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Articles + Publications | July 16, 2025

To Waive or Not to Waive, Redux

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Following its recent opinion in *Village of Morrisville v. Federal Energy Regulatory Commission*, the D.C. Circuit Court of Appeals has once again waded into the issue of when a state waives its certification authority under Section 401 of the Clean Water Act (CWA). The court on July 10, 2025, rejected a licensee's long-running effort to demonstrate that the California State Water Resources Control Board (the Board) had waived its Section 401 certification authority in connection with the relicensing of two hydroelectric projects in California. While unpublished, the court's opinion in *Nevada Irrigation District v. Federal Energy Regulatory Commission* provides further guidance on the type and timing of evidence necessary to establish a coordinated "withdrawal-and-resubmission scheme" resulting in the waiver of a state's certification authority.

Section 401 of the CWA requires any applicant for a federal license or permit that may result in a discharge to navigable waters to obtain a water quality certification (WQC) from the appropriate state or tribal authority in which the discharge will originate. Common examples of licenses or permits that may be subject to Section 401 certification include hydropower licenses and natural gas pipeline certificates issued by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act and Natural Gas Act, respectively, permits for the discharge of dredged or fill material under CWA Section 404, permits issued by the U.S. Army Corps of Engineers under Rivers and Harbor Act Sections 9 and 10, and National Pollutant Discharge Elimination System permits under CWA Section 402 where EPA administers the permitting program.

Under the CWA, a state or tribe waives its Section 401 certification authority if it refuses or fails to act on a WQC application "within a reasonable period of time (which shall not exceed one year)." 33 U.S.C. § 1341(a)(1). As established in the D.C. Circuit's opinion in *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), one circumstance under which a state waives its Section 401 certification authority is when the state and the WQC applicant engage in a "coordinated … scheme" under which the applicant withdraws and resubmits its application to reset the one-year clock to give the state more time to issue its certification. Since *Hoopa Valley Tribe* was issued, courts have been clarifying the evidence necessary to establish a "coordinated withdrawal-and-resubmission scheme" that results in waiver. To date, no court has found sufficient evidence to meet this standard.

Nevada Irrigation District continues this trend. In this case, the licensee challenged two orders by FERC determining that the Board had not waived its 401certification authority. The first order involved an effort to relicense the Yuba-Bear Project, which was initiated in 2011. Over several years, the licensee would withdraw and re-file its WQC application. The Board would respond with a letter indicating that the withdrawal and resubmission had reset the one-year clock for WQC issuance. The Board would also indicate that the licensee had not yet complied with the California Environmental Quality Act (CEQA). Relying on *Hoopa Valley Tribe*, FERC determined

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that the exchanges between the Board and the licensee established a “coordinated scheme” which resulted in the Board waiving its certification authority. *Nev. Irrigation Dist.*, 171 FERC 61,029 (Apr. 16, 2020).

The Ninth Circuit vacated that order in 2022 on grounds that FERC’s finding of coordination was not supported by substantial evidence and remanded the matter back to FERC. *SWRCB v. FERC*, 43 F.4d 920 (9th Cir. 2022). On remand, the licensee submitted a supplemental petition, which presented new arguments and new evidence. FERC denied that petition and a subsequent request for rehearing. The licensee appealed FERC’s orders to the D.C. Circuit Court of Appeals.

The second order involved the Drum-Spaulding Project, where a relicensing proceeding was also underway. The licensee similarly withdrew and re-filed its WQC application, and the Board similarly reset the one-year certification period and observed that the licensee had not yet complied with CEQA. Following the precedent set by the Ninth Circuit in *SWRCB v. FERC*, FERC denied the licensee’s petition for a declaratory judgment on the waiver issue. The licensee appealed FERC’s decision to the D.C. Circuit.

On appeal, the licensee argued that FERC’s application of the “coordinated withdrawal-and-resubmission scheme” standard with respect to the Yuba-Bear Project was not based on substantial evidence. More specifically, the licensee argued that FERC should have reopened the record on remand to admit additional evidence, including several emails from the Board and an affidavit from the licensee’s consultant. The D.C. Circuit rejected those arguments, observing that the licensee’s “unforced errors” that prevented the submission of the new evidence in the original proceedings before FERC did not rise to the level of “extraordinary circumstances” requiring FERC to reopen the record.

The D.C. Circuit similarly sustained FERC’s decisions with respect to the Drum-Spaulding Project. The court rejected the licensee’s arguments that the evidence before FERC (including letters from the licensee withdrawing and re-filing its WQC application and letters from the Board confirming receipt) constituted a “functional agreement” between the Board and the licensee to provide more than a year for issuance of the WQC. The D.C. Circuit distinguished the “routine informational responses” in the record before FERC with the evidence of “mutual agreement, contractual or functional, to circumvent the statutory deadline” that the Ninth Circuit relied on in *Hoopa Valley Tribe*.

The D.C. Circuit’s opinion in *Nevada Irrigation District v. Federal Energy Regulatory Commission* can be found here.

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