JUMPING THROUGH *HOOPA*: COMPLICATING THE CLEAN WATER ACT FOR THE STATES

SUMMARY

Section 401 certification and permit conditioning under the Clean Water Act is one of the most significant tools for states to influence federally permitted activities involving discharges into navigable waters. However, states are required to set conditions within one year or they forgo their ability to do so. In practice, the one-year review is difficult for states to meet and led to a common practice known as "withdraw and resubmit" in which states could reset the clock. But in *Hoopa Valley Tribe v. Federal Energy Regulatory Comm'n*, the D.C. Circuit unanimously struck down this practice. Because the U.S. Supreme Court denied review, states now have one calendar year to issue their water quality certifications and decide if any conditions should be included. On March 17, 2020, the Environmental Law Institute hosted an expert panel that explored the ramifications of the *Hoopa* decision on states and §401 permit applicants. Below, we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

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James McElfish: Thanks for joining us on today's panel. Sharon White and Rick Glick bring decades of experience to our topic, dealing in many respects with infrastructure, permitting of dams, and licensing and relicensing considerations with practices involving the Federal Energy Regulatory Commission (FERC). I look forward to their discussion of the *Hoopa Valley Tribe* case,[1] §401 of the Clean Water Act (CWA),[2] and other topics as they arise.

I want to say a bit about §401. That's a provision that is extremely well known to the states and to applicants, and maybe less well known to the general public and CWA enthusiasts. It's one of the oldest parts of the modern-era CWA. The Federal Water Pollution Control Act (FWPCA) of 1948[3] was amended a number of times through the 1960s, but primarily was research-oriented and dealt with some issues related to large cities and mainstem rivers. But in 1970, the U.S. Congress amended the FWPCA to add a process known as water quality certification.[4] That provision is what is codified two years later as §401 of the CWA.

The U.S. Environmental Protection Agency (EPA) regulations that describe how §401 is carried out by EPA in the states were issued in 1971.[5] So, the regulations that we're operating under to this day were actually issued the year before the 1972 amendments to the FWPCA.[6] The amendments in 1972 made some minor changes to §401, but left it largely intact.

I want to review some of the relevant provisions in §401 to set the stage for today's discussion. Pursuant to the Act, most states have been delegated authority from EPA to develop water quality standards for navigable waterways within their jurisdiction. Section 401 was basically designed as a way to provide states, which, predating the modern Act and continuing through the modern Act, have primary jurisdiction over water quality standards, with an oversight or a check on federal licensing or permitting activities that might affect those states' water quality. As amended, §401(a) of the CWA reads: "Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency [that is the federal agency] a certification from the State . . . that any such discharge will comply with the applicable provisions" that are listed in that section of the Act, but that primarily deal with protections of water quality.

So, a certification has to be provided to the federal agency by the applicant, and that certification is provided by the state. Section 401(a) also states: "No license or permit shall

1. Hoopa Valley Tribe v. Federal Energy Regulatory Comm'n, 913 F.3d 1099, 49 ELR 20015 (D.C. Cir. 2019).
2. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
3. Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948).
4. Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91.
5. 40 C.F.R. §121 (1971).
6. Federal Water Pollution Control Act Amendments, Pub. L. No. 92-500, 86 Stat. 816 (1972).

be granted until the certification required by this section has been obtained or," noteworthy for today's discussion, "has been waived." No license or permit shall be granted, no-way no-how, if certification has been denied. Thus, if a state denies certification that the discharge will meet the water quality standards, that ends the matter as far as the federal permitting and licensing agency is concerned.

But the other provision of §401(a) that we're going to focus on is: if the state, or interstate agency—which sometimes provides the certifications—or the Administrator where EPA is responsible, as the case may be, "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application."

In other words, if the state receives a request for certification and fails to act on it within a reasonable period, bounded by the statute to one year, that ends the matter and there's no requirement for a certification in order to get the license. That is the crux of the *Hoopa Valley Tribe* decision that we'll be talking about.

Section 401(d) also says something about the content of state certifications. Most activities requiring a license or a permit from a federal agency don't end up in a denial of water quality certification, but many of them end up with conditions that are imposed by the state. Conditions often include things like complying with instream-flow requirements, or complying with protection of fisheries, or obtaining a state sediment and erosion control permit. Section §401(d) says that "[a]ny certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [the Clean Water Act]," and, noteworthy, "with any other appropriate requirement of State law set forth in such certification."

These become conditions on a federal license or permit subject to the provisions of §401. States are frequently in a position to grant a certification but require certain reporting, or monitoring, or other requirements. This often becomes an issue at hand in licensing or relicensing of a hydroelectric power facility, or §401 certification related to a U.S. Army Corps of Engineers (the Corps) permit or other permit for wetlands dredge and fill or stream crossings under §404. This has arisen quite a bit in the context of pipelines and the like.

This §401 certification is particularly important to states, territories, and tribes because they integrate this into their water quality and dredge-and-fill permit programs. More than 20 states have built their entire freshwater wetlands programs on §401 certification. They have no state regulations that say you need a state permit for dredge and fill in waters in the state, but they rely on the §401 review and condition process for their regulatory power.

Many states coordinate §401 certification applications with applications to the Corps for §404 permits. There's often a memorandum of understanding on joint permit applications and the like in particular states. States also deal with certification of Corps nationwide permits and state programmatic general permits by deciding which of those permits will be allowed to operate in those states, and sometimes attach individual state conditions to the use of §404 nationwide permits. This doesn't occur only where there's an individual permit application, but oftentimes where the Corps has proposed these nationwide permits that are applicable for commonly occurring activities.

Section 401 applies to a great variety of activities requiring federal permits and licenses. Some states have very expansive regulations and administrative review processes including appeals, administrative review, and other things that apply to §401. In many cases, these processes end up taking more than the one year that is provided for in §401(a).

The *Hoopa Valley Tribe* case involves a FERC relicensing. It's one in which the state, in order to deal with a prolonged §401 certification, entered into an agreement with the applicant whereby each year the §401 request for certification would be withdrawn and then would be resubmitted, in effect restarting the one-year limitation over time. Last summer, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit said you can't do that. The statute says a year means a year. At least in the case of a collusive year-after-year resubmission or reapplication, that will not suffice. So then the §401 certification is waived.

Because the situation has arisen in many other instances—including pipeline applications at FERC, dam relicensing, and other things—*Hoopa Valley Tribe* has become particularly prominent in a number of noteworthy cases, including on the Constitution Pipeline in New York, in which a certification was denied and the U.S. Court of Appeals for the Second Circuit had upheld the state of New York.[7] But in light of *Hoopa Valley Tribe*, FERC said, well, it's been waived, you can go ahead. (For other reasons, the Constitution Pipeline recently decided to withdraw its application.[8]) In the Exelon relicensing of the Conowingo Dam on the Susquehanna River, the lengthy process there has been affected by *Hoopa Valley Tribe*.[9]

One final note: EPA last August proposed to rewrite pretty extensively the §401 certification regulations that were originally promulgated in 1971.[10] That rewrite attracted a great deal of comment, particularly from states that rely on §401 for their processes.

We're going to lead off our panel with Rick Glick, who will talk primarily about the *Hoopa Valley Tribe* decision and its implication for FERC and other cases. We're going to follow up with Sharon White who will add to that array of discussion. We'll cover to some degree the EPA rule-

7. Constitution Pipeline Co., LLC v. New York State Dept. of Envtl. Conservation, 868 F.3d 87 (2d. Cir. 2017), *cert. denied*, 138 S. Ct. 1697 (2018).
8. Constitution Pipeline, *Feb. 24 Media Statement*, https://constitutionpipeline.com/ (last visited Apr. 22, 2020).
9. Joint Offer of Settlement and Explanatory Statement of Exelon Generation Company, LLC and the Maryland Department of the Environment, Nos. P-405-106 and P-405-121 (Oct. 29, 2019), https://mde.maryland.gov/programs/Water/WetlandsandWaterways/Documents/Conowingo_Settlement.pdf.
10. U.S. EPA, Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44080 (Aug. 22, 2019).

making, then we'll circle back for some discussion, and then questions.

Rick Glick: Thank you, Jim. Before we get to the *Hoopa Valley Tribe* case, it'd be good to get a bit of background beyond what Jim had suggested is special about §401, and why it's so key to development projects.[11]

First, one of the things that I want to emphasize is that the §401 authority is very broad. It's not just about water quality standards. It also mentions other appropriate requirements of state law. States have certainly seized upon that as an opportunity to use the §401 process to impose state policy and state priorities in a federal licensing context. The intent was to allow that to happen, I think, at some level. Cooperative federalism is the goal, to provide a meaningful role for states and a process at the federal level that could affect state waters in a significant way. But the reality has been years of delay and potential for veto, and state impositions are very expensive and onerous sometimes, the conditions that go along with the §401 process.

The one-year period that Jim mentioned starts when the application is filed. States have argued that they have to deem the application complete before the clock starts running. That has been stricken down by the courts.[12] So, it begins the day that application is filed and it all has to be completed within one year. There also is authority in the Northwest that the one-year period is inclusive of any state appellate processes.[13] That is, any changes to the certification resulting from the appeal would have no legal effect on the federal permitting agency. The state would have to find other ways of addressing these concerns.

FERC has long criticized the state process suggesting or demanding that applicants withdraw and refile to avoid the one-year period, but acquiesced to it. FERC policy had been that, once states did that and once the application was refiled, the clock did start anew. That has changed.

In the hydropower context, §401 plays an interesting role. There is a line of cases that is quite direct that says that the Federal Power Act, which controls licensing of hydroelectric projects on navigable waters, preempts the states from duplicative regulatory authority with FERC. So, if the state intends to or attempts to impose requirements that would be within FERC's ambit, the U.S. Supreme Court has been clear that the states are preempted from doing that. But are they?

What §401 does is confer broad authority for the states to do through the §401 process that which they cannot do in the face of the Federal Power Act because this is federally delegated authority. So, it is used and I think perceived by the states as a workaround for preemption concerns. Again, the Supreme Court has helped out with that quite a bit. In the 1994 case *PUD No. 1 of Jefferson County v. Washington Department of Ecology*,[14] the Court allowed the imposition of minimum instream flows for fish as a §401 condition because there was a link that was found to water quality standards.

In the *S.D. Warren Co. v. Maine Bd. of Envtl. Protection* case in 2006,[15] the Court went even further than that. It was an interesting case. The issue was whether there is §401 jurisdiction with a dam that is just passing pollutants through and not adding pollutants. The Court in about 1.5 pages said yes. Section 401 says there has to be discharge. Discharges occur through dams and, therefore, there's jurisdiction.

Then, the Court spent another 25 or 30 pages on what I consider to be dicta, expounding on the broad authority that states have in this context to impose whatever requirements they think are appropriate. Included within that list are things like fish passage, things like recreation flows, things that are not directly related to water quality. Again, that is dicta, but sure is a good indication of how the Court thinks about the scope of §401 authority.

In the natural gas context, it's a little different. The Natural Gas Act specifically says that it preempts state siting of gas terminals and pipelines, but reserves to the states authority under the CWA, the Clean Air Act (CAA),[16] and the Coastal Zone Management Act (CZMA).[17] States have attempted with mixed results to weaponize that authority to oppose liquefied natural gas (LNG) projects that they do not want within their borders.

One state attempted to do that in *AES Sparrows Point LNG, LLC v. Smith*.[18] In that case, state law required local land use approvals as a precondition of state approval under the CZMA. Since the local government prohibited the development, state approval was denied. The court found the local law at issue had not gone through the proper CZMA process and so overturned the state decision. A concurring opinion would have stricken the local control element as preempted by federal law on its face. Interestingly, however, the court did uphold the state's denial of the §401 certification.

Now, let's talk about *Hoopa* and the context that the *Hoopa* case arises in. PacifiCorp operates a series of hydroelectric facilities on the Klamath River, which crosses from Oregon into California, where it discharges into the Pacific Ocean.

PacifiCorp applied for a new FERC license. Their 50-year license was expiring and, in the process, they discovered that there were fish passage issues that would need to be addressed. They were quite expensive and the company was thinking that it would be better for them not to relicense these facilities. But the question was how to handle that.

In the course of filing for their new license on these facilities, PacifiCorp filed §401 applications in both Oregon and California, because the projects had discharge in both states. While this was going on, a decades-long water rights adjudication was proceeding to allocate the waters in

11. *Editor's Note:* Rick Glick has advised/represented a number of clients in the CWA §401 process.
12. Millennium Pipeline Co., LLC v. Seggos, 860 F.3d 696 (D.C. Cir. 2017).
13. Port of Seattle v. Pollution Control Hearings Bd., 151 Wash. 2d 568, 90 P.3d 659 (2004).
14. 511 U.S. 700, 24 ELR 20945 (1994).
15. 547 U.S. 370, 36 ELR 20089 (2006).
16. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
17. 16 U.S.C. §§1451-1466, ELR Stat. CZMA §§302-319.
18. 527 F.3d 120, 127 (4th Cir. 2008).

the Klamath River.[19] That included hydroelectric facilities like PacifiCorp.

The Klamath adjudication and the PacifiCorp Klamath project relicensing led to settlement negotiations that went over several years involving the company, state and federal resource agencies, several tribes, conservation groups, and the irrigation community. This was a very difficult negotiation. It took a very long time. The result of it initially was the Klamath Hydroelectric Settlement Agreement,[20] which provided for the removal of those four PacifiCorp dams that PacifiCorp wanted to remove in both states. At the same time, the Klamath Basin Restoration Agreement[21] was adopted, which provided cooperative efforts to protect fisheries and water supplies.

These agreements together were intended to address a wide range of environmental issues associated with water use in the basin. It's a little ironic that this comprehensive settlement is the context in which the *Hoopa* case arises.

The original settlement agreement required congressional approval. For a variety of reasons, that congressional approval failed. So, they went back to the negotiating table and adopted the amended Klamath Hydroelectric Settlement Agreement.[22] In the amended agreement, all that was required was FERC approval, and it left Congress out of the equation. The concept was that they were going to split the license into two pieces. One part of the license was to maintain the facilities PacifiCorp wanted to continue to operate. The other part provided for the removal of four dams.

In the course of doing that, as part of the agreement, PacifiCorp would transfer that part of the license to a new nonprofit corporation that was established with the purpose of removing those dams—the Klamath River Renewal Corporation (KRRC). If that was a successful effort, then the KRRC would surrender that license after removal. Getting to this point and getting the process moving required an awful lot of cooperation between the two states and other stakeholders at the legislative level, at the governors' level, at the agencies' level. It was a big deal.

Special bond issues were offered to provide funding for this work. Special legislation was enacted. Special regulatory approvals in both Oregon and California were required. All of that takes time to work out. Pending these approvals, the agreement provided that PacifiCorp would withdraw and refile its §401 application each year so this process can work itself through. It was contemplated it would take many years to accomplish. So again, a settlement was reached to try to work around that deadline.

But here's where the problem arose. The Hoopa Valley Tribe Reservation straddles the Trinity River near the confluence with the Klamath River and downstream of the PacifiCorp project. The Tribe participated in the settlement discussions, but did not sign. They were one of the few holdouts that did not enter the agreement because they were frustrated with the slow pace of the dam removal. They went to FERC. Their petition said, you know what, this is a fraud, and FERC needs to acknowledge that §401 authority has been waived by the states because this is going way beyond one year. FERC denied that request, and the Tribe appealed to the D.C. Circuit.

Oregon and California declined to intervene in that case, asserting sovereign immunity under the Eleventh Amendment. Oregon took that a step further and said that the states were indispensable parties because it's their certification. Since they're immune from suit, the court lacks jurisdiction and the case should be dismissed. The court wasn't buying that. The D.C. Circuit said that the petition doesn't involve a state certification decision or the application of state law, but rather a federal agency's order, and that is FERC—a matter explicitly within the purview of this court.

The court emphasized that one year means one year. The court rejected the states' argument that the clock resets when the new application is filed. They also rejected the concept that the one-year limit was to protect the applicant, not a third party like the Tribe—it is the applicant who makes a "voluntary" choice to withdraw and refile. The court right off the bat said, well, it's not clear how voluntary that arrangement is. The states ask and applicants must follow. But what's interesting about the case is the language that is used in it. Clearly, the court saw this withdraw-and-refile process as a subterfuge. There is very strong language that shows the court sees this as a subterfuge.

What the court reacted to is that, in this case, there was no pretense of filing a new application with new information. Rather it was a one-page letter that would be filed each calendar year that would withdraw and request renewal. It's the same application, unchanged. This would happen for more than a decade. The court said such an arrangement does not just exploit a statutory loophole. It serves to circumvent a congressionally granted authority over hydroelectric projects.

Section 401 limits the review to one year. The withdraw/refile workaround cedes to the states control over whether and when a federal license will issue. Thus, if allowed, this scheme could be used to indefinitely delay federal licensing procedures, which undermines FERC's jurisdiction. PacifiCorp's withdrawals or resubmissions were not just similar requests. They were not new requests at all. The court was particularly offended by the use of this workaround for the one-year limitation, and said so in very strong language.[23]

The question, though, is to what extent *Hoopa Valley Tribe* should be seen as broadly applicable precedent for future §401 proceedings. Is it a broad-based deconstruction of the workaround of withdrawal and refiling to beat the one-year clock, or is it a narrow decision confined to its facts? There's reason to think that the latter might be the case, in that

19. Oregon.gov, *Klamath River Basin Adjudication*, https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/default.aspx (last visited Apr. 22, 2020).
20. *See* Klamath River Renewal Corporation, *Settlement Agreements*, http://www.klamathrenewal.org/quick_guide_to_klamath_agreements/ (last visited Apr. 22, 2020).
21. *Id.*
22. *Id.*
23. Hoopa Valley Tribe v. Federal Energy Regulatory Comm'n, 913 F.3d 1099, 1104, 49 ELR 20015 (D.C. Cir. 2019).

> [t]he record does not indicate that PacifiCorp withdrew its request and submitted a wholly new one in its place, and therefore, we decline to resolve the legitimacy of such an arrangement. We likewise need not determine how different a request must be to constitute a "new request" such that it restarts the one-year clock.[24]

We will see in a moment that states have attempted to use that argument before FERC and failed, but the issue is still there as to what *Hoopa* really means in terms of what a new request means and under what circumstances a waiver will occur.

The aftermath of *Hoopa* is interesting. Jim cited a couple of cases that followed *Hoopa*. I'm not going to talk about them right now, but there are some recent FERC precedents that seemed to adopt *Hoopa* full-bore. As I mentioned, FERC has been critical of the withdrawal and resubmittal process but adhered to it to the extent that, when an applicant withdrew and refiled a new application, FERC did not intervene and say that it's prohibited but accepted that a new application created a new one-year period. No more.

In *Placer County Water Agency*,[25] a 2019 FERC decision, there was a withdrawal and resubmittal over a six-year cycle with no changes to the application. FERC said, under *Hoopa*, the state has waived its authority and that's that. Similarly, in *Southern California Edison Co.*,[26] there was a 10-year period of withdrawal and resubmittal with no new information coming in with the new application. FERC found there was a waiver. There was also evidence in the record to suggest that the applicant contributed to the delay in its interactions with the state agencies, but FERC said that under *Hoopa*, such evidence is irrelevant to the statutory deadline. FERC said it's the statutory deadline that counts, one year is one year. And that's what *Hoopa* stands for.

The *Constitution Pipeline Co., LLC* case[27] is an interesting one, as Jim alluded to. This is a 2019 FERC decision. In this instance, there were only two withdrawals and resubmittals, but the application was unchanged. However, during the pendency of the application, extensive new information, thousands of pages of new information, were submitted during the one-year period. The state had argued that this really constituted a new application and FERC said, no, it did not. It did not restart the clock. The resubmittal itself was just two pages and the one-year period runs from the date of the original filing.

What I find interesting about this case is the dissent by Commissioner Richard Glick [no relation], who distinguished the *Hoopa* case in a way that frankly makes sense to me. It may make less sense to my clients who are interested in this kind of issue. What he was saying is that the D.C. Circuit left to a later case how much new information is needed to reset a one-year period. The record of this instance shows that lots of new information came in that the state wasn't able to review in that period and needed additional time to do that.

He also notes that there were a lot of factors that the court was offended by in the *Hoopa* case that partially drove its opinion. For example, the purpose of the amended Klamath Hydroelectric Settlement Agreement was on its face to delay the FERC process, to push this out a little bit to allow the work to continue. It was very clear that there would be no interim changes in the application. The *Hoopa* court suggested that's just on its face invalid.

What Commissioner Glick determines from that is that it makes the *Hoopa* case "hard to apply." He would have remanded this case and developed information to understand whether these factors were driving factors at all. He didn't think that *Hoopa* drove the result in this case or in others that he dissented in as well.

So, there we are. We have the *Hoopa* decision. The question is what do states do with this information? One thing that states are doing is, rather than asking for a withdrawal and resubmittal, they are denying certifications within one year without prejudice. In fairness, these projects are complex. They take time to review. Often, a state can't quite get to where it needs to go. Sometimes, they want more information from the applicant. So, what states are doing now, that I've heard about at least, is they are denying the application and inviting the applicant to refile.

Query whether that is sustainable. Is that not a similar workaround to the withdrawal and resubmittal process? I think one could make that argument, but in the meantime, the Donald Trump Administration has inserted itself in adopting a rulemaking that would by rule try to incorporate into the regulatory process that which the *Hoopa* court tried to do. With that, I'm going to turn it over to Sharon White with the question of whether these new rules resolve the uncertainty that the *Hoopa* case creates.

Sharon White: I am a FERC regulatory lawyer representing hydropower licensees. As you can imagine, all the changes in §401 that have occurred in the past year-and-a-half have had a vast impact on my clients.[28] Rick has provided an excellent overview of the *Hoopa* case, and it sets up my presentation very well.

First, I will cover the response to the *Hoopa* case both in terms of hydropower licensees and what they've been doing in reaction to *Hoopa* at state water quality agencies as well as FERC itself. Then, I will discuss the Administration's attempt to reform §401 through Executive Order and rulemaking.

I will start with hydro licensees' responses to *Hoopa*. First, a historical note. As of March 2019, 17 FERC hydropower licensing decisions were delayed by the failure of state water quality agencies to timely act on a §401 request. Eight of these had been delayed for more than 10 years.[29]

24. *Id.*
25. 167 FERC ¶ 61056 (2019).
26. 170 FERC ¶ 61135 (2020).
27. 169 FERC ¶ 61199 (2019).
28. *Editor's Note:* Sharon White has advised/represented a number of clients in the CWA §401 process.
29. Letter from Malcolm Woolf, President and CEO, National Hydropower Association, to Andrew Wheeler, Administrator, U.S. EPA, re: National Hydropower Association Comments on EPA's Proposal for Updating Regulations on Water Quality Certification 8 (Oct. 21, 2019), https://www.regulations.

Section 401 certification has been a major source of delay in hydropower licensing. For that reason, *Hoopa* was a major game changer in this industry.

Licensees started using the *Hoopa* decision almost immediately to resolve these long-standing delays. This was done primarily through requests to FERC for a finding of waiver of state water quality authority under §401. Licensees did this either through petitions for declaratory order or by a letter request to FERC asking for a waiver decision. They started doing this within four weeks of the *Hoopa* decision. It was very quick. FERC responded quickly with its first declaratory order within three months of the *Hoopa* decision finding a strict reading of one year means one year. As Rick mentioned, that's the *Placer County Water Agency* case.

Licensees have also pursued some state court challenges of the §401 certifications. There are several ongoing administrative and state court appeals of §401 certifications in the states, primarily California and Maine. These appeals are two-pronged. They request the state waive because a year had passed, but also that the §401 conditions themselves are beyond the scope of §401 using the EPA rulemaking that is pending right now. In some cases, the hydropower licensees pursue both of these paths, a waiver request in front of FERC and a state court challenge of the §401 certifications.

Licensees are also considering what constitutes a new application to restart the one-year clock. As Rick mentioned, *Hoopa* left us wide open on what qualifies as a new application to restart the clock. But licensees do have the option to revise their applications and include a new proposal in order to restart the clock and submit it to §401 agencies. Some licensees are considering that.

Licensees are also in some cases engaging earlier with states. Some states previously had been reluctant to participate in the FERC relicensing study process. They would indicate that they would request additional studies and information through the §401 process, which occurs much later in the licensing process, as opposed to the FERC study dispute process. *Hoopa* really changes that. States may be more willing to engage earlier.

Licensees are also considering whether to submit new §401 applications after one year has passed if the state either fails to act or denies a §401 without prejudice. Under FERC's regulations, a licensee must have a §401 application on file with the state in order for its FERC application to be in good standing. But what to do if the state denies a §401 without prejudice? This often creates a dilemma for the licensee. A lot of times, this drives them to seek a waiver request with FERC to get some guidance on what to do. But FERC has been pretty flexible with this requirement and has not always required a §401 application to be on file given the uncertainty of §401 right now.

Licensees are also considering when to submit a §401 application. Under FERC's regulations, they are required to do that within 60 days after FERC has determined that the license application is complete and ready for environmental analysis. But FERC's regulations do allow some flexibility for waiver of this requirement, so a licensee could submit a §401 application a bit further down the line (e.g., after FERC has issued the National Environmental Policy Act (NEPA)[30] document if all parties think that that would be better).

Finally, licensees are considering when the appropriate time is to seek waiver, whether it is sufficient after one year or whether you have to wait multiple years to build the record and make a better case in front of FERC. But FERC has now indicated that the number of years that have passed is really not relevant. So, we are going to see more licensees taking action sooner and not waiting for 10 years of withdraw and resubmit before asking FERC to intervene.

The states have actively been engaged in response to *Hoopa*, primarily by challenging waiver requests in front of FERC. This is mostly in California because most of the waiver requests are license proceedings there. The State Water Resources Control Board has asserted multiple grounds for opposition to FERC findings of waiver. It argues that there has been no formal agreement to delay issuance of §401 certification. It basically encourages a strict reading of *Hoopa*—that unless there is a formal agreement to delay, then *Hoopa* does not apply.

It argues that the licensee is voluntarily withdrawing and resubmitting its §401 application to avoid denial without prejudice, and that there is no indefinite delay if the state eventually issues the §401 certification, even if that is years later. It also argues that the state needs the FERC NEPA document to conduct its state review, and that it cannot issue its §401 until it has completed the California Environmental Quality Act process. Finally, it argues that there are insufficient resources to act within a year because the state has been responding to droughts, or there is a lack of resources and that *Hoopa* should not be applied retroactively but only prospectively.

All those arguments have failed thus far in front of FERC. The state of California has not pursued any challenges of FERC's waiver requests yet in the court of appeals in the hydropower context, but may do so if it chooses to appeal any of these new licenses that come out and incorporate a waiver decision. That could go up to the U.S. Court of Appeals for the Ninth Circuit. If the Ninth Circuit makes a decision contrary to *Hoopa*, it sets up a circuit split that could eventually get to the Supreme Court. So that is definitely something to watch.

The states, California in particular, are also granting §401 certifications without a pending application before them. In this case, they have denied a §401 application without prejudice, but then continued to process the application even though the applicant did not resubmit an application, and eventually issued a §401 certification. That is being challenged at FERC as well.

As Rick mentioned, especially in California but in other states as well, states are proceeding with denials without

gov/contentStreamer?documentId=EPA-HQ-OW-2019-0405-0807&attachmentNumber=1&contentType=pdf.

30. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.

prejudice, instead of directing withdrawals and resubmittals of §401 applications. Query whether that is the functional equivalent of a withdraw and resubmit. I would argue that it is the same exact thing. I think it is potentially the next big case in the Court of Appeals, on whether this practice is legitimate or violates *Hoopa*.

Another note is that states must explain their denial of a §401 application under the *National Fuel Gas Supply* case in the Second Circuit.[31] States, under the arbitrary and capricious standard, must explain and provide a rational connection between the facts found and the choices made. So, those denials without prejudice are still subject to a waiver determination if the state does not make this explanation for a denial. If, for example, the state just denies because it is out of time, that should not be sufficient.

Finally, at least in some states, we have seen states moving faster and wanting to get their certifications out in one year. And really that is what everybody wants. So, that's a great result out of *Hoopa*. Some states are going in that direction and pushing out these §401s within a year.

Moving to FERC's response to *Hoopa*, FERC has issued several declaratory orders finding waiver of §401.[32] It has found a strict application of *Hoopa* that one year is one year. *Hoopa* is not limited to its facts and does not just apply to a case where there is a formal agreement to delay issuance of a water quality certification. FERC issued its first declaratory order rather fast, but then slowed down and had multiple declaratory orders pending before it. But we have seen a recent uptick in FERC's response to pending waiver requests. It is pushing them out quickly now. In fact, we are expecting another one this week.[33]

As I mentioned, FERC is not strictly enforcing its requirement to have a §401 application pending during the licensing. It is also reviewing the timing of the §401 process independently, without a waiver request before it. This might be a trend that we start seeing in all license applications, that FERC will be examining on its own.

Finally, FERC has indicated that it will treat §401 conditions included in invalid §401 certifications as recommendations, if time allows. It will have discretion whether to include them or not. As I mentioned, FERC has not definitively ruled on the state's practice of denying without prejudice in the hydro context. It has indicated that this might be an option in dicta in a gas case,[34] but has not applied this in the hydro context. That is something to watch for.

Rick provided a preview of these cases, so I am not going to do a deep dive into them. But the *Placer County Water Agency* case was the first declaratory order finding waiver under §401. FERC held that a formal agreement was not required, and that exchanges between the entities amounted to an ongoing agreement to restart the clock. Essentially, the licensee entered e-mails and other documentation from the state water quality agency into the record, directing it to withdraw and resubmit or risk getting a denial. FERC found that there was evidence to show that a waiver had occurred on that basis.

I will note that the *Placer County Water Agency* declaratory order has now gone final. The state did not appeal it to the Ninth Circuit, but the state certainly could appeal the waiver determination when FERC issues the new license. That could go up to the Ninth Circuit.

In the *McMahan Hydroelectric* case,[35] FERC ruled for the first time proactively that a state's §401 authority was waived without a waiver request in front of it. This was an original license for a small project in North Carolina in which the applicant filed a §401 application in 2017. The state requested additional information as well as FERC's NEPA document and basically said that the §401 application is on hold until it receives the information. The applicant provided some of the additional information, but FERC did not complete its NEPA review within one year. So the applicant was directed to withdraw and resubmit its application, which the applicant did two years in a row. But then FERC issued the license. It did its own examination of the §401 time line and found that a waiver had occurred. The withdrawal and resubmittal did not restart the clock. FERC also noted that the submittal of additional information requested by the state does not toll the one-year period at all.

From the FERC perspective on the *Constitution Pipeline* case, FERC found that, due to the waiver, the water quality agency's later denial of the §401 application had no legal significance, and also that no formal agreement was needed to violate the one-year deadline. Also, the fact that the delay was for a shorter period than *Hoopa* does not matter. The state also argued that, without a §401 certification in place, the construction of the pipeline would result in significant environmental harm. FERC denied that argument, finding that it did not depend on the forthcoming §401 certification to justify its conclusion that project-related impacts would be acceptable and the project should be authorized. FERC did its own independent review of that and was comfortable moving forward.

Empire Pipeline,[36] which is now a pending case in the Second Circuit, is a gas pipeline case with some interesting facts. The applicant and the state agreed to revise the date by which the state received the §401 application to extend it for a few weeks to allow the state to issue its §401 determination. But ultimately, the state denied the §401 application and the applicant went to FERC for a waiver.

FERC found that the applicant and the state agency cannot extend the statutory deadline by an agreement to

31. National Fuel Gas Supply Corp. v. New York State Dep't of Envtl. Conservation, No. 17-1164, 2019 WL 446990, 49 ELR 20017 (2d Cir. Feb. 5, 2019).
32. Placer County Water Agency, 169 FERC ¶ 61046, para. 18 (2019); McMahan Hydroelectric, LLC, 168 FERC ¶ 61185 (2019), *denying reh'g and stay*, 171 FERC ¶ 61046 (2020); Southern Cal. Edison Co., 170 FERC ¶ 61135 (2020); Constitution Pipeline Co., 169 FERC ¶ 61199, para. 20 (2019).
33. Pacific Gas & Elec. Co., 170 FERC ¶ 61232, para. 27 (2020).
34. National Fuel Gas Supply Corp., 167 FERC ¶ 61007, para. 17, n.40 (2019).
35. McMahan Hydroelectric, LLC, 168 FERC ¶ 61185 (2019), *denying reh'g and stay*, 171 FERC ¶ 61046 (2020).
36. National Fuel Gas Supply Corp. and Empire Pipeline, Inc., 164 FERC ¶ 61084 (2018), *denying reh'g*, 167 FERC ¶ 61007 (2019). [Editor's Note: Sharon White submitted an amicus brief in support of FERC in this case as this issue was going to press.]

modify the date of receipt of the §401 application. FERC suggested, in dicta, that if the state needs more time, in the case of an incomplete application, it could deny the application with or without prejudice. This language is a little bit concerning, even though it is in a gas context and FERC has not opined on that in the hydro context yet. The case is currently pending, so it is a case to follow. It is also a good case to consider whether there should be a mechanism to allow a short extension of time beyond the one year if the state and the applicant are on the verge of some kind of settlement. EPA's notice of proposed rulemaking (NOPR) tees this issue up for discussion.

We are also expecting an order this week on Pacific Gas and Electric Company's (PG&E's) Kilarc-Cow Creek license surrender proceeding.[37] Here, PG&E filed its §401 application in August 2009 and withdrew every year for 10 years. FERC completed its NEPA review and the National Marine Fisheries Service issued its biological opinion back in 2011. Basically, the §401 application was the sole holdup on the surrender proceeding for many, many years. The Water Board denied the §401 application in April 2019 and encouraged PG&E to submit a new request. PG&E did not do that because it was post-*Hoopa*, but the Water Board nonetheless issued the §401 certification at the end of 2019. So now, PG&E has sought a waiver determination and has also asked FERC to reject all of the Water Board's §401 conditions. We are expecting that order this week, and it could be a good one.

Let's move on to the Administration's attempt to reform §401, starting with President Trump's Executive Order No. 13868 issued in April 2019.[38] The intention of the Executive Order was to provide for efficient permitting of energy infrastructure projects and reduce regulatory uncertainties. It was really targeted at coal, oil, and natural gas infrastructure projects, but it also included provisions on §401. It noted the confusion and uncertainty of that process and the need for reform.

The Executive Order directed EPA to issue new guidance and initiate a rulemaking to revise its §401 regulations, if appropriate. Subsequent to that, it requires §401 implementing agencies such as FERC to review their regulations and make them consistent with EPA's new rule. President Trump's Executive Order was really the driver behind EPA's rulemaking that came out in August.

I will note that before the NOPR was issued, EPA did revise its EPA guidance in June 2019, issuing a revised interim guidance document that supersedes prior guidance issued by the Barack Obama Administration in 2010. It provided a preview for the Administration's position in the rulemaking, including procedural and subsequent reforms to §401. It also teed up that EPA would be looking not just at the timing of §401, but also the scope of §401 and limiting that to water quality impacts from a project. That was another big game changer and was unexpected.

That leads to the proposed rule issued in August 2019. EPA's NOPR proposes sweeping changes to the timing and scope of §401. As Jim mentioned, it is the first major overhaul of EPA's §401 regulations since they were originally promulgated in 1971. More than a thousand comments were received on the NOPR. It is a controversial one, and I'm sure EPA has its hands full in producing a final rule, which is expected in May.

I will cover some of the major proposals in the NOPR. First, regarding scope, EPA proposes to limit a state's review and action under §401 to considerations of water quality. Under this proposal, conditions requiring recreation facilities and access improvements, payments to state agencies for improvements, and conditions to address alleged impacts from a project, such as air emissions and transportation effects, and even arguably conditions related to fish passage, could be off the table by limiting the scope of §401 in this way.

EPA has rejected the majority decision in the *PUD No. 1* case that Rick covered, which had previously been read to broaden the scope of §401. EPA has taken the position of the dissent in that case that §401 does not apply to a project in its entirety, but only to the discharge as a result of the project. EPA accordingly has limited the conditioning authority to water quality impacts from the point source discharge rather than the entire activity associated with the federally licensed project. So, any limitation or condition offered by a water quality agency that is unrelated to water quality would not be a condition considered required by the federal agency and could be rejected.

The NOPR also provides time limits for state action, specifically that one year is one year. It incorporates the *Hoopa* holding and finds that there is no tolling provision to stop the clock at any time in §401. If a state agency does not act on the §401 application, certification is waived. It specifies that the time line begins upon receipt of the application, not when the state deems it to be complete. It specifies that the state may not ask the project proponent to withdraw a §401 request or take any other action to modify or restart the clock. If the state seeks additional information from the applicant or needs more time, it does not excuse a state's failure to act within one year.

But EPA did tee up the issue of whether there is any legal basis or whether a federal agency could extend the one-year period where an applicant and a state water quality agency are working collaboratively and in good faith and it could be in their mutual interest to extend the period beyond one year. EPA has received comments on this, and we may see something on that in the final rule.

To limit overly broad §401 conditions, EPA proposed a definition of "condition" that includes only specific requirements included in a certification that are within the scope of certification. Under this definition, conditions must be necessary to assure compliance with water quality requirements. For each condition, the state must explain why the condition is necessary. To assure that the discharge will comply with state water quality requirements, the state must cite a law that authorizes the condition, and provide a statement of whether and to what extent a less stringent

37. FERC issued its order several days after the webinar was held. *See* Pacific Gas & Elec. Co., 170 FERC ¶ 61232, para. 27 (2020).
38. Exec. Order No. 13868, 84 Fed. Reg. 15495 (Apr. 15, 2019).

condition could satisfy the applicable water quality requirement. It is up to the federal agency to review whether the conditions are within the scope of §401 and whether the state has provided this necessary information. If it has, then the condition would be included in the federal license. If it has not, it may not be included in the federal license.

Federal agencies would also provide an opportunity for the state to remedy a condition that exceeds or conflicts with the scope of §401 authority if there is still time within that one-year period. Deficient conditions could be removed from a §401 certification on a piecemeal basis; it would not invalidate an entire §401 certification. But a federal agency would have the authority to reject certain conditions if they exceeded the scope of §401.

Finally, with regard to enforcement of §401 conditions, the current regulation states that §401 conditions become a requirement of the license, but it does not discuss a federal agency's responsibility to enforce the conditions. Under the NOPR, EPA proposes that the federal agency is responsible for enforcing the §401 conditions once they are incorporated into the license. So once the state issues a certification, §401 does not provide an additional or ongoing role for a state to enforce the conditions under federal law, and there is no independent state enforcement authority for conditions included in the federal license. That contradicts what several states have argued for many years and could be a controversial aspect of this final rule.

Also, EPA has sought comment on the use of re-openers. Re-openers are very common §401 conditions, allowing the state to re-open the certification during the term of the license for a multitude of reasons. EPA has sought comment on whether that should be explicitly prohibited or whether it is inferred by its other proposals. We might see something on that in the final rule.

As for next steps, we are expecting the final rule in May 2020. I think it is safe to say that there would be a number of legal challenges to EPA's final rule in the district court. Just as the Endangered Species Act (ESA)[39] final rules that came out last year were almost immediately challenged and are pending right now, I think it is likely that the new rules will be challenged and there will be a request for stay of the rule pending judicial review. We will see how that plays out. Also a possible change in the administration could affect the future of these §401 proposals.

James McElfish: We've received a number of questions. Could either of you explain more about an invalid §401 certification currently? If an applicant believes a certification or a condition is invalid, what recourse do they have under current law, and then what recourse might they have under the proposed rule?

Sharon White: An invalid certification would be one that was issued, for example, while a pending §401 application is not on file with the state. In this case, the state denies the application without prejudice, even though there is no pending §401 application. In theory, the waiver has already occurred, but the state nonetheless issues the §401 certification anyway.

The recourse for a licensee I believe is to go to FERC, ask for a waiver and a finding that the §401 certification is invalid. If FERC agrees, it will invalidate the §401 certification. It is left to FERC's discretion whether to incorporate some or all of the §401 conditions from the invalid certification into a FERC license. Again, FERC has indicated that it is going to treat them as recommendations, as opposed to mandatory conditions, if the §401 certification is invalidated, but FERC has not yet issued a license in this situation and acted on this. So we do not know what this is going to look like, and whether FERC is still going to defer to the state agencies and take these §401 conditions, or is actually going to reject some of them and use their discretion to do that.

Rick Glick: It's useful to keep in mind a couple of existing law provisions that have some relevance here. I think one is that, under the *American Rivers v. Federal Energy Regulatory Comm'n* case,[40] FERC was denied the ability to pick and choose among state conditions that it felt were appropriate. That used to be its practice. After *American Rivers*, the practice at FERC has been that whatever the state comes up with in its certification gets stapled on to the FERC license as license articles. That's part of the context here too.

Another thing is that there's lots of case law that says that the extent of or the validity of the state certification or conditions within that certification is a matter of state law, with the exception of procedural irregularities or perhaps the concept that the states exceeded their authority. I think there is a body of existing law that's going to have to be overlaid on these new cases and new interpretations as we're going forward.

James McElfish: I suppose, if the proposed rule is adopted, that FERC or any other licensing agency would be able to decide for itself whether a condition is inside or outside the scope. Is that right?

Sharon White: That's correct; there will be a FERC determination. FERC will make the determination whether it is within the scope of §401, that the state has provided an explanation for each §401 condition, and that some alternative and less burdensome condition would not fulfill and address the project impact.

James McElfish: Another question is what are states doing as a practical matter to expedite the process apart from these "denials without prejudice" and other maneuvers or machinations? Are there things that states are doing to actually get through this process within six months, or nine months, or a year?

Rick Glick: I'm not aware of specific state activities to try to expedite that process. When one considers what a FERC

39. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.

40. 129 F.3d 99, 28 ELR 20258 (2d Cir. 1997).

license application looks like—which is multivolume, hundreds or thousands of pages of review—and then the water quality certification application is not too far behind in terms of scope, what will have to happen is that states will have to make abbreviated reviews. In my own state, I know for a fact that state agencies lack the people power to process in-depth a serious application that might come in. So it's going to prompt them, I think, to act quickly and to perhaps lead to conclusions that may not be supportable going forward.

I think a little bit perversely it may lead state agencies to impose conditions that are more onerous than might be necessary, because they're going to default to being conservative as they're reviewing these things and sending them on to FERC. Knowing that in the FERC process the state's ability to impose conditions is quite limited and that FERC will have ultimate jurisdiction, it would not be a big surprise if you see states acting in a more aggressive way. If they have any evidence on the record to support a condition that might be more onerous than they would otherwise impose, that might happen.

Sharon White: We have seen states do three things to expedite the process thus far. They have started to get involved in the FERC licensing process a little bit earlier. Again, the study process in the FERC licensing occurs years before a §401 application goes in. But if the state has study needs that it needs addressed in order to issue a §401 certification, I think they are going to be a lot more inclined to get involved much earlier and resolve those disputes through the FERC study dispute process because that might be the only opportunity they get. I do not think they will be able to request additional studies as part of the §401 process and get those within one year.

The states are also engaging in increased consultation with stakeholders earlier and more frequently during the course of the one-year process. And, as discussed, they are increasing staffing for their state water quality agencies to really beef it up and get it going faster.

James McElfish: A question about state administrative appeals: how do state administrative appeals affect the application of *Hoopa Valley*, if at all?

Rick Glick: They don't. As mentioned in my presentation, there was a case coming out of the U.S. District Court in Washington in recent years in which that very issue was before the court.[41] Under the Washington procedures, there was an administrative appeal to the Pollution Control Hearings Board. That process was completed after the one-year period and the Washington Department of Ecology said, well, there has to be a tolling of the one-year period to account for state appellate processes. The court said, no, there does not. There is no tolling. You're just going to have to account for the fact that the §401 application is complete as it was originally done. If there are other state policies you want to impose, you have to do it through your own state regulatory process, but not through §401 because that process is over.

James McElfish: In that instance, would the original certification or denial be the certification? What are the implications of that?

Rick Glick: There is an original certification unmodified by the Pollution Control Hearings Board's ruling.

Sharon White: From a FERC perspective, if there is an appeal and the §401 conditions change on appeal outside the one-year period, it is within FERC's discretion to incorporate those new §401 conditions. They are not mandatory. FERC does typically incorporate them into the license, but they do have discretion not to do so.

James McElfish: There is a question about completeness. States have raised issues about the completeness of the §401 certification request they have received. What is the state to do?

Rick Glick: Courts have held that once the request for certification is made, the state's "subjective" determination of what is a complete application is irrelevant. The one-year period starts with that request, and the state can try to get clarification. But the one-year period will stand and there won't be any adjustments for determination and completeness.

Sharon White: I'll note that EPA's rulemaking has thrown out a suggestion on defining what constitutes an application, and is very specific about what an applicant needs to include. But in general, an applicant includes the entire FERC license application, which is hundreds of pages of information that FERC is working from to do their NEPA document. Arguably, if all of that information is in front of the §401 agency, that should be sufficient. The §401 agency does have the ability to request additional information but again, as I mentioned, that cannot toll the one-year period. So, if the state does not get it, they can't hold up the certification for that.

James McElfish: Since in FERC's August 2019 order on the Constitution Pipeline project, FERC concluded in the standard for waiver that if "an applicant withdraws and resubmits their request for water quality certification for the purpose of avoiding section 401's one-year time limit,"[42] how much significance do you place on the purpose element of the standard? Also, how do you think the settlement relates to the existence of signing of an agreement, formal or informal, between the applicant and the state? In other words, is there a limitation on *Hoopa Valley* related to the intent of the withdrawal, resubmit, and the existence or nonexistence of an agreement?

41. Airport Cmtys. Coal. v. Graves, 280 F. Supp. 2d 1207 (W.D. Wash. 2003).

42. Constitution Pipeline Co., LLC, 169 FERC ¶ 61199, para. 27 (Dec. 12, 2019), *quoting* 168 FERC ¶ 61129, para. 31 (Aug. 28, 2019).

Rick Glick: I don't think so.

Sharon White: I would argue that FERC has made it clear in interpreting *Hoopa* that a formal agreement is not necessary, and that an applicant's withdrawal and resubmittal of the §401 application is typically at the direction of the state. Applicants are doing it because they are getting an e-mail or a communication from the state directing it to withdraw and resubmit, because it needs more time. That does not toll the one-year period.

James McElfish: Among the cases that you see making their way through FERC or in the states, do you have any candidates that you think are most likely to get to the Supreme Court or create a conflict in the circuits?

Sharon White: I think the Placer County Water Agency license order could be the next one we would see, because FERC has already issued its waiver determination. As far as I know, there is nothing else holding up that relicensing proceeding. I think a license order is imminent. If the state or another party opts to bring that to the Ninth Circuit, if the court finds something contrary to *Hoopa*, it could tee it up to the Supreme Court. So, that case is a likely candidate.

Rick Glick: I'm not that familiar with the underlying facts of the *Placer County* case, but it does seem from a state point of view that might not be the best case to take up on appeal because it also involved multiple years of withdrawal and resubmittal. The *Constitution Pipeline* case was just one year of doing that with lots of new information coming in, but I don't really have a crystal ball on that.

James McElfish: Although I guess the Constitution Pipeline project might be tricky if they're no longer pursuing the pipeline. That brings us to the conclusion of our questions. Would our panelists like to leave us with any final thoughts for the day?

Rick Glick: I have a comment and a question for Sharon actually. I'm very interested in her views on this. I don't think anybody—state agencies, applicants, other stakeholders, or FERC— would question that this is a broken process, that the §401 process is not working the way it is intended to. It's very expensive. It's very time-consuming. It's very litigious. Were we living in a rational word, we would bring this to Congress and say we need clarification on this. But we don't live in that world. It's not going to happen.

My question is whether this is fixable in a rulemaking context. The way §401 has been set up, it's a delegation of federal authority under the CWA to the states for implementation. It does not provide a role for EPA other than if a neighboring state is concerned about its effects on its own water quality standards, then EPA can help the states work it out. But EPA is pretty much an outsider on this. So, if it adopts rules that purport to direct how states implement §401, is that sustainable? That is, would states be bound? If they do adopt such rules, is their interpretation of the CWA entitled to *Chevron* deference for a program they don't administer? I think it's an open question, whether the Court would do that here.

I'm curious how Sharon might view whether §401 implementation can be directed by EPA. And I'll add to that, too, that the prior guidance that was in place, the prior rules that were in place, were simply a compilation of the existing case law at the time. It was sort of a guidance to the states on things they should be considering. It did not and was not intended to direct states on how to implement their own processes. I think that's what the new rules are intended to try to do. Sharon, what do you think?

Sharon White: I don't think this is an issue that will be fixed quickly. I think that there is some flexibility depending on where EPA lands with the final rule. That might provide some provisions to get the applicants and the states to start talking and trying to fix these issues. For example, if EPA provides some flexibility to the federal agency to extend the deadline if the states and the applicants are close and the one year is approaching. Because, at least what I've seen with my clients, they are good stewards. They want to work with their state water quality agency, keep a good relationship, and try to get there. If it is close, I don't think that they would oppose having a little more time to get there. But whether the states will comply with these new rules and whether FERC will intervene is yet to come. I don't know.

James McElfish: I will add that EPA is leaning very heavily on *Chevron* in the proposed rule, including the flavor of *Chevron* that's exemplified by the Supreme Court's *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.* Decision,[43] wherein an agency says it can overrule an interpretation by a court. In this case, EPA has indicated that it disagrees with the Supreme Court majority in the *PUD No. 1* case. One of the interesting sidelights is that the dissent in *PUD No. 1* is Justice Clarence Thomas, whose views EPA now is proposing to embrace. Justice Thomas, in a recent cert denial, indicated that he no longer believes in *Brand X* deference.[44] So, we'll have some interesting deference issues perhaps when the §401 rule is finalized.

43. 545 U.S. 967 (2005).
44. Baldwin v. United States, 589 U.S. ___ (2020) (Thomas, J., dissenting).