

171 FERC ¶ 61,046  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick, Bernard L. McNamee,  
and James P. Danly.

McMahan Hydroelectric, LLC

Project No. 14858-002

ORDER DENYING REHEARING AND STAY

(Issued April 16, 2020)

1. On September 20, 2019, the Commission issued an order granting an original license to McMahan Hydroelectric, LLC (McMahan Hydro) pursuant to Part I of the Federal Power Act (FPA) to operate and maintain the Bynum Hydroelectric Project No. 14858 (Bynum Project).<sup>1</sup> The North Carolina Department of Environmental Quality (North Carolina DEQ) and PK Ventures I (PK Ventures) sought rehearing. PK Ventures also sought a stay of the License Order. For the reasons discussed below, we deny rehearing and stay.

**I. Background**

2. The Bynum Project is located on the Haw River in Bynum, Chatham County, North Carolina. In 1985, the Commission authorized hydropower development at the Bynum Project by issuing a 30-year license to Tuscarora Yarns, Inc. to operate and maintain the Bynum Project No. 4093.<sup>2</sup> PK Ventures subsequently acquired the facilities in 1986 and requested that the license be transferred to it, but then failed to provide the required documentation to effectuate the transfer.<sup>3</sup> The project has not operated for the past 10 years and its license expired on April 30, 2015.<sup>4</sup>

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<sup>1</sup> *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (2019) (License Order).

<sup>2</sup> *Tuscarora Yarns, Inc.*, 31 FERC ¶ 62,273 (1985). The Commission later approved transfer of the license to Bynum Hydro Company (Bynum Hydro). *Tuscarora Yarns, Inc. & Bynum Hydro Co.*, 34 FERC ¶ 62,155 (1986).

<sup>3</sup> *See PK Ventures I Ltd. P'ship*, 153 FERC ¶ 61,040, at P 2 (2015).

<sup>4</sup> License Order, 168 FERC ¶ 61,185 at PP 3, 12.

3. As discussed in more detail in the License Order, after license expiration, the Commission solicited applications for a license to operate the project.<sup>5</sup> On March 30, 2015, McMahan Hydro filed an application for a license to operate and maintain the Bynum Project.

4. On September 20, 2019, the Commission issued McMahan Hydro an original license concluding, among other things, that North Carolina DEQ had waived its authority to issue a water quality certification pursuant to section 401 of the Clean Water Act (CWA)<sup>6</sup> for the project.<sup>7</sup> On the same day, North Carolina DEQ issued a certification for the project.

5. PK Ventures argues that the Commission lacks jurisdiction over the Bynum Project and therefore improperly issued the License Order, which PK Ventures claims threatens its property rights.<sup>8</sup> North Carolina DEQ and PK Ventures argue that, in the License Order, the Commission applied an unjustifiably broad reading of the U.S. Court of Appeals for the D.C. Circuit's decision in *Hoopa Valley Tribe v. FERC*<sup>9</sup> when finding that North Carolina had waived water quality certification.<sup>10</sup> We disagree and affirm the Commission's authority to issue the License Order and make the waiver determination, as discussed below.

## **II. Procedural Matters**

### **A. Answer to Request for Rehearing**

6. On November 1, 2019, North Carolina DEQ filed both a motion for leave to answer and an answer to PK Ventures' request for rehearing. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to a request for rehearing.<sup>11</sup> Accordingly, we deny North Carolina DEQ's motion and reject its answer.

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<sup>5</sup> *Id.* P 4.

<sup>6</sup> 33 U.S.C. § 1341(a)(1) (2018).

<sup>7</sup> *Id.* P 37.

<sup>8</sup> *Id.* at 5, 19-26.

<sup>9</sup> 913 F.3d 1099, 1103 (D.C. Cir. 2019) (*Hoopa Valley*).

<sup>10</sup> License Order, 168 FERC ¶ 61,185 at P 34 n.24.

<sup>11</sup> 18 C.F.R. § 385.713(d)(1) (2019).

**B. Stay Request**

7. PK Ventures requests that the Commission stay the License Order pending rehearing and any subsequent judicial review.<sup>12</sup> This order addresses and denies PK Ventures' request for rehearing; accordingly, we dismiss as moot the request to stay the proceeding during the pendency of the rehearing period. With regard to PK Ventures' request to stay the proceeding after the rehearing period, PK Ventures provides no discussion, support, or reasons for granting stay. Accordingly, we deny the request.

**III. Discussion****A. Commission Jurisdiction under Section 23 of the FPA**

8. PK Ventures contends that the Commission failed to make a necessary navigability determination for the Haw River,<sup>13</sup> claims that the Commission admits that the river is a non-navigable waterway, and that the Commission accordingly lacks jurisdiction over the project.<sup>14</sup>

9. Section 23(b)(1) of the FPA sets forth several grounds for the Commission to exercise licensing authority over hydroelectric projects.<sup>15</sup> PK Ventures references one: the requirement that a non-federal hydroelectric project be licensed if it is located on navigable waters of the United States.<sup>16</sup> In addition, however, section 23(b)(1) also requires that a non-federal hydroelectric project be licensed if it meets the following three-part test: (a) it is located on a body of water over which Congress has commerce clause jurisdiction; (b) has undergone project construction on or after August 26, 1935; and (c) affects the interests of interstate or foreign commerce.<sup>17</sup> The Commission determined in the License Order that the Haw River is a commerce clause stream, that the project underwent post-1935 construction, and that the project will affect interstate

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<sup>12</sup> PK Ventures Rehearing and Stay Request at 5.

<sup>13</sup> *Id.* at 5, 22.

<sup>14</sup> *Id.* at 22 (citing License Order, 168 FERC ¶ 61,185 at P 26).

<sup>15</sup> 16 U.S.C. § 817(1) (2018).

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

<sup>17</sup> *Id.*

commerce through its connection to the interstate grid.<sup>18</sup> Therefore, because the project meets all of the factors of the three-part test, it is required to be licensed; consequently, the Commission did not need to make a navigability determination for the Haw River.<sup>19</sup>

10. PK Ventures claims that the project does not satisfy the three-part test because the project did not undergo post-1935 construction. PK Ventures argues that project was built in 1874, and that the Commission erroneously concluded there was post-1935 construction based upon a “1940” date on the project’s turbine.<sup>20</sup> PK Ventures argues there is no evidence that the apparent turbine replacement amounted to a new dam or other project work begun after 1935,<sup>21</sup> or that the project underwent any construction that altered its operation, given that the Bynum Project retained its 1874 stone masonry dam, spillway, reservoir, powerhouse, and single generating unit.<sup>22</sup>

11. While ordinary maintenance, repair, and reconstruction activity does not constitute post-1935 construction, the enlargement of generating capacity, or of the impoundment/diversion structure, or the construction of other significant physical plant features does.<sup>23</sup> The Commission explained in the License Order that the project underwent post-1935 construction because the Bynum Project’s generating facilities were converted from mechanical hydropower to electrical hydropower after 1935.<sup>24</sup> The Commission cited PK Ventures’ filings describing the powerhouse as containing a

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<sup>18</sup> License Order, 168 FERC ¶ 61,185 at P 26.

<sup>19</sup> We note, even if the project were not required to be licensed under section 23(b) of the FPA, the Commission possesses the authority under section 4(e) of the FPA to grant licenses voluntarily sought for projects on Commerce Clause waters. *See* 16 U.S.C. § 797(e) (2018); *Cooley v. FERC*, 843 F.2d 1464, 1467 (D.C. Cir. 1988) (recognizing that the Commission is authorized to issue licenses to projects located on non-navigable Commerce Clause streams, regardless of the date of construction).

<sup>20</sup> PK Ventures Rehearing and Stay Request at 20-21.

<sup>21</sup> *Id.* at 20-21 (citing *Puget Sound Power & Light Co.*, 557 F.2d 1311, 1314-15 (9th Cir. 1977) (*Puget Sound*)).

<sup>22</sup> *Id.* at 23.

<sup>23</sup> *Puget Sound*, 557 F.2d at 1314-15.

<sup>24</sup> License Order, 168 FERC ¶ 61,185 at P 26, n.17 (citing the EA at 54; McMahan Hydro’s March 30, 2015 Final License Application at 48; PK Ventures April 30, 2010 Pre-Application Document, Project No. P-4093, at 11 (describing the powerhouse as containing a “Leffel Type S 1940” turbine)).

“Leffel Type S 1940” turbine as evidence the project underwent this conversion after 1935.<sup>25</sup> PK Ventures argues that a filing referencing the 1940 turbine is not substantial evidence,<sup>26</sup> but we note that the Commission’s finding is consistent with other evidence of the project’s construction date. In the 1982 license application, Tuscarora Yarns stated that the project generated power using an electric generator equipped with a Leiffel S Turbine<sup>27</sup> and that the “facility has been in operation for the past forty years as is, and we plan to continue the same operation.”<sup>28</sup> Indeed, it would be difficult to credit any assertion (and PK Ventures makes no such argument) that a 1940 turbine could have been installed prior to that date.

12. PK Ventures next argues that even if the turbine was replaced, that replacement, without more, is only normal maintenance and repair activity.<sup>29</sup> We disagree. The Bynum Project’s installation of the turbine and generator in 1940 did not constitute a replacement, but rather a conversion that changed a mechanical energy facility with no hydroelectric generation to a hydroelectric project with 600 kilowatts (kW) of new hydroelectric generating capacity.<sup>30</sup> As PK Ventures acknowledges, the creation of new hydroelectric capacity constitutes post-1935 construction under section 23(b)(1) of the FPA.<sup>31</sup> With regard to PK Ventures’ suggestion that a hydroelectric turbine existed

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<sup>25</sup> *Id.*

<sup>26</sup> PK Ventures Rehearing and Stay Request at 20-22.

<sup>27</sup> Tuscarora Yarns Application for a Minor License at 10 (Oct. 7, 1982) (P-4093).

<sup>28</sup> *Id.* at 23.

<sup>29</sup> In support PK Ventures also argues that the License Order relied on *Aquenergy Systems, Inc. v. FERC*, 857 F.2d 227 (4th Cir. 1988) (*Aquenergy*), which established the exception to *Puget Sound* for post-abandonment construction. PK Ventures Request for Rehearing at 22-23 (citing *Thomas Hodgson & Sons v. FERC*, 49 F.3d 822, 826 (1st Cir. 1995) (ruling that post-abandonment construction cannot be found without physical repair or reconstruction)). The License Order cited *Aquenergy* to support that installing a generator and associated electrical equipment constitutes post-1935 construction. In that case, however, restoring the project to service required substantial reconstruction and occurred after a 30-year period of complete abandonment of the project. Here, as PK Ventures acknowledges, there is no evidence of post-abandonment construction. PK Ventures Rehearing and Stay Request at 22. Therefore, we need not address PK Ventures’ arguments related to post-abandonment construction.

<sup>30</sup> License Order, 168 FERC ¶ 61,185 at P 11.

<sup>31</sup> PK Ventures Rehearing and Stay Request at 20 (citing *L.S. Starrett Co. v. FERC*, 650 F.3d 19, 27 (1st Cir. 2011) (finding reasonable the Commission’s

before 1935 and the Leffel Type S 1940 turbine installation was a replacement, PK Ventures offers no evidence to support this suggestion, and fails to rebut the clear evidence that the Bynum Project was converted from mechanical energy to hydroelectric power after 1935.

13. PK Ventures also claims the Commission failed to recognize that the Bynum Project has no effect on interstate commerce because the project does not currently displace power on the interstate electrical grid. PK Ventures argues that the project has not operated for 10 years and PK Ventures, should it choose to operate the project, is free to produce power for non-grid use.<sup>32</sup>

14. PK Ventures misunderstands the Commission's criteria when assessing whether a proposed project impacts interstate commerce. A determination as to whether a proposed project would affect interstate commerce rests on the proposed use of the project's power, not on the existing state of the project. The Commission determined in the License Order that the Bynum Project, as proposed by McMahan Hydro, will affect interstate commerce through its connection to the interstate power grid.<sup>33</sup> PK Ventures does not address this determination; accordingly, we affirm the Commission's determination in the License Order that the Bynum Project will affect interstate commerce.<sup>34</sup>

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interpretation of "construction" to include an increase in generating capacity of 86 kW); *Puget Sound*, 557 F.2d at 1316 (noting that post-1935 construction requires an increase in generating capacity)). *See also Bass/Wilson Properties, LLC*, 150 FERC ¶ 62,066, at P 5 (2015) (determining that installing new hydroelectric generating capacity constitutes post-1935 construction within the meaning of FPA section 23(b)(1)).

<sup>32</sup> PK Ventures Rehearing and Stay Request at 3, 24.

<sup>33</sup> License Order, 168 FERC ¶ 61,185 at P 26 (citing *Habersham Mills v. FERC*, 976 F.2d 1381, 1384-85 (11th Cir. 1992) (holding that small hydroelectric projects that are connected to the interstate grid, even if they have no interstate sales, affect interstate commerce by displacing power from the grid, and the cumulative effect of the national class of these small projects is significant for purposes of FPA section 23(b)(1)); EA at 2 (explaining that McMahan Hydro plans to operate the project, which has an installed capacity of 600 kW and can generate an average of 2,461 megawatt-hours of electricity annually).

<sup>34</sup> License Order, 168 FERC ¶ 61,185 at P 26.

## B. PK Ventures' Property Rights

15. PK Ventures argues that because, in its view as discussed above, the Commission lacks statutory authority to issue a license for the Bynum Project, section 21 of the FPA,<sup>35</sup> which confers upon licensees the right to condemn the necessary property for the location and operation of the project, has no effect. Therefore, PK Ventures asserts, the License Order stands in contravention of the FPA, the United States Constitution, the Constitution of North Carolina, and unspecified federal and state laws protecting property and water rights.<sup>36</sup>

16. We disagree. As discussed above and affirmed in this order, the Commission had authority to license the proposed project and properly issued the license.<sup>37</sup> Thus, McMahan Hydro may, if necessary, obtain the necessary project property rights by means of the eminent domain power conferred by section 21 of the FPA.<sup>38</sup>

17. PK Ventures argues that the Commission failed to establish a project boundary leaving uncertain the extent to which property and other rights held by PK Ventures may be subject to the License Order and section 21 of the FPA.<sup>39</sup> An established project boundary is not a prerequisite to the Commission's issuance of a license; the final boundary, and any necessary property rights are frequently obtained thereafter.<sup>40</sup> Article 202 of the License Order requires the licensee to file, within 90 days of the issuance date of the license, a set of revised exhibit G maps, which includes the final project boundary,<sup>41</sup> and Article 203 of the license requires McMahan Hydro to report to the Commission within four years on the status of the property rights McMahan Hydro

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<sup>35</sup> 16 U.S.C. § 814 (2018).

<sup>36</sup> PK Ventures Rehearing and Stay Request at 25-26.

<sup>37</sup> License Order, 168 FERC ¶ 61,185 at P 26.

<sup>38</sup> *Id.* P 27.

<sup>39</sup> PK Ventures Rehearing and Stay Request at 5, 26.

<sup>40</sup> License Order, 168 FERC ¶ 61,185 at P 27 (citing *Swift Creek Power Co., Inc.*, 83 FERC ¶ 61,238, at 62,038 (1998); *Nw. Power Co.*, 59 FERC ¶ 61,132, at 61,492 (1992)).

<sup>41</sup> *Id.* at Article 202. McMahan Hydro's Exhibit G drawings are currently pending before the Commission. McMahan Hydro Revised Exhibit-G Map for the Bynum Hydro Project (Dec. 18, 2019).

holds on lands within the project boundary.<sup>42</sup> These actions will resolve the issues raised by PK Ventures.

**C. Clean Water Act Section 401 Water Quality Certification**

**1. Clean Water Act Section 401 Certification Timeline**

18. Under section 401(a)(1) of the CWA, any applicant seeking a federal license for an activity that “may result in any discharge into the navigable waters,” such as a Commission-issued hydroelectric license, must first seek water quality certification from the state or states in which a discharge may occur.<sup>43</sup> However, certification requirements shall be waived 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.”<sup>44</sup>

19. On March 3, 2017, McMahan Hydro sent North Carolina DEQ, and North Carolina DEQ received, a request for water quality certification.

20. On April 26, 2017, North Carolina DEQ requested additional information to supplement McMahan Hydro’s application. Specifically, North Carolina DEQ indicated that it would put McMahan Hydro’s application on hold until McMahan Hydro provided a water quality monitoring plan and a copy of the Commission’s Draft Environmental Assessment (EA) for the project.<sup>45</sup> On December 21, 2017, McMahan Hydro submitted a water quality monitoring plan to North Carolina DEQ.<sup>46</sup>

21. That same day, McMahan Hydro contacted a North Carolina DEQ employee via e-mail, stating that McMahan Hydro would like to discuss refiling the section 401

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<sup>42</sup> License Order, 168 FERC ¶ 61,185 at P 27. In addition, Standard Article 5 of the license requires McMahan Hydro to obtain the property rights necessary to operate the project within five years, and, if necessary, obtain any necessary property rights through the use of eminent domain pursuant to FPA section 21. License Order, 168 FERC ¶ 61,185 at P 27 (citing 16 U.S.C. § 814 (other citations omitted)).

<sup>43</sup> 33 U.S.C. § 1341(a)(1).

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

<sup>45</sup> License Order, 168 FERC ¶ 61,185 at P 34 n.25 (citing McMahan Hydro’s March 19, 2018 Copy of Request to Withdraw and Re-apply for Water Quality Certification).

<sup>46</sup> *Id.* P 34.

certification application because the Commission had yet to issue the EA.<sup>47</sup> On January 3, 2018, the North Carolina DEQ employee instructed McMahan Hydro to send a letter stating that McMahan Hydro would like to withdraw and reapply.<sup>48</sup> On February 20, 2018, McMahan Hydro submitted a letter via e-mail, requesting to withdraw and refile its application.<sup>49</sup> On February 22, 2018, North Carolina DEQ acknowledged McMahan Hydro's request, stating that "[a]ll application materials will be retained and a new application fee is not required."<sup>50</sup>

22. On October 25, 2018, the Commission staff issued the EA.<sup>51</sup> On December 20, 2018, North Carolina DEQ acknowledged that it had received the EA and provided comments to McMahan Hydro on the water quality monitoring plan.<sup>52</sup> At North Carolina DEQ's request, on January 18, 2019, McMahan Hydro submitted a revised water quality monitoring plan.<sup>53</sup>

23. On January 25, 2019, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) decided *Hoopa Valley*, answering in the affirmative the question

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<sup>47</sup> See *id.* P 35 n.25 (citing McMahan Hydro's January 3, 2018 Hydro Monitoring Plan Proposal, accessed on North Carolina DEQ's electronic document database for Bynum Hydro Project (FERC #4093), <https://edocs.deq.nc.gov/WaterResources/0/doc/663438/Page1.aspx?searchid=5601113c-b8be-4604-9441-c5bcf5195d14> (e-mail from Andrew McMahan to North Carolina DEQ's Jennifer Burdette)).

<sup>48</sup> See *id.* (e-mail from Jennifer Burdette to Andrew McMahan) (instructing McMahan Hydro that "[t]o refile your application, you will need to send a letter stating that you would like to withdraw your application and reapply prior to March 3, 2017 [sic]. We do not charge an additional review fee when the delay is beyond the applicant's control as in your situation").

<sup>49</sup> See *id.* P 35 n.29 (citing McMahan Hydro's March 19, 2018 Copy of Request to Withdraw and Re-apply for Water Quality Certification (e-mail from Andrew McMahan to North Carolina DEQ's Karen Higgins)).

<sup>50</sup> *Id.* P 35, n.30 (citing e-mail from Karen Higgins to Andrew McMahan).

<sup>51</sup> *Id.* P 8.

<sup>52</sup> *Id.* P 36 (citing McMahan Hydro's March 13, 2019 Copy of Revised Water Quality Monitoring Plan, Docket No. P-14858, at 1-2).

<sup>53</sup> *Id.* P 36 n.33 (citing McMahan Hydro's March 13, 2019 Copy of Revised Water Quality Monitoring Plan, Docket No. P-14858, at 4-14).

“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.”<sup>54</sup>

24. On February 7, 2019, a North Carolina DEQ employee informed McMahan Hydro of the impending one year deadline: “[P]lease remember to send [North Carolina DEQ’s section 401 supervisor] a request to withdraw and reapply (I think the deadline is by February 20<sup>th</sup>).”<sup>55</sup> Four days later, on February 11, 2019, McMahan Hydro emailed a letter to North Carolina DEQ which simultaneously withdrew and refiled its application for the second time. By email sent February 20, 2019, North Carolina DEQ confirmed that McMahan Hydro’s application had been withdrawn and resubmitted.<sup>56</sup>

25. As discussed, on September 20, 2019, when the Commission issued McMahan Hydro an original license, the Commission concluded that North Carolina DEQ had waived its authority to issue a water quality certification for the project.<sup>57</sup>

## **2. The Commission’s Waiver Determination was Supported by Record Evidence**

26. Both North Carolina DEQ and PK Ventures argue that the Commission erred in finding that North Carolina DEQ waived its certification authority. North Carolina DEQ also claims that the License Order is ambiguous as to when North Carolina DEQ waived its authority.<sup>58</sup>

27. In *Hoopa Valley*, the D.C. Circuit undertook “an undemanding inquiry” into whether the withdrawal and resubmission scheme in that case would reset the statutory clock “because Section 401’s text is clear” that waiver occurs if the state refuses or fails

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<sup>54</sup> *Hoopa Valley*, 913 F.3d at 1103.

<sup>55</sup> License Order, 168 FERC ¶ 61,185 at P 36 (citing McMahan Hydro’s March 13, 2019 Copy of Revised Water Quality Monitoring Plan at 15 (e-mail from North Carolina DEQ’s Chonticha Mcdaniel to Andrew McMahan)).

<sup>56</sup> *Id.* (citing McMahan Hydro’s March 13, 2019 Copy of Request to Withdraw and Re-apply for Water Quality Certification (Feb. 20, 2019 e-mail from Andrew McMahan to Karen Higgins)).

<sup>57</sup> *Id.* P 37.

<sup>58</sup> North Carolina DEQ Rehearing Request at 17-18.

to act after the absolute maximum period of one year.<sup>59</sup> The court concluded that “[t]he pendency of the requests for state certification in this case have far exceeded the one-year maximum” when the applicant for water quality certification had for a number of years sent an identical letter to the state certifying agencies purporting to withdraw and resubmit the very same certification request that had been pending before that withdrawal.<sup>60</sup> The court explained that, in that case, the clock did not restart because “withdrawals-and-resubmissions were not just similar requests, they were not new requests at all.”<sup>61</sup>

28. At a minimum, McMahan Hydro’s second withdrawal and resubmission of its request on February 20, 2019, did not restart the time limit for North Carolina DEQ to act on the preexisting request.<sup>62</sup> On February 7, 2019, a North Carolina DEQ employee informed McMahan Hydro of the impending one year deadline and requested that McMahan Hydro withdraw and resubmit by February 20, 2019.<sup>63</sup> North Carolina DEQ characterizes this communication as a courtesy email<sup>64</sup> and claims that McMahan Hydro indicated that it intended to withdraw and resubmit its application during a prior meeting.<sup>65</sup> But no additional information had been submitted to North Carolina DEQ after January 18, 2019,<sup>66</sup> and the only purpose of the communication was to request that McMahan Hydro withdraw and resubmit its request before the impending one-year

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<sup>59</sup> *Hoopa Valley*, 913 F.3d at 1103-04.

<sup>60</sup> *Id.* at 1104.

<sup>61</sup> *Id.*

<sup>62</sup> This assumes for the sake of argument that McMahan Hydro’s February 22, 2018 resubmitted application constituted a new application; however as discussed below, we separately find that the first resubmission was not a valid new request that restarted the one-year clock for waiver. *See infra* at PP 29-30.

<sup>63</sup> *See* License Order, 168 FERC ¶ 61,185 at P 36 (citing McMahan Hydro’s March 13, 2019 Copy of Revised Water Quality Monitoring Plan at 15 (e-mail from North Carolina DEQ’s Chonticha Mcdaniel to Andrew McMahan) (“... [P]lease remember to send [North Carolina DEQ’s section 401 supervisor] a request to withdraw and reapply (I think the deadline is by February 20<sup>th</sup>).”)).

<sup>64</sup> North Carolina DEQ Rehearing Request at 15.

<sup>65</sup> *Id.* at 7.

<sup>66</sup> License Order, 168 FERC ¶ 61,185 at P 36.

deadline.<sup>67</sup> Because there was no change to McMahan Hydro's certification application or its project and its resubmission was at the behest of North Carolina DEQ, we find that North Carolina DEQ waived section 401 certification by failing to act by February 20, 2019.<sup>68</sup>

29. We also find that North Carolina waived section 401 certification after McMahan Hydro's first withdrawal and resubmission of its request, accepted by North Carolina DEQ on February 22, 2018. After McMahan Hydro submitted its certification application on March 3, 2017, North Carolina DEQ requested that McMahan Hydro submit the project's draft EA and a water quality plan to supplement its application.<sup>69</sup> McMahan Hydro subsequently submitted a water quality monitoring plan to North Carolina DEQ,<sup>70</sup> but, as North Carolina DEQ points out, it was McMahan Hydro that contacted North Carolina DEQ to discuss refiling the certification request because the Commission had yet to issue the EA before the one-year deadline.<sup>71</sup> Although this

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<sup>67</sup> *See id.* (citing McMahan Hydro's March 13, 2019 Copy of Request to Withdraw and Re-apply for Water Quality Certification (e-mail from Andrew McMahan to Karen Higgins)).

<sup>68</sup> *See Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129, at P 37 (2019) (explaining that the fact that a state is reviewing additional information does not toll the one-year waiver deadline and that "a single withdrawal and resubmission could amount to waiver."); *see also S. Cal. Edison Co.*, 170 FERC ¶ 61,135, at PP 23-29 (2020) (finding that the record showed the state agency's direct participation in a withdrawal and resubmittal scheme based in part on the emails that the state agency staff sent annually ahead of the one-year deadline requesting the licensee to withdraw and resubmit its certification application).

<sup>69</sup> License Order, 168 FERC ¶ 61,185 at P 34 n.25 (citing McMahan Hydro's March 19, 2018 Copy of Request to Withdraw and Re-apply for Water Quality Certification at 1).

<sup>70</sup> We note that North Carolina DEQ failed to act or respond to McMahan Hydro's water quality plan after submission on December 21, 2017, and that North Carolina did not provide any comments until December 20, 2018, more than one year after McMahan Hydro's original March 3, 2017 request. *See id.* PP 34-36.

<sup>71</sup> *See id.* P 35 n.27 (citing McMahan Hydro's January 3, 2018 Hydro Monitoring Plan Proposal, accessed on North Carolina DEQ's electronic document database for Bynum Hydro Project (FERC #4093), <https://edocs.deq.nc.gov/WaterResources/0/doc/663438/Page1.aspx?searchid=5601113c-b8be-4604-9441-c5bcf5195d14> (e-mail from Andrew McMahan to North Carolina DEQ's Jennifer Burdette)).

withdrawal and resubmission was initiated by McMahan Hydro, we are not persuaded that this was a unilateral action by the applicant. North Carolina DEQ instructed McMahan Hydro to send a letter indicating that McMahan Hydro would like to withdraw and reapply and also indicated that no additional review fee was necessary.<sup>72</sup> McMahan Hydro's February 20, 2018 withdrawal-and-resubmittal letter did not convey any substantive information to North Carolina DEQ, but merely withdrew and resubmitted the very same water quality certification request that had been pending before North Carolina DEQ on that date. Accordingly, consistent with the court's holding in *Hoopa Valley*, we affirm the determination in the License Order that North Carolina DEQ waived its authority to issue a section 401 water quality certification.

30. We note that to the extent a state lacks sufficient information to act on a certification request, it has a complete remedy: it can deny certification. Delay beyond the statutory deadline, however, is not an option. We also note that, as discussed above, before the deadline for action on the second certification request, North Carolina DEQ had in hand for over a month all the information it had previously requested. Consequently, North Carolina DEQ's belated September 20, 2019 "certification," issued on the same day that the Commission had previously publicly announced that it would act in the licensing proceeding,<sup>73</sup> had no force and effect.<sup>74</sup>

### 3. The Commission did not violate the plain language and intent of Clean Water Act

31. North Carolina DEQ next argues that the Commission cannot find waiver under section 401 of the CWA when McMahan Hydro withdrew its certification request before the one-year statutory period expired.<sup>75</sup> North Carolina DEQ argues that section 401 of

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<sup>72</sup> See *id.* P 35 n.26 (e-mail from Jennifer Burdette to Andrew McMahan) (instructing McMahan Hydro that "[t]o refile your application, you will need to send a letter stating that you would like to withdraw your application and reapply prior to March 3, 2017 [sic]. We do not charge an additional review fee when the delay is beyond the applicant's control as in your situation").

<sup>73</sup> Sunshine Act Meeting Notice, September 19, 2019 Meeting (Sept. 12, 2019), <https://www.ferc.gov/CalendarFiles/20190912183440-CA09-19-019.pdf>.

<sup>74</sup> *S. Cal. Edison Co.*, 170 FERC ¶ 61,135, at P 37 ("[O]nce a state agency has waived its authority to act on a water quality certification application, the water quality conditions are not mandatory and acceptance of the conditions is a matter within the federal agency's discretion."); *Pac. Gas & Elec. Co.*, 170 FERC ¶ 61,232, at P 44 (2020) (explaining that a post-waiver certification by the state is invalid).

<sup>75</sup> North Carolina DEQ Rehearing Request at 9.

the CWA does not prohibit an applicant from withdrawing its request before the one-year period. North Carolina DEQ did not fail or refuse to act on McMahan Hydro's requests, because those requests were voluntarily withdrawn.<sup>76</sup>

32. In *Hoopa Valley*, the D.C. Circuit explained that coordinated withdrawals and resubmissions of the same certification request amount to a "failure or refusal to act" under section 401 of the CWA,<sup>77</sup> and nothing in the CWA permits the Commission to make "an exception for an individual request made pursuant to a coordinated withdrawal and resubmission scheme."<sup>78</sup> As discussed, McMahan Hydro, in coordination with North Carolina DEQ, withdrew and resubmitted the same certification requests pending before North Carolina DEQ and did not convey any information indicating any alteration in the project, let alone filing a new application.<sup>79</sup>

33. North Carolina DEQ also argues that the Commission's waiver is contrary to the legislative intent behind section 401, which North Carolina DEQ claims was enacted to ensure that federal licensing or permitting agencies cannot override state water quality permits.<sup>80</sup> North Carolina argues that legislative history shows that the waiver provision was intended to address "sheer inactivity by the State," not the kind of ongoing coordination that North Carolina DEQ engaged in with McMahan Hydro.<sup>81</sup>

34. North Carolina DEQ misreads the purpose of section 401's one-year time limitation as being limited to preventing only "sheer inactivity."<sup>82</sup> This reading undercuts the statute's purpose because section 401 was enacted, not just to prevent inactivity, but to "prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401."<sup>83</sup> Thus, the D.C. Circuit has explained that where an applicant for water quality certification each year sent a "letter

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<sup>76</sup> *Hoopa Valley*, 913 F.3d at 1104.

<sup>77</sup> *See id.* at 1105.

<sup>78</sup> *Id.* at 1104.

<sup>79</sup> *See supra* at PP 28-29.

<sup>80</sup> North Carolina DEQ Rehearing Request at 10.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Hoopa Valley*, 913 F.3d at 1101 (citing *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011)).

indicating withdrawal of its water quality certification request and resubmission of the very same,” “[s]uch an arrangement does not exploit a statutory loophole; it serves to circumvent [the Commission’s] congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.”<sup>84</sup> As in *Hoopa Valley*, North Carolina DEQ’s and McMahan Hydro’s coordinated withdrawal and resubmittal of the certification request delayed state action beyond the statute’s prescribed one-year deadline and circumvented the Commission’s “regulatory authority of whether and when to issue a federal license.”<sup>85</sup>

#### 4. No Formal Agreement is Necessary under *Hoopa Valley*

35. North Carolina DEQ contends that it did not waive its authority under section 401, because North Carolina DEQ did not enter into a formal agreement with McMahan Hydro to defer the one-year statutory limit.<sup>86</sup> The state claims (without providing supporting evidence as to the applicant’s intent) that McMahan Hydro voluntarily withdrew and resubmitted its application with the understanding that North Carolina DEQ did not have a sufficient record or sufficient time to comply with notice and comment procedures in order to grant the requested certification within one year.<sup>87</sup> North Carolina DEQ also argues that the Commission’s waiver determination was arbitrary and capricious because the Commission failed to seek any input from North Carolina DEQ on whether North Carolina DEQ formed an agreement with McMahan Hydro to circumvent section 401 of the CWA.<sup>88</sup> To that end, North Carolina DEQ included a declaration from a North Carolina DEQ employee to support its claim that it did not enter into a formal agreement with McMahan Hydro.<sup>89</sup>

36. In *Hoopa Valley*, the D.C. Circuit held 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

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<sup>84</sup> *Id.* at 1104.

<sup>85</sup> *Id.* at 1103. *See, e.g., Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129, at P 34 n.80 *reh’g denied*, 169 FERC ¶ 61,199 (2019) (explaining even where there are multiple withdrawals and resubmittals, there only needs to be a failure to act in one 12-month period to find waiver).

<sup>86</sup> North Carolina DEQ Rehearing Request at 12-13.

<sup>87</sup> *Id.* at 6-7.

<sup>88</sup> *Id.* at 16.

<sup>89</sup> *Id.* at 16-17.

period of time greater than one year.”<sup>90</sup> In *Placer County Water Agency*, the Commission determined that *Hoopa Valley* does not require a formal agreement between a licensee and a state certifying agency, but that exchanges between entities could amount to an ongoing agreement.<sup>91</sup> Based on the record in that case, we determined that the state and the licensee had a functional agreement because they worked to ensure that withdrawal and resubmission would take place each year, creating a procedure that delayed a certification decision by over six years.<sup>92</sup> Similarly, in *Southern California Edison Company*, the Commission reiterated that no formal, written agreement was necessary when the state coordinated with the applicant to withdraw and resubmit the certification request and did so for the purpose of avoiding waiver.<sup>93</sup>

37. As discussed above, the exchanges between McMahan Hydro and North Carolina DEQ on timing amounted to an ongoing agreement that allowed North Carolina DEQ to delay acting within the CWA section 401 one-year deadline. North Carolina DEQ instructed McMahan Hydro to send a letter indicating that it would like to withdraw and reapply for water quality certification before the end of the one-year period in 2018,<sup>94</sup> and again instructed McMahan Hydro to withdraw and resubmit its certification request before the impending deadline in 2019.<sup>95</sup> The record does not reflect evidence that McMahan Hydro displayed any desire for the state to delay action. Consistent with the Commission’s determinations in *Placer County*<sup>96</sup> and *Southern California Edison*

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<sup>90</sup> *Hoopa Valley*, 913 F.3d at 1103.

<sup>91</sup> 169 FERC ¶ 61,046, at P 18 (2019) (*Placer County*).

<sup>92</sup> *Id.*

<sup>93</sup> 170 FERC ¶ 61,135, at PP 20, 23 (2020) (finding waiver when the state indicated that if it could not act within the one-year deadline, it would request the licensee to withdraw and resubmit its certification application and subsequently sent annual emails ahead of the one-year deadline with this request).

<sup>94</sup> License Order, 168 FERC ¶ 61,185 at P 35, n.26 (e-mail from Jennifer Burdette to Andrew McMahan) (instructing McMahan Hydro that “[t]o refile your application, you will need to send a letter stating that you would like to withdraw your application and reapply prior to March 3, 2017 [sic]. We do not charge an additional review fee when the delay is beyond the applicant’s control as in your situation”).

<sup>95</sup> *Id.* at P 36 (citing McMahan Hydro’s March 13, 2019 Copy of Revised Water Quality Monitoring Plan at 15 (e-mail from North Carolina DEQ’s Chonticha Mcdaniel to Andrew McMahan)).

<sup>96</sup> 169 FERC ¶ 61,046, at P 18.

*Company*,<sup>97</sup> in these circumstances, a formal agreement between a licensee and a state certifying agency is not necessary.

38. Contrary to North Carolina DEQ's claim, the Commission was under no obligation to seek input from North Carolina DEQ on whether an agreement was formed. Nothing prevented the state from explaining its actions, yet it elected not to do so until after we had acted on the merits. In any case, North Carolina DEQ's affidavit stating that it did not have a formal agreement with McMahan Hydro is unconvincing and irrelevant. As discussed above, the Commission did not need to determine that North Carolina DEQ and McMahan Hydro entered into formal agreement, but rather properly relied on North Carolina DEQ's coordination with McMahan Hydro.<sup>98</sup> Finally, North Carolina DEQ had, and availed itself of, the opportunity to respond to the determination, in its request for rehearing.<sup>99</sup>

### 5. PK Ventures' CWA Section 401 Arguments

39. PK Ventures argues that under North Carolina regulations, a project owner must sign an application for a section 401 certification. Because PK Ventures did not sign McMahan Hydro's application, PK Ventures claims that the application does not meet North Carolina's regulations and is invalid.<sup>100</sup> PK Ventures goes on to argue that this invalid request was then effectively withdrawn on April 4, 2019, when McMahan Hydro requested that North Carolina DEQ put its application on hold, in violation of section 4.34(b)(5)(i) of the Commission's regulations.<sup>101</sup> PK Ventures also contends because McMahan Hydro violated North Carolina regulations, its representation before the

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<sup>97</sup> 170 FERC ¶ 61,135 at PP 20, 23.

<sup>98</sup> *See supra* at PP 28-29, 37.

<sup>99</sup> Even if North Carolina DEQ did not anticipate that the License Order would determine that the state had waived certification, the opportunity to seek rehearing is an adequate opportunity to challenge the Commission's decision. *Cf. Blumenthal v. FERC*, 613 F.3d 1142, 1145-46 (D.C. Cir. 2010) (finding that rehearing provides an adequate opportunity to respond to new evidence).

<sup>100</sup> PK Ventures Rehearing and Stay Request at 11-12.

<sup>101</sup> *Id.* at 8-10 (citing 18 C.F.R. § 4.34(b)(5)(i) (2019)).

Commission that it had validly requested its certification violates the False Claims Act<sup>102</sup> and Commission regulations governing market manipulation.<sup>103</sup>

40. It is unclear that PK Ventures can properly raise these issues here. Alleged violations of state procedures (other than those mandated by the CWA, such as the public notice requirement in section 401(a)(1))<sup>104</sup> must be raised before the state. Further, PK Ventures misconstrues the Commission's regulations. Section 4.34(b)(5)(i) of the Commission's regulations requires that an applicant for a federal license file, within 60 days from the date of issuance of the Commission's notice that an application is ready for environmental analysis, the requested water quality certification and/or provide the date that water quality certification was requested or indicate whether the state waived certification.<sup>105</sup> This filing requirement has no bearing on an applicant's administrative requests before a state nor does it affect how a certification request is treated under a state law. As noted above, PK Ventures' claims that McMahan Hydro specifically requested a hold on the certification on April 4, 2019. PK Ventures' claim that such a hold or stay violates North Carolina regulations and its argument that North Carolina law requires that the project owner sign the water quality certification application are matters of state law beyond the Commission's authority to consider under the CWA.<sup>106</sup> Indeed, if McMahan had violated North Carolina regulations – something the state does not assert – that would have been a matter for the state to address. Similarly, PK Ventures' claimed violation of the False Claims Act and asserted evidence of market manipulation are beyond the scope of this licensing proceeding. In any event, PK Ventures does not adequately explain the

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<sup>102</sup> *Id.* at 14 (citing 16 U.S.C. § 1001 (2018)).

<sup>103</sup> *Id.* PK Ventures cites 18 C.F.R. § 1c for this proposition, but we assume it was referring to 18 C.F.R. Part 1c (2019).

<sup>104</sup> 33 U.S.C. § 1341(a)(1) (2018).

<sup>105</sup> 18 C.F.R. § 4.34(b)(5)(i) (2019). The Commission issued this notice on February 14, 2017. 82 Fed. Reg. 10,571 (Feb. 14, 2017). McMahan Hydro provided this information to the Commission in Docket No. P-4093-035 on March 29, 2017.

<sup>106</sup> *See City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (explaining that the Commission has an obligation to confirm that the state has satisfied section 401 in a way that satisfies the restrictions of that subsection, but it is not required to inquire into every state law requirement under the CWA, “especially to the extent doing so would place FERC in the position of applying state law standards”). Moreover, as discussed, the Commission determined that North Carolina DEQ had already waived water quality certification by this date.

grounds for those claims, although they appear to hinge only on PK Ventures' asserted violations of state law which are, as noted, beyond our authority.

41. PK Ventures further avers that the Commission failed to comply with the referral procedures set forth in the CWA.<sup>107</sup> Section 401(a)(2) of the CWA provides “[u]pon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator [of the Environmental Protection Agency (EPA)] of such application and certification.”<sup>108</sup> The purpose of this section is to allow the Administrator to determine whether a discharge from the project will affect the water quality of any state other than the state in which the discharge will originate and, if so, to notify the second state.<sup>109</sup> Because the Commission found that North Carolina DEQ waived certification, the Commission was under no obligation to further notify the Administrator of the EPA.<sup>110</sup> Moreover, we note there is nothing in the record to suggest that the project would have adverse impacts on another state's water quality. In any event, PK Ventures cites no authority to show that even a clear failure to comply with section 401(a)(2) would invalidate the license issued in these proceedings.

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<sup>107</sup> PK Ventures Request for Rehearing and Stay at 15 (citing 33 U.S.C. § 1341(a)(2) (2018)).

<sup>108</sup> 33 U.S.C. § 1341(a)(2). *See Avista Corp.*, 127 FERC ¶ 61,265, at P 97 (2009) (noting that section 401(a)(2) directs a federal licensing agency to follow certain procedures that are designed to protect the water quality of a state other than that in which the project discharge originates).

<sup>109</sup> *See Avista Corp.*, 127 FERC ¶ 61,265 at P 98.

<sup>110</sup> The Commission also publicly noticed McMahan Hydro's application. 80 Fed. Reg. 23,525 (Apr. 28, 2015).

The Commission orders:

(A) North Carolina DEQ's and PK Ventures' requests for rehearing are hereby denied, as discussed in the body of this order.

(B) PK Ventures' request for stay pending rehearing is hereby dismissed as moot and its request for stay pending appeal is denied, as discussed in the body of this order.

(C) North Carolina DEQ's answer to PK Ventures' request for rehearing is hereby rejected, as discussed in the body of this order.

By the Commission. Commissioner Glick is concurring in part and dissenting in part with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

McMahan Hydroelectric LLC

Project No. P-14858-002

(Issued April 16, 2020)

GLICK, Commissioner, *concurring in part and dissenting in part*:

1. I agree with the Commission that the North Carolina Department of Environmental Quality (North Carolina DEQ) waived its authority under section 401 of the Clean Water Act<sup>1</sup> because it did not act on a substantially unrevised section 401 application for more than a year, instead participating in a withdrawal-and-resubmission scheme intended to avoid that one-year deadline. Nevertheless, I dissent in part because the Commission goes out of its way to make a superfluous second waiver finding.<sup>2</sup> I would decide this proceeding on the straightforward basis on which we all agree. Accordingly, I concur in part and dissent in part.

2. Section 401 requires applicants for a federal license that “may result in any discharge into the navigable waters”—a category that includes hydroelectric licenses issued by the Commission—to secure a certificate from the state in which the “discharge originates or will originate.”<sup>3</sup> Section 401, however, imposes a time limit on states’ review of a certificate request: “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, the certification requirements of this subsection shall be waived with respect to such Federal application.”<sup>4</sup> Prior to the D.C. Circuit’s decision in *Hoopa Valley*, the Commission took the position that an applicant’s withdrawal and resubmission of a section 401 application was sufficient to restart the one-year deadline.<sup>5</sup>

3. *Hoopa Valley* rejected that interpretation in a proceeding that addressed the long-delayed relicensing proceeding for PacifiCorp’s Klamath River Hydroelectric Facility

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<sup>1</sup> 33 U.S.C. § 1341(a)(1) (2018).

<sup>2</sup> 913 F.3d 1099, 1101 (D.C. Cir. 2019), *pet. for cert. denied sub nom. Cal. Trout v. Hoopa Valley Tribe*, 2019 WL 6689876 (Dec. 9, 2019).

<sup>3</sup> 33 U.S.C. § 1341(a)(1).

<sup>4</sup> *Id.*

<sup>5</sup> *Hoopa Valley*, 913 F.3d at 1104.

along the border between California and Oregon.<sup>6</sup> To make a long story short, several years ago PacifiCorp apparently came to the conclusion that relicensing the facility would not be cost-effective.<sup>7</sup> PacifiCorp then entered an agreement with the two states and a variety of stakeholders to hold the relevant state licensing proceedings in abeyance while it pursued options for decommissioning the facility.<sup>8</sup> One of the state licensing proceedings PacifiCorp sought to delay involved its requests for a certificate pursuant to section 401. To avoid section 401's one-year limitation, PacifiCorp agreed to annually withdraw and resubmit its section 401 application before the one-year limit expired—a task it accomplished each year by submitting a one-page letter, stating its intent to withdraw and resubmit its application.<sup>9</sup>

4. In *Hoopa Valley*, the court held that PacifiCorp's particular withdrawal-and-resubmission tactic did not restart the one-year limitation on the states' review of its section 401 application,<sup>10</sup> meaning that the states had waived their section 401 authority by failing to act on PacifiCorp's application within a year. But the court went out of its way to limit its ruling to the facts before it. The court explained that its decision resolved “a single issue: whether a state waives its Section 401 authority when, pursuant to an agreement between a state and an applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year.”<sup>11</sup>

5. Most importantly for the purposes of today's order, the court expressly avoided addressing what happens when the applicant modifies its section 401 application before the one-year period elapses. The court explicitly “decline[d] to resolve the legitimacy” of an arrangement in which an applicant withdrew its 401 application and submitted a new

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<sup>6</sup> *Id.* at 1101.

<sup>7</sup> *Id.* at 1101-02.

<sup>8</sup> *Id.* at 1101.

<sup>9</sup> *Id.* at 1102-04. That process had gone on for “more than a decade” by the time that the D.C. Circuit decided *Hoopa Valley*. *Id.* at 1104.

<sup>10</sup> *Id.* at 1103.

<sup>11</sup> *Id.*; *see also id.* at 1104 (noting that the D.C. Circuit had not previously 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”).

one in its place.<sup>12</sup> Similarly, the court did not address “how different a [section 401 application] must be to constitute a ‘new request’ such that it restarts the one-year clock.”<sup>13</sup> In addition, throughout the opinion, the court referenced a slew of factors that might limit the scope of its decision, including the parties “deliberate and contractual idleness,”<sup>14</sup> the fact that the purpose of the agreement was to delay the license process,<sup>15</sup> the fact that PacifiCorp “never intended to submit a ‘new request,’”<sup>16</sup> and the decade-long licensing delay caused by the scheme.<sup>17</sup>

6. That makes *Hoopa Valley* a hard case to apply. On the one hand, the court made clear that the Commission’s prior interpretation—that any withdrawal and resubmission of a section 401 application restarted the one-year period for review—was wrong. Although that is enough to decide a handful of relatively easy cases, it tells us little about the majority of fact patterns likely to come before this Commission. Indeed, as noted, the court enumerated, but did not decide, a host of questions that will ultimately determine the scope of the waiver rule announced in *Hoopa Valley*.

7. This case could have been one of the relatively easy ones. As the Commission explains, McMahan Hydroelectric, LLC (McMahan Hydro) sent North Carolina DEQ its first section 401 application on March 3, 2017.<sup>18</sup> On April 26, 2017, North Carolina DEQ requested significant additional information, including a water quality monitoring plan, which had not previously been provided.<sup>19</sup> McMahan Hydro submitted that information on December 21, 2017, and, that same day, contacted North Carolina DEQ to discuss withdrawing and resubmitting its application, which it ultimately did on

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<sup>12</sup> *Id.*

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

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (“This case presents the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification.”); *id.* at 1105 (describing the set of facts before the court as one “in which a licensee entered a written agreement with the reviewing states to delay water quality certification”).

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

<sup>17</sup> *Id.*

<sup>18</sup> *McMahan Hydroelectric, LLC*, 171 FERC ¶ 61,046, at P 19 (2020) (Rehearing Order).

<sup>19</sup> *Id.* P 20.

February 20, 2018.<sup>20</sup> Roughly a year later, at North Carolina DEQ's request, McMahan Hydro withdrew and resubmitted its application a second time on February 11, 2019,<sup>21</sup> with the only intervening changes to the application being certain revisions to the water quality monitoring program made in response to comments by North Carolina DEQ.<sup>22</sup>

8. As I explained in my partial dissent from the underlying order, the facts surrounding the second withdrawal and resubmission are sufficient for us to conclude that North Carolina waived its section 401 authority.<sup>23</sup> As noted, McMahan Hydro had pending before North Carolina DEQ a substantially unmodified application from February 20, 2018, (the date of its first withdrawal and resubmission) through February 20, 2019 (nine days after its second withdrawal and resubmission).<sup>24</sup> The principal change made during that period was the relatively minor revisions to the water quality monitoring program made in response to North Carolina DEQ's comments.<sup>25</sup> Those changes were not, in my opinion, sufficient to constitute a new application. Accordingly, the February 11, 2019 withdrawal and resubmission, made at North Carolina DEQ's behest, did not restart the one-year deadline, meaning that McMahan Hydro had substantially the same application pending before the North Carolina DEQ for more than a year. That is sufficient to conclude that the state waived its section 401 rights.<sup>26</sup>

9. The Commission, however, goes on to find a second waiver based on McMahan Hydro's first withdrawal and resubmission.<sup>27</sup> As I explained in my statement on the underlying order, I see no need for that superfluous second finding. In any case, I note that, in the underlying order, the Commission suggested that only a major physical

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<sup>20</sup> *Id.* PP 20-21.

<sup>21</sup> At which point the D.C. Circuit had issued its decision in *Hoopa Valley*.

<sup>22</sup> *Id.* PP 22, 24.

<sup>23</sup> *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (2019) (License Order) (Glick, Comm'r, concurring in part and dissenting in part at P 5).

<sup>24</sup> *See supra* P 7. North Carolina DEQ ultimately acted on that application on September 20, 2019, the day the Commission issued the License Order. Rehearing Order, 171 FERC ¶ 61,046 at P 30.

<sup>25</sup> *See supra* P 7.

<sup>26</sup> Rehearing Order, 171 FERC ¶ 61,046 at P 28.

<sup>27</sup> License Order, 168 FERC ¶ 61,185 (Glick, Comm'r concurring in part and dissenting in part at PP 4-5).

modification to a project could create a new application, at least absent some undefined “unusual circumstances.”<sup>28</sup> Today’s order does not repeat that point—a step in the right direction from my perspective. Nothing in the Clean Water Act or *Hoopa Valley* requires us so drastically limit what might constitute a new section 401 application. Congress enacted section 401 so that states can ensure that a federally licensed or certificated project does not violate state or federal water quality standards and to permit states to impose such conditions as are necessary to ensure that result.<sup>29</sup> Significant changes in how a project is monitored could well determine whether a state can make the water quality findings required by section 401, even if those changes do not require a new license application with the Commission.<sup>30</sup> Taking the position that *only* a revised application with this Commission could result in a new section 401 application would discount the complex and nuanced review that many states undertake in implementing their section 401 authority.

For these reasons, I respectfully concur in part and dissent in part.

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Richard Glick  
Commissioner

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<sup>28</sup> License Order, 168 FERC ¶ 61,185 at P 38 & n.43.

<sup>29</sup> See *PUD No. 1 of Jefferson Cnty. v. Wa. Dep’t of Ecology*, 511 U.S. 700, 707-08 (1994); see also *S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 386 (2006) (explaining why “Congress provided the States with power to enforce ‘any other appropriate requirement of State law’” pursuant to their section 401 authority).

<sup>30</sup> *PUD No. 1 of Jefferson Cnty*, 511 U.S. at 707 (listing the provisions of the Clean Water Act that a state must find a discharge consistent with as part of its section 401 determination).