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# To Waive or Not to Waive? That Is the 401 Question

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The U.S. Court of Appeals for the D.C. Circuit on May 16, 2025, clarified the conditions under which a state waives its Clean Water Act (CWA) Section 401 water quality certification (WQC) authority. In *Village of Morrisville v. Federal Energy Regulatory Commission*, the D.C. Circuit rejected arguments by a hydropower licensee that Vermont waived its certification authority under Section 401 by failing to issue a WQC within one year from receipt of a certification request. The applicant unilaterally withdrew and refiled its WQC application twice in an effort to avoid unfavorable certification conditions. Because the applicant withdrew its WQC application to further its own interests, the court held that the applicant could not claim that Vermont waived its Section 401 conditioning authority by not issuing a WQC within a year from the original application.

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 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).

Until 2019, some states would attempt to extend this maximum one-year period by reaching an arrangement (formal or otherwise) with the applicant, who would withdraw and resubmit its certification request, thereby resetting the one-year clock and giving states more time to issue a WQC. The D.C. Circuit invalidated that approach in *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019). The court in *Hoopa Valley Tribe* held that a state waives its Section 401 certification authority when, "*pursuant to an agreement between the State and applicant*, an applicant repeatedly withdraws-and resubmits its request for water quality certification," thereby extending the one year limit provided for in the CWA. The court found that a "coordinated withdrawal-and-resubmission scheme" between the state and applicant would "readily consume" the one-year limit found in the CWA's plain language.

In *Village of Morrisville*, the D.C. Circuit provided additional clarity on state waiver of Section 401 certification authority. That case involved the Village of Morrisville's efforts to relicense the Morrisville Hydroelectric Project in Vermont. Morrisville filed a relicensing application with FERC in April 2013. The following year, it filed a WQC request with the Vermont Agency of Natural Resources (Vermont ANR). Morrisville unilaterally withdrew and

resubmitted its WQC request on two occasions in order to develop additional information and negotiate more favorable WQC conditions with Vermont ANR.

Vermont ANR eventually issued a WQC. Morrisville sought to nullify the unfavorable conditions in the WQC by arguing before FERC that Vermont ANR waived its Section 401 authority when it allowed Morrisville to withdraw and resubmit its WQC request twice. FERC rejected those arguments on grounds that Morrisville had withdrawn and resubmitted its application "unilaterally and in its own interest," rather than "at the behest of the state."

The D.C. Circuit affirmed FERC's decision, agreeing that "the record contains no evidence of … an agreement" similar to the coordinated withdrawal-and-resubmission arrangement invalidated in *Hoopa Valley Tribe*. The court affirmed that the record contained no evidence demonstrating that the state was "engaged in a scheme to 'circumvent' the [one-year] statutory deadline." Instead, the court agreed with FERC that Morrisville "acted unilaterally and out of its own self-interest to obtain more favorable conditions, rather than in coordination with the State." Accordingly, the court found that Vermont had not waived its certification authority.

The *Village of Morrisville* makes clear that a WQC applicant cannot engage in unilateral "gamesmanship" by attempting to buy itself more time to negotiate favorable conditions with the state via withdrawal-and-resubmission, and then claim waiver if those efforts are unsuccessful.

The D.C. Circuit's opinion in *Village of Morrisville, Vermont v. Federal Energy Regulatory Commission* can be found here.

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