PETITION FOR REHEARING FILED MARCH 11, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1271

HOOPA VALLEY TRIBE, *Petitioner*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*,

AMERICAN RIVERS, *et. al*, *Intervenors for Respondent*

STATE OF OREGON, *et. al*, *Amici Curiae for Respondent*

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF STATES OF OREGON, ALASKA, HAWAII, IDAHO, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW JERSEY, RHODE ISLAND, SOUTH DAKOTA, VERMONT, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF INTERVENORS' PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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March 18, 2019

COMBINED CERTIFICATES

Certificate as to Parties, Rulings, and Related Cases (Cir. Rule 28(a)(1))

A. Parties and Amici. All parties, intervenors, and *amici* appearing before this Court other than the States joining this brief are listed in the Intervenors' Petition for Panel Rehearing or Rehearing *En Banc* and the Parties' briefs in this case, No. 14-1271. The States joining this brief are Oregon, Alaska, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, New Jersey, Rhode Island, South Dakota, Vermont, Washington, and Wyoming.

B. Rulings under Review. References to the ruling at issue appear in the Intervenors' Petition for Panel Rehearing or Rehearing *En Banc* and the Parties' briefs in this case, No. 14-1271.

C. Related Cases. References to any related cases appear in the Intervenors' Petition for Panel Rehearing or Rehearing *En Banc* and the Parties' original briefs in this case, No. 14-1271.

Dated: March 18, 2019

Respectfully Submitted,

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INTRODUCTION AND INTEREST OF AMICI

This case presents an issue of exceptional importance to all States that exercise their water quality certification authority under Section 401 of the Clean Water Act. As the intervenors have explained in their petition, the panel's decision threatens the careful balance that Congress created when it gave States express statutory authority to protect against the harmful effects that federally permitted energy projects may have on state water quality.

The Federal Energy Regulatory Commission (FERC) ruled that Oregon and California authorities had not waived their right to require conditions of approval that will protect water quality. The panel vacated FERC's orders, holding that Oregon and California waived their water quality certification authority under Section 401 of the Clean Water Act. The amici States now submit this brief in support of panel or *en banc* rehearing under Federal Rule of Appellate Procedure 29(b)(2) and Circuit Rule 35(f).

This Court should grant rehearing because the panel opinion will adversely affect the States' congressionally retained sovereign right to protect water quality within their boundaries. The opinion undercuts the coequal management of the nation's waters established by the Clean Water Act by attributing actions taken by an applicant—withdrawal and resubmittal of an application—to the States of Oregon and California as a "scheme" to circumvent FERC's licensing authority.

This holding construes the Act in a manner inconsistent with its text and with U.S. Supreme Court precedent, and thwarts the ability of States, tribes, and other interested parties to resolve complex issues surrounding licensing of projects that may result in discharge into state waters.

ARGUMENT

A. Under the plain language of Section 401, a state does not "fail[] or refuse[] to act on a request for certification" when it accepts an applicant's withdrawal and resubmission of its application.

Section 401 of the Clean Water Act requires that any applicant for a federal license to conduct an activity "which may result in any discharge into the navigable waters" of a State must first obtain a water quality certification from that State. 33 U.S.C. § 1341(1)(a). This provision ensures that state water quality standards are met by any federally licensed project. If the State "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements" are waived. *Id.*

The plain and unambiguous text of Section 401 provides that state certification is waived only if a State fails or refuses to act on an individual request for certification within the relevant time after receipt of that particular request. Nothing in the text of the statute prohibits an applicant from submitting and then withdrawing its request for certification before the one-year period for making a

decision expires. *See, e.g.*, *Hardt v. Reliance Standard Life Ins.*, 560 U.S. 242, 251 (2010) (court "must enforce plain and unambiguous statutory language according to its terms"); *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (citation omitted). Nor does anything in the text of the statute support an interpretation that resubmissions are "not new requests," as the panel held, unless they differ substantially from previous, withdrawn requests for certification. Under the clear text of section 401, the period for state review commences upon "receipt of *such* request" (which refers back to the statutory language "a request"); it does not state "any request" or "any identical request" or call for a judgment on how similar a withdrawn application is to a new application for the same project. The statute itself thus does not support the panel's holding that submittal of a similar request is not a request for certification.

A permit applicant's choice to withdraw and resubmit an application does not constitute a "failure" or "refusal" to act on the part of the State. Moreover, as this Court has recognized, the statutory language "clearly expresses a congressional intent to place the burden of requesting a state water quality certification on the license applicant. *Only after a request has been made* can a state waive its certification right, and then only by refusing to respond to *the*

request within a reasonable period of time." *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir. 1997) (emphasis added). Consequently, if the applicant withdraws its request for certification, whether by agreement or otherwise, the clear terms of Section 401 do not justify a determination that the State has waived its right as to that request.

Consistent with the text of Section 401, this Court has refused to read additional terms into the waiver provision of Section 401 that do not appear there. In *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963 (D.C. Cir. 2011), the applicant contended that the State had waived its certification authority by issuing a certification on the final day of the one-year period that included a "number of terms and conditions," including a requirement that the applicant post a surety bond. *Id.* at 966. The certification further provided that it would not become effective until the bond was in place. *Id.* The applicant argued that the State had waived its certification authority because the certification was not *effective* prior to the statutory deadline. This Court rejected that argument, holding that accepting the applicant's interpretation of Section 401 "would require adding terms to the statute that Congress has not included." 643 F.3d at 974. The panel decision here, however, adds terms to Section 401 that Congress did not include—namely, that a State waives its certification authority by participating in a settlement that indicates an applicant will withdraw and resubmit an application for the purpose of avoiding

waiver. The panel's judgment that a failure to act on a request includes failing to act on a certification request that has been withdrawn is inconsistent with the text and purpose of the statute.

The amici States' interpretation of section 401 is consistent with the U.S. Environmental Protection Agency's (EPA's) regulation on state certification. EPA's interpretation of the Clean Water Act is entitled to deference by this court. Like FERC's regulation, EPA's regulation provides that waiver occurs on "the failure of the State * * *to act on *such* request for certification within a reasonable period of time *after receipt of such request*, as determined by the licensing or permitting agency * * *." 40 C.F.R. § 121.16(b) (emphasis added). Any interpretation that further limits what type of request commences the review time period, or what actions of an applicant may affect that time period, requires the addition of words to the plain text of the statute, and is contrary to both EPA's regulation and with this Court's precedent.

In sum, this Court should find that an *applicant's* choice to withdraw and resubmit an application does not constitute a "failure" or "refusal" to act on the part of the *State*. The plain and unambiguous text of Section 401 demonstrates that so long as a certification request is withdrawn prior to expiration of the statute's one-year deadline, the State has not waived its certification authority. Nothing in the record before this Court suggests that the States of Oregon and California failed

or refused to act on any request that was not withdrawn before the applicable deadline.

B. Legislative history supports this plain language construction.

Generally, "resort to legislative history is not appropriate in construing plain statutory language." *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 494 (D.C. Cir. 2004). Nonetheless, the legislative history of Section 401 is instructive, because it demonstrates that when Congress adopted a one-year time limit for States to respond to a request for certification, it intended to ensure that "sheer inactivity" by a State would not "frustrate" the application process. *Alcoa Power*, 643 F.3d at 972 (citation omitted). Because withdrawal and resubmission does not involve "sheer inactivity" by the State, the purpose of the one-year time limit is not implicated.

The one-year time limit was first proposed by amendment in the House. *See* 115 Cong. Rec. 9264 (1969). As Representative Edmundson explained,

> The Federal agency must also set a reasonable time within which the State must act, either to grant or to deny, the certification.

The time limit thus addresses the concern that a state water pollution control authority would "simply sit on its hands and do nothing," which could "kill a proposed project." *Id.* at 9265.

The conference substitute included a similar explanation for the addition of the state waiver provision. The Conference Report provided:

> * * * In order to insure that sheer inactivity by the State, interstate agency, or Secretary, as the case may be, will not frustrate the Federal application, a requirement, similar to that contained in the House bill 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, interstate agency, or Secretary, as the case may be, fails or refuses to act on the request for certification, then the certification requirement is waived* * * .

Conf. Report No. 91-940 (1970), *reprinted in* 1970 U.S.C.C.A.N 2712, 2741.

In short, the legislative history indicates that Congress was concerned with "frustrating the Federal application" by *state* delay or inactivity. There is no indication that Congress was troubled by the prospect of an *applicant*'s voluntary choice to withdraw its application from a State's review process and resubmit it at its discretion.[1] In such an event, the application is not "frustrated" by any state delay or inaction. Here, it was PacifiCorp's obligation to withdraw and resubmit its application; the States were under no obligation to abstain from taking action on those applications. The fact that the States accepted the withdrawal of each application and did not act upon a subsequent application before that application was again withdrawn by *the applicant* cannot—without adding words to Section 401—be construed as a State's inaction.

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[1] The panel chose not to address the alternative argument that PacifiCorp had abandoned the project by failing to complete the tasks required of it.

C. The panel decision could result in approval of many projects without any review of compliance with state water quality standards.

The panel decision held that "if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters." Slip op. at 11-12. But that reasoning fails to account for the fact that the Clean Water Act itself establishes "the policy of the Congress to recognize, preserve, and protect *the primary responsibilities and rights of States*" to protect state water quality, 33 U.S.C. § 1251, and the U.S. Supreme Court precedent finding that state Clean Water Act authority neither interferes with FERC's authority under the Federal Power Act nor conflicts with other federal agencies' authority. *See PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994); *accord S.D. Warren Co. v. Me. Bd. of Envtl. Protection*, 547 U.S. 370, 386 (2006) (emphasizing that "State certifications under §401 are essential in the scheme to *preserve* state authority to address the broad range of pollution.").

With respect to complex projects like the Klamath hydroelectric project at issue here, allowing an applicant to withdraw and resubmit the requests without waiving state review is crucial if the projects are to go forward. The projects themselves often require many years of study and planning. FERC's rules require that a request for state water quality certification be pending throughout the process, but the rules also authorize the applicant to withdraw its application to

prevent the certain denial of an incomplete application, and to resubmit the application so that it would remain pending as required by FERC's rules. In the absence of voluntary withdrawals and resubmissions by applicants, implementation of complex projects on the scale of the one at issue here would not be viable.[2]

The panel decision does contain some language indicating that it is intended to apply only to a fairly narrow set of circumstances. But the rule of law it announced is capable of broad application, and if so applied could result in no state water quality review of many large energy projects, including potentially ten in Oregon and fifteen in Washington alone. If a State cannot retain its authority over water quality certification when an applicant withdraws and resubmits the request for certification, there will be little incentive for States to enter into long-term settlement agreements to resolve intractable disagreements over the operation of proposed and existing federally approved facilities that affect water quality. FERC encourages such settlements, recognizing that "hydroelectric licensing proceedings * * * are multi-faceted and complex," involving "the balancing of many public

[2] The panel's assertion that "the licensee entered into a written agreement with the reviewing states to delay water quality certification" is factually inaccurate. First, Section 1.6.6 (JA_349) of the Klamath Hydroelectric Settlement Agreement expressly retained the Oregon Department of Environmental Quality's authority to act on PacifiCorp's application. ("Nothing in this Settlement is intended or shall be construed to affect or limit the authority or obligation of any Party to fulfill its constitutional, statutory, and regulatory responsibilities . . . ."). Second, the California State Water Board was not a party to the agreement; therefore, it cannot be said to have had *any* agreement with PacifiCorp.

interest factors, as well as consideration of the views of all interested groups and individuals." *Policy Statement on Hydropower Licensing Settlements*, 116 FERC ¶ 61,270 (Sept. 21, 2006).

An applicant can choose not to withdraw and resubmit a request for state certification, and instead assume the risk that the State will deny the request. But when there could be ways to cure the deficiencies in the application, that result serves no party's interest. An applicant's choice to withdraw and resubmit an application promotes the settlement of disputes related to license applications without undermining protection of state water quality.[3] The panel decision concluding that this practice constitutes a waiver of a State's certification authority is of exceptional importance, and rehearing *en banc* is warranted.

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[3] For example, numerous interim measures were negotiated by settlement parties and are carried out by PacifiCorp while FERC responds to present transfer and surrender applications.

CONCLUSION

This court should grant rehearing *en banc* and reverse the decision of the panel majority. In the alternative, the panel should grant rehearing for reconsideration of its decision.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C)(i), Federal Rules of Appellate Procedure, I certify that the Brief of States of Oregon, Alaska, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, New Jersey, Rhode Island, South Dakota, Vermont, Washington, and Wyoming as *Amici Curiae* in Support of Intervenors' Petition for Panel Rehearing or Rehearing *En Banc* is proportionately spaced, has a typeface of 14 points or more and contains 2,438 words.

DATED: March 18, 2019

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 18th day of March, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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