United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 1, 2018 Decided January 25, 2019

No. 14-1271

HOOPA VALLEY TRIBE,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

AMERICAN RIVERS, ET AL.,
INTERVENORS

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

Thane D. Somerville argued the cause for petitioner. With him on the briefs was *Thomas P. Schlosser*.

Carol J. Banta, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. On the brief were *James P. Danly*, General Counsel, *Robert H. Solomon*, Solicitor, *Robert M. Kennedy*, Senior Attorney, and *Ross R. Fulton*, Attorney.

Richard Roos-Collins, Julie Gantenbein, Stuart Sornach, Michael A. Swiger, and *Sharon L. White* were on the briefs for intervenors American Rivers, et al. in support of respondent.

Michael A. Swiger and *Sharon L. White* were on the brief for intervenor Pacificorp in support of respondent. *Charles R. Sensiba* entered an appearance.

George J. Mannina Jr. was on the brief for intervenor-respondent Siskiyou County, California. *Ashley Remillard* and *Paul S. Weiland* entered appearances.

Robert W. Ferguson, Attorney General, *Sonia A. Wolfman*, Assistant Attorney General, Office of the Attorney General for the State of Washington, *Lawrence G. Wasden*, Attorney General, Office of the Attorney General for the State of Idaho, *Joseph A. Foster*, Attorney General, Office of the Attorney General for the State of New Hampshire, *Douglas S. Chin*, Attorney General, Office of the Attorney General for the State of Hawaii, *Janet T. Mills*, Attorney General, Office of the Attorney General for the State of Maine, *Peter K. Michael*, Attorney General, Office of the Attorney General for the State of Wyoming, *Eric T. Schneiderman*, Attorney General at the time the brief was filed, Office of the Attorney General for the State of New York, and *Sean D. Reyes*, Attorney General, Office of the Attorney General for the State of Utah, were on the brief for *amici curiae* States of Washington, et al. in support of intervenors-respondents American Rivers, et al.

Kamala D. Harris, Attorney General at the time the brief was filed, Office of the Attorney General for the State of California, *Robert W. Byrne*, Senior Assistant Attorney General, *Eric M. Katz*, Supervising Deputy Attorney General, and *Ross H. Hirsch* and *Adam L. Levitan*, Deputy Attorneys General, were on the

brief for *amicus curiae* California State Water Resources Control Board in support of respondent.

Ellen F. Rosenblum, Attorney General, and *Paul Garrahan*, Attorney-In-Charge, Office of the Attorney General for the State of Oregon, were on the brief for *amicus curiae* The State of Oregon in support of respondent.

Before: GRIFFITH and PILLARD, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge.*

Opinion for the Court filed by *Senior Circuit Judge* SENTELLE.

SENTELLE, *Senior Circuit Judge*: Hoopa Valley Tribe ("Hoopa") petitions for review of Federal Energy Regulatory Commission ("FERC") orders, which found (1) that California and Oregon had not waived their water quality certification authority under Section 401 of the Clean Water Act ("CWA") and (2) that PacifiCorp had diligently prosecuted its relicensing application for the Klamath Hydroelectric Project ("Project"). Whereas statutory waiver is mandated after a request has been pending for more than one year, the issue in this case is whether states waive Section 401 authority by deferring review and agreeing with a licensee to treat repeatedly withdrawn and resubmitted water quality certification requests as new requests. We conclude that the withdrawal-and-resubmission of water quality certification requests does not trigger new statutory periods of review. Therefore, we grant the petition and vacate the orders under review.

I. BACKGROUND

A. Statutory Background

Under Subchapter I of the Federal Power Act ("FPA"), 16 U.S.C. §§ 791a-823g, Congress granted FERC authority to regulate the licensing, conditioning, and development of hydropower projects on navigable waters. Under Section 401 of the CWA, any applicant seeking a federal license for an activity that "may result in any discharge into the navigable waters" must first seek water quality certifications from the controlling states. *See* 33 U.S.C. § 1341(a)(1). Thus, a state's water quality review serves as a precondition to any federal hydropower license issued by FERC. The statute further provides that state certification requirements "shall be waived with respect to such Federal application" if the 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." *See id.* "[T]he purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

B. History of the Klamath Hydroelectric Project

In this case, the hydropower project in question consists of a series of dams along the Klamath River in California and Oregon, which were originally licensed

to a predecessor of PacifiCorp in 1954. Since the original license expired in 2006, PacifiCorp has continued to operate the Project on annual interim licenses pending the broader licensing process. Due to the age of the Project, the dams are not in compliance with modern environmental standards. Since modernizing the dams was presumably not cost-effective, PacifiCorp sought to decommission the lower dams. In 2004, PacifiCorp filed for relicensing with FERC, with a proposal to relicense the upper dams and decommission the remainder. All milestones for relicensing have been met except for the states' water quality certifications under Section 401.

In 2008, a consortium of parties—California, Oregon, Native American tribes, farmers, ranchers, conservation groups, fishermen, and PacifiCorp—began settlement negotiations to resolve the procedures and the risks associated with the dams' decommissioning. These negotiations culminated in a formal agreement in 2010, the Klamath Hydroelectric Settlement Agreement ("KHSA" or the "Agreement"), imposing on PacifiCorp a series of interim environmental measures and funding obligations, while targeting a 2020 decommission date. Under the KHSA, the states and PacifiCorp agreed to defer the one-year statutory limit for Section 401 approval by annually withdrawing-and-resubmitting the water quality certification requests that serve as a pre-requisite to FERC's overarching review. The Agreement explicitly required abeyance of all state permitting reviews:

> Within 30 days of the Effective Date, the Parties, except ODEQ [Oregon Department of

> Environmental Quality], will request to the California State Water Resources Control Board and the Oregon Department of Environmental Quality that permitting and environmental review for PacifiCorp's FERC Project No. 2082 [Klamath Hydroelectric Project] licensing activities, including but not limited to water quality certifications under Section 401 of the CWA and review under CEQA [California Environmental Quality Act], will be held in abeyance during the Interim Period under this Settlement. PacifiCorp shall withdraw and re-file its applications for Section 401 certifications as necessary to avoid the certifications being deemed waived under the CWA during the Interim Period.

See KHSA at 42.

The parties to the KHSA agreed to a number of preconditions for decommissioning, the most relevant of which was the securing of federal funds, which never occurred. Consequently, on April 6, 2016, a subset of parties from the original KHSA agreed to an "Amended KHSA," which created an alternative plan for decommissioning that contemplated the transfer of licensing to a company, Klamath River Renewal Corporation ("KRRC"), formed by the signatories of the Amended KHSA in order to limit potential liability that existing parties anticipated from decommissioning the dams. Of relevance, Hoopa—whose reservation is downstream of the Project—was not a party to either the KHSA or the Amended KHSA.

On September 23, 2016, PacifiCorp filed for an amended license to enable transfer of the dams to KRRC. Having never previously considered the transfer of a license for the sole purpose of decommissioning, and based on legal, technical, and financial concerns, FERC chose to separately review the applications for (1) amendment and (2) transfer. On March 15, 2018, FERC approved splitting the lower dams to a separate license, but has yet to approve transfer of that license. PacifiCorp remains the licensee for both of these newly split licenses.

C. Procedural History

On May 25, 2012, Hoopa petitioned FERC for a declaratory order that California and Oregon had waived their Section 401 authority and that PacifiCorp had correspondingly failed to diligently prosecute its licensing application for the Project. On June 19, 2014, FERC denied that petition. On July 18, 2014, Hoopa requested rehearing on its original petition, and FERC denied that request on October 16, 2014. Subsequently, on December 9, 2014, Hoopa petitioned this Court to review FERC's orders. This Court initially held the case in abeyance once the Amended KHSA was in place. But the decommissioning the agreement contemplated has yet to occur, and in light of Hoopa's pending petition, we removed the case from abeyance on May 9, 2018.

II. DISCUSSION

We review FERC orders under the Administrative Procedure Act ("APA"), which empowers the Court "to reverse any agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *See, e.g.*, *Wisconsin Valley Improvement v. FERC*, 236 F.3d 738, 742 (D.C. Cir. 2001) (quoting 5 U.S.C. § 706(2)(A)). In conducting the review in this case, because FERC is not the agency charged with administering the CWA, the Court owes no deference to its interpretation of Section 401 or its conclusion regarding the states' waiver. *See Alcoa Power,* 643 F.3d at 972.

A. Sovereign Immunity

The state of Oregon, an amicus curiae, has challenged this Court's jurisdiction over the instant matter. Specifically, California and Oregon have exercised their sovereign immunity under the Eleventh Amendment by refusing to intervene in this review. Oregon avers a status as an indispensable party because this review entails a potential finding of the states' waiver of their Section 401 authority. Thus, Oregon asserts that this case must be dismissed, relying on Fed. R. Civ. P. 19.

However, California and Oregon are not indispensable parties to the instant case. Contrary to Oregon's argument, Fed. R. Civ. P. 19 does not govern this joinder issue. *See Int'l Union, United Auto. v. Scofield,* 382 U.S. 205, 217 n.10 (1965). Rather, as an appellate court

reviewing an agency action, we look to Fed. R. App. P. 15. Rule 15 only requires the respondent federal agency as a necessary party to a petition for review—joinder of no other party is required. *See* Fed. R. App. P. 15. With regard to sovereign immunity generally, Oregon's position is incompatible with the precepts of federalism and this Court's prior precedent. Hoopa's petition does not involve a state's certification decision or a state's application of state law, but rather *a federal agency's order,* a matter explicitly within the purview of this Court when petitioned by an aggrieved party. *See* 16 U.S.C. § 825*l*(b). Indeed, FERC orders regarding a state's compliance are properly reviewed by federal appeals courts whether or not the state is a party to the review. *See, e.g., City of Tacoma v. FERC,* 460 F.3d 53 (D.C. Cir. 2006). This is especially true, in cases such as this, when the dispositive issue on review is the interpretation of federal law. *See* U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ."). Accordingly, this Court has jurisdiction over the instant matter, and we shall proceed to the merits of Hoopa's claims.

B. Waiver under Section 401

Hoopa's petition presents three theories as bases for relief: the states' waiver of their Section 401 authority, PacifiCorp's failure to diligently prosecute its licensing application, and FERC's abdication of its

regulatory duty. However, all of Hoopa's theories are connected.

Resolution of this case requires us to answer a single issue: whether 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. If this type of coordinated withdrawal-and-resubmission scheme is a permissible manner for tolling a state's one-year waiver period, then (1) California and Oregon did not waive their Section 401 authority; (2) PacifiCorp did not fail to diligently prosecute its application; and (3) FERC did not abdicate its duty. However, if such a scheme is ineffective, then the states' and licensee's actions were an unsuccessful attempt to circumvent FERC's regulatory authority of whether and when to issue a federal license.

Determining the effectiveness of such a withdrawal-and-resubmission scheme is an undemanding inquiry because Section 401's text is clear.

> If the State, interstate agency, or Administrator, as the case may be, 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 this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section

> has been obtained or has been waived as provided in the preceding sentence.

See 33 U.S.C. § 1341(a)(1). The temporal element imposed by the statute is "within a reasonable period of time," followed by the conditional parenthetical, "(which shall not exceed one year)." *See id.* Thus, while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year. Indeed, the Environmental Protection Agency ("EPA")—the agency charged with administering the CWA—generally finds a state's waiver after only six months. *See* 40 C.F.R. § 121.16.

The pendency of the requests for state certification in this case has far exceeded the one-year maximum. PacifiCorp first filed its requests with the California Water Resources Control Board and the Oregon Department of Environmental Quality in 2006. Now, *more than a decade later,* the states still have not rendered certification decisions. FERC "sympathizes" with Hoopa, noting that the lengthy delay is "regrettable." According to FERC, it is now commonplace for states to use Section 401 to hold federal licensing hostage. At the time of briefing, twenty-seven of the forty-three licensing applications before FERC were awaiting a state's water quality certification, and four of those had been pending for *more than a decade.*

Implicit in the statute's reference "to act on *a request* for certification," the provision applies to a specific request. *See* 33 U.S.C. § 1341(a)(1) (emphasis added). This text cannot be reasonably interpreted to

mean that the period of review for one request affects that of any other request. In its decision, FERC used this text to rescue the states from waiver. FERC found that while PacifiCorp's various resubmissions involved the same Project, each resubmission was an independent request, subject to a new period of review. Thus, FERC averred that the states had not failed to act. In doing so, FERC acted arbitrarily and capriciously.

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. 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 KHSA 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.

While the statute does not define "failure to act" or "refusal to act," the states' efforts, as dictated by the

KHSA, constitute such failure and refusal within the plain meaning of these phrases. Section 401 requires state action within a reasonable period of time, not to exceed one year. California and Oregon's deliberate and contractual idleness defies this requirement. By 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.

Congress intended Section 401 to curb a *state's* "dalliance or unreasonable delay." *See, e.g.,* 115 Cong. Rec. 9264 (1969). This Court has repeatedly recognized that the waiver provision was created "to prevent a State from indefinitely delaying a federal licensing proceeding." *See Alcoa Power,* 643 F.3d at 972-73; *Millennium Pipeline Co. v. Seggos,* 860 F.3d 696, 701-02 (D.C. Cir. 2017).

While caselaw offers some guidance regarding a state's waiver, *e.g., North Carolina v. FERC,* 112 F.3d 1175, 1183-85 (D.C. Cir. 1997), this Court has never addressed the specific factual scenario presented in this case, *i.e.,* an applicant agreeing with the reviewing states to exploit the withdrawal-and-resubmission of water quality certification requests over a lengthy period of time. In its supplemental brief, FERC directs the Court's attention to a Second Circuit opinion which suggested, in light of various practical difficulties, that a state could "request that the applicant withdraw and resubmit the application." *See New York State Dep't of*

Envtl. Conservation v. FERC, 884 F.3d 450, 455-56 (2d Cir. 2018) (citing *Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation,* 868 F.3d 87, 94 (2d Cir. 2017)). That suggestion was not central to the court's holding. The *dicta* was offered to rebut the state agency's fears that a one-year review period could result in incomplete applications and premature decisions. *See id.* (identifying denial without prejudice as another alternative).

While it is the role of the legislature, not the judiciary, to resolve such fears, those trepidations are inapplicable to the instant case. The record indicates that PacifiCorp's water quality certification request has been complete and ready for review for more than a decade. There is no legal basis for recognition of an exception for an individual request made pursuant to a coordinated withdrawal-and-resubmission scheme, and we decline to recognize one that would so readily consume Congress's generally applicable statutory limit. Accordingly, we conclude that California and Oregon have waived their Section 401 authority with regard to the Project.

C. Futility

FERC postulated that a finding of waiver would require the agency to deny PacifiCorp's license. As a result, PacifiCorp would have to file a decommissioning plan for the Klamath dams, and since decommissioning of the Project is an activity that itself would result in a "discharge into the navigable waters," that plan

would be subject to its own set of the oft-delayed state water quality certifications. Thus, in a futile sequence of events, the Project would revert back to its present state, only burdened with additional delays.

FERC may be correct that "[i]ndefinite delays in processing [licensing] applications are . . . not in the public interest." *See Georgia-Pacific Corp.,* 35 FERC ¶ 61120, 61248 n.8 (Apr. 25, 1986). However, such practical concerns do not trump express statutory directives. *See supra* Section II.B. Regardless, had FERC properly interpreted Section 401 and found waiver when it first manifested more than a decade ago, decommissioning of the Project might very well be underway.

Further, FERC possesses a critical role in protecting the public interest in hydropower projects. *See* 16 U.S.C. §§ 797(e), 803(a), 808(a). FERC solicits comments from interested parties and holds public meetings. *See, e.g., U.S. Dep't of Interior v. FERC,* 952 F.2d 538, 540 (D.C. Cir. 1992). FERC may also "participate in an advisory role in settlement discussions or review proposed settlements" for the development or decommissioning of such projects. *See* Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act, 116 FERC ¶ 61270, 62086 (Sept. 1, 2006). Here, it did neither. Hoopa's interests are not protected directly as it is not a party to the KHSA or Amended KHSA, nor are its interests protected indirectly through any participation by FERC in those same settlement agreements. Therefore, we disagree that a finding of waiver is futile because, at a minimum, it

provides Hoopa and FERC an opportunity to rejoin the bargaining table.

III. CONCLUSION

For the reasons set forth above, we vacate and remand the rulings under review. FERC shall proceed with its review of, and licensing determination for, the Klamath Hydroelectric Project.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1271 **September Term, 2018**

FERC-P-2082-61

Filed On: April 26, 2019

Hoopa Valley Tribe,

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

American Rivers, et al.,
Intervenors

BEFORE: Griffith and Pillard, Circuit Judges; Sentelle*, Senior Circuit Judge

ORDER

Upon consideration of the petition of respondent-intervenors American Rivers, California Trout, and Trout Unlimited for panel rehearing, and the response thereto; the motions of the States of Oregon, et al., the California State Water Resources Control Board ("California Board"), and the Karuk Tribe, et al., for

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* Senior Circuit Judge Sentelle would deny the motions of the States of Oregon, et al., and the California Board for invitation to file briefs amici curiae.

invitation to file briefs amici curiae, and the lodged briefs amici curiae; and the motion of respondent-intervenor PacifiCorp for leave to file a response and the lodged response, it is

ORDERED that the motions filed by the States of Oregon, et al. and the California Board for invitation to file briefs amici curiae be granted. The Clerk is directed to file the lodged briefs. It is

FURTHER ORDERED that the motion filed by the Karuk Tribe, et al. for invitation to file brief amici curiae be denied. The Clerk is directed to note the docket accordingly. It is

FURTHER ORDERED that the motion of PacifiCorp for leave to file a response be granted. The Clerk is directed to file the lodged response. It is

FURTHER ORDERED that the petition for panel rehearing be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1271 **September Term, 2018**

FERC-P-2082-61

Filed On: April 26, 2019

Hoopa Valley Tribe,

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

American Rivers, et al.,
Intervenors

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao*, Circuit Judges; Sentelle**, Senior Circuit Judge

ORDER

Upon consideration of the petition of respondent-intervenors American Rivers, California Trout, and

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* Circuit Judge Rao did not participate in this matter.

** Senior Circuit Judge Sentelle would deny the motions of the States of Oregon, et al., and the California Board for invitation to file briefs amici curiae.

Trout Unlimited for rehearing en banc, and the absence of a request by any member of the court for a vote; and the motions of the States of Oregon, et al., the California State Water Resources Control Board ("California Board"), and the Karuk Tribe, et al., for invitation to file briefs amici curiae, and the lodged briefs amici curiae, it is

ORDERED that the motions of the States of Oregon, et al. and the California Board for invitation to file briefs amici curiae be granted. The Clerk is directed to file the lodged briefs. It is

FURTHER ORDERED that the motion of Karuk Tribe, et al. for invitation to file brief amici curiae be denied. The Clerk is directed to note the docket accordingly. It is

FURTHER ORDERED that the petition for rehearing en banc be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

2014 WL 2794387

FEDERAL ENERGY REGULATORY COMMISSION
Commission Opinions, Orders and Notices

Before Commissioners: Cheryl A. LaFleur, Acting Chairman; Philip D. Moeller, John R. Norris, and Tony Clark.

PacifiCorp

Project No., 2082-058
ORDER DENYING PETITION
FOR DECLARATORY ORDER
(Issued June 19, 2014)

1. The Hoopa Valley Tribe (Tribe) has filed a petition for a declaratory order asking the Commission to find that PacifiCorp, the licensee for the Klamath Hydroelectric Project No. 2082, has failed to diligently pursue relicensing of the project, dismiss PacifiCorp's relicense application, and direct PacifiCorp to file a plan for decommissioning the project. In the alternative, the Tribe asks the Commission to declare that the State of California Water Resources Control Board (California Water Board) and the Oregon Department of Environmental Quality (Oregon DEQ) have waived their authority to issue water quality certification for the project pursuant to the Clean Water Act. This order denies the petition.

Background

2. The 169-megawatt Klamath Project is located principally on the Klamath River in Klamath County, Oregon and Siskiyou County, California.[1] The project includes seven hydroelectric developments and one non-generating dam.[2] The Commission's predecessor, the Federal Power Commission, issued a 50-year original license for the project in 1954. The license expired in 2006 and the project has been operated under annual license since that time.[3]

3. On February 25, 2004, PacifiCorp filed with the Commission an application for a new license for the Klamath Project. The company proposed to relicense five of the project's generating developments and to decommission the other three developments, including the non-generating development. In November 2007, Commission staff issued a Final Environmental Impact Statement (EIS) in the relicensing proceeding.[4] Staff recommended adopting PacifiCorp's proposal, with the addition of a number of environmental measures.

4. On March 5, 2010, PacifiCorp filed with the Commission the Klamath Hydroelectric Settlement Agreement

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[1] One development is located on Fall Creek, a tributary to the Klamath.

[2] *See Final Environmental Impact Statement for Hydropower License, Klamath Hydroelectric Project,* Federal Energy Regulatory Commission, Office of Energy Projects (November 2007) at xxxiii.

[3] *See* 16 U.S.C. § 808(a)(1) (2012).

[4] *See* n.2, *infra.*

(Settlement Agreement). The Settlement Agreement, which was signed by the Governors of the States of California and Oregon, PacifiCorp, the U.S. Department of the Interior, the Department of Commerce's National Marine Fisheries Service, several Indian tribes (not including the Hoopa Tribe), and a number of local counties, irrigators, and conservation and fishing groups, provided for the future removal of PacifiCorp's licensed Klamath River dams, with a target date of 2020. The parties did not ask the Commission to act on the agreement, the completion of which was contingent on the passage of federal legislation and action by the Secretary of the Interior.

5. To date, no federal legislation regarding the Settlement Agreement has been enacted,[5] and the parties have not requested Commission action.

6. Under section 401(a)(1) of the Clean Water Act,[6] the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency has either issued a Water Quality Certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year.

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[5] On May 21, 2014, Senator Wyden introduced S. 2379, entitled, "A bill to approve and implement the Klamath Basin agreements, to improve natural resource management, support economic development, and sustain agricultural production in the Klamath River Basin in the public interest and the interest of the United States, and for other purposes."

[6] 33 U.S.C. § 1341(a)(1) (2012).

7. PacifiCorp filed a request for water quality certification with the California Water Board on March 29, 2006. Since then, the company has withdrawn and refiled its application eight times. Similarly, PacifiCorp filed a request for certification with Oregon DEQ on March 29, 2006, and has withdrawn and refiled its application eight times. In refiling its applications, PacifiCorp has noted that the Settlement Agreement requires it to do so in order to avoid waiver by the water quality certifying agencies.[7]

8. On May 25, 2012, the Tribe filed a petition for a declaratory order, asking the Commission to find that PacifiCorp has failed to diligently pursue relicensing of the project and accordingly require the company to file a plan for decommissioning the project, or, in the alternative, find that California and Oregon have waived water quality certification and issue a new license for the project.

9. On June 25, 2012, PacifiCorp, on behalf of itself and 16 other parties, filed an answer opposing the petition. Also on June 25, 2012, the County of Siskiyou and Siskiyou County Flood Control and Water Conservation District filed an answer opposing project decommissioning but urging issuance of a license.

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[7] *See, e.g.,* letter from Mark A. Sturtevant (PacifiCorp) to Kimberly D. Bose (Commission Secretary), enclosing December 2, 2033 letter from PacifiCorp to Oregon Department of Water Quality (filed December 16, 2013).

Discussion

10. The Tribe argues that PacifiCorp is not taking action to obtain water quality certification and thus is not diligently pursuing its license application.[8] The Tribe therefore asks the Commission to dismiss the relicense application and require the company to file a plan to decommission the project.[9]

11. We agree with the Tribe that the circumstances of this case are far from ideal. As noted above, Commission staff issued the EIS in November 2007. The Commission could act on PacifiCorp's application but for the absence of water quality certification.[10] The Klamath Project is operating under the terms of the 1954 license, and, as a result, the many environmental benefits that could accrue under the new license have not occurred.[11] Under the express terms of the Clean Water Act, however, the Commission cannot issue and implement a new license until water quality certification has been issued.

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[8] Petition at 1-12.

[9] *Id.* at 12-13.

[10] There is also a need to conclude consultation under the National Historic Preservation Act, but such matters, as a rule, do not delay license issuance.

[11] While we cannot and do not consider the license application now, we note, as a general matter, that all licenses we have issued in recent times contain substantially more environmental measures than those issued 50 years ago, before any of the current environmental statutes were enacted and before the Federal Power Act was amended to enhance consideration of environmental matters.

12. We also agree with the Tribe that PacifiCorp has been complicit with the parties to the Settlement Agreement in agreeing to delay water quality certification, and that there is no apparent prospect of the federal legislation called for by the settlement being passed or of the necessary actions by the Secretary of the Interior taking place. Again, as the Tribe asserts, infinite delays in licensing proceedings are not in the public interest. Indeed, they are contrary to it.

13. Nonetheless, the remedy suggested by the Tribe —requiring PacifiCorp to file a decommissioning plan —would not resolve the impasse here. Any major decommissioning would likely result in some form of discharge into the navigable waters, meaning that the Commission could not implement decommissioning without a water quality certification.[12] Given that we would be acting contrary to the process envisioned by all the parties to the settlement, including the two water quality certifying agencies, it appears unlikely that the agencies would issue certification for a decommissioning process that did not comport with the terms of the settlement to which they have agreed.[13] It seems

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[12] *See, e.g., Duke Energy Carolinas, LLC,* 120 FERC ¶ 61,054 (2007) at PP 33-36 (stating that Commission could not accept license surrender, which included dam removal, without state water quality certification), *reh'g denied,* 123 FERC ¶ 61,069 at 17-21) (2008), *aff'd, Jackson County v. FERC*, 589 F.3d 1284 (D.C. Cir. 2009).

[13] Another likely outcome might be for PacifiCorp to file the Settlement Agreement as its decommissioning plan, even though the plan could not be implemented absent Congressional and executive department action.

more probable that they would either deny certification, thereby precluding decommissioning, or work with PacifiCorp and the other parties to repeatedly delay certification, as has already occurred in this case.

14. In addition, while we do have the authority to order a licensee to decommission a project,[14] we have done so only once in the absence of the licensee's consent, upon a finding that the facts of the case required that outcome.[15] Here, we have not concluded based on the record that decommissioning is required, and thus lack a basis for imposing such a requirement.[16] We are also unsure how demanding that PacifiCorp file a decommissioning plan when it had already taken substantial steps in that direction in concert with a large number of parties would yield a positive result. If we had a viable way to require the parties to move forward, we would certainly consider it. We do not see such an option before us.

15. The Tribe asks that, if we do not dismiss PacifiCorp's license application for lack of diligence and require a decommissioning plan, we issue a license, based on the conclusion that California and Oregon have waived water quality certification by failing to act

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[14] *See Edwards Manufacturing Company, Inc. and City of Augusta, Maine*, 81 FERC ¶ 61,255 at 62,207-09 (1997).

[15] *Id.*

[16] Without in any way prejudging the merits of the relicensing proceeding, we note that the EIS prepared by our staff recommended decommissioning only some of the project dams, consist with PacifiCorp's licensing proposal. We would at a minimum seriously consider staff's recommendation in acting in this case.

by the deadline established by the Clean Water Act — a reasonable period of time, not to exceed one year from the filing of a request for certification.[17] The Tribe contends that the states' failure to act within one year and their agreement with PacifiCorp not to do so amount to waiver.[18]

16. Again, we have some sympathy with the Tribe's argument. Indefinite delays in licensing proceedings do not comport with at least the spirit of the Clean Water Act and have the effect of preventing us from issuing new licenses that are best adapted to a current comprehensive plan for improving or developing a waterway in the public interest.[19] We have previously stated that we "cannot endorse procedures that result in undue extensions of the licensing process. . . . [Such an] inordinate delay was hardly what Congress contemplated in crafting the one-year certification deadline."[20]

17. In this case, however, we see little to be gained from finding that the states have waived certification and then issuing a license. It is clear that PacifiCorp and the other settling parties are committed to the process envisioned in the Settlement Agreement. PacifiCorp states in its opposition to the petition that it is endeavoring to implement the terms of the Settlement

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[17] *See* 33 U.S.C. § 1341(a) (2012).

[18] Petition at 14-21.

[19] *See* 16 U.S.C. § 808(a) (2012).

[20] *Central Vermont Public Service Corporation,* 113 FERC ¶ 61,167, at P 16, n.14 (2005).

Agreement, and will pursue relicensing if the agreement terminates. Given that we cannot require a licensee to accept a license, and that PacifiCorp views itself as bound to follow the settlement, we see little point in pursuing a course that would almost certainly leads [sic] to protracted litigation and would be unlikely to resolve the issues in this proceeding.

The Commission orders:

The petition for declaratory order filed by the Hoopa Valley Tribe on May 25, 2012, is denied.

By the Commission.

(SEAL)

Kimberly D. Bose
Secretary

2014 WL 5293211

FEDERAL ENERGY REGULATORY COMMISSION
Commission Opinions, Orders and Notices

Before Commissioners: Cheryl A. LaFleur, Chairman; Philip D. Moeller, Tony Clark, and Norman C. Bay.

PacifiCorp

Project No., 2082-061
ORDER DENYING REHEARING
(Issued October 16, 2014)

1. The Hoopa Valley Tribe (Tribe) has requested rehearing of the Commission's June 19, 2014, order[1] denying the Tribe's petition for a declaratory order either (1) finding that PacifiCorp, the licensee for the Klamath Hydroelectric Project No. 2082, has failed to diligently pursue relicensing of the project, dismissing PacifiCorp's relicense application, and directing PacifiCorp to file a plan for decommissioning the project, or (2) in the alternative, declaring that the State of California Water Resources Control Board (California Water Board) and the Oregon Department of Environmental Quality (Oregon DEQ) have waived their authority to issue water quality certification for the project pursuant to the Clean Water Act. As discussed below, we deny rehearing.

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[1] *PacifiCorp,* 147 FERC ¶ 61,216 (2014) (June 19 Order).

Background

2. The 169-megawatt Klamath Project is located principally on the Klamath River in Klamath County, Oregon and Siskiyou County, California.[2] The project includes seven hydroelectric developments and one non-generating dam.[3] The Commission's predecessor, the Federal Power Commission, issued a 50-year original license for the project in 1954. The license expired in 2006 and the project has been operated under annual license since that time.[4]

3. On February 25, 2004, PacifiCorp filed with the Commission an application for a new license for the Klamath Project. The company proposed to relicense five of the project's generating developments and to decommission the other three developments, including the non-generating development. In November 2007, Commission staff issued a Final Environmental Impact Statement (EIS) in the relicensing proceeding.[5] Staff recommended adopting PacifiCorp's proposal, with the addition of a number of environmental measures.

4. On March 5, 2010, PacifiCorp filed with the Commission the Klamath Hydroelectric Settlement Agreement (Settlement Agreement). The Settlement Agreement,

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[2] One development is located on Fall Creek, a tributary to the Klamath.

[3] *See Final Environmental Impact Statement for Hydropower License, Klamath Hydroelectric Project,* Federal Energy Regulatory Commission, Office of Energy Projects (November 2007) at xxxiii.

[4] *See* 16 U.S.C. § 808(a)(1) (2012).

[5] *See* n.2, *infra.*

which was signed by the Governors of the States of California and Oregon, PacifiCorp, the U.S. Department of the Interior, the Department of Commerce's National Marine Fisheries Service, several Indian tribes (not including the Hoopa Tribe), and a number of local counties, irrigators, and conservation and fishing groups, provided for the future removal of PacifiCorp's licensed Klamath River dams, with a target date of 2020. The parties did not ask the Commission to act on the agreement, the completion of which is contingent on the passage of federal legislation and action by the Secretary of the Interior.

5. To date, no federal legislation regarding the Settlement Agreement has been enacted,[6] and the parties have not requested Commission action.

6. Under section 401(a)(1) of the Clean Water Act,[7] the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency has either issued a Water Quality Certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year.

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[6] On May 21, 2014, Senator Wyden introduced S. 2379, entitled, "A bill to approve and implement the Klamath Basin agreements, to improve natural resource management, support economic development, and sustain agricultural production in the Klamath River Basin in the public interest and the interest of the United States, and for other purposes."

[7] 33 U.S.C. § 1341(a)(1) (2012).

7. PacifiCorp filed a request for water quality certification with the California Water Board on March 29, 2006. Since then, the company has withdrawn and refiled its application eight times. Similarly, PacifiCorp filed a request for certification with Oregon DEQ on March 29, 2006, and has withdrawn and refiled its application eight times.

8. On May 25, 2012, the Tribe filed a petition for a declaratory order, asking the Commission to find that PacifiCorp has failed to diligently pursue relicensing of the project and accordingly require the company to file a plan for decommissioning the project, or, in the alternative, find that California and Oregon have waived water quality certification and issue a new license for the project.

9. In the June 19 order, the Commission denied the Tribe's petition. We explained that, while the circumstances of the Klamath project relicensing are far from ideal, the Commission is barred by the Clean Water Act from issuing a new license in the absence of water quality certification from Oregon and California. We further concluded that ordering PacifiCorp to file a decommissioning plan would be unlikely to resolve the current impasse, given that the great majority of parties to the relicensing are pursuing implementation of the settlement, and that decommissioning would probably require water quality certification, which the states, as supporters of the settlement process, would not likely issue.[8] With respect to the Tribe's assertion

[8] June 19 Order, 147 FERC ¶ 61,216 at P 11.

that we should find that California and Oregon have waived water quality certification, we found that there was little point in pursuing a course that would almost certainly lead to protracted litigation and would be unlikely to resolve the issues in this proceeding.[9]

10. On July 18, 2014, the Tribe filed a timely request for rehearing.

Discussion

A. Dismissal of the Relicensing Application

11. The Tribe reiterates its assertions that PacifiCorp is diligently pursuing neither the issuance of a new license nor water quality certification, and that delay in relicensing is not in the public interest.[10] It asserts that our conclusion that a decommissioning plan would require water quality certification that the states would be unlikely to issue is unsupported by the record and an insufficient basis for denying its petition.[11] The Tribe further argues that, if the Commission were to grant the Tribe's petition, decommissioning would be the only appropriate course of action. It contends that the Commission must not let the settlement process

[9] *Id.* P 17.

[10] Request for rehearing at 12-14. The Tribe notes that the Commission has the authority to deny a new license to an applicant seeking relicensing. *Id.* at 14. While this is true, it does not assist us in resolving this case. Denying a new license where no party, other than the Tribe, seeks such a result, and, indeed, where our staff in the Final EIS recommended issuing a new license, would be difficult to justify.

[11] *Id.* at 14-17.

play out, but should either dismiss PacifiCorp's application for lack of prosecution or find that the states have waived water quality certification.[12]

12. Given that neither the Federal Power Act nor our regulations impose any requirements with respect to situations such as that presented here, we have considerable discretion with respect to administering this proceeding. Indeed, "the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress [has] confided the responsibility for substantive judgments."[13] The Tribe points to nothing in law, regulation, or precedent that requires us to find that PacifiCorp's application should be dismissed.

13. As we explained in the June 19 order, lengthy delays in licensing proceedings are contrary to the public interest.[14] At the same time, we see little to be gained by taking steps that would likely result in further delay, litigation, and extensive expenditures of time and money by the parties and the Commission. While it is unfortunately the case that there are relicensing proceedings that have been pending for many years

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[12] *Id.* at 17-20. The Tribe asserts that the fact that we have not taken action on the Settlement Agreement is contrary to our settlement policy. *Id.* at 5, n.8 (citing *Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act,* 116 FERC ¶ 61,270 (2006)). Nothing in our policy or practice requires us to act on settlements where, as here, the parties explicitly file an agreement for the Commission's information only, and not for Commission action.

[13] *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council,* 435 U.S. 519, 524-25 (1978).

[14] June 19 Order, 147 FERC § 61, 216 at P 12.

awaiting water quality certification,[15] there has been no such instance in which we have dismissed a relicense application for the licensee's failure to diligently pursue the application, in large part because of the confusion such an action would cause and because we have not seen a clear path to resolving the issues in these cases.[16]

14. We disagree with the Tribe's assertion that we lacked a basis in the record for suggesting that California and Oregon would be no more likely to issue water quality certification for a project decommissioning proceeding than they have been during the relicensing proceeding.[17] In the June 19 Order, we explained that "[g]iven that we would be acting contrary to the process envisioned by all the parties to the settlement, including the two water quality certifying agencies, it appears unlikely that the agencies would issue certification
for a decommissioning process that did not comport with the terms of the settlement to which they have

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[15] For example, relicensing of the Hells Canyon Project No. 1971 and the Poe Project No. 2107 has been pending since 2003, while the Upper North Fork Feather River relicensing has been awaiting water quality certification since 2002, and the Waterbury Project No. 2090 has been pending since 1999. Of 43 pending license applications regarding which our staff has completed its environmental analysis, 29 (67 percent) area waiting water quality certification.

[16] We continue to consider whether there are actions or incentives we can take that may be appropriate in individual proceedings to break these logjams.

[17] Request for Rehearing at 16.

agreed."[18] There is indeed no direct evidence in the record as to how the agencies would react were we to grant the Tribe's petition,[19] but our experience, both in this proceeding and generally, led us to conclude that California and Oregon could not be expected to act more promptly to authorize an outcome they do not support[20] than they have in the relicensing proceeding. We continue to find this conclusion reasonable.

15. The Tribe is also incorrect in asserting that requiring a decommissioning plan would be the only alternative in the case of a dismissed application. We could, for example, consider the project to be orphaned and seek other applications,[21] or we could issue PacifiCorp a non-power license for all or part of the project.[22]

16. In sum, the Tribe has shown no error in our decision to deny its request that we dismiss PacifiCorp's application and we deny rehearing on this matter.

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[18] June 19 Order, 147 FERC ¶ 61,216 at P 13.

[19] It is difficult to envision what evidence there could be, absent a statement by the agencies as to what they would do in a hypothetical situation.

[20] As noted in the June 19 order, a number of parties, including PacifiCorp, Oregon DEQ, and the California Water Board, opposed the Tribes petition.

[21] *See* 18 C.F.R. § 61.25 (2014). While this section explicitly deals with instances in which a license [sic] fails to file a timely, complete application, we believe that it would be applicable in the case of an application that we elected to dismiss later in a proceeding.

[22] *See* 16 U.S.C. § 808(f) (2012).

B. Waiver of Water Quality Certification

The Tribe argues that we erred in not determining that California and Oregon have waived water quality certification. The Tribe notes that section 401(a)(1) of the Clean Water Act provides that if a state "fails or refuses to act on a request for certification, within a reasonable time (which shall not exceed one year) after receipt of such request, the certification . . . shall be waived . . . ,"[23] and states that the question whether waiver has occurred is a federal question to be decided by the Commission.[24] The Tribe cites a number of cases, as well as legislative history, for the proposition that Congress intended the one-year deadline to avoid undue state delay of the federal proceedings.[25]

18. We agree with the Tribe that continued delays in completing the water quality certification are inconsistent with Congress' intent. We further agree that, in licensing proceedings before it, the Commission has the obligation to determine whether a state has complied with the procedures required by the Clean Water Act, including whether a state has waived certification.[26]

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[23] *See* 33 U.S.C. § 1341(a)(1) (2012).

[24] Request for Rehearing at 20-21.

[25] *Id.* at 22-23.

[26] *See, e.g., Alcoa Power Generating Inc. v. FERC,* 643 F.3d 963 (D.C. Cir. 2011) (affirming, as a federal question, the Commission's determination that a state had not waived certification); *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006) (stating that the Commission was obligated to inquire as to whether a state satisfied the Clean Water Act's notice requirements); *Keating v.*

19. We part company with the Tribe on whether certification has been waived in this case. The Tribe carefully hedges its argument, maintaining that it "does not ask the Commission to declare that the practice of 'withdrawal and resubmission' is unlawful in every instance,"[27] but is so only under the facts of this case, including the states' not acting within one year of the initial certification requests, the passage of time since the original requests, the delay in the relicensing proceeding, the states' agreement with the licensee not to move forward on certification, and the fact the licensee continues to operate its project under the terms of its existing license.[28]

20. We continue to be concerned that states and licensees that engage in repeated withdrawal and refiling of applications for water quality certification are acting, in many cases, contrary to the public interest by delaying the issuance of new licenses that better meet current-day conditions than those issued many decades ago, and that these entities are clearly violating the spirit of the Clean Water Act by failing to provide reasonably expeditious state decisions; however, notwithstanding that concern, we do not conclude that they have violated the letter of that statute. Section 401(a)(1) provides that a state waives certification when it does not act on an application within one year.

FERC, 927 F.2d 616 (D.C. Cir. 1991) (holding that the Commission was obligated to determine the effectiveness of a state's purported revocation of certification).

[27] Request for Rehearing at 25.

[28] *Id.* at 25-26.

The Act therefore speaks solely to *state action or in action,* rather than the repeated withdrawal and refiling of applications. By withdrawing its applications before a year has passed, and presenting the states with new applications, PacifiCorp has, albeit repeatedly, given the states new deadlines. The 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. Again, while the Commission continues to be concerned that these entities are violating the spirit of the Clean Water Act, the particular circumstances here, including the length of the delay, do not demand a different result because the Act speaks directly only to state action within one year of a certification request. Accordingly, we find that California and Oregon have not waived water quality certification in this case.

21. The Tribe's reliance on *Central Vermont Public Service Corporation*[29] is unavailing. In that case, although the state and the licensee had agreed that the licensee would withdraw and refile its water quality certification application on an annual basis, the licensee ultimately failed to do so and the state did not act on the then-pending application before the one-year deadline. We held that the passage of the deadline resulted in waiver, regardless of the fact that the two parties had intended to continue the withdrawal and refiling process: the governing fact was the expiration of the one-year period.[30] Here, whether for good or ill,

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[29] 113 FERC ¶ 61,167 (2005) *(Central Vermont). See* Request for Rehearing at 23-24.

[30] *See Central Vermont*, 113 FERC ¶ 61,167 at PP 15-16.

PacifiCorp has withdrawn and refiled its certification applications numerous times. The Tribe does not assert that the states missed the one-year deadline with respect to any single one of the company's applications. In essence, PacifiCorp and the states have avoided the error that Vermont and the licensee in that proceeding made. Accordingly, *Central Vermont* is inapposite here.

22. The Tribe goes on to argue that our decision not to declare that California and Oregon have waived water quality certification is arbitrary, capricious, and an abuse of discretion. The Tribe again asserts that our conclusions that the parties to the settlement are committed to it is unsupported by the record and that the public interest requires us to issue a new license or a decommissioning order.[31]

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[31] Request for Rehearing at 26-30. The Tribe also objects to what it asserts is the Commission's "failure to reinitiate the licensing process [[because] it cannot require a licensee to accept a license." *Id.* at 29. In the June 19 Order, 147 FERC ¶ 61,216 at P 17, we simply intended to indicate that the likely negative reaction to our issuing a license that ignored the wishes of the settling parties gave us little incentive to pursue untested legal theories. We nonetheless fully agree with the Tribe that we must issue licenses that satisfy the public interest standards established by the Federal Power Act, and we do not base licensing decisions on whether the applicant (or any other entity) will be pleased by our actions. We further agree, as noted above, that a new license would bring the project in line with current environmental standards. Were we to determine that water quality certification has been waived here, we would then issue a license that we concluded met the public interest, as we have done in other cases involving waiver. *See*, *e.g., Central Vermont, supra*; *FPL Energy Maine Hydro LLC,* 139 FERC ¶ 61,215 (2012); *Virginia Electric Power Company d/b/a Dominion Virginia Power/Dominion*

23. As we have explained, it is the Clean Water Act that prescribes when a state agency has waived certification; it is not an exercise of discretion vested in the Commission. If our interpretation of the statute is incorrect, that would be for the courts to determine.[32] As to the adherence of the settling parties to their agreement, we have no way of knowing how firm their commitment is, but we think it a reasonable assumption that entities will support an agreement which they have voluntarily negotiated and signed.

The Commission orders:

The request for rehearing filed by the Hoopa Valley Tribe on July 18, 2014, is denied.

By the Commission.

(SEAL)

Kimberly D. Bose
Secretary

North Carolina Power, 110 FERC ¶ 61,241 (2005); *Gustavus Electric Company,* 109 FERC ¶ 61,105, *reh'g denied,* 110 FERC ¶ 61,334 (2004).

[32] *See Alabama Rivers Alliance v. FERC,* 325 F.3d 290, 296-97 (D.C.Cir.2003) (noting that the Commission's interpretation of Section 401 of the Clean Water Act is entitled to no deference by the court because the Environmental Protection Agency, and not the Commission, is charged with administering the Clean Water Act, and that judicial review of the Commission's interpretation of Section 401 is de novo).

TITLE 33—NAVIGATION AND NAVIGABLE WATERS

SUBCHAPTER IV—PERMITS AND LICENSES

§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency 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. In any case where a State or interstate agency has no

authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, 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 this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection,

the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water

quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license

or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.