

NO. 14-1271

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

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HOOPA VALLEY TRIBE, *Petitioner*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*

AMERICAN RIVERS, *et. al, Intervenors*

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On Petition for Review of Orders of the Federal Energy Regulatory Commission

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**BRIEF OF KARUK TRIBE, YUOK TRIBE AMERICAN WHITEWATER,  
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, SOUTH  
YUBA RIVER CITIZENS LEAGUE, CALIFORNIA OUTDOORS,  
FRIENDS OF THE RIVER, AND IDAHO RIVERS UNITED, AS *AMICI  
CURIAE* IN SUPPORT OF INTERVENOR-RESPONDENTS' PETITIONS  
FOR REHEARING OR REHEARING EN BANC**

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## COMBINED CERTIFICATES

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

- A. *Parties and Amici.*** Except for the organizations that are signatories to this brief and any other amici who had not yet entered an appearance as of the filing of the petition for rehearing en banc, all parties, intervenors, and *amici* appearing before this Court are listed in the Intervenors' Petition for Panel Rehearing or Rehearing *En Banc* and the Parties' briefs in this case, No. 14-1271.
- 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.

### Rule 29(a)(4)(E) Statement

Proposed amici curiae certify that amici and their counsel were the sole authors of this brief and that they bore all costs of this brief, with no financial contributions from any party, party's counsel, or any other person not affiliated with proposed amici curiae or their counsel.

### Corporate Disclosure Statement

Under Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A) and Circuit Rule 26.1, each of the non-tribal proposed amici curiae certify that they are non-profit conservation organizations or trade industry groups, and have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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**GLOSSARY**

CSPA	California Sportfishing Protection Alliance
CWA	Clean Water Act, 33 U.S.C. § 1251 <i>et seq.</i>
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act, 16 U.S.C. § 791 <i>et seq.</i>
IUR	Idaho Rivers United
REA Notice	Notice of Ready for Environmental Analysis
SYRCL	South Yuba River Citizens League

## INTRODUCTION

The Karuk Tribe, the Yurok Tribe, American Whitewater, California Sportfishing Protection Alliance, South Yuba River Citizens League, California Outdoors, Friends of the River, and Idaho Rivers United (“Amicus Petitioners”) request rehearing of the Panel’s decision in *Hoopa Valley Tribe v. FERC*, D.C. Cir. No. 14-1271 (Jan. 25, 2019) (“Decision”). Amicus Petitioners submit this brief in support of Panel or *en banc* rehearing pursuant to the Federal Rule of Appellate Procedure 29(b)(2) and Circuit Rule 35(f) in order to address issues of exceptional importance that were not adequately considered or addressed by the Panel’s decision. Fed. R. App. P. 35(b).

This case arises from an appeal by the Hoopa Valley Tribe of a ruling by the Federal Energy Regulatory Commission (“FERC”) that agencies in Oregon and California had not waived their authority to issue water quality certifications under Section 401 of the Clean Water Act (“CWA”). The Hoopa Valley Tribe argued that the serial withdrawal and resubmittal of an application for water quality certification in the licensing proceeding for the Klamath River Hydroelectric Project, allowed by Oregon and California in order to allow for completion of the actions in a negotiated settlement, amounted to a waiver of Certification. The specific issue in this case is whether the states have timely exercised their right to issue a section 401 Certification for the Klamath River Hydroelectric Project, or

having failed to do so, have waived their authority under 33 U.S.C. § 1341 (“401 Authority”). More generally, however, this case will determine whether states will have a meaningful opportunity to evaluate whether hydropower projects discharging flows into navigable rivers will comply with state water quality standards.

The Supreme Court has long held that dams have significant adverse impacts on water quality. *See S.D. Warren Co. v. Me. Bd. Of Env't'l Protection*, 547 U.S. 370, 385 (2006); *PUD No. 1 v. Washington, Dep't of Ecology*, 511 U.S. 700, 719-20 (1994). Section 401 of the CWA stands as a bulwark against the harmful effects that federally permitted energy projects may have on water quality, providing states with the opportunity to exercise mandatory authority specifying the conditions under which a federally licensed project must operate in order to comply with state water quality standards. The Panel's decision invalidating FERC's long-established acceptance of allowing applicants for water quality certifications associated with FERC licenses to employ a withdraw-and-resubmit procedure could exempt dozens of hydropower dams that are currently undergoing FERC relicensing from compliance with state water quality standards for the next 30 to 50 years.

## INTERESTS OF AMICI

Amicus Petitioners are federally recognized Indian tribes situated on the Klamath River downstream of the Klamath Hydroelectric Project, and national, state, and regional organizations with extensive practical experience and expertise in restoring rivers that are impacted by hydropower dams. Combined, these tribal governments and organizations have invested tens of thousands of hours in hydropower licensing and associated water quality certification proceedings in the last decade, including significant resources on the Klamath Hydroelectric Project. Each of the non-tribal Amicus Petitioners is a member of the steering committee of the national Hydropower Reform Coalition or the California Hydropower Reform Coalition, or both.

Amicus Karuk Tribe is a federally recognized Indian tribe with approximately 3,700 members. Its headquarters is located in Happy Camp, California, along the Klamath River approximately 40 miles downstream of the Klamath Hydroelectric Project. The Karuk Tribe has lived in northern California since time immemorial. The stated mission of the Karuk Tribe is to promote the general welfare of all Karuk people; establish equality and justice for the Tribe; restore and preserve Tribal traditions, customs, language, and ancestral rights; and secure for themselves and their descendants the power to exercise the inherent

rights of self-governance. The Tribe depends on native fish and wildlife species for traditional cultural, religious, and subsistence uses.

Amicus Yurok Tribe is a federally recognized Indian tribe with over 6,300 tribal members which has occupied the lower Klamath River since time immemorial. The Yurok Tribe's reservation includes one-mile on each side of the lower 45 miles of the Klamath River in Northern California. The Yurok Tribe has federally reserved fishing and water rights on the Klamath River. The Tribe maintains a fishing based way of life on the Klamath River which includes several villages along the river, a subsistence and commercial fishery, numerous religious ceremonies and other cultural activities. The Tribe has invested decades of work and significant human and financial resources toward dam removal and restoration of the Klamath River.

Amicus American Whitewater is a national non-profit organization with a mission "to conserve and restore America's whitewater resources and to enhance opportunities to enjoy them safely." American Whitewater represents more than 5,000 members and 100 local paddling club affiliates across America. American Whitewater has actively participated in more than 50 FERC licensing proceedings over the past decade, the majority of which were associated with water quality certification proceedings.

Amicus California Sportfishing Protection Alliance (“CSPA”) is a non-profit fishery conservation organization incorporated in 1983. On behalf of its 1,000 members, CSPA’s mission is to protect, restore, and enhance California’s fishery resources and their aquatic ecosystems. CSPA carries out a substantial portion of its advocacy through hydropower relicensing proceedings. In the last 13 years, CSPA has actively participated in 14 licensing proceedings and seven water quality certification proceedings.

Amicus South Yuba River Citizens League (“SYRCL”) is a membership-based non-profit organization with over 3,000 members and nearly 1,000 active annual volunteers supporting the mission to protect and restore California’s Yuba River. Over the past decade, SYRCL has devoted substantial resources and advocacy to the relicensing of three hydropower projects in the Yuba River watershed. SYRCL expects that the water quality certification proceedings associated with these relicensings will address important resource issues not resolved in relicensing.

Amicus California Outdoors is a trade industry group comprised of fifty whitewater companies. Based in the foothills of California’s Sierra Nevada Mountains, California Outdoors represents outfitters that provide recreational whitewater opportunities for clients on west slope Sierra Nevada rivers. The

industry group has been involved in four major relicensing proceedings in the past two decades.

Amicus Friends of the River is a non-profit organization founded in 1973. Friends of the River has more than 3000 members dedicated to the protection, preservation, and restoration of California's rivers, streams, and aquatic ecosystems. Friends of the River's extensive experience in hydropower relicensing includes participation in 10 relicensing proceedings in the past 15 years, including party status in the Klamath relicensing.

Amicus Idaho Rivers United ("IRU") is a non-profit organization founded in 1990 "to protect and restore the rivers of Idaho." In the past decade, IRU has represented the interests of its 3,500 members in eight FERC licensing proceedings. IRU has a decade of work invested in the water quality certification proceedings of Idaho and Oregon for the Hells Canyon complex of three hydroelectric projects on the Snake River.

## **ARGUMENT**

### **1. The Panel's decision would undermine the ability of the states to protect water quality.**

The Panel's expansive reading of 33 U.S.C. § 1341, finding that a state waives its 401 Authority after one year, notwithstanding the fact the applicant had withdrawn its water quality certificate application and resubmitted a new application, will effectively prevent the states from determining whether the

issuance of a new hydropower license will ensure compliance with state-promulgated and federally-approved water quality standards. This would undermine “the policy of the Congress 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, and to consult with the Administrator in the exercise of his authority under this Act.” 33 U.S.C. § 1251(b).

FERC’s regulations require that an applicant for a hydropower license file a copy of its request for water quality certification within 60 days of FERC’s notice of acceptance and ready for environmental analysis (“REA Notice”). 18 C.F.R. §§ 5.23(b) and 4.34(b)(5)(i). This means that license applicants must request a section 401 Certification from the state or tribe prior to the completion of FERC’s environmental analysis of project impacts. By doing so, as FERC recognized in its 2003 *Notice of Proposed Rulemaking on the Integrated Licensing Process*, this requirement to request a state certification early in the application process will mean that the applicant may not provide the state authority with the information necessary to allow for meaningful review of the potential water quality impacts. 102 FERC ¶ 61,185 at P 95 (Feb. 20, 2003). FERC maintained, however, that it was bound by its own interpretation of its responsibilities under the Federal Power Act (“FPA”) and would not necessarily defer in its study determinations to the

stated information needs of state agencies with Clean Water Act section 401 jurisdiction:

There are limits to what the Commission can do to coordinate its activities with state processes. Some states, for instance, indicate that the problem of incomplete water quality certification applications when the license application is filed would be eliminated if the Commission would treat states as "full partners" in the licensing process, which appears to entail, among other things, complete deference to state agency study requests. The Commission may in fact require an applicant to complete all of the information-gathering or studies requested by a state agency, but must exercise its independent judgment with respect to each study request . . . .

*Id.* at P 98. As a result, lengthy delays often result from license applicants failing to provide state agencies with sufficient information to complete their review of the project to establish conditions necessary to comply with state water quality standards. *Id.* at P 94.

The Panel's decision is also likely to prevent state agencies from completing a meaningful environmental review to assure compliance with state water quality standards. Given that the FERC environmental review can extend at least a year beyond the time that it issues the REA Notice for the project, states would need to complete their own environmental review without the benefit of FERC's environmental analysis. Additionally, even with FERC's analysis available, the states often have requirements for environmental review not covered by FERC's analysis.

Thus, the Panel's decision effectively requires state agencies to certify compliance with state water quality standards without sufficient information and environmental analysis, or alternatively, deny certification. Either scenario would likely result in costly and time-consuming litigation by applicants or other stakeholders dissatisfied with the certification decision. Granting section 401 certification without sufficient environmental analysis by the states could result in projects that fail to adequately support designated and existing uses, including aquatic habitat and recreation.

- 2. The Panel's finding that the states waived their § 401 authority through reliance on the established withdraw-and-resubmit procedure would, if applied retroactively, result in the licensing of projects that fail to meet state water quality standards.**

The Panel's decision has resulted in confusion throughout the country among license applicants, resource agencies, and stakeholder groups, all of whom are uncertain how the Panel's decision will be applied to pending license applications. The potential that the decision will be applied retroactively also raises the prospect that previously issued hydropower licenses incorporating conditions mandated by state section 401 certifications could be challenged by Licensees seeking relief from water quality protection measures.

Pursuant to FERC's regulations, a state waives its 401 Authority if it has not denied or granted a certification within "one year after the date the certifying agency received a written request for certification." 18 C.F.R. § 4.34(b)(5). In

promulgating this rule in 1991, FERC explained that “[I]f an applicant fails to comply with a state agency’s procedural requirements, the agency has the power to deny the request for certification, and that denial is binding on this Commission. The denial can be issued without prejudice to the applicant’s refiling of an application that complies with the agency’s requirements.” 56 Fed. Reg. 23,108-01, 23,127 (May 20, 1991).

FERC's explanation of how it interpreted the CWA’s one-year deadline for state agencies to issue or waive certification thus authorized a deny-and-reapply procedure to provide state agencies with sufficient time to develop their own record, complete their own review of project impacts, and prescribe conditions for the operation of the project. While on the one hand FERC announced a “bright-line” test for timeliness of state section 401 certifications, it simultaneously affirmed that control of the procedures for development of certification rests with the states.

The withdraw-and-resubmit procedure at issue in this case is the functional equivalent by which a license applicant may elect to avoid the deny-and-reapply procedure expressly anticipated by FERC in comments to its 1991 rule. In the instant case, FERC explicitly accepted the use of the withdraw-and-resubmit practice. Since FERC’s decision in this instance was consistent with its past practice, the states reasonably relied on FERC to interpret it as the functional

equivalent to the deny-and-reapply procedure that FERC more explicitly called out in 1991.

Indeed, FERC has routinely incorporated into project licenses the states' certifications that were developed following this procedure. For example licenses the Upper American River Project,<sup>1</sup> the Chili Bar Project,<sup>2</sup> and the Poe Project<sup>3</sup> all used this process to allow the respective states the time necessary to complete meaningful reviews. Despite this, the Panel's decision fails to address the issue of how its decision will affect scores of pending hydropower licenses where states relied on FERC's acceptance of the withdraw-and-resubmit procedure to complete their environmental review of project impacts. Already, several project applicants

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<sup>1</sup> 148 FERC ¶ 62,070, Certification at 23 (available at [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/water\\_quality\\_cert/docs/uppramrvr/uarp\\_401wqc\\_combined.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/uppramrvr/uarp_401wqc_combined.pdf) (last visited March 18, 2019)); ([https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/water\\_quality\\_cert/docs/uppramrvr/uarp\\_ferc\\_license.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/uppramrvr/uarp_ferc_license.pdf))

<sup>2</sup> 148 FERC ¶ 62,148, Certification at 2 (available at [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/water\\_quality\\_cert/docs/chilibar\\_ferc2155/chilibar\\_revised401.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/chilibar_ferc2155/chilibar_revised401.pdf) (last visited March 18, 2019)).

<sup>3</sup> 165 FERC ¶ 62,172, Certification at 3 (available at [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/water\\_quality\\_cert/docs/poe\\_ferc2107/poe\\_final\\_wqc\\_signed.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/poe_ferc2107/poe_final_wqc_signed.pdf)(last visited March 18, 2019))

have petitioned FERC, arguing that states have waived their 401 Authority by failing to act timely on their request for water quality certification.<sup>4</sup>

Applying the Panel's decision retroactively will result in FERC licensing projects where states will have suddenly, and unexpectedly, lost the opportunity to establish instream flows and other conditions that will protect designated and existing uses under state water quality standards, undermining the critical role of the states in enforcing the CWA. While prospective application of the Panel's decision will present significant challenges for 401 certifying agencies, retroactive application of the decision would have a profoundly damaging impact on untold rivers where FERC issues licenses that fail to comply with state water quality standards.

The Panel's determination that the Oregon and California have waived their 401 Authority after having reasonably relied on express and implicit FERC guidance would violate principles of fundamental fairness in dealings between state and federal agencies responsible for ensuring the protection of water quality

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<sup>4</sup> See, e.g., Conowingo Hydroelectric Project, FERC Project No. P405. Notice of Petition for Declaratory Order re Exelon Generation Company, LLC under P-405 (available at [https://elibrary.ferc.gov/idmws/file\\_list.asp?document\\_id=14751783](https://elibrary.ferc.gov/idmws/file_list.asp?document_id=14751783) last visited March 18, 2019) and Yuba-Bear Hydroelectric Project, FERC Project, FERC Project No. 2266, Letter from R. Schenzinger, Nev. Irrigation District to K. Bose, FERC (available at [https://elibrary.ferc.gov/idmws/file\\_list.asp?document\\_id=14745472](https://elibrary.ferc.gov/idmws/file_list.asp?document_id=14745472) (last visited March 18, 2019)).

in FERC licensed hydropower projects. The Panel's decision undermines the cooperative federalism that is at the core of the CWA, the partnership between the states and the federal government in the implementation of the Clean Water Act.

### 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.

Dated: March 18, 2019

Respectfully submitted,

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**CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE  
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2568 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. Rule 32(e)(1).
  
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14-point Times New Roman font.

DATED: March 18, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that this Amicus Brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit on March 18, 2019, by utilizing the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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