

FERC V. STATES: SUBSTANTIAL EVIDENCE & FUNCTIONAL AGREEMENTS UNDER SECTION 401 OF THE CLEAN WATER ACT

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I. INTRODUCTION

According to the Office of Energy Efficiency & Renewable Energy, hydroelectric power makes up 31.5% of the United States' total renewable energy and 6.3% of the United States' electricity.¹ Since hydroelectric power is considered an affordable source of electricity, has a longer lifespan, and is potentially more flexible and reliable than other sources, such as solar, many companies have harnessed hydroelectric projects to garner these benefits.² Over the years, the courts have interpreted the scope of FERC's authority and obligations regarding hydroelectric projects in a number of cases.³ While FERC has general authority to approve, reject or condition hydroelectric project license applications, applicants must still satisfy the requirements of the Clean Water Act. Although that Act is administered by the Environmental Protection Agency (EPA), section 401 of that Act delegates certain EPA certification authority to states, provided they act on CWA applications within a year.⁴

1. OFF. ENERGY EFFICIENCY & RENEWABLE ENERGY, HYDROPOWER BASICS (2021) <https://www.energy.gov/eere/water/hydropower-basics>.

2. *Id.*; Lisa M. Bogardus, *STATE CERTIFICATION OF HYDROELECTRIC FACILITIES UNDER SECTION 401 OF THE CLEAN WATER ACT*, 12 VA. ENV'T L.J. 43, 43 (1992) ("The number of hydroelectric facilities in operation increased in the late 1970s and early 1980s when Congress established incentives to encourage hydropower development.")

3. HYDROPOWER BASICS, *supra* note 1.

4. Section 401 provides:

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. 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.

33 U.S.C. § 1341(a)(1).

For decades, hydroelectric project applicants that had not yet received CWA permits from the state within a year of applying would withdraw their permit applications and resubmit them, restarting the CWA's one-year clock. FERC had never questioned this process. But for the first time, a 2019 case, *Hoopa Valley Tribe v. Federal Regulatory Commission (Hoopa Valley)*, called the legitimacy of this withdraw and resubmit process into question. There, 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 period of time greater than one year."⁵⁶ In the aftermath of the *Hoopa Valley* decision, FERC expanded upon *Hoopa Valley*, finding waiver in a series of cases, not only where there was a written agreement to withdraw and resubmit a permit application but an implicit "functional" agreement to do so. This expansion of *Hoopa Valley* led to successful challenges to FERC's new standard brought in the Fourth and Ninth Circuit Courts of Appeal. As discussed in more detail *infra*, neither court addressed whether an implicit agreement could result in a state's loss of CWA section 401 rights, but both found that, assuming implicit agreements could result in waiver, FERC lacked substantial evidence to support its finding of such agreements. The implications of those cases, a 2021 Fourth Circuit decision in *North Carolina Department of Environmental Quality v. Federal Energy Regulatory Commission* and a 2022 Ninth Circuit opinion in *California State Water Resources Control Board v. Federal Energy Regulatory Commission* are the subject of this note.

This note makes the following contribution to the literature: in Part II *Hoopa Valley Tribe v. Federal Energy Regulatory Commission* and its holding will be discussed as it creates a picture of a coordinated scheme with the substantial evidence standard applied.⁷ This note will, additionally in Part III, explain the holdings of both *North Carolina Department of Environmental Quality v. Federal Energy Regulatory Commission* and *California State Water Resources Control Board v. Federal Energy Regulatory Commission*. Last, in Part IV, along with its impact on the application of the substantial evidence standard as it pertains to the FERC's findings of implicit agreements resulting in state waivers of their CWA authority, future implications of the holdings of both *NCDEQ* and *California State Water* will be contemplated.

5. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1103 (D.C. Cir. 2019).

6. See Charles R. Sensiba & Elizabeth J. McCormick, *Emerging Developments in Water Quality Certification for Federally Licensed or Permitted Facilities*, NR&E 2 (2020) <https://www.troutman.com/a/web/246105/NRE-v035n01-Summer20-feat06-SensibaMcCormick.pdf> ("In some states, however, it was common practice prior to *Hoopa Valley Tribe* for WQC applicants, at the request of the certifying agency, to withdraw their request prior to the one-year mark and resubmit the same application (often through the filing of a one-page withdraw and-resubmit letter) to purportedly restart the one-year time period"); see also 33 U.S.C. §§ 1251, § 401(a)(1) ("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.").

7. *Hoopa Valley Tribe*, 913 F.3d at 1105.

II. THE HOOPA VALLEY EFFECT

Under *Hoopa Valley Tribe v. FERC*, the United States Court of Appeals for the DC Circuit held that a coordinated withdrawal-and-resubmission scheme that involves a state's engagement in idleness or deliberate delay is a failure to act under section 401 of the Clean Water Act.⁸ The statute does not directly define failure to act, but since the statute requires state action a year, states that fail or refuse to act within one-year fall into this category.⁹

The Clean Water Act (CWA), formally known as the Federal Water Pollution Act, was first established in 1948 and aimed to address the various issues that came with pollution and wastewater.¹⁰ To maintain and restore the integrity of the Nation's waters,¹¹ the Act, through its many subsequent amendments, has continued its 1948 focus on water pollution elimination.¹² The Act, codified at 33 USC §§ 1251-1387, has been implemented by the EPA through its National Pollution Discharge Elimination System (NPDES) under which the agency grants individual or general permits.¹³

Part of the Clean Water Act, § 401, grants states and tribes the authority to “grant, deny, or waive certification of proposed federal licensing or permits that may discharge into the waters of the United States.”¹⁴ If an agency, State, or individual wishes to conduct an activity that may lead to discharge in any navigable waters, it must both submit federal application and obtain either a certification from the State where the activity would occur or a waiver of the certification requirement.¹⁵ Once notified, the State may deny the request. However, if approved, the federal permit would follow suit.¹⁶

In *Hoopa Valley*, the Klamath Hydroelectric Project, licensed to PacifiCorp's predecessor in 1954, consisted of multiple dams on the Klamath River.¹⁷ Along with Native American tribes, conservation groups, California, Oregon, and others,

8. *Id.*

9. *Id.* at 1104.

10. US ENV'T PROT. AGENCY, SUMMARY OF THE CLEAN WATER ACT (July 6, 2022), [https://www.epa.gov/laws-regulations/summary-clean-water-act#:~:text=\(1972\),quality%20standards%20for%20surface%20waters](https://www.epa.gov/laws-regulations/summary-clean-water-act#:~:text=(1972),quality%20standards%20for%20surface%20waters).

11. US DEP'T OF INTERIOR, CLEAN WATER ACT, [https://www.boem.gov/environment/environmental-assessment/clean-water-act-cwa#:~:text=95%2D217\)%2C%20this%20law,1251](https://www.boem.gov/environment/environmental-assessment/clean-water-act-cwa#:~:text=95%2D217)%2C%20this%20law,1251).

12. Claudia Copeland, *Clean Water Act: A Summary of the Law*, 1, CONGRESSIONAL RSCH. SERV. (Oct. 18, 2016), <https://sgp.fas.org/crs/misc/RL30030.pdf>.

13. US ENV'T PROT. AGENCY, NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES): *About NPDES* (July 6, 2022), <https://www.epa.gov/npdes/about-npdes>.

14. US ENV'T PROT. AGENCY, SECTION 401 OF THE CLEAN WATER ACT (Aug. 10, 2022), <https://www.epa.gov/cwa-401#:~:text=Section%20401%20Certification,Learn%20more%20about%20401%20certification>; Lisa M. Bogardus, *STATE CERTIFICATION OF HYDROELECTRIC FACILITIES UNDER SECTION 401 OF THE CLEAN WATER ACT*, 12 VA. ENV'T L.J. 43, 43(1992) (“Because hydroelectric projects can cause water quality problems within the impounded water and downstream of the dam states have required hydroelectric applicants seeking a license from the Federal Energy Regulatory Commission (FERC) to obtain certification, pursuant to section 401 of the Clean Water Act (CWA), that the project will not violate water quality standards.”).

15. SECTION 401 OF THE CLEAN WATER ACT, *supra* note 14; Bogardus, *supra* note 2, at 43.

16. SECTION 401 OF THE CLEAN WATER ACT, *supra* note 14.

17. *Hoopa Valley Tribe*, 913 F.3d at 1101.

PacifiCorp discussed settlement regarding the risks of decommissioning, leading them to enter into an agreement that imposed on PacifiCorp funding obligations and interim environmental measures.¹⁸ The Klamath Hydroelectric Settlement Agreement obligated PacifiCorp to seek deferral of the approval deadline of one year by withdrawing and resubmitting its certification requests.¹⁹ The Agreement explicitly contemplated that licensing activities under the CWA and review under CEQA would be held in abeyance during what the agreement called the “Interim Period” – the period between the Effective Date and Decommissioning.²⁰ The certification requests under this method were prerequisites to FERC’s review.²¹

The Hoopa Valley Tribe was not a party to either of the settlement agreements but was located downstream.²² To transfer the dams, PacifiCorp filed for an amended transfer, causing FERC to review the applications separately for transfer and amendment.²³ On May 25th 2012, there was a petition by Hoopa which sought a declaratory order stating that California and Oregon waived their Section 401 authority.²⁴ Further, the Hoopa Valley Tribe argued that PacifiCorp had failed to prosecute its project licensing application.²⁵ FERC ultimately denied that position two years later in June 2014, and again in October of 2014 when the Hoopa Valley Tribe requested a rehearing.²⁶ On June 19, 2014, after arguing that PacifiCorp was not taking action to obtain water quality certification, the Tribe asked FERC to dismiss the relicensing application and for the Commission to require the company to file a plan for decommission.²⁷ FERC agreed with the Hoopa Valley Tribe that PacifiCorp had been complicit in the Settlement Agreement to delay water quality certification, but denied that the remedy of decommissioning was the correct remedy.²⁸ The Tribe then petitioned the DC Circuit Court of Appeals to review FERC’s orders, arguing that the agreement between the state and the applicant to a withdraw and resubmit process unlawfully circumvented the one year deadline for state to act under section 401.²⁹

On review, the court agreed with the Tribe. “[A] state,” it ruled, “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.”³⁰

Section 401, the Court reasoned, was put in place to limit a State’s ability to unreasonably delay the issuance of a permit. California and Oregon, it found, were

18. *Id.*

19. *Id.*

20. *Id.* at 1101-02; *KLAMATH HYDROELECTRIC SETTLEMENT AGREEMENT*, (Feb. 18, 2016) <https://klamathrenewal.org/wp-content/uploads/2020/03/2016.12.31-Executed-and-Amended-Final-KHSA.pdf>.

21. *Hoopa Valley Tribe*, 913 F.3d at 1101-02.

22. *Id.*

23. *Id.* at 1102.

24. *Id.*

25. *Hoopa Valley Tribe*, 913 F.3d at 1102.

26. *Id.*

27. *PacifiCorp*, 147 FERC ¶ 61,216 at PP 9-10 (2014).

28. *Id.*

29. *Hoopa Valley Tribe*, 913 F.3d at 1102.

30. *Id.* at 1103.

indefinitely delaying the federal licensing process through their agreements with the permit applicants and thus, the scheme was illegal.³¹ This meant that by agreeing to delay action on the permit for more than a year, the states had waived their rights under Section 401.³² Once the certification is waived under the CWA Section 401, the agency, here FERC, has the power to issue the license to the project applicants.³³ As the Court made plain in *Hoopa Valley*, however, its holding was narrow: “This case presents the set of facts in which a licensee entered a *written* agreement with the reviewing states to delay water quality certification.”³⁴

The DC Circuit’s decision in *Hoopa* led FERC to change its position, expanding on *Hoopa* to find waiver even absent formal agreement between the applicant and the state. FERC continued to adhere to its longstanding position that where the applicant had *voluntarily* withdrawn and resubmitted an application there would be no state waiver.³⁵ But it went beyond *Hoopa Valley* to find waiver where there was an implicit or “functional” agreement between the state and the applicant to withdraw and resubmit. “In a series of orders,” including those that are a subject of this note, “FERC concluded that states had waived their Section 401 certification authority by coordinating with project applicants on the withdrawal-an-resubmission of Section 401 certification requests, even in the absence of an explicit contractual agreement to do so.”³⁶

In the aftermath of the DC Circuit’s decision, FERC began to find waivers involving both express agreements for certification delay and informal, coordinated schemes.³⁷ This led to the states of North Carolina and California challenging FERC’s waiver findings in *North Carolina Department of Environmental Quality v. FERC*³⁸ and *California State Water Resources Control Board v. FERC*,³⁹ the two cases that are the subjects of this note.

III. FERC VS. STATE

In both *California State Water Resources Control Board* and *North Carolina Department of Environmental Quality*, the state agencies administering the CWA asked the court system to strike down FERC’s determination that they had waived their rights under CWA Section 401 to issue water quality certifications. Although both cases were decided in different circuits, one thing is clear—the courts both ruled that FERC’s findings of waiver did not pass the substantial evidence test.

31. *Id.* at 1104-05.

32. *Id.* at 1105.

33. *Hoopa Valley Tribe*, 913 F.3d at 1101 (“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.””).

34. *Id.* at 1104. (emphasis added)

35. *Cal. State Water Res. Control Bd. v. FERC*, 43 F.4th 920, 925 (9th Cir. 2022) (“an applicant’s unilateral withdrawal and resubmittal is not imputed to the State”).

36. *Id.* at 926.

37. *Id.* at 931.

38. *N.C. Dep’t of Env’t Quality v. FERC*, 3 F.4th 655 (4th Cir. 2021).

39. *Cal. State Water Res. Control Bd. v. FERC*, 43 F.4th at 920 (9th Cir. 2022).

North Carolina Department of Environmental Quality v. FERC involved a Section 401-certification application filed by a hydroelectric license applicant with the North Carolina Department of Environmental Quality (NCDEQ). NCDEQ then sent a letter to the applicant containing information about refiling his application.⁴⁰ This letter included a date for submission, fee information, and the suggestion to withdraw and resubmit.⁴¹ Afterward, the applicant withdrew and reapplied for certification. NCDEQ subsequently issued the certification, but on the same day it did so, FERC, purporting to apply *Hoopa Valley*, concluded that more than a year had passed from the time the applicant had filed with NCDEQ, that NCDEQ had effectively coordinated a withdraw and resubmit agreement with the applicant and that NEDEQ had therefore waived its authority to issue the certification.⁴²

NCDEQ sought judicial review of FERC's decision in the Fourth Circuit. There, it advanced two arguments: (1) that the state *had* taken timely action on the permit application, albeit not final action, within the one year statutory window⁴³ and (2) that, in any event the questions it posed to the applicant did not demonstrate the existence of a coordinated agreement to a withdraw and resubmit scheme, but responses to the applicant, who, "in every instance . . . sought to withdraw his application."⁴⁴

As to the second of these arguments, the Court agreed with the state that there was no agreement, informal or otherwise, between the state and the applicant and that in ignoring an un rebutted affidavit from an NCEEQ staff member that "NCDEQ never ordered or otherwise required McMahan Hydro to withdraw and resubmit [its] application," FERC had failed to support its finding of such an agreement with substantial evidence.⁴⁵ Indeed, the record indicated that it was the *applicant* that, "for its own purposes, raised the prospect of withdrawing and re-submitting its application."⁴⁶

Having found that FERC's orders lacked substantial evidence of a functional agreement to coordinate, the Court found it unnecessary to rule whether by taking actions short of final action the state would avoid waiver of its rights under section 401.⁴⁷ But after noting that it owed FERC's interpretation of section 401 no deference under *Chevron*,⁴⁸ in unusually strong dicta, the Court made plain its inclination to accept NCDEQ's interpretation of section 401:

40. *N. C. Dept. of Env't Quality*, 3 F.4th at 662.

41. *Id.*

42. *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 at P 37 (2019).

43. *N.C. Dept. of Env't Quality*, 3 F.4th at 666-7.

44. *Id.* at 663.

45. *Id.* at 672.

46. *Id.*

47. *N.C. Dep't of Env't Quality*, 3 F.4th at 671 ("we agree with NCDEQ that FERC's key factual findings underpinning its waiver determination are not supported by substantial evidence. Accordingly, we leave the statutory-interpretation question for resolution in a case where the outcome depends on the precise meaning of the statute.").

48. *Id.* at 667 ("Because FERC does not administer the Clean Water Act, we owe no deference to its interpretation of § 401.").

If Congress had intended for the states to take final action on § 401 applications within a year of filing, the statute could have made that clear by providing that waiver occurs if the agency “fails to certify or deny compliance with water quality standards within one year.” Since Congress instead hinged waiver on the agency’s failure “to act” on a certification request, traditional rules of statutory construction would generally require us to interpret “acting” on a certification request as meaning something other than certifying or denying compliance with water-quality standards.⁴⁹

The court “remand[ed] the matter to FERC with instructions that the McMahan license be re-issued to include the conditions imposed by NCDEQ in its § 401 certification,”⁵⁰ which FERC then did.⁵¹

The Ninth Circuit’s decision in *California State Water*, issued a year after the Fourth Circuit’s opinion, covered similar ground. As in *N.C. Dep’t of Env’t. Quality*, the case centered on challenges to FERC’s findings that the state agency had waived its Section 401 rights by entering into functional withdraw and resubmit agreements with several applicants as a means to circumvent the one-year time limit for agency action. And as in the Fourth Circuit’s case, the Ninth Circuit found it unnecessary to determine whether an unwritten agreement between the applicant and the state could result in a state’s waiver of its Section 401 rights because it found no substantial evidence that such agreements existed.⁵² Citing *N.C. Dep’t of Env’t.*, it agreed that “it must take more than routine informational emails to show coordination” because the states’ “rights and responsibilities to ensure compliance with their water-quality standards are too important to be so easily stripped away.”⁵³

The *California State Water* case involved four hydroelectric projects proposed by the Nevada Irrigation District (“NID”), the Yuba County Water Agency (“YCWA”), the Merced Irrigation District (“MID”), and Pacific Gas and Electric Company (“PG&E”). As in *N.C. Dep’t of Env’t.*, FERC rested its Section 401 waiver findings in each instance on emails or other communications between the project applicants and the State Board as evidence of a coordinated scheme to reset the clock.⁵⁴ In NID’s case, FERC relied on the state board’s comments on FERC’s draft environmental impact statement, where the state described its “expectation that NID would withdraw and resubmit its request.”⁵⁵ As to YCWA FERC cited an email California sent to the applicant suggesting that it should withdraw and resubmit the request as soon as possible because the CEQA documents were incomplete.⁵⁶ When the YCWA responded with a date that it would resubmit, the State Board gave a reply in which it recommended that, due to the time it takes to get to the Executive Director, it is best to resubmit before a particular day.⁵⁷ The

49. *N.C. Dep’t of Env’t Quality*, 3 F.4th at 670.

50. *Id.* at 676.

51. *McMahan Hydroelectric, LLC*, 177 FERC ¶ 61,014 at P 13 (2021).

52. *California State Water Res. Control Bd. v. FERC*, 43 F.4th 920 (2022).

53. *Id.* at 936.

54. *Id.*

55. *Id.* at 928

56. *Cal. State Water Res. Control Bd.*, 43 F.4th at 928.

57. *Id.*

YCWA followed the guidance of the State Board and resubmitted their application, which the State Board accepted.⁵⁸ Looking at this, as well as an email exchange between YCWA and the state as evidence of their coordination, FERC reasoned that YCWA's "withdrawal and refiling of its application was in response to the [State] Board's request that it do so."⁵⁹

Like the previous two applicants, the MID and its predecessor PG&E were also found by FERC to be in a coordinated scheme with the State Board.⁶⁰ Before the due date had come up, MID was advised by the State Board that it should withdraw and resubmit the application.⁶¹ MID and PG&E took this advice and continued resubmitting over four years.⁶²

Ultimately agreeing with the Fourth Circuit, the Court stated that even if FERC was correct that a "functional" agreement could result in a state's waiver of its Section 401 rights, FERC lacked substantial evidence to demonstrate the existence of such agreements:

In short, the records in all three orders under review demonstrate that the Project Applicants chose to withdraw and resubmit their certification requests because they had not complied with California's CEQA regulations. Without a complete CEQA evaluation, the State Board was legally obligated to deny the requests without prejudice, and the record suggests that the State Board was prepared to do so. To avoid such a denial, the Project Applicants employed the common and long-accepted withdrawal-and-resubmission maneuver, with the State Board's acquiescence. We note that, if the Project Applicants had preferred not to undertake withdrawal-and-resubmission, they could have declined to do so, forced the State Board to deny their certification requests, and, if they believed the denials were unwarranted, challenged them in state court. The Project Applicants chose not to take that path—and nothing in the record shows that the State Board encouraged that choice. Under FERC's own coordination standard, a state's mere acceptance of a withdrawal-and-resubmission is not enough to show that the state engaged in a coordinated scheme to avoid its statutory deadline for action. Accordingly, FERC's orders cannot stand.⁶³

IV. FUTURE IMPLICATIONS

There are several considerations that come out of the *NCDEQ* and *California State Water* cases. First, while the two decisions tell us what does not qualify as substantial evidence of a coordinated functional agreement between the state and an applicant to a withdraw and resubmit scheme, they give little guidance as to what evidence of such a scheme would qualify as substantial. Second, and related, is the question left undecided by both courts, whether a "functional" agreement, as opposed to a written one, could result in a state waiving its rights under Section 401. Last, and most important, given (1) the strong dicta in *NCDEQ* suggesting that taking any action on a permit within a year, even if not final action, the state would not waive its Section 401 rights (2) given the subsequent adoption of that

58. *Id.*

59. *Cal. State Water Res. Control Bd.*, 43 F.4th at 929.

60. *Id.* at 930.

61. *Id.*

62. *Id.* at 930.

63. *Cal. State Water Res. Control Bd.*, at 935-36.

interpretation of Section 401 by FERC itself⁶⁴ and (3) given the Fourth and Ninth Circuits' observation that because EPA, not FERC, administers Section 401, FERC's interpretation of that provision will get no *Chevron* deference, how much real risk does a state face that it would waive its Section 401 rights?

A. *Substantial Evidence & Coordinated Schemes*

Because neither the Ninth nor Fourth Circuits needed to reach the question of whether a functional agreement to withdraw and resubmit permit applications could result in waiver of a state's Section 401 rights their decisions provide little guidance on the issue. Nor, therefore, do they provide much guidance as to what would constitute substantial evidence of such an agreement. But the discussions in both cases strongly hint that it may never be possible to prove the existence of a functional agreement to circumvent Section 401.

In *Hoopa Valley*, it was clear that there was a coordinated scheme reaching over a decade and memorialized in a formal agreement between all of the parties that was placed in writing. In both *California State Water* and *NCDEQ*, this was not the case. Both decisions made clear that where the applicant had made a unilateral decision to withdraw and resubmit its permit application the clock would restart even under FERC's interpretation of *Hoopa Valley*. And, both courts were reluctant to read into a state's advice to the applicant that its permit would be denied without more information as an agreement or the exercise of coercion.

Why this reluctance to finding a waiver through circumstantial evidence? As the Ninth Circuit pointed out in *California State Water*, "if a state waives its authority to impose conditions on a hydroelectric project's federal license through Section 401's certification procedure, that project may be noncompliant with prevailing state water quality standards for decades."⁶⁵ This concern appears to be at the heart of the Court's rejection of FERC's waiver findings involving four California hydroelectric license applications.⁶⁶ The purpose of giving states the authority to consider the environmental impact of a project is to ensure that water quality is protected. A standard that would make it too easy to find waiver would deprive states of the important right to protect local water quality.

Additionally, while there is no consensus as to what would amount to substantial evidence to signify a waiver, there is a decided trend to limit the circumstances in which a waiver could be found. In *Hoopa Valley*, the only case to find waiver as a result of continued withdrawals of submissions of permit applications, the D. C. Circuit found critical the existence of a formal written agreement covering years of withdrawals and resubmittals.⁶⁷ As noted earlier, the Fourth Circuit's dicta would further narrow the impact of *Hoopa Valley* by finding that *any* meaningful state action on a permit application taken within a year of filing – even though short of a final decision – would satisfy Section 401.

64. See discussion of *Turlock Irrigation District v. FERC*, 36 F.4th 1179 (D. C. Cir. 2022).

65. *Cal. State Water Res. Control Bd.*, 43 F.4th at 925.

66. *Id.* at 920.

67. *Hoopa Valley Tribe*, 913 F.3d at 1104.

While the Fourth Circuit's discussion of the issue was dicta, of particular significance is FERC's own subsequent decision to adopt the Fourth Circuit's dicta, an interpretation the D.C. Circuit itself has now upheld. A license applicant, Turlock Irrigation District, had sought a declaratory order from FERC that California's denials of its permit applications were not timely final actions under Section 401 because they were made without prejudice and "not 'on the technical merits of the certification requests.'"⁶⁸ FERC rejected Turlock's argument, holding that "Section 401 requires only action within a year to avoid waiver."⁶⁹ The D.C. Circuit agreed. "The Fourth Circuit," the D.C. Circuit said, "accurately described *Hoopa Valley* as a case in which "the state agencies and the license applicant entered into a written agreement that obligated the state agencies, year after year, to take *no action at all* on the applicant's § 401 certification request."⁷⁰ By contrast, *Hoopa Valley* "stressed that the applicant's "water quality certification request has been complete and ready for review for more than a decade."⁷¹

So, what, if anything, is left of FERC's "functional agreement" waiver theory? Given FERC's determination that "Section 401 requires only action [and not final action] within a year to avoid waiver,"⁷² a functional agreement to a withdraw and resubmit scheme would require proof that the agency planned to take *no* action when an application was resubmitted. It is possible that such a case might be made – that was the situation in *Hoopa*. But while possible, it seems unlikely that a state agency, aware of FERC's interpretation of "action" under Section 401, would not try to take *some* action on an application once submitted. Indeed, in the less than two years since the D.C. Circuit's 2022 *Turlock* opinion, FERC has entertained, but rejected "functional agreement" waiver arguments several times, finding that the state had taken action that precluded Section 401 waiver.⁷³

B. *Chevron Deference*

Finally, whatever viability might be left of the *Hoopa Valley* waiver decision is further diminished by the fact, noted earlier, that FERC would get no *Chevron* deference for any new interpretation of Section 401 it might adopt. This is not to say that a court would not find, on its own, that a functional agreement to a withdraw and resubmit scheme could violate Section 401. But, for the reasons discussed above, it would take a rare set of circumstances in which a state would waive its Section 401 rights because it took no action at all on an application.

V. CONCLUSION

In the aftermath of the DC Circuit's *Hoopa Valley* decision, it remains undecided whether, absent an express agreement between the applicant for certification and the certifying state agency the state could waive its rights under CWA Section

68. Turlock Irrigation District v. FERC, 36 F.4th 1179, 1182-83 (D. C. Cir. 2022).

69. *Id.*

70. *Id.* at 1183 (emphasis added).

71. *Id.*

72. *Turlock Irrigation District*, *supra* note 68, at 1182.

73. See, e.g., *Pacific Gas and Electric Company*, 186 FERC ¶ 61,121 at P 28 (2024); *Pacific Gas and Electric Company*, 184 FERC ¶ 61,138 at P 22 (2023).

401 by implication. What we do know however, is that subsequent decisions have greatly diminished importance of resolving this uncertainty. In the aftermath of the Fourth and Ninth Circuit decisions and FERC's own subsequent conclusion, upheld by the same court that decided *Hoopa Valley*, that "action" needed to avoid waiver need not be final action by the state, there is little likelihood that states will be found to have waived their Section 401 rights.

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