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SAFEGUARDING WATER QUALITY IN FEDERAL LICENSING DECISIONS: CALIFORNIA'S RESPONSE TO RECENT CONSTRAINTS ON CLEAN WATER ACT SECTION 401 CERTIFICATION AUTHORITY

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I. INTRODUCTION

Pursuant to Clean Water Act section 401, state water quality certification authority to regulate federally-licensed energy projects has been relatively well settled for decades. Long-standing precedents from the U.S. Supreme Court, other federal courts, the U.S. Environmental Protection Agency ("U.S. EPA"), and implementation of certification authority by the states, have repeatedly reinforced the cooperative federalism principle of the Clean Water Act: state section 401 certification authority is essential to preserve the states' ability to address a wide

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range of pollution problems caused by federally-permitted energy facilities.

In recent years, however, state section 401 certification authority has come under siege in the courts, by the Federal Energy Regulatory Commission ("FERC"), and through federal rule changes.

Commencing in 2019 with *Hoopa Valley Tribe v. Federal Energy Regulatory Commission* ("*Hoopa Valley*"), the U.S. Court of Appeals for the District of Columbia found that the states of California and Oregon had waived their authority to issue water quality certifications for a large hydroelectric project on the Klamath River by failing to act within one year—despite the applicant's timely "withdrawal-and-resubmission" of its 401 certification requests.[3] In doing so, the court upended a common practice used by certification applicants nationwide to avoid a premature denial or waiver owing to the one-year statutory deadline within which states must act.[4]

The case has had wide-reaching effects. FERC has applied *Hoopa Valley* broadly and, in many instances, expanded its holding, resulting in multiple states, including California, having their authority to issue water quality certifications and impose conditions on federally-licensed energy projects deemed waived by FERC. The practical effect of these waiver decisions is that states may have lost their sole regulatory tool to protect water quality from impacts of these energy projects for as much as 40 to 50 years.

Further restricting state authority to assure impacts from FERC-licensed facilities comply with pertinent water quality requirements, in 2019, the Trump Administration's U.S. EPA finalized a new Clean Water Act Section 401 Certification Rule ("Certification Rule"), radically narrowing the scope of state certification authority and placing new procedural limitations on that authority.

This Article examines the interrelationship of the Federal Power Act and the Clean Water Act with respect to states' duties to protect water quality. It then explores how section 401 is being redefined by the *Hoopa Valley* decision and U.S. EPA's Certification Rule, and discusses the State of California's response to those recent events. Ultimately, it remains to be seen whether the numerous legal challenges currently underway to test the legality of the federal agency actions will succeed in

[3] Hoopa Valley Tribe v. Fed. Energy Regul. Comm'n (*Hoopa Valley*), 913 F.3d 1099, 1105 (D.C. Cir. 2019). This paper will use "Fed. Energy Regul. Comm'n and "FERC" interchangeably to provide the commonly accepted case names in citations.

[4] 33 U.S.C. § 1341(a)(1).

re-aligning the states' ability to regulate water quality within their borders.[5]

II. The Federal Power Act and Clean Water Act Interrelationships

The scope of state water quality certification authority under Clean Water Act section 401 can best be understood by reviewing the interrelationships of the Federal Power Act and the Clean Water Act and the way in which courts have construed those authorities.

A. The Federal Power Act

Congress exercised its Commerce Clause authority over development of the nation's water resources through the Federal Power Act, to be administered by the Federal Power Commission, FERC's predecessor agency.[6] The Federal Power Act manifests its congressional intent for "a broad federal role in the development and licensing of hydroelectric power."[7] For example, section 4(e) of the Act authorizes FERC to issue licenses for any hydroelectric project "necessary or convenient [. . .] for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction" to regulate commerce.[8] "These sources of constitutional authority are all applied in the Federal Power Act to the development of the navigable waters of the United States" and "leaves to the states their traditional jurisdiction subject to the admittedly superior right" vested with FERC through the Act.[9] The Federal Power Act's wide preemptive reach informs the scope of state section 401 authority under the Clean Water Act.[10]

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[5] The analysis in this Article is current through March 14, 2021 and does not reflect factual or legal developments beyond that date.

[6] First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n (*First Iowa*), 328 U.S. 152, 171-72 (1946).

[7] California v. Fed. Energy Regul. Comm'n (*Rock Creek*), 495 U.S. 490, 496 (1990).

[8] 16 U.S.C. § 797(e).

[9] *First Iowa*, 328 U.S. at 171-72 (1946).

[10] The doctrine of preemption is derived from the Supremacy Clause of the United States Constitution (art. VI., cl. 2) which states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

B. The Clean Water Act

The Water Pollution Control Act of 1972, as amended,[11] commonly known as the Clean Water Act, is a comprehensive federal statutory scheme governing water pollution impacting the nation's surface waters. It is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[12] It was also enacted to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife."[13] Those ambitious goals are achieved through a cooperative federalism model whereby distinct roles are established for the federal and state governments.[14]

With respect to the regulatory programs established by the Clean Water Act, U.S. EPA, among other responsibilities, issues technology-based effluent guidelines that establish discharge standards for certain pollutants based on treatment or pretreatment technologies.[15] For example, U.S. EPA is required to set standards for new point sources,[16] for toxic discharges,[17] and to establish pretreatment standards.[18] U.S. EPA also publishes the national priorities list of toxic pollutants.[19] And U.S. EPA develops national water quality criteria recommendations for pollutants in surface waters for the protection of aquatic life and human health.[20] Those criteria provide guidance for states to use to establish water quality standards for controlling discharges of pollutants.[21]

Under the Clean Water Act, states are required to establish water quality standards.[22] Water quality standards consist of designated uses of a waterbody,[23] numeric or narrative water quality criteria,[24] and antidegradation requirements to protect existing uses and high quality wa-

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[11] 33 U.S.C. §§ 1251-1388.

[12] 33 U.S.C. § 1251(a).

[13] 33 U.S.C. § 1251(a)(2).

[14] Am. Farm Bureau Fed'n v. U.S. EPA, 792 F.3d 281, 287 (3rd. Cir., 2015).

[15] 33 U.S.C. §§ 1314, 1316, 1317.

[16] 33 U.S.C. § 1316(b)(1)(B).

[17] 33 U.S.C. § 1317(a)(2).

[18] 33 U.S.C. § 1317(b).

[19] 33 U.S.C. § 1317(a).

[20] 33 U.S.C. § 1314(a).

[21] 33 U.S.C. § 1314(a)(3), (7).

[22] 33 U.S.C. § 1313(b). U.S. EPA also has authority to establish water quality standards for a state under certain conditions. 33 U.S.C. § 1313(b).

[23] "Designated uses," must include, among others, recreation and protection and propagation of fish (commonly referred to as the Act's "fishable and swimmable" goals). 33 U.S.C. § 1251(a); *see* 40 CFR § 131.3(f) (defining "designated uses"). In California, designated uses are called "beneficial uses" and water quality criteria are called "water quality objectives." *See generally*, Cal. Wat. Code § 13050(f), (h) (describing beneficial uses and defining water quality objectives).

[24] *See* 40 CFR § 131.3(b) (defining criteria as "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of

ters.[25] Water quality standards serve as the backstop to the federally established technology-based limitations by indicating whether additional control requirements are needed to achieve the goals of the Act.

Each state is also required to develop a nonpoint source management program which identifies categories of nonpoint sources that add significant pollution to navigable waters and develop best management practices that will be undertaken to reduce the pollutant loadings.[26]

Consistent with its role as the agency in California authorized to exercise power delegated to it under the Clean Water Act,[27] the State Water Resources Control Board ("State Water Board") administers the Porter-Cologne Water Quality Control Act ("Porter-Cologne Act"), which establishes a comprehensive statutory program for water quality control.[28] California's nine Regional Water Quality Control Boards have primary responsibility for the adoption of water quality control plans for all waters within their respective regions.[29] Water quality control plans consist of the designation of the beneficial uses to be protected, water quality objectives, and a program of implementation to achieve water quality objectives.[30] The State Water Board may also adopt water quality control plans for waters for which water quality standards are required by the Clean Water Act.[31] The beneficial uses together with the water quality objectives contained in the water quality control plans constitute state water quality standards. In waters where water quality standards are not met, the Clean Water Act requires states to develop total maximum daily loads (TMDLs) of pollutants and levels necessary to ensure the water quality standards can be achieved and maintained.[32] TMDLs are one strategy to attain water quality objectives (with seasonal variations and a margin of safety).[33]

The Clean Water Act envisions and retains the robust role of the states to implement the Act to correspond with their traditional jurisdic-

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water that supports a particular use. When criteria are met, water quality will generally protect the designated use.").

[25] 40 CFR § 131.12; *see* U.S.C. §§ 1312(a) (expressing a principal goal of the Clean Water Act to "maintain" the water quality of the nation's waters), 1313(d)(4)(B) (antidegradation requirements must be satisfied before taking certain actions, including revising effluent limitations and water quality standards).

[26] 33 U.S.C. § 1329.

[27] CAL. WATER CODE § 13160.

[28] CAL. WATER CODE, Div. 7, §§ 13000-16104.

[29] CAL. WATER CODE §§ 13240, 13260, 13263.

[30] CAL. WATER CODE § 13050(j)(1)-(3).

[31] CAL. WATER CODE § 13170.

[32] 33 U.S.C. §§ 1313(d).

[33] 33 U.S.C. § 1313(d)(1); 40 CFR §§ 130.7(b)(1) and (c)(1); CAL. WATER CODE § 13242 (requires a program of implementation to achieve objectives).

tion over land and water resources within their borders.[34] It adds that "[e]xcept as expressly provided" in this Act, nothing shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters" of such states.[35]

C. The Federal Power Act Does Not Preempt State Authority in Several Limited Circumstances

While Congress gave broad and exclusive grant of authority to FERC over hydroelectric projects through the Federal Power Act—there is no preemptive effect where Congress intends the state to have concurrent or exclusive regulatory authority. Of the limited circumstances in which the Federal Power Act does not preempt state authority,[36] this Article briefly touches on the subjects that remain under the jurisdiction of states (recognized by section 27 of the Federal Power Act) and more extensively discusses the powers Congress vested to states in other federal law—Clean Water Act section 401.

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[34] *See* 33 U.S.C. § 1251(b) (expressly providing that the Clean Water Act seeks to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .").

[35] 33 U.S.C. § 1370.

[36] The major circumstances in which the Federal Power Act does not preempt state regulatory authority over hydroelectric projects include: Circumstances where other federal laws apply, including Clean Water Act sections 401 and 404, the state may regulate federally licensed FERC facilities in accordance with that authority. The Federal Power Act section 27 preserves limited state water right authority over FERC-licensed projects. State authority over consumptive use or other non-hydroelectric power use rights, such as irrigation or municipal use rights is also explicitly saved by section 27 of the Federal Power Act. County of Amador v. El Dorado Cty. Water Agency, 76 Cal. App. 4th 931 (1999); Corrected State Water Resources Control Board Order WR 2008-0014 at p. 31. State regulation of rates and services is expressly preserved under section 20 of the Federal Power Act. 16 U.S.C. § 812. State law actions for money damages are preserved under section 10(c) of the FPA. 16 U.S.C. § 803(c). Additionally, under the self-governance exception to preemption, states retain authority over state agencies and political subdivisions as owners or operators of FERC licensed hydroelectric facilities. *See* Friends of the Eel River v. N. Coast R.R. Auth., 3 Cal. 5th 677, 723-75 (2017), *cert. denied* (2018) (finding that there is no encroachment of the federal regulatory domain by a state law that is otherwise not inconsistent with the federal regulation when applied to a state entity); Corrected State Water Resources Control Board Order WR 2008-0014 at p. 31. States also have their full authority over hydroelectric projects that are not subject to FERC licensing, including federal facilities and federally authorized projects, which are exempt from regulation under the Federal Power Act. *See* Uncompahqre Valley Water Users Ass'n v. Fed. Energy Regul. Comm'n*,* 785 F.2d 269, 274-75 (10th Cir. 1986) (holding a specific statute authorizing the Secretary of the Interior to contract with entities for the development and sale of surplus water necessary for irrigation takes precedence over the general grant of authority in the Federal Power Act which would otherwise control).

1. Federal Power Act Section 27 Preserves Limited State Water Right Authority over FERC-Licensed Projects

While the Federal Power Act grants exclusive licensing power to FERC, Section 27 of the Federal Power Act expressly *saves* to the states certain water rights authority.[37] The reserved authority is limited to "state authority over the control, appropriation and use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."[38] The United States Supreme Court has unequivocally construed the language in the aforementioned savings clause as limited to preserving to the states' exclusive authority over application of property rights in water.[39]

In *First Iowa*, the Supreme Court held that the hydroelectric power project applicant was not required to obtain a permit for the same project under state law, as mandated by state law, because that law was not among the subjects saved to states in section 27.[40] The Court narrowly construed the phrase "or other uses" as "confined to rights *of the same nature* as those relating to the use of water in irrigation or for municipal purposes."[41] The Court viewed the phrase "or any vested right acquired therein" as underscoring the nature of the rights saved for the states as those related to propriety rights.[42]

In *Rock Creek*,[43] the Supreme Court rejected the State Water Board's argument that the minimum instream flow requirement established under state water rights authority is related to the category of subjects preserved to states under section 27 "to the control, appropriation, use, or distribution of water used [. . .] for [. . .] other uses."[44] Applying

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[37] Section 27 provides:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

16 U.S.C. § 821.

[38] 16 U.S.C. § 821.

[39] First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n (*First Iowa*), 328 U.S. 152, 175-76 (1946); California v. Fed. Energy Regul. Comm'n (Rock Creek), 495 U.S. 490, 506 (1990).

[40] *First Iowa*, 328 U.S. at 182. The Court rejected the state's argument that the language in Section 9(b) of the FPA (16 U.S.C. § 802(b)) "to engage locally in the business of developing, transmitting and distributing power," recognized dual control over permitting power projects. The Court held that the state law requirements to obtain a permit for a hydroelectric power project conflict with those of the Federal Power Act; requiring compliance with the state law would subvert the comprehensive purpose of the Federal Power Act Congress intended to vest in the predecessor of FERC and were, therefore, superseded. *Id*. at 178-82.

[41] *First Iowa*, 328 U.S. at 175-76 (emphasis added).

[42] *Id*.

[43] California v. Fed. Energy Regul. Comm'n (*Rock Creek*), 495 U.S. 490 (1990).

[44] *Id*. at 497-98.

First Iowa's limited reading of section 27, the Court held that California's instream flow requirements were not "saved" to the states because they have nothing to do with "proprietary rights" or "rights of the same nature as those relating to the use of water in irrigation or for municipal purposes."[45]

Because Congress has granted to FERC the exclusive regulatory authority over licensing of hydroelectric projects, the extent of state authority over single purpose FERC-licensed projects is limited under the Federal Power Act to that which was expressly reserved to the states—proprietary water rights.[46] To be clear, that means that for single-purpose hydroelectric projects, the State Water Board is prohibited from utilizing its Porter-Cologne Act authority or its water rights authority to administer water quality control or protect environmental quality under section 27.[47]

2. *Clean Water Act Section 401 Authorizes State Water Quality Certification Authority Over FERC-Licensed Projects*

While the Federal Power Act generally preempts state law over FERC-licensed, single-purpose hydroelectric projects, it does not preempt application of other federal laws. Pursuant to authority provided by other federal statutes, the states may regulate federally licensed FERC facilities in accordance with that authority.[48]

The Clean Water Act gives states,[49] in section 401, authority to grant, grant with conditions, deny, or waive water quality certifications before a federal license or permit is issued for activities that could result

[45] *Id.* at 498 (quoting *First Iowa*, 328 U.S. 152, at 176). The Court held that FERC had the exclusive authority to set minimum flows to remain in the bypassed section of the stream necessary to protect fish and the more stringent flows contained in the water right permit issued by the State Water Board pursuant to state law were invalid, reasoning that any other interpretation would give states veto power over FERC's licensing powers under the Act. *Id.* at 506-07.

[46] *Id.* at 494-98.

[47] Karuk Tribe of Northern California v. California Reg'l Water Quality Control Bd., 183 Cal. App. 4th 330 (2010). *See supra* note 37, identifying circumstances where preemption does not apply.

[48] *See* PUD No. 1 v. Washington Dept. of Ecology (*PUD No. 1*), 511 U.S. 700 (1994); *see also* Monongahela Power Co. v. Marsh, 809 F.2d 41 (1987) (FERC licensed facilities are subject to permitting requirements under section 404 of the Clean Water Act); 33 U.S.C. § 1344(b) (authorizing states to issue 404 permits for some waters of the United States).

[49] The certification authorities under Clean Water Act section 401 are states, authorized Indian tribes, or U.S. EPA depending on the entity that has jurisdiction over waters of the United States in the location of the discharge. 33 U.S.C. § 1341(a)(1). Pursuant to section 518(e) of the Clean Water Act, U.S. EPA is authorized to treat Indian Tribes as a state for many purposes of the Act, including section 401. 33 U.S.C. § 1377(e). This Article's reference to "states" includes reference to authorized Indian tribes.

in a discharge to the waters of the United States within their borders.[50] If a state grants certification with conditions, those conditions become conditions of the federal permit or license.[51] If the state denies certification, the federal agency cannot issue the permit or license.[52] A state's decision on how to exercise those options depends on its determination of whether the FERC-licensed activity that may result in a discharge will be consistent with pertinent provisions of the Clean Water Act governing the water quality standards, effluent limitations, new source performance standards, and toxic pollutant restrictions, and "pertinent requirements of state law."[53]

Thus, and central to this Article, although the Federal Power Act generally preempts states from administering state water quality control authority over FERC-licensed projects, the Clean Water Act authorizes states to certify that a proposed FERC-licensed project will comply with the Clean Water Act requirements and with any other pertinent requirement of state law.[54] Any provisions necessary to assure compliance with those requirements must become conditions of any FERC license issued.[55] FERC cannot reject or modify a state's conditions of certifica-

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[50] 33 U.S.C. § 1341(a)(1). The major federal permits and licenses subject to a state's certification authority include Clean Water Act section 402 permits (where U.S. EPA administers the permitting program in non-delegated states), Clean Water Act section 404 permits and Rivers and Harbors Act Sections 9 and 10 permits issued by the U.S. Army Corps of Engineers, and hydropower and natural pipelines licenses issued by FERC.

[51] 33 U.S.C. § 1341(d).

[52] *Id.* § 1341(a)(1).

[53] The relevant text in section 401(a)(1) is:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates [. . .] that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. § 1341(a)(1). Those provisions to which section 401 refers are, respectively, Clean Water Act sections 301 (effluent limitations for point sources), 302 (water quality related effluent limitations), 303 (water quality standards and implementation plans), 306 (national standards of performance for new sources), and 307 (toxic and pretreatment effluent standards). The statutory provisions that have the most relevance to this Article are sections 301 and 303.

Section 401(d) further provides:

> [A]ny certification [. . .] shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant [. . .] will comply with any applicable effluent limitations and other limitations, under sections 1311 or 1312 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition [of the Federal license or permit].

33 U.S.C. § 1341(d).

[54] 33 U.S.C. § 1341(d).

[55] 33 U.S.C. § 1341(d).

tion.[56] Section 401 certification authority is, therefore, a significant tool that allows a state to protect its water quality from the impacts of FERC-licensed projects.

In enacting the Clean Water Act, Congress "sought to expand federal oversight of projects affecting water quality while also reinforcing the role of states as the prime bulwark in the effort to abate water pollution."[57] The water quality certification authority granted to states is "one of the primary mechanisms" through which states may exercise this authority to protect water quality.[58] In California, the State Water Board is the designated state agency authorized to exercise power delegated to states by the Clean Water Act.[59] Thus, the State Water Board is the only state entity with the authority to attach mandatory conditions to a FERC license. Other state agencies, like the California Department of Fish and Wildlife, can only provide FERC with recommendations.[60] Accordingly, the State Water Board has the vital role of protecting water quality resources from impacts of FERC-licensed projects for all Californians.

Importantly, under the Clean Water Act a state can waive its certification authority if it "fails or refuses to act on a request for certification within a reasonable amount of time (which shall not exceed one year)" after receipt of a request for a water quality certification.[61] The waiver provision was intended to protect applicants from having their ability to obtain a federal license frustrated by "sheer inactivity" of a state.[62] But Congress did not appear to consider the circumstances where such a passage of time was outside of the state's reasonable control, like a state's need for additional information from the applicant to perform its certification review, to accommodate settlement negotiations, or because of delays requested by or caused by an applicant. Additionally, the state water

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[56] Am. Rivers Inc. v. FERC, 129 F.3d 99 (2d Cir. 1997).

[57] Alcoa Power, Inc. v. FERC, 643 F.3d 963, 971; *see also* Keating v. FERC, 927 F.2d 616, 622 (1991) (Congress "plainly intended an integration of both state and federal authority").

[58] Keating v. FERC, 927 F.2d at 622.

[59] CAL. WAT. CODE, § 13160.

[60] California v. FERC, 495 U.S. 490, 495 (1990).

[61] 33 U.S.C. § 1341(a)(1); 18 C.F.R. § 4.34(b)(5)(iii).

[62] The language now found in section 401 was originally section 21(b) of the Federal Water Pollution Act, through an amendment made by the Water Quality Improvement Act of 1970. Pub. L. No. 91–224, 84 Stat. 91, § 103 (Apr. 3, 1970). As stated in the Conference Report:

> In order to insure that sheer inactivity by the State . . . will not frustrate the federal application, a requirement . . . is contained in the conference substitute that if within a reasonable period, which cannot exceed one year, after it has received a request to certify, the State . . . fails or refuses to act on the request for certification, then the certification requirement is waived. If a State refuses to give certification, the courts of that State are the forum in which the applicant must challenge that refusal if the applicant chooses to do so.

Conf. Rep. No 91-940, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 2712, 2741.

quality certification authority was enacted by Congress around the same time that the California Legislature adopted the California Environmental Quality Act ("CEQA") and other states were adopting new environmental review laws.[63] Accordingly, when Congress suggested a state's certification should not take longer than one year, it likely did not consider the time it may take to comply with state environmental laws, because most of those laws were either very recently passed or not yet on the books.[64] As discussed below, in California, the time needed to comply with CEQA requirements alone makes compliance with the one-year timeframe in the Clean Water Act extremely difficult, if not impossible.

III. In California, Complex Projects and Required State Environmental Review Processes Make It Difficult to Complete a Section 401 Certification Within One Year

In California, federally-licensed energy projects requiring water quality certifications are usually hydroelectric projects.[65] Hydroelectric projects have dammed many major rivers in the state and include significant features that impact downstream water quality and fish populations, including electrical generation pumps, cooling and conveyance components and hatcheries designed to mitigate for the impacts to fisheries from the projects.[66] Anadromous fish species, such as salmon and steelhead trout, may be blocked or hindered in their upstream and downstream migration due to the barriers presented by the projects.[67] Reservoirs and other water impoundments can also alter the natural streamflow affecting migration triggers.[68] All of these projects' elements

[63] Cal. Pub. Res. Code, Div. 13, §§ 21000-21189.70.10.

[64] Indeed, California was the first state in the nation to pass an environmental quality act, signed by Governor Ronald Reagan in 1970 (*See id.*).

[65] FERC, Complete list of active licenses (Jan 15, 2021), https://www.ferc.gov/sites/default/files/2021-01/ActiveLicense_01.15.2021.xlsx.

[66] § 37:3. Electric Consumers Protection Act and the environmental effects of hydropower projects, 4 Pub. Nat. Res. L. § 37:3 (2d ed.) (Explaining that "a hydroelectric project is typically composed of several components: a dam to impound a waterway, a channel to conduct the water to a turbine, a powerhouse to create energy (which includes a turbine to convert water energy into mechanical energy and a generator to convert mechanical energy into electrical energy), and a conduit to return the water to the waterway from which it was diverted. Each of these components can adversely affect fish and wildlife habitat. Dams, for example, can inundate fish spawning grounds, change water temperatures, increase pollutants, disrupt downstream gravel recruitment, and reduce oxygen availability.").

[67] Murray D. Feldman, *National Wildlife Federation v. FERC and Washington State Department of Fisheries v. FERC: Federal Energy Regulatory Commission Ignores Ninth Circuit Rebuke on Hydropower Permitting*, 15 Ecology L.Q. 319, 323 (1988).

[68] *Id*.

can have significant impacts on water quality and therefore must be carefully analyzed before the State Water Board issues a certification.[69]

In analyzing a section 401 certification application for a hydropower project, the State Water Board assesses the nature of the proposed discharges, identifies conditions needed to protect water quality and determines whether additional studies are needed to analyze the effects of the discharges.[70] Significantly, as mentioned above, the State Water Board must also comply with CEQA before any certification is issued.[71] Until recent changes in state law (explained more below), the State Water Board was required to complete its CEQA analysis *before* it could issue a certification.[72] Due to most projects' complexity and significance of environmental impacts, CEQA review is almost always a lengthy and expensive process.

Complicating matters even further, frequently the project applicants are public water districts that have principal responsibility for carrying out and approving the project as a whole, meaning they are the CEQA "lead agency"—the only agency that can complete the CEQA review.[73] As the lead agency, the public water agency applicants control when and how the environmental review gets done. The State Water Board has jurisdiction over only part of the project; it is the "responsible agency" under CEQA, and has the ability to help inform the environmental review process by providing comments on the areas within its jurisdiction, but it does not and cannot control the scope or timing of the environmental review.[74]

Prior to 2020, the practical impact of this CEQA dynamic was that it was extremely difficult, if not impossible, to complete water quality certifications for hydroelectric projects within the one-year timeframe. For years, consistent with well-established practice sanctioned by FERC, to avert a premature denial of an application, a project applicant would voluntarily withdraw its application before one year lapsed and then resubmit the application, effectively restarting the federal clock and avoiding waiver of the state's authority.[75] This allowed for room to ensure the

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[69] Andrew H. Sawyer, *Rock Creek Revisited: State Water Quality Certification of Hydroelectric Projects in California*, 25 PAC. L.J. 973, 975-80 (1994) (discussing the impacts of hydroelectric and other water development projects to water quality and fish, wildlife, and habitat beneficial uses and citing National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 161-64 (D.C. Cir. 1982)).

[70] CAL. CODE REGS. tit. 23, §§ 3855-61.

[71] CAL. PUB. RES. CODE § 21080.

[72] *Id*.

[73] CAL. PUB. RES. CODE § 21067; CAL. CODE REGS. tit. 14, §§ 15050, 15051.

[74] CAL. PUB. RES. CODE §§ 21002.1(d), 21067, 21069; CAL. CODE REGS. tit. 14, § 15051(a); Planning & Conservation League v. Castaic Lake Water Agency (2009) 180 Cal. App. 4th 210, 239.

[75] *See e.g*., Constitution Pipeline Co., LLC, 162 F.E.R.C. ¶ 61,014 at para. 23 (Jan. 11, 2018); Ridgewood Maine Hydro Partners, L.P., 77 F.E.R.C. ¶ 62,201, 64,425 (Dec. 27, 1996).

application was complete enough for the state to prepare the certification and to account for any complexities encountered during the certification and environmental review processes. In many cases, the withdrawal and resubmittal of applications also created space for negotiation of settlement agreements.[76]

IV. Sweeping Changes to Certification Authority—Implied Waiver

The first recent major change to states' section 401 water quality certification authority came with the D.C. Circuit's decision in *Hoopa Valley* in 2019.[77] This decision, as interpreted by FERC, effectively invalidated the longstanding practice of "withdrawal-and-resubmission," putting an abrupt and retroactive end to the customary method of avoiding premature denial of a certification and waiver of a state's 401 certification authority where a certification was not completed within one year.[78]

A. Background on the *Hoopa Valley* Case and Klamath River Dam Removal Efforts

The *Hoopa Valley* case involved a large hydroelectric project on the Klamath River, which flows from Southern Oregon through Northern California.[79] Construction on the original project started in the early 1900s and extended through 1967, ultimately comprising several hydroelectric dams, powerhouses and fish hatcheries.[80] According to CEQA findings issued by the State Water Board in 2020,[81] the dams cause sig-

[76] *See e.g*., Barrish & Sorenson Hydroelectric Co., Inc., 68 F.E.R.C. ¶ 62161, 64258 (Aug. 12, 1994); Ridgewood Maine Hydro Partners, L.P., 77 F.E.R.C. ¶ 62201, 64408 (Dec. 27, 1996); Citizens Utilities Co., 105 F.E.R.C. ¶ 62119, 64242 (Nov. 21, 2003).

[77] *Hoopa Valley*, 913 F.3d 1099, 1105 (D.C. Cir. 2019).

[78] *Id.* at 1105.

[79] *Id*. at 1101.

[80] *Id.*; *see also* PacifiCorps, *Klamath River* (Project Overview), https://www.pacificorp.com/energy/hydro/klamath-river.html (last visited Apr. 10, 2021).

[81] On April 7, 2020, the State Water Board issued a water quality certification for a project to remove four of the dams that are part of the Lower Klamath project. State Water Res. Control Bd., In the Matter of Water Quality Certification for Klamath River Renewal Corporation Lower Klamath Project License Surrender, FERC Project No. 14803 (April 7, 2020). Prior to the issuance of the water quality certification, the State Water Board prepared a CEQA Environmental Impact Report and issued CEQA Findings and Statements of Overriding Considerations. *Id*. at Attachment 4 (CEQA Findings and Statements of Overriding Consideration for the Lower Klamath Project License Surrender (Apr. 2020)).

nificant water quality impacts.[82] In fact, the impacts of the facilities to the Klamath's once-robust salmon fishery have been nothing short of devastating,[83] resulting in an existential threat to the way of life for many tribal communities, who for thousands of years have relied on the salmon for cultural practices, economic well-being, and basic subsistence.[84]

The Klamath Project's initial FERC license was issued in 1954 and its first relicensing effort began in 2004.[85] The relicensing meant that for the first time in the 100-year history of the Project, it would be required comply with modern federal environmental laws. Similarly, when PacifiCorp filed its requests to California and Oregon for section 401 water quality certifications in 2006, it was also to be the first time the states of California and Oregon would have a chance to condition the Klamath Project for the protection of downstream water resources.

Once the relicensing process began, PacifiCorp, the current owner of the Klamath hydroelectric project,[86] faced with the daunting expense of upgrading the dams to modern environmental standards, entered into negotiations that ultimately culminated in an agreement to remove the dams. The agreement, the Klamath Hydroelectric Settlement Agreement ("KHSA"),[87] was signed by more than 40 parties, including the United

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[82] *Id*. at Attachment 4, pp. 1-4. Additionally, portions of the Klamath River and the hydroelectric facilities that make up the Klamath Project are on the list of threatened and impaired waters for California, which states are required to submit to U.S. EPA every two years. 33 U.S.C. § 1313(d). *See* Lower Klamath Project: Federal Energy Regulatory Commission Project No. 14803, CAL. WATER BOARDS, https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/lower_klamath_ferc14803.html (last visited Apr. 10, 2021).

[83] John Heil, *The Natural Portfolio: Spring-run Chinook Salmon-essential to life history diversity*, U.S. FISH & WILDLIFE SERV., PAC. S.W. REGION (May 8, 2020) https://www.fws.gov/cno/newsroom/Featured/2020/Natural_Portfolio/. *See also* Species Directory: Coho Salmon, NOAA FISHERIES, https://www.fisheries.noaa.gov/species/coho-salmon.

[84] Alexander Matthews, *The Largest dam-Removal in US History*, BBC FUTURE (Nov. 10, 2020), https://www.bbc.com/future/article/20201110-the-largest-dam-removal-project-in-american-history; Jose Del Real, *Sick River: Can These California Tribes Beat Heroin and History*, N.Y. TIMES (Sept. 4, 2018), https://www.nytimes.com/2018/09/04/us/klamath-river-california-tribes-heroin.html.

[85] *Hoopa Valley*, 913 F.3d 1099, 1101 (D.C. Cir. 2019) (noting that the Klamath hydropower dams were originally licensed in 1954 to PacifiCorp's predecessor and the original license expired in 2006); Lower Klamath Project: Federal Energy Regulatory Commission Project No. 14803, *supra* note 82.

[86] PacifiCorp is owned by Warren Buffett's Berkshire Hathaway.

[87] Klamath Hydroelectric Settlement Agreement (KHSA) (Feb. 18, 2010, as amended Apr. 6, 2016 & Nov. 30, 2016), http://www.klamathrenewal.org/wp-content/uploads/2020/03/2016.12.31-Executed-and-Amended-Final-KHSA.pdf. A second agreement was signed at the same time, the Klamath Basin Restoration Agreement, which was designed to balance water use between the environment and farmers, provide funding for restoration and irrigation and fund economic development opportunities for the local communities. Due to inaction by Congress, the original agreements expired by their own terms in 2015. In April 2016, the KHSA was amended and remains the agreement governing the ongoing dam removal effort. *See* KLAMATH RIVER RENEWAL CORP., *Settlement Agreements*, https://www.klamathrenewal.org/settlement-agreements/ (last visited Apr. 11, 2021).

States, agencies of the states of California and Oregon, Tribes, irrigators, environmental organizations and dozens of others.[88]

The negotiations were formalized in 2008, making it a distinct possibility that neither a new FERC license nor the California and Oregon 401 certifications would be necessary.[89] Once the KHSA and related agreements were signed in 2010, the signatories specifically asked the State Water Board and the Oregon Department of Water Quality (Oregon's certification agency) to hold their section 401 certification proceedings in abeyance while the settlement agreements[90] were implemented.[91] Because the signing of the KHSA could have mooted the relicensing application and lead to dam removal if implemented, the project's relicensing effort was also put into abeyance by FERC, and the project continued to be operated on annual licenses.[92]

Additionally, pursuant to the terms of the KHSA, PacifiCorp withdrew and resubmitted its 401 certification requests each year to toll the one-year statutory period under section 401 within which states must act.[93] PacifiCorp's annual withdrawal and resubmittal was done to avoid expenditure of time and resources in pursuit of permits it may not need, but also to preserve the ability to obtain them if the KHSA was not implemented. Given the common practice at the time, those involved assumed this was the appropriate and effective way to preserve the states' certification authority should the dam removal negotiations fail.

The Hoopa Valley Tribe, which was not a signatory to the KHSA or the other related agreements, petitioned FERC in May 2012 for a declaratory order that California and Oregon had waived their section 401 authority.[94] In June 2014, FERC denied that petition finding that

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[88] Klamath Hydroelectric Settlement Agreement, *supra* note 87, at 60-98.

[89] In 2008, the negotiating parties entered into an "Agreement in Principle" to resolve litigation and other controversies in the Klamath Basin, with the express intent to "find a path to Facilities removal." *See* Agreement in Principle 1 (Nov. 2008), https://www.doi.gov/sites/doi.gov/files/archive/news/archive/08_News_Releases/klamathaip.pdf.

[90] The State Water Board was not a signatory to the Klamath Hydroelectric Settlement Agreement. *See* Klamath Hydroelectric Settlement Agreement, *supra* note 87, at 60-98.

[91] *Hoopa Valley*, 913 F.3d 1099, 1104 (D.C. Cir. 2019); Fourth Klamath Abeyance Resolution, State Water Resources Control Board Resolution No. 2012-0039 (July 17, 2012).

[92] If a new license is not granted prior to the expiration of the existing license, FERC may issue to the licensee an annual license to operate a project from year to year, "under the terms and conditions of the existing license until . . . a new license is issued." 16 U.S.C. § 808(a)(1); Klamath Water Users Ass'n v. FERC, 534 F.3d 735, 737 (D.C. Cir. 2008) (finding PacifiCorp entitled to annual licenses under the Federal Power Act while its license application is pending).

[93] *Hoopa Valley*, 913 F.3d at 1104.

[94] *Id.* at 1102. The motivation of the Hoopa Valley Tribe in pursuing the case was confusing to some because it seemed to be seeking a remedy that would undermine its own authority (the Tribe has "treatment as a state" with authority to set its own water quality conditions in a 401 certification, but lost it when the court concluded that the state 401 certification authority had been waived). Additionally, while it was not a signatory to the KHSA, it had expressed support for dam removal.

California and Oregon had not waived their water quality certification authority and that PacifiCorp had diligently prosecuted its relicensing application for the Klamath Hydroelectric Project.[95] The Hoopa Valley Tribe then sued FERC in the D.C. Circuit on December 14, 2014.[96]

The first iteration of the KHSA was subject to certain contingencies, including passage of federal legislation and a determination by the U.S. Secretary of the Interior that dam removal should proceed. By the end of 2015, however, neither federal legislation nor the required Secretarial Determination (that relied on the passage of legislation) were secured.[97] Due to the failure of those contingencies to realize, the KHSA and related agreements expired by their own terms.[98] Nevertheless, the signatories continued to request that the water quality certification process be held in abeyance so the KHSA could be renegotiated. The KHSA was subsequently amended in 2016 and is one of the agreements governing the dam removal process that is currently pending before FERC.[99] Initially, the D.C. Circuit also held the *Hoopa Valley* case in abeyance to allow the decommissioning to occur, but by May of 2018, when the Amended KHSA still had not been fully implemented, the D.C. Circuit took the matter out of abeyance and the case proceeded.[100]

B. THE *HOOPA VALLEY* DECISION

In *Hoopa Valley*, the D.C. Circuit ultimately resolved a single issue in the affirmative: "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."[101]

The Court found that the states and PacifiCorp's contractual agreement (the KHSA) to have PacifiCorp withdraw and resubmit its 401 certification applications to toll the one-year period consisted of an

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Because the states' 401 certification authority was a significant driver of PacifiCorp's agreement to decommission and remove the dams, seeking a waiver of that authority seemed to undermine the dam removal effort. In filings, however, the Tribe expressed the position that the outdated license and conditions were harming the Tribe's interests and that an updated license could bring the project into conformance with current resource protection laws. Brief of Hoopa Valley Tribe at 22, Hoopa Valley Tribe v. Fed. Energy Regul. Comm'n, 913 F.3d 1099 (D.C. Cir. 2019) (No. 14-1271).

[95] *Hoopa Valley*, 913 F.3d at 1102.

[96] *Id.*

[97] This was not without significant effort to get legislation passed. Bills were introduced in 2011, 2014 and 2015. S. 1851 & H.R. 3398, 112th Congress (1st Sess. 2011); S. 2379 & S. 2727, 113th Congress (2d Sess. 2014); S. 133, 114th Congress (1st Sess. 2015).

[98] *See generally* Klamath Hydroelectric Settlement Agreement, *supra* note 87.

[99] *Id*.

[100] *Hoopa Valley,* 913 F.3d at 1102.

[101] *Id.* at 1103, emphasis added.

improper "scheme" to delay water quality certification and avoid waiver.[102] The court reasoned that this withdrawal and resubmittal "scheme," if allowed, could indefinitely delay the federal licensing action, and concluded that it was ineffective to extend the period within which a state must act.[103] "Such an arrangement," the court reasoned, "does not exploit a statutory loophole; it serves to circumvent a congressionally granted authority over the licensing, conditioning and developing of a hydropower project."[104] The Court focused on the language of the KHSA and concluded that "California and Oregon's deliberate and contractual idleness defie[d]" the statutory time limit and that the agreement usurped FERC's control over whether and when a federal license could be issued.[105]

The Court's focus on the contractual arrangement between the states and applicant suggests that its holding should be limited to circumstances where a state enters into a written agreement with the licensee to delay processing the certification request. If that is indeed what the Court intended, then it should not have found waiver—at least with respect to California. While the California Governor and a two other California agencies were signatories to the KHSA, the State Water Board was not.[106] The State Water Board accommodated the requests of the applicant and other negotiating parties that it not take any actions in pursuit of a 401 certification because the parties believed such actions would impair implementation of the KHSA.[107] While it could be argued that the State Water Board's willingness to hold the certification process in abeyance reflected too much deference to the negotiating parties and not enough diligence, it is factually incorrect to conclude that the State Water Board entered into a contractual agreement with the applicant to do anything, let alone circumvent the law.

Unfortunately for the Water Board, it was difficult to correct the Court's apparent misconception that it was a party to the KHSA. Since the states declined to waive their sovereign immunity,[108] neither was a

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[102] *Id.* at 1101-02, 1104.

[103] *Id*. at 1104.

[104] *Id*.

[105] *Id*. at 1101-02.

[106] In addition to the Governor, the California Natural Resources Agency and Department of Fish and Wildlife were signatories to the KHSA on behalf of California. Klamath Hydroelectric Settlement Agreement, *supra* note 87, at 60-98.

[107] Fourth Klamath Abeyance Resolution, *supra* note 91.

[108] Under the doctrine of state sovereign immunity, federal courts are precluded from exercising jurisdiction over a state unless the state consents to jurisdiction. U.S. Const. amend. XI. A state can waive its sovereign immunity and allow a federal court to hear and decide a case against it (Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997)), but it is common for states not to consent to federal court jurisdiction in order to retain their sovereign immunity.

party to the matter, even though it was their certification authority at issue.[109] While the State Water Board did submit an amicus brief arguing against waiver and informed the court that it was not a signatory to the KHSA,[110] it had limited opportunity beyond that to ensure that the Court knew it was not a signatory to the KHSA. For example, when it became evident at oral argument that the contractual arrangement related to the 401 certifications in the KHSA would be central to the Court's decision, and it did not seem clear to the Court which California agencies were (and were not) parties to the KHSA, the State Water Board could not speak up at oral argument to clear the record because it was not a party to the case.[111] And of the parties that were able to speak during oral argument—FERC and the Hoopa Valley Tribe—neither had an interest in pointing out the nuance that while certain other California entities were parties to the KHSA, the State Water Board was not. Indeed, even though it was purportedly defending its own finding that the states had not waived their authority, FERC ended up making it very clear to the Court that it "sympathize[d]" with the Hoopa Valley Tribe's position and noted for the Court that the state's lengthy delay in issuing Section 401 certifications was "regrettable."[112]

It is possible the D.C. Circuit simply did not find it significant that the specific agency with California's section 401 certification authority—the State Water Board—was not a party to the KHSA since California's Governor and other state agencies were signatories. After all, the point was made in the State Water Board's amicus brief.[113] Additionally, the factual error in the decision was addressed in a petition for a writ of certiorari (albeit in a footnote), so the U.S. Supreme Court also apparently did not find the error significant enough to warrant review.[114]

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[109] *Hoopa Valley*, 913 F.3d at 1102-1103.

[110] Brief of Amicus Curiae California State Water Resources Control Board in Support of Respondent and Affirmance at 30, 32, Hoopa Valley Tribe v. Fed. Energy Regul. Comm'n, 913 F.3d 1099 (D.C. Cir. 2019) (No. 14-1271) (filed December 1, 2015).

[111] A Deputy Attorney General with the California Attorney General's Office representing the State Water Board was at the oral argument but did not have an opportunity to speak since the State Water Board was not a party. *See* Oral Argument Recordings, *Hoopa Valley Tribe v. Fed. Energy Regul. Comm'n*, D.C. Cir. (Oct. 1, 2018), https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/147ABBE5D626EB4A852583190059D9B5/$file/14-1271.mp3.

[112] *Hoopa Valley*, 913 F.3d at 1104.

[113] Brief of Amicus Curiae California State Water Resources Control Board in Support of Respondent and Affirmance, *supra* note 110, at 30, 32.

[114] An application petition for writ of certiorari was filed in the United States Supreme Court by two interested environmental organizations, California Trout and Trout Unlimited, on August 26, 2019. Petition for a Writ of Certiorari, Cal. Trout v. Hoopa Valley Tribe, 140 S. Ct. 650 (2019), No. 19-257, 2019 WL 4072818 (U.S.). Twenty-one states, including California and Oregon, filed an amicus to support the petition. *Id.*; Brief for the States of Oregon, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, New

It nonetheless remains concerning that so much of the Court's decision in this case rested on the apparent incorrect assumption that there was a formal contractual agreement between the State Water Board and PacifiCorp to delay the certification process for the Klamath Project.[115]

Nevertheless, the Court's focus on the contractual arrangement between the applicant and the states to withdraw and resubmit the same application year after year is important because the holding of the case appears to be limited to the practice of withdrawal and resubmittal under those particular circumstances. The Court could have—but did not—expressly invalidate the practice of withdrawal and resubmittal altogether. Accordingly, the case could be viewed as leaving open the question of whether, under different facts, a withdrawn request for a 401 certification that is resubmitted later, would be an acceptable procedure.[116]

C. FERC's Broad and Retroactive Application of the *Hoopa Valley* Decision

For now, the *Hoopa Valley* ruling stands as D.C. Circuit precedent.[117] Since *Hoopa Valley* was decided, FERC has applied the decision broadly and retroactively by finding that California waived its section 401 certification authority in numerous cases. FERC has imposed a waiver of the State Water Board's 401 certification authority for fourteen hydroelectric projects that are—and have been for decades—impacting California's water quality, many without modern environmental protections.[118] Like the Klamath Project, many of these hydropower

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Jersey, New Mexico, North Carolina, Rhode Island, South Dakota, Utah, Washington and Wisconsin as Amici Curiae in support of Petitioners 15 n. 4, Cal. Trout v. Hoopa Valley Tribe, 140 S. Ct. 650 (2019), No. 19-257, (filed on September 27, 2019). The petition was denied on December 9, 2019. Cal. Trout v. Hoopa Valley Tribe, 140 S.Ct. 650 (2019).

[115] Despite similarities to the federal structure, California, like many other states, has a divided executive power (unlike the federal government that is a unitary executive power). Marine Forests Soc'y v. Cal. Coastal Comm'n (2005) 36 Cal. 4th 1, 31. The executive function of the state is dispersed among several elected officials, each of whom are independently accountable to the voters. *Id*. California state agencies are therefore independent legal entities and the action of one state agency cannot bind another. People v. Hy-Lond Enters., Inc. (1979) 93 Cal. App. 3d 734, 751-52 (holding that a judgment obtained in litigation against one state agency did not bind other state agencies that were not parties to the litigation).

[116] *See Hoopa Valley*, 913 F.3d at 1104 (construing section 401(a)(1)'s reference "to act on a request for certification" to apply to "a specific request" and noting the record did not indicate whether PacifiCorp's resubmitted requests were "wholly new" and reaching its holding on the facts presented).

[117] The U.S. Supreme Court declined to review the matter, leaving intact the D.C. Circuit's opinion. Cal. Trout v. Hoopa Valley Tribe, 140 S. Ct. 650 (2019).

[118] Placer Cty. Water Agency (*In re* Middle Fork American River), 167 F.E.R.C. ¶ 61,056 (2019); Yuba Cty. Water Agency (*In re* Yuba River Development Project), 171 F.E.R.C. ¶ 61,139

dams are being relicensed by FERC for the first time since the enactment of modern environmental laws, and once a new license is issued, the project may not come up for relicensing again for 40-50 years.[119]

The State Water Board petitioned FERC to rehear each of its administrative waiver decisions and has challenged several of them in the U.S. Court of Appeals for the Ninth Circuit, not only because of the importance of retaining the ability to protect California's water resources through its section 401 certification authority, but also because it does not believe *Hoopa Valley* should apply.[120]

None of FERC's post-*Hoopa Valley* decisions have facts that align with the unique facts in the *Hoopa Valley* case. In fact, in many of the post-*Hoopa Valley* matters, FERC has extended the case to find that a formal agreement between the licensee and the State Water Board was not necessary to support a finding of waiver.[121] Instead, where FERC has determined the record shows both sides worked to ensure the withdrawal and resubmittal happened each year, or even where it concluded that the State Water Board presumed the applicant would withdraw and resubmit to prevent the State Water Board from having to deny certification, it has concluded the State Water Board was complicit in delaying issuance of a certification, thereby waiving its certification authority.[122]

In some of the cases, however, the record FERC relied on for the waiver conclusion included informal correspondence from the State

(2020); Merced Irrigation District (*In re* Merced Hydroelectric Project, Merced Falls Hydroelectric Project), 171 F.E.R.C. ¶ 61,240 (2020); Pac. Gas and Elec. Co. (*In re* Upper North Fork Feather River), 172 F.E.R.C. ¶ 61,064 (2020); S. Cal. Edison Co. (*In re* Big Creek Hydroelectric Projects) (includes six hydropower projects), 170 F.E.R.C. ¶ 61,135 (2020); Pac. Gas and Elec. Co. (*In re* Kilarc-Cow Creek Hydroelectric Project), 170 F.E.R.C. ¶ 61,232 (2020); S. Feather Water and Power Agency, 171 F.E.R.C. ¶ 61,242 (2020); Nevada Irrigation District (*In re* Yuba-Bear Hydroelectric Project), 171 F.E.R.C. ¶ 61,029 (2020). And there is another waiver request currently pending at FERC, Pacific Gas & Electric's Mc-Cloud Pitt Hydroelectric Project, FERC Project No. 2106. If past is prologue, the list will continue to grow.

[119] *See e.g*., Placer Cty. Water Agency (*In re* Middle Fork American River), 167 F.E.R.C. ¶ 61,056 (2019) (license last issued in 1963); Merced Irrigation District (*In re* Merced Hydroelectric Project, Merced Falls Hydroelectric Project), 171 F.E.R.C. ¶ 61,240 (2020) (license last issued in 1965); Yuba Cty. Water Agency (*In re* Yuba River Development Project), 171 F.E.R.C. ¶ 61,139 (2020) (license last issued in 1963); Nevada Irrigation District (*In re* Yuba-Bear Hydroelectric Project), 171 F.E.R.C. ¶ 61,029 (2020) (license last issued in 1963).

[120] State Water Resources Control Board v. FERC (Nevada Irrigation District), No. 20-72432 (9th Cir. Aug. 14, 2020); State Water Resources Control Board v. FERC (Yuba County Water Agency), No. 20-72782 (9th Cir. Sept. 17, 2020); State Water Resources Control Board v. FERC (Merced Irrigation District), Case No. 20-72958 (9th Cir. Oct. 2, 2020).

[121] *See e.g*., Placer Cty. Water Agency (*In re* Middle Fork American River), 167 F.E.R.C. ¶ 61,056 (2019) (waiver order issued April 18, 2019); Yuba Cty. Water Agency (*In re* Yuba River Development Project), 171 F.E.R.C. ¶ 61,139 (2020) (Waiver order issued May 21, 2020); Merced Irrigation District (*In re* Merced Hydroelectric Project, Merced Falls Hydroelectric Project), 171 F.E.R.C. ¶ 61,240 (2020) (waiver order issued June 18, 2020).

[122] *Id.*

Water Board to the applicant reminding the applicant of the upcoming one-year deadline and explaining that it would need additional information, sometimes including a completed CEQA document, before it could issue a certification.[123] In these cases, there was no express agreement between the licensee and the state to delay the process, but rather, there was evidence of the state exercising diligence to keep the process moving. Nonetheless, finding the State Water Board's conduct evidenced the existence of an implied agreement or at least complicity in the delay, and citing the *Hoopa Valley* case as the basis, FERC has found the State Water Board waived its certification authority in each case where the applicant withdrew and resubmitted its application and later sought a waiver order from FERC.[124]

Moreover, these waiver decisions have been retroactively applied by FERC to certification requests that were withdrawn and resubmitted before *Hoopa Valley* was decided.[125] This is true even though prior to *Hoopa Valley*, FERC had long held that an applicant's withdrawal and resubmittal started a new one-year certification period.[126] As recently as 2018, FERC stated in an order: "[w]e reiterate that once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under section 401(a)(1)."[127] Prior to the *Hoopa Valley* case, the State Water Board therefore relied on the common—and sanctioned—withdrawal and resubmit practice as a mechanism for applicants to avoid premature denial of a certification or waiver of the state's authority. Based on prior FERC actions, its retroactive application of the *Hoopa Valley* decision is troubling on equitable principles alone.

Finally, in several of the recent cases where FERC found waiver due to the State Water Board's purported complicity or inaction, the applicant was a public water agency—and therefore acting as the lead agency for the purposes of CEQA—but never completed (and in some

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[123] *Id*.

[124] *See* FERC cases, *supra* note 118.

[125] *See e.g*., Placer Cty. Water Agency (*In re* Middle Fork American River), 167 F.E.R.C. ¶ 61,056 (2019) (originally requested a 401 certification in 2011); Merced Irrigation District (*In re* Merced Hydroelectric Project, Merced Falls Hydroelectric Project), 171 F.E.R.C. ¶ 61,240 (2020) (originally requested a 401 certification in 2014); Yuba Cty. Water Agency (*In re* Yuba River Development Project), 171 F.E.R.C. ¶ 61,139 (2020) (originally requested a 401 certification in 2017).

[126] *See e.g.,* Barrish & Sorenson Hydroelectric Co., Inc., 68 F.E.R.C. ¶ 62,161, 64,258 (Aug. 12, 1994); Ridgewood Maine Hydro Partners, L.P., 77 F.E.R.C. ¶ 62,201, 64,425 (Dec. 27, 1996); Cent. Vt. Pub. Serv. Co., 113 F.E.R.C. ¶ 61,167, 61,653 at para. 19 (Nov. 17, 2005).

[127] Constitution Pipeline Co., *LLC*, 162 F.E.R.C. ¶ 61,014 at para. 23 (Jan. 11, 2018), *rehearing denied*, 164 F.E.R.C. ¶ 61029 (July 19, 2018), *order on voluntary remand*, 168 F.E.R.C. ¶ 61129 (Aug. 28, 2019), *rehearing denied*, 169 F.E.R.C. ¶ 61199, 62461 (Dec. 12, 2019).

cases never even started) the requisite CEQA review.[128] Prior to last year, the State Water Board could not have legally issued a 401 certification without a completed CEQA document, and it often had no control over that process. Thus, to the extent there was delay and inaction that led to the withdrawal and resubmittal of an application, it was typically on the part of the applicant, not the state—making the finding of waiver even more problematic as a potential means for applicants to avoid the state certification process.[129] At the very least, under the circumstances where the applicant was the agent of delay, it seems that a more appropriate consequence for the lapse of the statutory timeline should not be a waiver of the states' certification authority, but rather a denial of certification.

The State Water Board's challenges to FERC's post-*Hoopa Valley* decisions of waiver will likely take years to make their way through the courts. If the State Water Board is not successful in limiting the reach of *Hoopa Valley* in these matters, however, California will have lost its principal authority to protect water resources from adverse effects of federally-licensed hydropower projects in numerous important watersheds for a generation.

V. The California State Legislature's Response to *Hoopa Valley*—A CEQA Fix

Hoopa Valley is a disappointing and consequential loss for the State Water Board (and many other state certification authorities nationwide). But FERC's apparent willingness to apply the decision broadly and retroactively made it clear that the State Water Board's ability to condition FERC-licensed projects in California is under serious threat. Since adjustment to the Clean Water Act by the U.S. Congress is uncertain, the California Legislature took action to ensure preservation of this critically important State Water Board authority.

On June 29, 2020, Governor Newsom signed amendments to the California Water Code to provide the State Water Board with the authority to issue 401 certifications before CEQA review is completed.[130]

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[128] *See e.g*., Merced Irrigation District, 171 F.E.R.C. ¶ 61,240 (2020); Nevada Irrigation District, 171 F.E.R.C. ¶ 61,029 (2020).

[129] Even when the State Water Board is CEQA lead agency, the applicant has substantial control over the timing of CEQA compliance because the State Water Board needs a complete project description and to make arrangements with the applicant for payment for preparation of environmental documentation, which can sometimes turn into lengthy negotiations in and of themselves.

[130] Cal. Water Code § 13160, as amended by Stats. 2020, ch. 18, § 9 (AB 92), eff. June 29, 2020.

Importantly, the new law did not waive CEQA requirements for issuance of 401 certifications. Instead, it was carefully crafted to preserve the CEQA process. It provides the State Water Board with authority to issue certifications before CEQA review is completed, if waiting for such completion "poses a substantial risk of waiver."[131] Once the CEQA process is completed, the new law provides a mechanism for the Board to reopen any final certification to incorporate CEQA findings or mitigation measures, "to the extent authorized by federal law."[132]

As a result, the new law adjusts the sequencing of the State Water Board's review, recognizing CEQA is not only time-consuming for these complex projects but also frequently within the sole control of the project applicant. Its aim is to ensure the State Water Board can meet its 401-certification deadline and protect water quality. The Legislature therefore found a creative way to ensure that CEQA's environmental protections are preserved without impeding the protections that can be provided through the Clean Water Act. These changes in the law ensure that the State Water Board is in a better position to protect water quality into the future despite new constraints resulting from the *Hoopa Valley* case.

Remarkably, however, the recent attacks on state certification authority did not end here. In 2019, the Trump Administration's U.S. EPA squarely targeted that authority, further stripping the states of their ability to protect water resources within their respective borders.

VI. Trump-Era Environmental Roll-Backs for Section 401 Authority Unravel Judicial Decisions That Have Interpreted the Authority Broadly

To understand how sweeping the Trump U.S. EPA 401 certification regulations are in restricting state authority, it is important to understand the judicial decisions that have long ratified an expanded view of the scope of state section 401 authority. The following addresses two U.S. Supreme Court cases that evaluated a state's authority to condition a certification, and important precedents from the federal Circuit Courts of Appeals concerning federal agencies' lack of authority to review or modify a state's conditions of certification.

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[131] Cal. Water Code § 13160(b)(2).

[132] Cal. Water Code § 13160(b)(2). Notably, the ability for the State Water Board to reopen the certification to include additional conditions and address CEQA findings or mitigation measures may be subject to a legal challenge, given U.S. EPA's interpretation of its new rule governing certifications. *See* discussion *infra* Section IV.D.2-3 and note 192. However, state conditions preserving authority to reopen and amend 401 certifications are common and have been upheld as consistent with the Federal Power Act. Am. Rivers v. FERC, 129 F.3d 99, 102, 111-12 (2d Cir. 1997).

A. *PUD No. 1:* State Certification Authority Extends to the "Activity as a Whole"

In *PUD No. 1 v. Washington Dept. of Ecology* ("*PUD No. 1"*), the U.S. Supreme Court examined the State of Washington's authority to condition a certification under section 401 with a minimum instream flow requirement to maintain the fisheries in the reach of a river from which the project would divert water.[133]

Although the project at issue would have resulted in two possible discharges, one from the release of dredge and fill material during project construction and another from the end of the tailrace after having been used to generate power, the instream flow requirement was not related to the two possible discharges.[134] The project proponent argued that because that requirement was unrelated to the project's two possible discharges, the requirement was impermissibly outside of the State's certification authority under section 401.[135]

The Court disagreed, holding that a discharge is the necessary condition to trigger certification authority under section 401(a)(1), but section 401(d) expands state certification authority "as authorizing additional conditions and limitations on *the activity as a whole* once the threshold condition, the existence of a discharge, is satisfied."[136]

To arrive at that conclusion, the Court evaluated the use of two different terms in section 401(a)(1) and section 401(d). The Court reasoned that while section 401(a)(1) ties state certification to a "discharge," section 401(d) ties certification to "the applicant."[137] Section 401(d) authorizes states to place "any effluent limitations and other limitations [. . .] necessary to assure that any applicant" will comply with the listed provisions of Clean Water Act and "with any other appropriate requirement of State law."[138]

Having concluded that the certification may include requirements placed on the project as a whole unrelated to the discharge, and recognizing that a state's conditioning authority "is not unbounded,"[139] the Court then turned to the question of whether the instream flow requirement was within the proper scope of section 401(d).[140] The State asserted the instream flow requirement was necessary to meet the applicable water

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[133] *PUD No. 1*, 511 U.S. 700 (1994).
[134] *Id*. at 710-11.
[135] *Id*. at 711.
[136] *Id.* at 711-712 (emphasis added).
[137] *Id.* at 711.
[138] *Id.*
[139] *Id*. at 712.
[140] *Id*. at 712-13.

quality standard adopted pursuant to section 303 of the Clean Water Act.[141] Although section 303 is not one of the provisions identified in section 401(d), the Court concluded section 401(d) authorized a state to place limits to ensure compliance with section 303.[142] The Court reasoned that section 401(d) requires compliance with section 301, which in turn incorporates section 303 by reference. As a result, the Court held that a state's water quality standards[143] adopted pursuant to section 303 qualify as a permissible "other limitation" to assure compliance with section 301 of the Act.[144] The Court also found that "limitations to assure compliance with state water quality standards are also permitted by section 401(d)'s reference to 'any other appropriate requirement of State law.' "[145]

Under *PUD No. 1*, certification authority is broad and includes limitations related to water quality impacts from the project as a whole.[146] That is, certification authority is triggered by a project's possible discharge, but once that authority is triggered, a state's regulatory reach extends beyond that threshold condition to project activities. Moreover, regulatory limitations may be used to assure compliance with Clean Water Act provisions beyond those enumerated in section 401(d), including section 303.[147] While the Court declined to examine what additional requirements could comprise the outermost scope of certification authority based on "any other appropriate requirements of state law," it held that water quality limitations necessary for compliance with water quality standards established pursuant to section 303 are "at a minimum . . . 'appropriate' requirements of state law."[148]

As a result, the State Water Board may impose conditions on certifications that are necessary to enforce beneficial (designated) uses, water quality objectives (criteria), and TMDLs established in water quality

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[141] *Id*. at 712.

[142] *Id.* at 712-13.

[143] The project proponent also argued that the minimum flow requirement was impermissible because its purpose was to protect a designated use (fish migration, rearing, and spawning), contending that section 303(c)(2)(A) required states to protect designated uses only through the implementation of specific numeric water quality criteria. The Court evaluated the plain language of section 303(c)(2)(A) and disagreed with the project proponent's interpretation. The Court pointed out that water quality standards consist of both components—designated uses and water quality criteria. *PUD No. 1*, 511 U.S. at 714-715. "[U]nder the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards." *Id.* at 715.

[144] *Id.* at 713.

[145] *Id.*

[146] *Id*.

[147] *Id*. at 712-13.

[148] *Id.* at 713.

control plans.[149] Because the reach of the state's certification authority extends to setting conditions or limitations on project activities and are not limited to the discharge, a state's regulatory authority extends to water chemistry and fisheries management control actions related to water quality impacts affecting beneficial uses caused by dam and project operations.[150] Such impacts may include, but are not limited to, reductions in instream flow, changes in temperature, turbidity, dissolved oxygen, algal productivity, siltation, loss of assimilative capacity, and saltwater intrusion—in addition to direct impacts from the discharge from project construction and the water from the tailrace.[151]

Thus, with the scope of certification authority adopted in *PUD No. 1*, the Court restored the states' section 401 permitting authority previously held to be preempted by the Federal Power Act in *First Iowa* and *Rock Creek*,[152] reaffirming the cooperative federalism scheme of the Clean Water Act.

B. *S.D. Warren:* To Be Subject to State 401 Certification Authority, the "Discharge" Need Not Include a Pollutant

In 2006, the U.S. Supreme Court in *S.D. Warren Co. v. Maine Board of Environmental Protection* ("*S.D. Warren"*) was called upon to address an issue readily accepted by the Court in *PUD No. 1*—whether certification authority under section 401 is triggered by a dam's potential to have a "discharge" in the broad sense (i.e., a discharge of water from the dam), without necessarily discharging any "pollutants."[153]

Because the Clean Water Act does not define the term "discharge," the Court evaluated the Clean Water Act's use of the term "discharge" in section 401 and the triggering statutory phrase in section 402—a "discharge of a pollutants."[154] The Act defines "discharge of pollutant" as meaning "any addition of any pollutant to navigable waters from any point source."[155] The Court found that the term alone in the context of certification authority should be afforded its ordinary meaning, "flowing

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[149] *See* authorizing statutes, *supra* notes 30 through 34 and accompanying text.

[150] *See e.g., PUD No. 1*, 511 U.S. at 709-710, 712-13.

[151] *See* Sawyer, *supra* note 69, at 975-80 (discussing the impacts of hydroelectric and other water development projects to water quality and fish, wildlife, and habitat beneficial uses).

[152] *See PUD No. 1*, 511 U.S. at 734 (Thomas, J., dissenting) ("Today, the Court gives the States precisely the veto power over hydroelectric projects [through section 401] that we determined in [*Rock Creek*] and *First Iowa* they did not possess [under the Federal Power Act].").

[153] S.D. Warren Co. v. Maine Bd of Env't Prot. (*S.D. Warren*), 547 U.S. 370, 376-87 (2006) (discussing *PUD No. 1*, 511 U.S. at 711, 725).

[154] *Id.* at 375, 380-85; *see also* 33 U.S.C. §§ 1341(a)(1), 1362(12)

[155] *Id.* at 381 (citing 33 U.S.C. § 1362(12)).

or issuing out,"[156] and concluded that section 401 has a broader reach than "discharge of a pollutant."[157]

While the Court noted that the Clean Water Act defines "discharge of pollutants," in part, as coming from a point source, the Court did not specifically address whether the triggering discharge for certification authority must be from a point source.[158] Yet the Ninth Circuit has concluded that under section 401 the "discharge" must be from a point source.[159]

As for the Court's holding, the Court brought to focus the Clean Water Act's overarching goal of protecting the quality of the Nation's waters not just by controlling "the addition of pollutants" but also addressing "pollution" generally.[160] Reinforcing the Clean Water Act's principal of cooperative federalism, the Court affirmed, "State certifications under section 401 are essential in the scheme to preserve state authority to address the broad range of pollution."[161]

C. *American Rivers v. FERC*: Federal Agencies Lack Authority to Second Guess State 401 Certification Conditions and Review Is in State Court

In *American Rivers v. FERC*, the Second Circuit Court of Appeals addressed whether the seemingly mandatory language of section 401 of the Clean Water Act effectuated an impermissible incursion into the Federal Power Act's broad preemptive reach.[162] As noted above, section 401 provides that any conditions imposed by a certification issued under that section "shall become a condition" on any federal license or permit subject to the section.[163] But FERC argued that the Federal Power Act empowered it to refuse to include certain conditions imposed by the state's certification if it believed the conditions to be beyond the scope of

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[156] *Id.* at 376 (citing Webster's New International Dictionary).

[157] *Id.* at 375-76, 380.

[158] *Id.* at 375-76 (citing 33 U.S.C. § 1362(12) (defining discharge of pollutants)).

[159] Or. Nat. Desert Ass'n v. Dombeck, 172 F.3d 1092, 1099 (9th Cir. 1998). Additionally, in the context of National Pollutant Discharge Elimination System ("NPDES") Permits, the D.C. Circuit held that discharges from dams are "point sources" but are not subject to NPDES permitting requirements because dams do not discharge pollutants added by the dam or reservoir, and because the type and severity of pollution caused by dams is so varied, dam regulation under the NPDES permitting system would be impractical. Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 165, 171, 182 (D.C. Cir. 1982).

[160] *S.D. Warren*, 547 U.S. at 385 (citing 33 U.S.C. § 1251 and citing and quoting 33 U.S.C. § 1362(12) (defining "pollution" as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of the water.")).

[161] *Id.* at 386.

[162] Am. Rivers v. FERC, 129 F.3d 99, 102, 111 (2d Cir. 1997).

[163] 33 U.S.C. § 1341(a).

a state's section 401 authority.[164] In rejecting that argument, the Second Circuit held that FERC is bound by the mandatory language in section 401 to include state-imposed conditions.[165] The Court reasoned that while the Federal Power Act has a broad preemptive effect, the Clean Water Act "has diminished this preemptive reach by expressly requiring [FERC] to incorporate into its licenses state-imposed water-quality conditions."[166]

With respect to the ability to challenge state-imposed conditions, the *American Rivers v. FERC* Court and other courts have concluded that the proper venue is in state court.[167] As a result, the federal agency has two choices when a state grants a certification with conditions it finds to be beyond the scope of section 401: it can either issue the license or permit with the conditions, or it can refuse to issue the hydropower license altogether.[168] Notably, the Second Circuit found that while the federal agency may not second-guess the appropriateness of a state's conditions, it is empowered to determine whether the state issued the certification within the statutorily prescribed period or whether the proper state has issued the certification.[169] The implications here are that the federal agency may not trespass into the substantive aspects of a state's certification, but it does have at least some authority to evaluate whether certain procedural aspects of section 401 are properly satisfied.

D. How U.S. EPA's "Clean Water Act Section 401 Certification Rule" Reshapes State Certification Authority

During the decades following the decision in *PUD No. 1*, numerous federal appellate courts addressed additional important features of section 401, in addition to the waiver provision evaluated in *Hoopa Valley*.[170] On April 10, 2019, just two months after the *Hoopa Valley* case was decided, President Trump issued Executive Order No. 13868, "Promoting Energy Infrastructure and Economic Growth."[171] In it, the for-

[164] Am. Rivers v. FERC, 129 F.3d at 102, 111.

[165] *Id.* at 111.

[166] *Id.* at 107, 111 (citing 33 U.S.C. § 1341(a)(1)).

[167] *Id.* at 107, 110-11; *see, e.g.*, Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA, 684 F.2d 1041, 1056 (1st Cir. 1982).

[168] Am. Rivers v. FERC, 129 F.3d at 111 (2d Cir. 1997).

[169] *Id.* at 110-11.

[170] *See, e.g.,* N.Y. State Dept. of Env't Conservation v. Fed. Energy Regul. Comm'n, 884 F.3d 450, 455-56 (2d Cir. 2018) (holding the statutory time period does not begin when the certifying authority determines the request for certification is "complete" but upon "receipt" of the request).

[171] Exec. Order No. 13,868, 84 Fed. Reg. 15,495 (Apr. 10, 2019).

mer President highlighted America's energy abundance and declared that needless red tape to permitting energy projects and regulatory uncertainty are a hindrance to realizing its full economic potential.[172] It also directed the U.S. EPA Administrator to review section 401 of the Clean Water Act and related regulations to "take into account federalism considerations underlying section 401" and focus on: timely federal-state cooperation and collaboration, the appropriate scope of state water quality reviews, the types of appropriate conditions that may be included in a certification, the times for reasonable certification reviews, and the sufficiency of information with which a state should substantively act on a certification request.[173]

On June 1, 2020, U.S. EPA, for the first time in 50 years, enacted its statutory interpretation of section 401 of the Clean Water Act, entitled "Clean Water Act Section 401 Certification Rule" ("Certification Rule").[174] U.S. EPA addressed all the aspects of section 401 as directed.[175] As a result, the Certification Rule contains significant substantive and procedural regulatory changes which diminish state certification authority—including many that seem incongruent with the plain language of the Clean Water Act and precedent interpreting that authority.

It comes as no surprise, then, that at the time of writing this Article, the Certification Rule is subject to legal challenges in numerous federal courts, including a multi-state challenge brought in the U.S. District Court for the Northern District of California.[176]

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[172] *Id.*

[173] *Id.* at 15,495-96.

[174] Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) (to be codified at 40 C.F.R. pt. 121) [hereinafter Certification Rule]. The Certification Rule is effective on September 11, 2020 and applies to certification requests filed on or after that date and not to requests filed before that date. *Id.*at 42,287; *see* Clean Water Act Section 401 Certification Final Rule (Fact Sheet), https://www.epa.gov/sites/production/files/2020-06/documents/frequently_asked_questions_fact_sheet_for_the_clean_water_act_section_401_certification_rule.pdf (Question 6).

[175] U.S. EPA characterizes the rule as "intended to increase the predictability and timeliness of CWA section 401 certification actions by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures." Certification Rule, 85 Fed. Reg. 42,210. While 401 certifications often cause extensive delay, one can debate whether the delay is because of the complexity of the technical and biological issues, the substantive and procedural requirements of modern environmental statutes, applicant foot-dragging, failure of FERC to update the license or require appropriate reporting and monitoring before the relicensing process is initiated, or lack of state resources or redirecting those resources to more immediate issues like drought response. It is likely that delay occurs for all those reasons.

[176] California v. Andrew Wheeler, No.: 3:20-cv-4869 (N.D. Cal. July 21, 2020). Plaintiffs represent the States of California, Washington, New York, Colorado, Connecticut, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Caroline, Oregon, Rhode Island, Vermont, Wisconsin, the Commonwealths of Massachusetts and Virginia, the District of Columbia, and the California State Water Resources Control Board. *See also*, Am. Rivers v. Wheeler, No. 3:20-cv-04636 (N.D. Cal. July 13, 2020); Suquamish Tribe v. Wheeler, No. 3:20-cv-

Additionally, immediately upon taking office, President Biden issued an Executive Order directing numerous executive agencies to review federal regulations enacted during the Trump Administration that may be inconsistent with the purpose of the order (primarily aimed at protecting public health and the environment from the impacts of climate change).[177] For any such regulations identified, the federal agencies are directed to consider suspending, revising, or rescinding them.[178] The Certification Rule is among several rules under U.S. EPA's jurisdiction subject to such review.[179]

Of the numerous changes contained in the Certification Rule, the following focusses on three of the most noteworthy ones.

1. The Scope of Certification Authority

The Certification Rule drastically narrows the scope of certification authority in a couple ways. First and foremost, it limits the scope of certifications to the consideration solely of the impacts of "discharges."[180] That limitation departs from the U.S. Supreme Court's long-standing holding in *PUD No. 1* that a state's certification authority extends to impacts of the construction or operation of the facility's "activity as a whole," upon the triggering event of the existence of a "discharge."[181] U.S. EPA justifies that significant departure by seizing on the different language used in section 401(a)(1) and 401(d).

06137 (N.D. Cal. Aug. 31, 2020); Del. Riverkeeper Network v. EPA, No. 2:20-CV-3412 (E.D. Pa. July 13, 2020); S.C. Coastal Conservation League v. Andrew Wheeler, No. 2:20-cv-03062 (D.S.C. Aug. 26, 2020).

[177] Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021) ("Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis").

[178] *Id.*

[179] The Biden-Harris transition team put out a fact sheet identifying the list of agency actions subject to review in accordance with the executive order. The U.S. EPA subsequently requested the U.S. Department of Justice to seek stays or abeyances of federal actions challenging rules subject to U.S. EPA's review. Rebecca Beitsch, *Biden EPA Asks DOJ to Hit Pause on Defense of Trump-era Rules*, THE HILL (Jan. 22, 2021, 3:03 PM), https://thehill.com/policy/energy-environment/535450-biden-epa-asks-doj-to-hit-pause-on-defense-of-trump-era-rules. At the time of this writing, the court ordered the multi-state challenge brought in the U.S. District Court for the Northern District of California to be held in abeyance for 60 days, until April 20, 2021. Order re Joint Motion to Hold Proceedings in Abeyance, California v. Andrew Wheeler, No.: 3:20-cv-4869 (N.D. Cal. Feb. 22, 2021).

[180] Certification Rule, 85 Fed. Reg. 42,210, 42,251-53 (codified at 40 CFR §§ 121.3 (defining the scope of certification as "limited to assuring that a discharge [. . .] will comply with water quality requirements"), 121.1(n) (defining "water quality requirements" as the provisions of sections "301, 302, 303, 306, and 307 of the Clean Water Act" and state "requirements for point source discharges into waters of the United States")).

[181] *PUD No. 1*, 511 U.S. 700, 711-12 (1994).

U.S. EPA pivots from *PUD No. 1's* holding by dismissing the notion that it was based on a plain reading of the text.[182] U.S. EPA argues that because section 401(a) uses "discharge" and section 401(d), "applicant," ambiguity is created which opens the door for its statutory interpretation.[183] In so doing, U.S. EPA concludes that the Court's holding does not prevent it from reaching a different interpretation.[184] U.S. EPA also states that *PUD No. 1's* holding relied, at least in part, on U.S. EPA's interpretation of its certification regulations that pre-dated the 1972 Clean Water Act amendments.[185] Because U.S. EPA now believes the "most appropriate" interpretation is that "applicant" in section 401(d) simply refers to the entity responsible for complying with certification, the term should not be construed as broadening the scope of certification authority.[186]

As for the meaning of "discharge" to trigger section 401(a) authority, U.S. EPA affirms the decision in *S.D. Warren*, that "any discharge" should be given its plain and ordinary meaning and should not be interpreted to require a "discharge of pollutants."[187] Yet with respect to the other critically important aspect of certification authority—the additional language in section 401(d) that specifies certifications may include requirements as necessary to assure compliance with "with any other appropriate requirement of State law,"—the Certification Rule even further limits the scope of water quality problems the states may address. U.S. EPA had previously interpreted that language to include non-point discharges to non-federal waters.[188] Pursuant to decisional authority and

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[182] U.S. EPA also seems to admonish the Supreme Court's "reasonable read" of the statutory provisions and its failure to perform any legislative analysis of the amendments made to the Clean Water Act. 85 Fed. Reg. 42,210, 42,233.

[183] Certification Rule, 85 Fed. Reg. 42,210, 42,232-34.

[184] *Id.* at 42,233.

[185] *Id.*

[186] *Id.* at 42,232, 42,234.

[187] *Id.* at 42,238 (discussing *S.D. Warren*, 547 U.S. 370, 376 (2006). *See* discussion of *S.D. Warren*, *supra* Section VI.B.

[188] Certification Rule, 85 Fed. Reg. 42,210, 42,234-35. "Non-federal waters" refer to those waters within a state's boundaries that are not waters of the United States. *Id.* at 42,234. Non-federal waters include groundwater and isolated wetlands. Rapanos v. United States, 547 U.S. 715 (2006). Under the Navigable Waters Protection Rule, promulgated by U.S. EPA and the U.S. Army Corps of Engineers under the Trump Administration, the definition of "waters of the United States," was revised and non-federal waters were expanded to include ephemeral waters and wetlands that were no longer deemed adjacent to other jurisdictional waters. The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250, 22,251 (Apr. 21, 2020) (codified at 33 CFR §§ 328.3(c)(1) (definition of adjacent wetlands), 328.3(b)(3) (ephemeral streams)). The Biden Administration has since directed U.S. EPA and the U.S. Army Corps of Engineers to revisit that rule considering the environmental priorities announced in the Administration's Executive Order. Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2020); Fact Sheet: List of Agency Actions for Review, THE WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/state-

U.S. EPA interpretation, states have used section 401(d) authority to address a broad range of water quality problems (e.g., as noted in the discussion of PUD No. 1). The Certification Rule now specifies that certification authority is limited to assuring the discharge complies with "water quality requirements," and defines that term as limited to certain provisions in the Clean Water Act and state "regulatory requirements for point source discharges into waters of the United States."[189]

Of course, section 401(d) does not contain any language to limit its reach to impacts caused by point sources to federal jurisdictional waters. U.S. EPA suggests that for reasons similar to why it has chosen to interpret "applicant" in section 401(d) as not broadening "discharge" in section 401(a), it also believes the section 401(d)'s express allowance that a certification may include requirements necessary to assure compliance "with any other appropriate requirement of State law" should not be read any broader than its reach to point source discharges to waters of the United States in section 401(a).[190]

While the meaning of the statutory text in section 401(d) is not entirely clear, its interpretation by the agency charged with its implementation must be reasonable, and U.S. EPA's interpretation of the scope of certification authority is challenging to reconcile.[191] Its effort to align sections 401(a) and 401(d) renders meaningless the additional language in section 401(d). As a result, as interpreted by U.S. EPA, there is no difference between the triggering discharge under section 401(a) and the state's ability to include water quality protection requirements in the certification to address impacts from the facility as a whole or from nonpoint sources to nonfederal waters under section 401(d).

In limiting the reach of certification authority to begin and end with a point source discharge to waters of the United States, the Certification Rule drastically reduces the ability of states to address the full scope of impacts to water quality and beneficial uses occasioned by hydropower projects. As earlier noted, those impacts could include water quality problems from nonpoint pollution that occurs within a reservoir and not from ongoing point source discharges, including: dissolved minerals, soil

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ments-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/. As a result, the scope of waters that comprise non-federal waters is subject to change.

[189] Certification Rule, 85 Fed. Reg. 42,210, 42,251-53 (codified at 40 CFR §§ 121.3 (defining the scope of certification as "limited to assuring that a discharge [. . .] will comply with water quality requirements"), 121.1(n) (defining "water quality requirements" as the provisions of sections "301, 302, 303, 306, and 307 of the Clean Water Act" and state "requirements for point source discharges into waters of the United States")).

[190] *Id.* at 42,253.

[191] Lever Bros. Co. v. United States, 877 F.2d 101, 105 (D.C. Cir. 1989) (citing and quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842-43).

erosion, or oxygen content; barriers to fish passage from existing dams and diversion works; and reduced instream flows where water is diverted from a stream but there is no discharge back into the stream after use; and impacts to non-federal waters, such as groundwater and certain isolated wetlands or ephemeral streams.[192]

As a result, with its Certification Rule, U.S. EPA dispenses with what the *S.D. Warren* Court observed was squarely preserved by the Clean Water Act's system respecting a state's concern: "state authority to address a broad range of pollution."[193]

2. State Conditions and Denials

Although section 401 gives states broad authority to deny and condition certifications, the Certification Rule authorizes the federal agency to encroach on that authority. It establishes new procedural requirements that must accompany state-imposed conditions or a denial of certification and, as discussed in the next section, authorizes the federal agency to find waiver if the federal agency determines the state action failed to meet those requirements.

With respect to the new procedural requirements, the Certification Rule requires any condition to be accompanied by written information explaining "why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements" and a citation to the federal or state law that authorizes the condition.[194] Similarly, for any denial of certification, the Certification Rule requires the state to provide written information that identifies "the specific water quality requirement with which the discharge will not comply," and that explains why the discharge is unable to comply with the identified requirements.[195] If the denial is due to insufficient information, the state must identify the information that it needs.[196]

U.S. EPA's rationale for those procedural requirements is to increase transparency and, in the furtherance of promoting regulatory cer-

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[192] Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 174-77 (D.C. Circuit, 1982). With its Certification Rule, U.S. EPA also finds that "reopener" clauses, included to ensure water quality is protected over the relatively long life of the license, are inconsistent with section 401 and not permissible under the Certification Rule's requirement that the state not take any action that extends the reasonable period of time identified by the federal agency to act on the certification. Certification Rule, 85 Fed. Reg. 42,210, 42,280 (see 40 CFR § 121.6(e)). *See also* Sawyer, *supra* note 69.

[193] *S.D. Warren*, 547 U.S. 370, 386 (2006).

[194] Certification Rule, 85 Fed. Reg. 42,210 42,286 (codified at 40 CFR § 121.7(d)(1)(i)-(ii)).

[195] *Id.* at 42,286 (codified at 40 CFR § 121.7(e)(ii)-(iii)).

[196] *Id.* at 42,286 (codified at 40 CFR § 121.7(e)(iii)).

tainty, to make sure the certification authority understands its own authority as currently interpreted by U.S. EPA.[197]

Prior interpretations from U.S. EPA did not require any specific findings for a condition or denial. More significantly, and as discussed above, prior U.S. Supreme Court and U.S. Circuit Court of Appeals interpretations did not permit a federal agency to interfere with a state's mandatory conditioning and denial authority, and most certainly did not allow the federal agency to unilaterally find waiver based on its own discretionary decision that the state failed to meet new regulatory requirements.

3. Implied Waiver

One of the most striking features of the Certification Rule is that it specifies the federal agencies' role in determining whether a state's certification complies with section 401 and empowers federal agencies to void the denial or condition if it finds that it does not. To arrive there, U.S. EPA chronicles numerous cases that have evaluated the federal agencies' role in the certification process.[198] On the one hand, federal agencies have been counseled not to interfere with a state's certification, even in deciding the condition does not go "far enough" in protecting water quality standards.[199] In other cases, the federal agencies are instructed that they may include conditions in the federal license more protective than that required by the state and, in still other cases, that federal agencies have an affirmative obligation to determine whether the certifying authority correctly complied with the procedural components of the statute.[200] With its Certification Rule, U.S. EPA purports to reconcile the patchwork of case law and articulate the federal agencies' role in the certification process.[201]

Specifically, U.S. EPA interprets that portion of section 401(a) that specifies that a state waives certification when it "fails or refuses to act on a request for certification, within a reasonable period of time (which

[197] *Id.* at 42,256, 42,258.

[198] *Id.* at 42,222-24.

[199] *Id.* at 42,223 (citing and quoting, among other cases, Sierra Club v. U.S. Army Corps of Eng'rs, 909 F.3d 635, 648 (4th Cir. 2018) (holding the federal agency has no authority to replace a state's condition even where the federal agency deems it to be more protective of beneficial uses)).

[200] *Id.* at 42,223 (citing and quoting, among other cases, Snoqualmie Indian Tribe v. Fed. Energy Regul. Comm'n., 45 F.3d 1207, 1219 (9th Cir. 2008) (upholding FERC's license condition increasing minimum instream flows necessary to create mist designed to "augment the Tribe's religious experience") and Keating v. FERC, 927, F.2d 616, 622-23, 625 (D.C. Cir. 1991) ("FERC must at least decide whether the state's assertion of revocation satisfies section 401(a)(3)'s predicate requirements)).

[201] 85 Fed. Reg. at 42,223-24.

shall not exceed one year)."[202] As improbable as it may seem, U.S. EPA purports to "clarify" the meaning of the statute by explaining that a key ambiguity in the phrase "fail or refuse to act" is the meaning of "to act."[203] U.S. EPA concludes that "to act," and with it, the federal agency's corresponding authority to find waiver, must be informed by the procedural context of applicable statutes and regulations rather than to mean "just any act."[204] The Certification Rule goes on to specify what "acts" are *not* in conformance with section 401 and therefore constitute waiver.[205]

Under the Certification Rule, waiver occurs when the state does not (1) act within the reasonable period of time; (2) provide certifications in writing; (3) provide the findings the Certification Rule requires to support a denial of certification (discussed above); (4) comply with other procedural requirements of section 401 (e.g., providing public notice); or (5) provide the findings the Certification Rule requires to support a condition (discussed above).[206] Moreover, where the federal agency deems the state's supporting information infirm or absent and finds waiver, the federal agency will grant the federal permit or license in the case of a denial of certification, or without the condition if a condition is at issue.[207]

Assigning the federal agency with authority to review whether the state's written explanation accompanying the condition or denial satisfies the new procedural requirements or is in some manner inadequate—and to find waiver in the latter circumstance—is incongruent with the plain language under the Clean Water Act, and precedents from the Second Circuit in *American Rivers v. FERC* and other federal Circuit Courts of Appeals concerning the federal agency's lack of authority to review or modify a state's conditions of certification, and in a manner that undermines state self-governance.[208]

Although cast as procedural requirements, potentially as a means to get around precedents concerning the federal agency's lack of authority

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[202] 33 U.S.C. § 1341(a)(1).

[203] Certification Rule, 85 Fed. Reg. 42,210, 42,266.

[204] *Id.* at 42,266.

[205] *Id.* at 42,286 (codified at 40 C.F.R. § 121.9(a), (b)).

[206] *Id.* at 42,286 (codified at 40 C.F.R. §§ 121.9(a)(2)(i)-(iv), 121.9(b)).

[207] 85 Fed. Reg. at 42,286 (codified at 40 CFR § 121.9(b)). Regarding waiver for conditions not supported by sufficient findings, U.S. EPA provides that that such waiver is severable—waiver is limited to the condition and not the overall certification. 85 Fed. Reg. 42,267.

[208] *See, e.g.*, Am. Rivers v. FERC, 129 F.3d 99, 107, 110-11 (2d Cir. 1997); *see, e.g.*, Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA, 684 F.2d 1041, 1056 (1st Cir. 1982).

to second guess state-imposed conditions,[209] FERC's determination that a state's finding is inadequate has the drastic effect of voiding the state's certification or condition altogether.[210] Of course, there is nothing in section 401, express or implied, that gives the federal agency authority to evaluate whether a state has adequately justified its decision to deny or condition certification.[211] Thus, rather than falling within the proper bounds of FERC's authority to determine certain procedural aspects of section 401 are satisfied (*e.g.*, timeliness, the proper certifying authority, or a state's assertion of revocation) acknowledged by *American Rivers* and in *Keating v. FERC*, these procedural requirements likely run afoul of those proper bounds.[212] This aspect of the Certification Rule will undoubtedly be addressed by courts on challenges to the plain reading of section 401 and as federal agencies apply it to the states' actions on certifications moving forward.

Finally, yet importantly, while the Certification Rule codifies *Hoopa Valley*'s central holding,[213] it also extends it to preventing a state from *requesting* the project applicant withdraw its certification request and resubmit it with additional information the state deems necessary for its review.[214] The clear implication here is that certifying states will simply have to deny certifications without prejudice when the applicant fails

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[209] *See supra* text accompanying note 169; *see also*, Keating v. FERC, 927, F.2d 616, 622-23, 625 (D.C. Cir. 1991) ("FERC must at least decide whether the state's assertion of revocation satisfies section 401(a)(3)'s predicate requirements").

[210] Of course, state law may impose requirements for findings to support agency decisions. *See, e.g*. Asociacion de Gente Unida por el Agua v. Cent. Valley Reg'l Water Quality Control Bd., 210 Cal. App. 4th 1255, 1281 (2012). But review of those findings is in state court, and if the court finds the agency has failed to make adequate findings the remedy is a remand to the state agency to reconsider its decision. *See, e.g., Id.* The agency's failure to make adequate findings is not a bar to a decision on remand reaching the same result, or substituting different conditions addressed to the same issue, if that decision is supported by adequate findings. Additionally, although the certification at issue is subject to the Natural Gas Act rather than the Federal Power Act, with judicial review in the federal Courts of Appeals instead of state court, and pre-dates the Certification Rule, in *Mountain Valley Pipeline, LLC v. North Carolina Department of Environmental Quality*, the court found that denial of certification was within the state's authority, but the state failed to adequately explain its reasoning. 990 F.3d 818, 821 (4th Cir. 2021). The remedy was a remand to the state to explain its reasoning. *Id.* at 833. That is in sharp contrast to the Certification Rule, where the remedy for a state's failure to explain its denial is to void the denial and treat it as a waiver. Certification Rule, 85 Fed. Reg. 42,210, 42,286 (codified at 40 CFR §§ 121.9(a)(2)).

[211] *Compare* 33 U.S.C. § 1341(a)(1) (providing "[n]o license or permit shall be granted if certification has been denied by the State") and 1341(d) (providing that requirements set forth in the certification by the State "shall become a condition" of the federal license) *with* 40 CFR § 121.9(a)(2)(iii), (iv) (authorizing the federal agency to find waiver where the state has granted a certification with conditions or denied certification upon the state's failure to satisfy the new procedural requirements that must accompany a certification condition or denial).

[212] Am. Rivers v. FERC, 129 F.3d 99, 110-111 (2d Cir. 1997).

[213] *See* discussion of *Hoopa Valley*, *supra* Section IV.B.

[214] Certification Rule, 85 Fed. Reg. 42,210, 42,285-86 (codified at 40 CFR § 121.6(e)).

to provide information the state needs to complete its review. Of course, under the Certification Rule, FERC would have the ability to review the state's findings underlying that denial and potentially void the denial and find waiver if it deems the findings inadequate.[215]

It is worth emphasizing that prior interpretations of section 401 have never encompassed these procedural requirements. Never under any circumstance has a federal agency ever been permitted to find waiver based on its own determination that a state's condition or denial is insufficient. This aspect of the new rule effectively grants the federal agency veto authority over the states' certification conditions and denials—authority that is at odds with the plain language of the law, decisional authority, and the principles of cooperative federalism.

VII. Conclusion

For now, California will have to contend with the *Hoopa Valley* case and its fallout. It is possible that the FERC waiver decisions the State Water Board is challenging (along with others being challenged nationwide) will limit the reach of *Hoopa Valley* and reduce its constraints on states' section 401 certification authority. But even if those challenges are not successful, since the California Legislature amended the California Water Code to allow certifications to be issued before completion of the CEQA process where there is significant risk of waiver, the basic ability to exercise the authority in California is preserved for now.

With the Certification Rule's narrowing of the scope of section 401 certification, however, U.S. EPA under the Trump Administration drastically undercut the state's ability to assure impacts from FERC-licensed hydropower facilities comply with the full range of water quality pollution control requirements under state law. Taken together, the new substantive and procedural requirements of the Certification Rule represent a radical departure from long-standing Supreme Court and Court of Appeals precedents, as well as prior U.S. EPA interpretations, and state action on certifications. In so doing, the Certification Rule upends the fundamental structure of the Clean Water Act that affords states with substantial authority to regulate water quality within their respective borders. Moreover, the Rule disrupts the cooperative federalism scheme on which the Clean Water Act is premised.

To be sure, the Certification Rule's path is fraught with its potential demise. Ongoing litigation could succeed in having the rule set aside

[215] *Id.* at 42,286 (codified at 40 CFR §§ 121.9(a)(2)(iii), 121.9(c)).

and rescinded. U.S. EPA under the Biden Administration would then have an opportunity to review the Rule and initiate the full public process to develop a new rule. Even if the Certification Rule is not set aside by the courts, U.S. EPA could undertake to rescind the rule through a formal rulemaking process.

In the meantime, FERC continues to apply its expansive interpretation of *Hoopa Valley* and is likely to further limit state authority through its application of the Certification Rule. For now, one thing is certain: Except where waiver decisions are successfully challenged or repealed, states will be substantially deprived of their authority under the Clean Water Act to protect the quality of the waters within their states.