequencing of approvals in hydropower licensing.<sup>73</sup> But more fundamentally, the footnote’s hypothetical is simply that: a straw hypothetical that to date the Commission has shown no indication of pursuing. The practical fact remains that the ESA consultation is delayed, and action by Commission staff is the first and current roadblock in the critical path to the consultation’s progress.

Since *Hoopa Valley* was decided, the Commission has cited the loss of control of the timing of license issuance on its way to finding waiver of certification authority in other proceedings where the State did not act within one-year of an original § 401 request that had been withdrawn.<sup>74</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

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<sup>72</sup> Order at fn. 64.

<sup>73</sup> FERC generally issues certificates before federal authorizations are obtained. *See, e.g., Atlantic Coast Pipeline LLC*, 161 FERC ¶ 61,042 (October 13, 2017), App. A, Environmental Condition 10.

<sup>74</sup> *See e.g.,* 169 FERC ¶ 61,056 *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.

sufficient to find waiver as it prejudiced the Commission by delaying our licensing proceeding.”<sup>75</sup> There, however, the Commission alleged *actual harm* to its authority. The *Yuba River Development Project* Order does not even allege harm from delay. Rather, it only alludes to *potential* harm: “withdrawal and resubmission could be used to indefinitely delay ...” (Order at 29, fn 59 *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>76</sup>

Here, there is no third party claiming injury. There is no evidence that the party seeking waiver, YCWA, has been harmed by its own withdrawal-and-resubmittals of the § 401 requests. To the contrary, the record indicates that YCWA 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*, YCWA was responsible for complying with state law procedures for implementing Section 401, which included preparing and

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<sup>75</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 (May 12, 2020), eLibrary nos. 20200512-3003, 20200512-3004, 20200512-3005, 20200512-3006, 20200512-3007, 20200512-3008.

<sup>76</sup> *Hoopa Valley*, 913 F.3d at 1105.

submitting an environmental document under CEQA to the State Water Board.<sup>77</sup> 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 YCWA’s withdrawal and resubmission of § 401 requests distinguishes this case from *Hoopa Valley* and weighs against waiver.

**4. There Is No Basis For The Commission To Find That The One Year Time Limit Is Absolute.**

In *Hoopa Valley* the D.C. Circuit did not resolve the issue of whether the resubmittal of a 401 application would result in waiver in situations involving incomplete or new applications because “PacifiCorp’s water quality certification request had been complete and ready for review for more than a decade.”<sup>78</sup>

Here, the Commission errs in relying on its own precedent to establish a bright line rule that goes beyond the *Hoopa Valley* ruling and applies it to YCWA’s incomplete application for 401 certification.<sup>79</sup> Citing the recent Order of *Nevada Irrigation District*, the Commission argues “that section 401 of the CWA is clear, and that failure to act within the one-year time limit is absolute.”<sup>80</sup> The court of *Hoopa Valley* does not support this, nor does the plain

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<sup>77</sup> Petition for Waiver, Appendix B, pdf p. 20-21. Email from Philip Choy, State Water Board, to Jim Lynch, HDR (July 25, 2018, 9:24 am), *see also* Letter from Eileen Sobeck, State Water Board, to Curt Aikens, Yuba County Water Agency, July 31, 2019. Included as Appendix A of Petition for Waiver, pdf pp. 11-12.

<sup>78</sup> *Hoopa Valley*, 913 F.3d at 1105.

<sup>79</sup> Conservation Groups still maintain that YCWA’s application for 401 certification was incomplete, because it did not fulfill the legal requirements of CEQA. *See* Network Opposition comments, p. 13; *see also* Cal. Code Regs. tit. 23, § 3856 (f).

<sup>80</sup> Order, ¶ 18.

language reading of the statute. Additionally, past precedent by the Commission do not support this conclusion.<sup>81</sup>

In an Order issuing a new license for *KEI (Maine) Power Management (III) LLC*, the Commission accepted the “withdrawal and submit” process and included water quality certification in the new license. The Commission stated,

“DMR’s fish passage recommendations into the water quality certification, KEI Power voluntarily withdrew and resubmitted its application for a water quality certification on December 7, 2018, stating it was doing so to provide KEI Power additional time to negotiate fish passage measures with state and federal resource agencies and to avoid potential inconsistencies between certification conditions and FPA section 18 prescriptions. Maine DEP received this request the same day. On November 22, 2019, Maine DEP issued a certification for the project. On December 23, 2019, KEI Power filed a copy of its appeal of the water quality certification before the Maine DEP. Although KEI Power has appealed the certification, the certification has not been stayed.”<sup>82</sup>

The Commission did not offer an explanation as to why the certification was included, inconsistent with its “recent precedent” in *Placer County Water Agency, Pacific Gas & Electric Company*, and *Southern California Edison* stating a “bright line rule.”<sup>83</sup>

Nor has the Commission explained why the licensee’s failure to adhere to the “absolute” rule does not equally warrant sanction. YCWA volunteered to be the lead agency for CEQA. It is undisputed that, pursuant to state law, the completion of CEQA is a precondition to the

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<sup>81</sup> *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014, P 23 (2018), *rev’d* 168 FERC ¶ 61,129 (2019), *reh’g denied*, 169 FERC ¶ 61,199 (2019), *Barrish & Sorenson Hydroelectric Co., Inc.*, 68 FERC ¶ 62,161, 64,258 (1994); *Ridgewood Maine Hydro Partners, L.P.*, 77 FERC ¶ 62,201, 64,425 (1996); *Cent. Vt. Pub. Serv. Corp.*, 113 FERC ¶ 61,167, P 19 (2005).

<sup>82</sup> 171 FERC ¶ 62,043, *Declaratory Order on Waiver of Water Quality Certification*, KEI (Maine) Power Management (III) LLC, P-2079-080 (Apr. 15, 2020), ¶ 18.

<sup>83</sup> *See Placer County Water Agency*, 169 FERC ¶ 61,056, *Pacific Gas & Electric Company*, 170 FERC ¶ 61,232, *Southern California Edison*, 170 FERC ¶ 61,135.



issuance of water quality certification.<sup>84</sup> YCWA made absolutely no effort to initiate, let alone complete, CEQA within the one-year time period.<sup>85</sup>

As raised in the Network’s Response in Opposition to Waiver, YCWA was just as aware as the State Water Board of the statutory one-year timeline.<sup>86</sup> Yet the Commission has waived certification but not even responded to the Network’s argument that failure to complete CEQA demonstrates lack of diligent prosecution of the license application.<sup>87</sup> If the State Water Board and the applicant were “complicit” in wrongdoing, the Commission should explain why it is depriving the State Water Board of its regulatory authority while it rewards YCWA with its desired outcome and holds YCWA to no account for failure to diligently prosecute its license application.

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

The Order does not consider the equitable doctrine of unclean hands. Under that doctrine, an entity asking for equitable relief “must come with clean hands.”<sup>88</sup> Unclean hands is

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<sup>84</sup> See Cal. Code Regs., tit 23, 3837(b)(2).

<sup>85</sup> In contrast, Placer County Water Agency (PCWA) acting as lead agency completed CEQA within 6 months of the issuance of FERC’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>86</sup> Response of Foothills Water Network in Opposition to August 22, 2019 “Request” of Yuba County Water Agency to Confirm Waiver of Water Quality Certification Yuba River Development Project, P-2246-0, eLibrary 20191007-5004 (October 7, 2019).

<sup>87</sup> *Id.*

<sup>88</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”].

an applicable consideration in Commission proceedings,<sup>89</sup> and Section 401's one-year period for state action on a 401 request is subject to equitable defenses.<sup>90</sup>

Here, YCWA comes to the Commission with unclean hands.

Similar to the requirements under the National Environmental Policy Act, under CEQA, a public agency like YCWA or the State Water Board cannot carry out or approve a project that may have a significant effect upon the environment without first undertaking environmental analysis of the proposed project.<sup>91</sup> In its correspondence with the State Water Board, YCWA committed to be the lead agency for purposes of preparing the environmental document under CEQA that would support YCWA's decision to implement the project<sup>92</sup> and the State Water Board's decision to certify the project: "YCWA intends to be the Lead Agency for compliance with the requirements of the California Environmental Quality Act (CEQA), and will coordinate with the State Water Board and other Responsible Agencies under CEQA."<sup>93</sup>

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

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<sup>89</sup> *Rocky Mountain Natural Gas Co. v. FERC*, 114 F.3d 297, 299 (D.C. Cir. 1997).

<sup>90</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>91</sup> Cal. Code Regs. tit. 14, § 15002.

<sup>92</sup> In contrast, Placer County Water Agency (PCWA) acting as lead agency completed CEQA within 6 months of the issuance of FERC'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>93</sup> YCWA's application for certification is included in Appendix B of its Petition for Waiver, pdf pp. 16 ff. YCWA filed a copy of the application for certification with the Commission August 25, 2017, eLibrary no. 20170825-5210, p. 2.

withdraw-and-resubmit its 401 request and then not re-apply after it was denied without prejudice. YCWA now argues that the State Water Board should bear the consequences for YCWA's failure to prepare the CEQA document.

The Commission should not permit YCWA to benefit from its failure to comply with state law procedures by avoiding compliance with the CWA and using the regulatory loophole initiated by *Hoop Valley Tribe* and perpetuated by Commission precedent. The Commission appears to dismiss the importance of YCWA's actions and disposition in this proceeding by suggesting that the State Water Board "ignores [its] own role in the process."<sup>94</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 YCWA to not act on certification or played any other deleterious role that would warrant waiver of its certification authority over a 30-50 year activity. The Commission's stretch to award equitable relief to YCWA in the form of waiver here notwithstanding YCWA's failure to comply with requirements of the State's procedures for implementing Section 401 is contrary to concepts of equity and defeats the purpose of the CWA, which is protection of water quality.

**C. The Commission Should Equitably Toll Its Interpretation of Section 401's One-Year Deadline in this Case.**

During the majority of time YCWA's license application and § 401 requests were pending, the Commission took the position that withdrawal-and-resubmittal of a § 401 request, regardless of the circumstances, triggered a new one year period for the state to act.<sup>95</sup> In its response to Nevada Irrigation District's request for waiver, the State Water Board stated that it

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<sup>94</sup> Order, ¶ 25.

<sup>95</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).

relied on the Commission’s position.<sup>96</sup> The Orders in *Nevada Irrigation District* and the present matter dramatically reverse 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 here articulates a bright-line rule 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 certification authority. It finds that under this new interpretation that “the one-year time limit is absolute”<sup>97</sup>, thereby the State Water Board has missed the one-year deadline here and waived its authority. The Order does not explain why the Commission declined to equitably toll this new interpretation of the deadline here to avoid inequitable results.

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>98</sup> Equitable tolling is especially appropriate here because 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>99</sup> The State Water Board acted diligently to protect its authority against inadvertent waiver for failure to act

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<sup>96</sup> See State Water Board Response to Nevada Irrigation District’s 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>97</sup> Order, ¶ 18.

<sup>98</sup> *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 755 (2016).

<sup>99</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).

on any request pending for one year. The Commission should apply 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 in Implementing CEQA in its Exercise of Section 401 is Inappropriate.**

The Order faults the State Water Board for complying with state legal requirements to implement the California Environmental Quality Act (CEQA) in order to administer Section 401, which often takes more than one year.<sup>100</sup> This challenge to the State of California's procedures for implementing CEQA is without merit and otherwise inappropriate.

As stated in Sections II, V.A.3, and V.C, *supra*, California's procedures require environmental review under CEQA prior to the State Water Board's action on a § 401 request. 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, YCWA committed to serve as lead agency for purposes of undertaking the environmental analysis and preparing the environmental document under CEQA.<sup>101</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 how to approve the project involved."<sup>102</sup> The record shows that YCWA did not comply with these state law procedures.

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<sup>100</sup> Order, ¶ 23.

<sup>101</sup> Cal. Pub. Resources Code § 21165 (Lead Agency; Preparation of Impact Report).

<sup>102</sup> Cal. Pub. Resources Code § 15096 (Process for a Responsible Agency).

The Commission’s criticism that the state’s “reliance on a state regulatory process (i.e., CEQA compliance) over which the Board has potentially limited control over timing and often takes more than one year to complete does not excuse the Board from complying with the statutory requirements of the CWA” is unfounded here.<sup>103</sup> As stated above, the Commission has not shown the State Water Board’s actions here ran afoul of the statute. Further, there is nothing inherently inconsistent between the time it takes to comply with CEQA and the one-year time for the State to act on a § 401 request.<sup>104</sup> As YCWA’s consultant explained to Nevada Irrigation District in the context of the *Yuba-Bear* proceeding, the State Water Board’s review of a complete § 401 request and environmental analysis under CEQA can occur concurrently.<sup>105</sup> In a 2018 report to the YWCA Board of Directors, staff stated “[t]o take advantage of the staff expertise and experience and the current momentum we have, YWA staff plans to develop a CEQA document, tiering off the FEIS that can be available when YWA, as the Lead Agency, formally initiates the CEQA process. SWRCB will be a Responsible Agency using the CEQA document for issuance of the water quality certification.”<sup>106</sup> The FEIS for the Yuba River Development Project has been “available” since January 2, 2019. Based on our review of the record, YCWA does not dispute that it voluntarily assumed the responsibility of being lead agency for CEQA or that it failed to fulfill those duties in a timely manner.<sup>107</sup> It does not dispute

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<sup>103</sup> Order, ¶ 25.

<sup>104</sup> Cal. Pub. Resources Code § 15108 (Completion and Certification of EIR).

<sup>105</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 13, 2020). Please note that the NID consultant is the same consultant for YCWA.

<sup>106</sup> See YCWA, Board of Directors Minutes (Sep. 4, 2018), available at [https://www.yubawater.org/AgendaCenter/ViewFile/Minutes/\\_09042018-358](https://www.yubawater.org/AgendaCenter/ViewFile/Minutes/_09042018-358), p. 108 (last accessed June 15, 2020).

<sup>107</sup> Petition for Waiver, p. 4, see also p. 7 fn. 34 (“Nonetheless, YCWA estimates that as lead CEQA agency, it would be required to spend approximately \$300,000 to complete the CEQA process, in addition to the substantial

that its failure to produce a CEQA document after two years effectively blocked the State Water Board from issuing a 401 certification in accordance with state law.

Section 401 requires each state to establish procedures for public notice and for public hearings where the state deems appropriate, 33 U.S.C. § 1341(a)(1), but otherwise sets no express requirements or limitations on what information the states may require or what procedures they may follow. The Commission lacks authority under the FPA or CWA to invalidate the procedures enacted by the State for CEQA, and its disagreement with such procedures is not a legitimate basis for finding waiver under Section 401.

**E. The Commission’s Challenge to State Procedures in the Administration of Section 401 Applications is Inappropriate.**

The Order faults the State Water Board for relying on their implementation procedures for administering Section 401 applications, highlighting annual reminder emails and cooperative communication between YCWA and State Water Board staff.<sup>108</sup> This challenge to the State of California’s procedures for implementing its authority under Section 401 is also without merit and undermines the foundation of cooperative federalism that the CWA rests upon.

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>109</sup>

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administrative fees YCWA pays to the State Water Board every year in connection with the CWA 401 certification process”).

<sup>108</sup> Order, ¶ 23.

<sup>109</sup> 33 U.S.C. § 1341(a)(1).

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 rules to provide that the clock under Section 401 begins when “the certifying agency received a written request for certification.”<sup>110</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>111</sup>

The Order relies on the Commission’s decision in *Pacific Gas & Electric Company* to challenge California’s procedures.<sup>112</sup> The Commission cites its statement “[w]e found that the record showed that the Board *expected* the applicant to withdraw and refile its certification application and the applicant cooperated.”<sup>113</sup> What the State Water Board “expected” and what the Board ordered or required are different things. One can “expect” an outcome without controlling that outcome. An expectation can be based on reasonable inference, without ability

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<sup>110</sup> 18 C.F.R. § 4.34(b)(5).

<sup>111</sup> Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters, 56 Fed. Reg. 23108, 23,127 (May 20, 1991).

<sup>112</sup> *Pacific Gas and Electric Company*, 170 FERC ¶ 61,232.

<sup>113</sup> *Id.* at p. 27. Order, ¶ 22.



to enforce or compel. There is nothing in either case that suggests that an expectation was a regulatory requirement.

The Order for YCWA continues to add layers to a structure that lacks foundation. In footnote 58 of the Order, the Commission cites the California Code, emphasizing that California explicitly contemplates a situation in which “the application in writing withdraws the request for certification.”<sup>114</sup> The fact that the Code acknowledges an option does not pass judgment on it one way or the other. In this case, it simply recognizes an option based on past experience.

The Commission states: “[w]e note that to the extent a state lacks sufficient information to act on a certification request, it has a remedy: it can deny certification.”<sup>115</sup> The applicant also has a remedy: withdrawal of the application, which the applicant may perceive as less adverse to its interests. The Commission's formulation would deprive the applicant of this option and compel the state, in order to maintain its authority, to adopt what would widely be perceived as a more punitive outcome.<sup>116</sup> Such a requirement interferes with the right of the State Water Board to establish its own procedures.

The Commission errs in dictating how the State regulates state agencies such as YCWA, and unilaterally penalizes the State Water Board for its internal policies to encourage compliance

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<sup>114</sup> Order, ¶ 25, fn. 58, *see also* Cal. Code Regs, tit. 23, § 3836(c) (emphasis added in Order).

<sup>115</sup> Order, ¶ 25.

<sup>116</sup> California's State Water Board has consistently upheld a culture of cooperation to achieve regulatory compliance, which is in its discretion as outlined by the Clean Water Act. For example, in the State Water Board's recent comments to the U.S. Bureau of Reclamation for Order 90-5 Sacramento River Temperature Management (June 1, 2020), it stated:

“The State Water Board wants to work cooperatively with Reclamation and watershed stakeholders on collaborative science and planning to further improve our shared understanding of temperature management actions that can best achieve water supply and fish protection goals . . . The Board relies on the expertise of our federal partners to help us make the best decisions. We cannot do this alone.”

p. 8. Available at <https://cah2oresearch.com/2020/06/01/state-water-board-formally-objects-to-reclamations-2020-sacramento-river-temperature-management-plan/> (last accessed June 22, 2020).

with licensees. The Commission argues that “[t]ellingly, as noted above, the Board did not dispute Yuba County’s statements that the project had not changed between applications and that the Board had all of the information it needed to act.”<sup>117</sup> This ignores YWCA’s inaction and failure to complete CEQA, painting a double standard and imposing judgment on state procedures that under the CWA, the state has complete discretion on *how* to implement. Essentially, the Commission faults the State Water Board for failing to punish YCWA for not filing a complete application for 401 certification, even as, as noted *supra*, the Commission equally fails to punish YCWA for its role in delay.

## **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 and direct YCWA to complete the CEQA document that is necessary for the Water Board to act on a certification request, and direct YCWA to submit a new request for water quality certification within 30 days of YCWA’s certification of the final CEQA document.

## **VII. CONCLUSION**

The Network respectfully requests that the Commission grant the requested relief.

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<sup>117</sup> Order, ¶ 24.

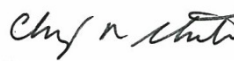
Dated: June 22, 2020

Respectfully submitted,



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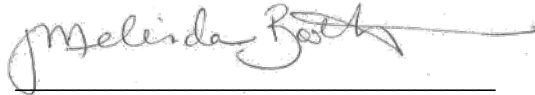
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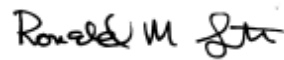
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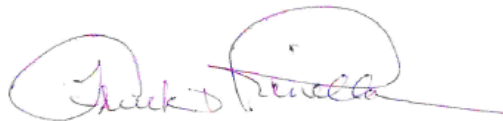
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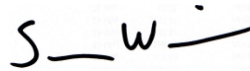
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**DECLARATION OF SERVICE**

**Yuba County Water Agency's Yuba River Development Project (P-2246-065)**

I, Traci Sheehan, declare that I today served the attached "Foothills Water Network's Request for Rehearing of Order on Waiver of Water Quality Certification" 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: June 22, 2020

By:



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