

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

North Carolina Department of
Environmental Quality,

Petitioner,

v.

Federal Energy Regulatory Commission,

Respondent.

Case No. _____

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and Section 313(b) of the Federal Power Act, 16 U.S.C. 825l(b), Petitioner North Carolina Department of Environmental Quality hereby petitions this Court to review (i) a final order of the Federal Energy Regulatory Commission (“FERC”) issued September 20, 2019, entitled “Order Issuing Original License” (168 FERC ¶ 61,185) (“License Order”), issuing a license to McMahan Hydroelectric, LLC, to operate and maintain the Bynum Hydroelectric Project and determining, in part, that North Carolina waived its authority to issue a water quality certification pursuant to Section 401 of the Clean Water Act; and (ii) FERC’s “Order Denying Rehearing and Stay” issued April 16, 2020 (171 FERC ¶ 61,046) (“Rehearing Denial”). Petitioner contends that, in issuing the License Order and the Rehearing Denial, FERC erred in determining that North Carolina waived its authority to issue a water quality

certification for the Bynum Hydroelectric Project. In accordance with Local Rule 15(b), the License Order and the Rehearing Denial are attached hereto as Exhibit A and Exhibit B, respectively.

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LIST OF RESPONDENTS

In accordance with Local Rule 15(b), Petitioner provides a list of Respondents below specifically identifying the Respondents' names and the addresses where Respondents and/or their counsel may be served with copies of this Joint Petition for Review:

Respondent

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CERTIFICATE OF SERVICE

In accordance with Federal Rule of Appellate Procedure 15(c)(1) & (2), the undersigned certifies that, on June 12, 2020, a copy of this Petition for Review was served by email to the parties on FERC's official service list of parties admitted to participate in dockets P-14858 and P-4093. A list of those served is attached as Exhibit C.

The undersigned certifies that a copy of the foregoing Petition for Review was served on June 12, 2020 by certified mail, return receipt requested, on the following:

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Exhibit A

168 FERC ¶ 61,185
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

McMahan Hydroelectric, LLC

Project No. 14858-000

ORDER ISSUING ORIGINAL LICENSE

(Issued September 20, 2019)

INTRODUCTION

1. On March 30, 2015, McMahan Hydroelectric, LLC (McMahan Hydro) filed an application for a license, pursuant to Part I of the Federal Power Act (FPA),¹ to operate and maintain the Bynum Hydroelectric Project No. 14858 (Bynum Project). The 600-kilowatt (kW) project is located at an existing dam on the Haw River, in the town of Bynum, Chatham County, North Carolina. The project will not occupy federal land.²
2. As discussed below, this order issues an original minor license for the Bynum Project.

¹ 16 U.S.C. §§ 791a – 825r (2018).

² The Haw River is a tributary of the Cape Fear River, which is a navigable waterway. *See J & T Hydro Co.*, 50 FERC ¶ 62,079, at n.4 (1990). Tributaries of navigable waterways are Commerce Clause streams within the meaning of section 23(b)(1) of the FPA. *FPC v. Union Elec. Co.*, 381 U.S. 90, 97 (1965). Because the project will be located on a stream over which Congress has jurisdiction under the Commerce Clause, affects interstate commerce through its connection to an interstate power grid, and involves post-1935 construction, it is required to be licensed pursuant to section 23(b)(1) of the FPA. *See* 16 U.S.C. § 817(1) (2018).

BACKGROUND

3. In 1985, the Commission authorized hydropower development at Bynum Dam by issuing a 30-year license to Tuscarora Yarns, Inc. to operate and maintain the Bynum Project No. 4093.³ The license expired on April 30, 2015.⁴

4. No license applications were filed at least 24 months before the Bynum Project's license expiration date, i.e. by April 30, 2013, the deadline established by section 16.20(c) of the Commission's regulations.⁵ Therefore, pursuant to section 16.25 of its regulations,⁶ the Commission issued a notice on June 19, 2013, giving interested entities 90 days to file a notice of intent to file an application for a license.⁷ On September 16, 2013, McMahan Hydro timely filed a notice of intent to file a license application and, on March 30, 2015, timely filed an application.

5. On September 23, 2016, the Commission issued a public notice accepting the application for filing and setting November 22, 2016, as the deadline for filing motions to intervene and protests.⁸ The North Carolina Wildlife Resources Commission (North

³ *Tuscarora Yarns, Inc.*, 31 FERC ¶ 62,273 (1985). The Commission later approved transfer of the license to Bynum Hydro Company (Bynum Hydro). *Tuscarora Yarns, Inc. and Bynum Hydro Co.*, 34 FERC ¶ 62,155 (1986). PK Ventures I Limited Partnership (PK Ventures) subsequently acquired the project facilities, but, although it requested that the license be transferred to it, failed to provide the required documentation, so the transfer was not approved. See *PK Ventures I Ltd. P'ship*, 153 FERC ¶ 61,040, at P 2 (2015).

⁴ Prior to expiration of the license, staff determined that Bynum Hydro, the licensee of record, had been administratively dissolved by the State of North Carolina. As there would have been no point in issuing an order directing a dissolved entity to continue project operation, the Commission determined that it was in the public interest to allow the license to expire. *PK Ventures*, 153 FERC ¶ 61,040 at P 12.

⁵ 18 C.F.R. § 16.20(c) (2019). Although PK Ventures filed a notice of intent to file a license application and a pre-application document on April 30, 2010, in Docket No. P-4093, it did not subsequently file a license application.

⁶ 18 C.F.R. § 16.25 (2019).

⁷ This notice was published in the *Federal Register* on June 26, 2013. 78 Fed. Reg. 38,308.

⁸ 81 Fed. Reg. 67,340 (Sept. 30, 2016).

Carolina WRC) and the North Carolina Department of Environmental Quality (North Carolina DEQ) each filed a notice of intervention.⁹

6. PK Ventures, the current owner of the hydroelectric facilities, filed a timely motion to intervene opposing the project.¹⁰ PK Ventures argues that the Commission should deny McMahan Hydro's license application because, among other things, the Commission lacks jurisdiction over the project and because issuance of a license to McMahan Hydro would infringe upon PK Ventures' property rights.

7. On February 3, 2017, the Commission issued a public notice indicating that the application was ready for environmental analysis and setting April 4, 2017, as the deadline for filing comments, recommendations, terms and conditions, and prescriptions.¹¹ North Carolina WRC, the U.S. Fish and Wildlife Service (FWS), the U.S. Department of the Interior's Office of Environmental Policy and Compliance (Interior), and North Carolina DEQ filed comments and recommendations. PK Ventures filed comments in response to the February 3, 2017 notice, echoing its earlier statements.

8. On October 25, 2018, Commission staff issued an Environmental Assessment (EA), analyzing the impacts of the proposed project and alternatives to it and thereafter issued notice of the EA,¹² setting a deadline for comments of November 26, 2018. North Carolina DEQ and PK Ventures filed comments.

9. The interventions, comments, and recommendations have been fully considered in determining whether, and under what conditions, to issue this license.

PROJECT DESCRIPTION

A. Project Area

10. The Bynum Project is located on the Haw River adjacent to the town of Bynum, North Carolina. From the project area, the Haw River generally flows south for approximately 12 miles before joining the Cape Fear River. From the confluence, the

⁹ Under Rule 214(a)(2) of the Commission's Rules of Practice and Procedure, the North Carolina WRC and North Carolina DEQ became parties to the proceeding upon timely filing of their notices of intervention. 18 C.F.R. § 385.214(a) (2019).

¹⁰ Timely, unopposed motions to intervene are granted by operation of Rule 214(c) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(c) (2019).

¹¹ 82 Fed. Reg. 10,571 (Feb. 14, 2017).

¹² 83 Fed. Reg. 54,737 (Oct. 31, 2018).

Cape Fear River flows in a southerly direction for about 202 miles into the Atlantic Ocean.

B. Project Facilities

11. The Bynum Project includes the existing 900-foot-long, 10-foot-high stone masonry Bynum Dam that forms a 20-acre impoundment known as Odell Lake. The project dam consists of a 750-foot-long uncontrolled spillway section and a 150-foot-long, non-overflow section containing an intake facility with two Tainter gates. The two 6-foot-wide Tainter gates control inflow to a 2,000-foot-long, 40-foot-wide power canal. The power canal directs flow to a powerhouse containing one 600-kilowatt generating unit. The power canal includes a drainage gate immediately upstream of the powerhouse. Beyond the powerhouse, a 500-foot-long, 50-foot-wide tailrace returns water to the river, and a 100-foot-long, 0.48-kilovolt transmission line takes project power to a utility company's transformer, making the grid interconnection. When operating, the project bypasses approximately 2,500 feet of the river downstream of the dam.

12. The project has not operated for at least 10 years. In order to operate the Bynum Project, McMahan Hydro anticipates performing rehabilitation work that will likely include replacing the seals on the intake gates, clearing the intake canal of vegetation, and refurbishing the electrical components in the powerhouse.

13. The project includes one recreation facility; a canoe portage with a portage trail, an upstream and downstream canoe launch, and take-out areas.

C. Project Boundary

14. The proposed project boundary encloses all of the project facilities listed above.

D. Proposed Project Operation

15. The project will be operated in a run-of-river mode whereby water flowing out of the turbines and bypassed reach combined will approximate inflow to the impoundment.

E. Proposed Environmental Measures

16. To protect the Cape Fear shiner and its habitat,¹³ McMahan Hydro proposes to provide a minimum flow of 240 cubic feet per second (cfs) to the bypassed reach from March 1 through April 30 and 120 cfs the rest of the year. The minimum flow will be provided via spill over the dam. When the impoundment surface level drops below the

¹³ The Cape Fear shiner is a federally and state listed endangered species.

level required to release the minimum flow over the dam, an automatic shutoff device will close the Tainter gates and project operation will cease.

17. To protect fish, other aquatic organisms, and habitat from erosion and sedimentation during project refurbishment, McMahan Hydro proposes to develop an erosion management plan that includes using best management practices.
18. To protect fish, other aquatic organisms, and habitat from future impoundment sediment management or dredging, McMahan Hydro proposes to develop a plan for erosion management during those activities, if necessary.
19. To ensure operational compliance and protect aquatic resources, McMahan Hydro proposes to develop a flow monitoring plan to document the maintenance of run-of-river operation, and the minimum flows to the project's bypassed reach.
20. To support fish, other aquatic organisms, and habitat, McMahan Hydro proposes to monitor for and maintain an instantaneous 4.0 milligrams per liter (mg/l) of dissolved oxygen (DO) concentration and 5.0 mg/l daily average DO concentration in the bypassed reach and tailrace during project operation.
21. To protect fish, other aquatic organisms, and habitat, McMahan Hydro proposes to develop an intake maintenance plan for the disposition of organic and inorganic waste that collects on the project dam and powerhouse trashracks, to keep organic material in the river for use by aquatic organisms and properly dispose of trash.
22. To minimize fish impingement and entrainment, McMahan Hydro proposes to consult with North Carolina DEQ, North Carolina WRC, and FWS to develop measures as necessary.
23. To protect environmental resources in the impoundment, bypassed reach, and downstream river reach, McMahan Hydro proposes to develop an impoundment drawdown and refill management plan should there be a need to draw down the impoundment or otherwise interrupt flow into the bypassed reach.
24. To provide public recreation opportunities, McMahan Hydro proposes to develop a recreation management plan (Recreation Plan) that includes provisions for:
(1) improving the existing portage trail by removing impediments to access and installing a new wooden stair system; (2) improving an existing, but unmaintained, hiking trail from Bynum Dam to the powerhouse to connect state-maintained trails that exist upstream and downstream of project land; and (3) installing signs to inform the public of the project's recreational amenities.

PRELIMINARY MATTERS

A. The Commission's Jurisdiction

25. PK Ventures contends that the Commission lacks jurisdiction over the Bynum Project because it is located on a non-navigable portion of the Haw River. In questioning the Commission's jurisdiction, PK Ventures also asserts, without elaboration, that the project neither affects interstate commerce nor has undergone post-1935 construction or modification.

26. Section 23(b)(1) of the FPA requires a non-federal project to be licensed if it is located on a body of water over which Congress has commerce clause jurisdiction, has undergone project construction on or after August 26, 1935, and affects the interests of interstate or foreign commerce.¹⁴ As noted above, the Bynum Project is located on the Haw River, a tributary of the Cape Fear River, which is a navigable waterway.¹⁵ Non-navigable commerce clause waters include the headwaters and tributaries of navigable waters,¹⁶ and are commerce clause waterways within the meaning of FPA section 23(b)(1). Because the Bynum Project's generating facilities were converted from mechanical hydropower to electrical hydropower after 1935, the project has undergone post-1935 construction.¹⁷ Last, the project will affect interstate commerce through its

¹⁴ 16 U.S.C. § 817(1).

¹⁵ See *supra* note 2; See also *J & T Hydro Co.*, 50 FERC ¶ 62,079 at n.4.

¹⁶ *FPC v. Union Elec. Co.*, 381 U.S. at 97.

¹⁷ See EA at 54; McMahan Hydro's March 30, 2015 Final License Application at 48; See also PK Ventures' April 30, 2010 Pre-Application Document, Project No. P-4093, at 11 (describing the powerhouse as containing a "Leffel Type S 1940" turbine). The installation of a generator and associated electrical equipment constitutes post-1935 construction for the purposes of FPA section 23(b)(1). See *Aquenergy Sys., Inc. v. FERC*, 857 F.2d 227 (4th Cir. 1988).

connection to the interstate power grid.¹⁸ Therefore, the Bynum Project is required to be licensed by the Commission pursuant to section 23(b)(1) of the FPA.¹⁹

B. Property Rights

27. PK Ventures argues that the Commission must deny McMahan Hydro's license application because McMahan Hydro does not possess the necessary water rights or rights in the project property or facilities. However, the acquisition of property rights (including water rights) needed for a project is not a prerequisite to issuance of a license; such rights are frequently obtained thereafter.²⁰ Standard Article 5 of this license gives McMahan Hydro five years to obtain the property rights necessary to operate the project. If property rights cannot be obtained by purchase, McMahan Hydro can, if necessary, obtain any property or water rights that are necessary for project operation through the use of eminent domain pursuant to FPA section 21.²¹ As explained in more detail below, Article 203 of this license requires McMahan Hydro to report to the Commission within four years on the status of the property rights McMahan Hydro holds on lands within the project boundary.

SUMMARY OF LICENSE REQUIREMENTS

28. This license, which authorizes 600 kW of renewable energy generation capacity, requires the proposed measures noted above except for water quality monitoring and the measures for fish impingement and entrainment protection, as well as staff and state agency-recommended modifications and the measures described below. Combined, these

¹⁸ See *Habers Mills v. FERC*, 976 F.2d 1381, 1384-85 (11th Cir. 1992) (holding that small hydroelectric projects that are connected to the interstate grid, even if they have no interstate sales, affect interstate commerce by displacing power from the grid, and the cumulative effect of the national class of these small projects is significant for purposes of FPA section 23(b)(1)).

¹⁹ See 16 U.S.C. § 817(1).

²⁰ See, e.g., *Swift Creek Power Co., Inc.*, 83 FERC ¶ 61,238, at 62,038 (1998); *Northwest Power Co.*, 59 FERC ¶ 61,132, at 61,492 (1992).

²¹ 16 U.S.C. § 814 (2018). See *Marseilles Hydro Power, LLC*, 107 FERC ¶ 61,066, at P 10 (2004) (footnotes omitted) ("It therefore appears that a licensee can, upon payment of just compensation, obtain the necessary project water rights by means of the eminent domain power conferred by section 21 of the FPA, 16 U.S.C. § 814."); see also *City of Santa Clara, Cal.*, 20 FERC ¶ 61,257, at 61,483 (1982) (citing *State of Cal. Dep't of Water Res.*, 18 FERC ¶ 61,056 (1982)).

measures will protect, mitigate impacts to, or enhance geology and soils, water quality, fisheries, and recreation resources at the project.

29. To protect aquatic resources, this license requires that McMahan Hydro's proposed flow monitoring plan include a provision stating that in the event that run-of-river operation or minimum flows are interrupted, a report must be filed documenting the details of the event and a description of measures to prevent future interruptions.

30. To protect cultural resources at the project, this license requires McMahan Hydro to stop all land-clearing and land-disturbing activities and consult with the North Carolina State Historic Preservation Officer (SHPO) if a previously unidentified cultural resource is discovered during project operation, maintenance, or other project-related activities. In addition, this license requires McMahan Hydro to consult with the North Carolina SHPO prior to implementing any activities or project modifications not specifically authorized by this license to determine the effects of the activities on historic properties and the need for cultural resource studies or measures, if any.

31. To provide public recreation opportunities at the project, this license requires McMahan Hydro to develop a schedule for the construction of the proposed recreation facilities and to provide for their maintenance.

32. Given the anticipated increased recreation use at the project over the next 10 years, this license requires McMahan Hydro to consult with the North Carolina DEQ, North Carolina WRC, Chatham County Parks and Recreation Department, and the Carolina Canoe Club in 2030 to reevaluate the adequacy of the project's recreation facilities.

WATER QUALITY CERTIFICATION

33. Under section 401(a)(1) of the Clean Water Act (CWA),²² the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency either has issued water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year. Section 401(d) of the CWA provides that the certification shall become a condition of any federal license that authorizes construction or operation of the project.²³ As discussed below, we find that North Carolina waived certification.

²² 33 U.S.C. § 1341(a)(1) (2012).

²³ *Id.* § 1341(d).

34. On March 3, 2017, McMahan Hydro requested water quality certification from the North Carolina DEQ. North Carolina DEQ received McMahan Hydro's certification request on March 3, 2017,²⁴ making March 3, 2018, the deadline for the state to act on the request. On April 26, 2017, North Carolina DEQ requested additional information to supplement McMahan Hydro's application.²⁵ Specifically, North Carolina DEQ indicated that McMahan Hydro's application would be on hold until it provided (1) a water quality monitoring plan, and (2) a copy of the Commission's draft EA for the project.²⁶ McMahan Hydro submitted a water quality monitoring plan to North Carolina DEQ on December 21, 2017.

35. On December 21, 2017, McMahan Hydro contacted a North Carolina DEQ employee via e-mail, stating "[a]t some point I'd also like to discuss refiling my 401 application since I still haven't received my Environmental Assessment from FERC."²⁷ On January 3, 2018, the North Carolina DEQ employee instructed McMahan Hydro that "[t]o refile your application, you will need to send a letter stating that you would like to withdraw your application and reapply prior to March 3, 2017 [sic]. We do not charge an additional review fee when the delay is beyond the applicant's control as in your situation."²⁸ On February 20, 2018, McMahan Hydro submitted a letter via e-mail, requesting to withdraw and refile its application for the first time.²⁹ North Carolina DEQ

²⁴ See February 20, 2018 letter from Andrew McMahan (President, McMahan Hydro) to Karen Higgins (North Carolina DEQ). McMahan Hydro filed a copy of this letter in Docket No. P-14858 on March 19, 2018.

²⁵ See McMahan Hydro's March 19, 2018 Copy of Request to Withdraw and Re-apply for Water Quality Certification, Docket No. P-14858, at 1.

²⁶ *Id.*

²⁷ See McMahan Hydro's January 3, 2018 Hydro Monitoring Plan Proposal, accessed on North Carolina DEQ's electronic document database for Bynum Hydro Project (FERC #4093), <https://edocs.deq.nc.gov/WaterResources/0/doc/663438/Page1.aspx?searchid=5601113c-b8be-4604-9441-c5bcf5195d14> (e-mail from Andrew McMahan to North Carolina DEQ's Jennifer Burdette).

²⁸ See *id.* (e-mail from Jennifer Burdette to Andrew McMahan).

²⁹ See McMahan Hydro's March 19, 2018 Copy of Request to Withdraw and Re-apply for Water Quality Certification (e-mail from Andrew McMahan to Karen Higgins).

acknowledged McMahan Hydro's request on February 22, 2018, stating that "[a]ll application materials will be retained and a new application fee is not required."³⁰

36. On October 25, 2018, Commission staff issued the EA for the Bynum Project.³¹ On December 20, 2018, North Carolina DEQ provided comments on the water quality monitoring plan.³² At North Carolina DEQ's request, on January 18, 2019, McMahan Hydro submitted a revised water quality monitoring plan.³³ On January 25, 2019, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) decided *Hoopa Valley Tribe v. FERC*, which is discussed further below.³⁴ On February 7, 2019, a North Carolina DEQ employee informed McMahan Hydro of the impending one year deadline: ". . . [P]lease remember to send [North Carolina DEQ's section 401 supervisor] a request to withdraw and reapply (I think the deadline is by February 20th)."³⁵ Four days later, on February 11, 2019, McMahan Hydro requested to withdraw and refile its application for the second time.³⁶ North Carolina DEQ acknowledged McMahan Hydro's second withdrawal and resubmittal request on February 20, 2019.³⁷

37. North Carolina DEQ failed to act on McMahan Hydro's request for water quality certification within a reasonable period of time, not to exceed one year of receiving McMahan Hydro's application. McMahan Hydro's withdrawal and resubmittal of its

³⁰ *Id.* (e-mail from Karen Higgins to Andrew McMahan).

³¹ While the record does not reflect when North Carolina DEQ received the EA, in a letter dated December 20, 2018, the agency's section 401 supervisor stated that "[t]he Division of Water Resources (Division) recently reviewed . . . FERC's Environmental Assessment (EA) for the Bynum Hydroelectric project." McMahan Hydro's March 13, 2019 Copy of Revised Water Quality Monitoring Plan, Docket No. P-14858, at 1.

³² *Id.* at 1-2.

³³ *Id.* at 4-14.

³⁴ 913 F.3d 1099 (D.C. Cir. 2019).

³⁵ See McMahan Hydro's March 13, 2019 Copy of Revised Water Quality Monitoring Plan at 15 (e-mail from North Carolina DEQ's Chonticha Mcdaniel to Andrew McMahan).

³⁶ See McMahan Hydro's March 13, 2019 Copy of Request to Withdraw and Reapply for Water Quality Certification (e-mail from Andrew McMahan to Karen Higgins).

³⁷ *Id.* (e-mail from Karen Higgins to Andrew McMahan).

water quality certification application did not restart the one-year clock. In *Hoopa Valley Tribe v. FERC*, the D.C. Circuit held that “a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year.”³⁸ Thereafter, in *Placer County Water Agency*,³⁹ we held that a formal agreement between a licensee and a state certifying agency was not necessary to support a finding of waiver: rather, the exchanges between the entities could amount to an ongoing agreement.⁴⁰ Here, the record shows that North Carolina DEQ and McMahan Hydro agreed to a withdrawal and refiling process (and, indeed, that the state agency directed that activity), such that North Carolina DEQ has delayed the licensing of the Bynum Project.

38. Further, North Carolina DEQ’s request for additional information did not delay the one-year clock. Nor did McMahan Hydro’s submittal of information requested by North Carolina DEQ (i.e., a water quality monitoring plan and a copy of Commission staff’s EA) during the state’s review of the certification request render McMahan Hydro’s certification application a “new” application. The Commission has explained that, under the CWA, the certification waiver period begins on the date the certifying agency receives the certification request, rather than on the date the agency accepts the request.⁴¹ The Commission amended its regulations more than 30 years ago to incorporate this statutory requirement.⁴² In Order No. 464, by tying commencement of the certification waiver period to the date of receipt rather than the date on which the state certifying agency accepts the request, the Commission deliberately extracted itself from deciding whether a certification application is complete under state rules. Determining whether such an application is complete would require the Commission to interpret state rules in

³⁸ 913 F.3d at 1103.

³⁹ 167 FERC ¶ 61,056 (2019).

⁴⁰ *Id.* P 16.

⁴¹ *Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, Order No. 464, FERC Stats. & Regs. ¶ 30,730 (1987) (cross-referenced at 38 FERC ¶ 61,146) (Order No. 464).

⁴² *Id.*, amending 18 C.F.R. § 4.38 to provide that a certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the CWA if the certifying agency has not denied or granted certification by one year after the date the certifying agency received the request for certification. *See* 18 C.F.R. § 4.38(e)(2) (1988). This same requirement now appears in 18 C.F.R. § 4.34(b)(5)(iii) (2019).

order to resolve a litany of questions arising from the information request (e.g., whether the information request was appropriate under state law; whether the applicant provided the requested information; whether the provided information was significant enough to be treated as a “new” application; and, if provided during the course of the year, whether the information resulted in an extension of the one-year deadline). Under the Commission’s regulations, the Commission need not make such findings – the clock starts on the date the certifying agency receives the certification request.⁴³ As Order No. 464 notes, “[t]he Commission believes that a one-year waiver period, calculated from the date of receipt of a certification request, should in all but the most unusual cases provide certifying agencies with sufficient time to complete the certification proceeding.”⁴⁴ Moreover, an applicant’s submittal of additional information at a certifying agency’s request generally would not rise to the level of a material change to a project’s plan of development, such that an application to amend a pending license application, and a new certification request, would be warranted.⁴⁵ Accordingly, we find that North Carolina DEQ has waived certification.

⁴³ We cannot agree, in the absence of unusual circumstances (which are not presented here), with the dissent’s suggestion that “a significant modification to a pending section 401 application [that does not reflect a major physical modification to the project] may justify withdrawing and resubmitting that application without running afoul of section 401’s time limitation.” The exchange of information between an agency and an applicant is not unusual and typically will not result in a new filing date. For example, we often send data requests to hydro license applicants and those requests, which may deal with significant matters, do not restart the clock on the proceeding or typically alter our processing schedule. Indeed, failing to find waiver due to information requests from state agencies could encourage the states to ask applicants to provide additional data in order to give themselves more time to process certification requests, in contravention of Congress’ intent.

⁴⁴ FERC Stats. & Regs. ¶ 30,730 at 30,545.

⁴⁵ See *Erie Boulevard Hydropower, L.P.*, 131 FERC ¶ 61,036, at PP 15-17 (2010) (explaining that a material change to a project’s plan of development would involve significant changes to the project’s physical features), *aff’d*, *Green Island Power Authority v. FERC*, 497 F. App’x 127 (2d Cir. 2012); see also 18 C.F.R. § 4.35(f)(1) (2019).

COASTAL ZONE MANAGEMENT ACT

39. Under section 307(c)(3)(A) of the Coastal Zone Management Act (CZMA),⁴⁶ the Commission cannot issue a license for a project within or affecting a state's coastal zone unless the state CZMA agency concurs with the applicant's certification of consistency with the state's CZMA program, or the agency's concurrence is conclusively presumed by its failure to act within six months of its receipt of the applicant's certification.

40. By letter filed October 14, 2016, the North Carolina Division of Coastal Management confirmed that the project is not located within North Carolina's zone of potential effects on coastal resources, and that a federal consistency certification is not necessary. Therefore, a coastal zone consistency review is not required.

SECTION 18 FISHWAY PRESCRIPTIONS

41. Section 18 of the FPA⁴⁷ provides that the Commission shall require the construction, maintenance, and operation by a licensee of such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.

42. By letter filed June 11, 2015, the Secretary of the Interior requested that the Commission reserve the authority to prescribe fishways. Consistent with Commission policy, Article 404 of this license reserves the Commission's authority to require fishways that may be prescribed by Interior for the Bynum Project.

THREATENED AND ENDANGERED SPECIES

43. Section 7(a)(2) of the Endangered Species Act of 1973⁴⁸ requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of federally listed threatened and endangered species, or result in the destruction or adverse modification of their designated critical habitat.

44. One federally listed endangered species, the Cape Fear shiner, is known to occur in the Bynum Project vicinity.⁴⁹ Two other federally listed species, the harperella⁵⁰ and

⁴⁶ 16 U.S.C. § 1456(c)(3)(A) (2018).

⁴⁷ 16 U.S.C. § 811 (2018).

⁴⁸ 16 U.S.C. § 1536(a) (2018).

⁴⁹ EA at 43.

⁵⁰ Harperella is a perennial wetland herb.

red-cockaded woodpecker,⁵¹ are found in the county, but are not known to be in the project area and would not be affected by the operation of the project.⁵²

45. In section 3.3.4 of the EA, staff determined that the project, as proposed with the staff recommended measures, is not likely to adversely affect the Cape Fear shiner.⁵³ By letter filed February 13, 2019, FWS concurred with this finding.

NATIONAL HISTORIC PRESERVATION ACT

46. Under section 106 of the National Historic Preservation Act (NHPA)⁵⁴ and its implementing regulations,⁵⁵ federal agencies must take into account the effect of any proposed undertaking on properties listed or eligible for listing in the National Register of Historic Places (defined as historic properties) and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. This process generally requires the Commission to consult with the SHPO to determine whether and how a proposed action may affect historic properties, and to seek ways to avoid or minimize any adverse effects.

47. By letter filed April 23, 2015, the North Carolina SHPO stated that the project would not affect cultural resources. In the EA, staff also determined that the proposed action would not affect historic properties.⁵⁶ However, it is possible that unknown archaeological or cultural resources could be discovered during project-related construction, operation, or other activities that require land-disturbance. Therefore, Article 409 requires McMahan Hydro to stop work and consult with the North Carolina SHPO if previously unidentified archaeological or cultural artifacts are discovered during project maintenance or operation.

⁵¹ See Interior's official list of threatened and endangered species accessed by staff using the IPaC website (<https://ecos.fws.gov/ipac/>) on April 30, 2018, and filed on May 9, 2018. The IPaC report identified three species: the Cape Fear shiner, harperella, and red-cockaded woodpecker.

⁵² EA at 44.

⁵³ EA at 46.

⁵⁴ 54 U.S.C. § 306108 (Pub. L. No. 113-287, 128 Stat. 3227 (Dec. 19, 2014)).

⁵⁵ 36 C.F.R. pt. 800 (2019).

⁵⁶ EA at 56.

48. To protect cultural resources, Article 410 requires McMahan Hydro to consult with the North Carolina SHPO prior to conducting any maintenance activities, land-clearing or land-disturbing activities, or changes to project operation or facilities that do not require Commission approval but could affect cultural resources.

RECOMMENDATIONS OF FEDERAL AND STATE FISH AND WILDLIFE AGENCIES PURSUANT TO SECTION 10(J) OF THE FPA

49. Section 10(j) of the FPA⁵⁷ requires the Commission, when issuing a license, to include conditions based on recommendations submitted by federal and state fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act,⁵⁸ to “adequately and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat)” affected by the project.

50. On April 3, 2017, the North Carolina WRC timely filed the following four recommendations under section 10(j) of the FPA: (1) operate the project in a run-of-river mode; (2) provide a minimum flow to the bypassed reach of 120 cfs or inflow to the impoundment; (3) prepare a plan for maintaining and monitoring run-of-river operation and impoundment levels; and (4) develop a Recreation Management Plan.

51. North Carolina WRC’s section 10(j) recommendations are adopted in license Articles 401 (project operation) and 403 (plan for maintaining and monitoring run-of-river operation and impoundment levels). Because the recommendation to develop a Recreation Management Plan is not a specific fish and wildlife recommendation, staff determined that it was outside the scope of section 10(j). However, staff considered, and ultimately adopted, North Carolina WRC’s recommendation under section 10(a) of the FPA as discussed below.

SECTION 10(A)(1) OF THE FPA

52. Section 10(a)(1) of the FPA⁵⁹ requires that any project for which the Commission issues a license be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce; for the improvement and utilization of waterpower development; for the adequate protection, mitigation, and enhancement of fish and wildlife; and for other beneficial public uses, including irrigation, flood control, water supply, recreation, and other purposes.

⁵⁷ 16 U.S.C. § 803(j)(1) (2018).

⁵⁸ 16 U.S.C. §§ 661, *et seq.* (2018).

⁵⁹ 16 U.S.C. § 803(a)(1).

A. Water Quality Monitoring

53. McMahan Hydro proposes to monitor for DO concentration and temperature. Staff concluded in the EA that the project, which would be operated in run-of-river mode, with minimum flows to the bypassed reach of at least 120 cfs, and a small impoundment with short water retention time to affect water quality, would have almost no effect on DO concentration and temperature in either the reservoir, bypassed reach, or river reach downstream of the project's powerhouse.⁶⁰ With regard to DO concentrations in the bypassed reach where project operations could cause reduced flows, the EA noted that water quality monitoring data obtained at the North Carolina Ambient Monitoring Station in the bypassed reach showed that the DO concentrations did not drop below 6 mg/L either during the ten years when the project operated with a bypassed reach minimum flow of 80 cfs (1997-2006), or during the nine years when the project was not operating (2007-2016), and therefore, the project is unlikely to cause poor DO conditions in the bypassed reach.⁶¹ Because project operation would not have a negative effect on water quality, this license does not require water quality monitoring.

B. Impingement and Entrainment of Fish

54. Neither McMahan Hydro nor the agencies have proposed or recommended any specific fish impingement and entrainment protection measures. McMahan Hydro proposes to consult with North Carolina DEQ, North Carolina WRC, and FWS post-licensing to develop measures to minimize fish impingement and entrainment. However, staff concluded in the EA that project-related impingement and entrainment would not have adverse effects on fish populations because fish burst speeds, site characteristics, and habitat preferences make significant impingement or entrainment unlikely. In addition, most entrained fish would be small individuals of a species that can absorb the loss of many small fish at a population level.⁶² Therefore, this license does not require impingement and entrainment protection measures. However, the licensee is free to

⁶⁰ EA at 30-32.

⁶¹ In assessing whether or not the DO concentration data was indicative of poor water quality conditions, the EA compared the DO data to the state DO standard of a daily minimum average concentration of 5 parts per million, which is equivalent to 5 mg/L, and an instantaneous minimum of 4 parts per million, which is equivalent to 4 mg/L. Because the lowest DO concentration measured during past periods when the project was and was not operating was 6 mg/L, the EA concluded that the project, if licensed and operating once again with an even higher bypassed reach minimum flow release than under previous project operations, would not adversely affect water quality. *See* EA at 30-32.

⁶² EA at 36.

consult with the agencies and to seek to amend its license to implement any measures they collectively deem appropriate.

C. Recreation Management Plan

55. In its section 10(j) recommendations filed April 3, 2017, the North Carolina WRC recommended that the licensee prepare a recreation management plan that includes provisions for providing a canoe portage and associated signage. As noted above, this recommendation is considered under section 10(a)(1) of the FPA, rather than section 10(j).

56. McMahan Hydro's proposed plan includes provisions for: (1) improving the existing portage trail at the project by removing impediments to access and installing a new wooden stair system; (2) improving an existing, but unmaintained, hiking trail from Bynum Dam to the powerhouse to connect state-maintained trails located upstream and downstream of the project; and (3) installing signs to inform the public of the project's recreational amenities. The North Carolina WRC supports McMahan Hydro's proposal.

57. As discussed in the EA, future recreation use at the Bynum Project will likely increase, as the nearby population is expected to increase markedly.⁶³ Staff recommended that McMahan Hydro's proposed recreation management plan be implemented for the project, with additional measures.⁶⁴ The additional staff-recommended measures include developing a schedule for improving the portage and hiking trails and developing provisions to ensure that the improvements are maintained over the term of the license. Also, given the anticipated increased recreation use at the project over the next 10 years, this license requires McMahan Hydro to consult with the North Carolina DEQ, North Carolina WRC, Chatham County Parks and Recreation Department, and the Carolina Canoe Club in 2030 to ensure that the recreation facilities continue to adequately meet demand. Article 408 requires McMahan Hydro to prepare a Recreation Plan that includes staff's recommended provisions.

COMMENTS ON THE EA

A. Alternatives Analysis

58. PK Ventures argues that the alternatives analysis is flawed because the EA failed to consult the owner and to consider other reasonable and feasible alternatives. In particular, PK Ventures states that, by defining the existing state of the site as the no-

⁶³ EA at 49-50.

⁶⁴ EA at 70.

action alternative, staff does not treat the existing lack of hydropower operations at the site as an environmental enhancement for comparison with other alternatives.

59. Section 102(2)(E) of National Environmental Policy Act (NEPA) requires agencies to consider reasonable alternatives to proposed actions.⁶⁵ In the EA, the alternatives analysis compared the no-action alternative, McMahan Hydro's proposal, and the staff recommended alternative. PK Ventures provides no information regarding any additional alternative proposal or measures to be considered. Instead, PK Ventures seems to confuse the proposed action before the Commission (i.e. McMahan Hydro's proposal) with another possible use of the facilities.⁶⁶ NEPA does not require the Commission to consider alternatives that have not been proposed.

60. The Council on Environmental Quality regulations define a no-action alternative to "mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity...."⁶⁷ Commission staff appropriately used existing conditions as the baseline environmental condition to be compared with McMahan's proposal and the staff recommended measures. The EA explains that under the no action alternative, the dam and other project facilities "would remain as is, with all flows passing over the spillway except for insignificant leakage at the intake gates into the canal."⁶⁸ As described in section 2.1.2 of the EA, Bynum Dam is not currently licensed by the Commission and has not generated electricity for more than a decade.⁶⁹

B. Project Refurbishment Impacts

61. PK Ventures contends that the EA fails to fully analyze the impacts of project refurbishment. PK Ventures points out that Commission staff anticipates that refurbishment could result in erosion and sediment discharge on land and in the water within the project boundary, potentially impacting aquatic habitat and organisms.

⁶⁵ 42 U.S.C. § 4332(2)(E) (2012).

⁶⁶ See PK Ventures, EA Comments, Docket No. P-4093, at 10 (filed Nov. 26, 2018) ("The no-action alternative is flawed in that it does not consider potential utilization and disposition of the property other than use by McMahan which is not owner and has no authority with respect to the property.").

⁶⁷ Council on Environmental Quality, *CEQ 40 Most Asked Questions*, at 3 (Mar. 1981), <https://www.energy.gov/sites/prod/files/G-CEQ-40Questions.pdf>

⁶⁸ EA at 8.

⁶⁹ EA at 9.

Therefore, PK Ventures disagrees with the EA's recommendation that the license require McMahan Hydro to develop detailed plans to protect against, and mitigate effects of, erosion and sedimentation, and to manage drawdowns and debris, only after license issuance. To facilitate stakeholder review and comment, PK Ventures believes that the following plans and measures should have been developed prior to, and included in, the EA: the Erosion Management Plan, Impoundment Drawdown and Refill Management Plan, Debris Management Plan, and the project rehabilitation measures. With regard to project refurbishment, PK Ventures argues that the EA should have included a clear list of the proposed rehabilitation activities. According to PK Ventures, the plans should include the timing and duration of the work.

62. Although McMahan Hydro has been unable to access the site to make a full assessment of restoration needs, McMahan Hydro anticipates it will need to repair the intake gates, clear the intake canal of vegetation, stabilize the canal banks if necessary, revegetate the canal banks with grass to prevent erosion, and refurbish the electrical components in the powerhouse.⁷⁰ The EA analyzed these measures and any potential environmental effects.⁷¹ The power canal is designed so that, with the intake Tainter gates closed, the sluice gate adjacent to the powerhouse can be used to drain the power canal for work in a dry setting.⁷² Currently, leaking Tainter gates prevent draining the power canal. Once the Tainter gates are resealed, rehabilitation work on the canal embankments can be done in a dry setting, eliminating the possibility of sediment transport and allowing McMahan Hydro to substantially reduce the risk of harmful release of sediment into the river.

63. As recommended in the EA, McMahan Hydro is required to finalize the Erosion Management Plan (Article 405) before starting any land-disturbing or land-clearing activities and the Impoundment Drawdown and Refill Management Plan (Article 402) and Debris Management Plan (Article 406) before operating the project.⁷³ In addressing the erosion, drawdown and refill, and debris management issues, the EA recommended, and this license requires, that those plans include detailed procedures, provisions, and best management practices for protecting environmental resources, as well as provide work schedules describing the timing and duration of plan activities. The EA also recommended, and this license requires, consultation on the development of the plans

⁷⁰ EA at 10, 15.

⁷¹ EA at 15.

⁷² EA at 16.

⁷³ EA at 67.

with North Carolina DEQ, North Carolina WRC, and FWS, and final approval by the Commission

C. Project Operation

64. North Carolina DEQ in its comments on the EA requests that the applicant operate the facility during normal operations at or above the dam crest such that the stipulated flow requirements and run-of-river operation are maintained.

65. In order to protect aquatic organisms and habitat in the project impoundment and river downstream, McMahan Hydro proposes, and this license requires, that the project be operated as described by North Carolina DEQ, including the requirement for run-of-river operation and the release of minimum flows, over the dam, to the bypassed reach (Article 401).⁷⁴

D. Flow Monitoring

66. In its comments on the EA, North Carolina DEQ asks the Commission to include “language in the license” ensuring the Commission’s consideration of future license measures in the event that the U.S. Geological Survey (USGS) discontinues use of gage No. 02096960, located on the Haw River just downstream of the project and North Carolina DEQ discontinues its water quality monitoring program in the future.

67. Consistent with North Carolina DEQ’s request, Standard Article 11 set forth in Form L-12, attached hereto, reserves the Commission’s authority to reopen the license, upon the Commission’s own motion or upon the petition of certain federal and state fish and wildlife agencies, for future consideration of additional license measures or modifications of the license requirements to protect fish and wildlife resources.

⁷⁴ In comments on the EA, filed on November 23, 2018, North Carolina DEQ noted that the North Carolina Division of Energy, Mining and Land Resources’ dam database lists Odell Lake with a larger surface area but a smaller storage capacity than McMahan Hydro described in its license application. Once McMahan Hydro acquires the necessary property interests to rehabilitate and operate the project, we expect McMahan Hydro to notify the Commission of any inaccuracies in the description of the project facilities including the reservoir dimensions, and file any necessary license amendments.

ADMINISTRATIVE PROVISIONS

A. Annual Charges

68. The Commission collects annual charges from licensees for administration of the FPA. Under the regulations currently in effect, projects with an authorized installed capacity of less than or equal to 1,500 kW, like this project, will not be assessed an annual charge.⁷⁵

B. Exhibit F and G Drawings and As-built Drawings

69. The Commission requires licensees to file sets of approved project maps and drawings in electronic file format.

70. The amended exhibit G map, filed on August 19, 2016, is not approved because it does not include the title block required by section 4.39 of the Commission's regulations.⁷⁶ The exhibit F drawings, filed on November 27, 2015, are not approved because a plan view of the spillway section and a section view of the non-overflow dam are not included.

71. Article 202 requires the licensee to file, within 90 days of the issuance date of this license, a set of revised exhibit F drawings that includes a plan view of the spillway section and a section view of the non-overflow dam, and a revised exhibit G map that includes the title block in the correct corner of the map.

72. The Commission requires licensees to file revised drawings of project features as-built when new construction or, as in this case, rehabilitation is necessary. Article 205 requires the filing of these as-built drawings.

C. Project Land Rights Progress Report

73. Standard Article 5 set forth in Form L-12, attached hereto, requires the licensee to acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project, within five years. In order to monitor compliance with Standard Article 5, Article 203 requires the licensee to file, no later than four years after license issuance, a report detailing its progress on acquiring title in fee or the necessary rights to all lands within the project boundary. The report must include specific documentation on the

⁷⁵ See 18 C.F.R. § 11.1(b)(1) (2019).

⁷⁶ 18 C.F.R. § 4.39 (2019).

status of the rights that have been acquired as of the filing date of the progress report, and a plan and schedule to acquire all remaining land prior to the five-year deadline.

D. Project Financing

74. To ensure that there are sufficient funds available for project construction, operation, and maintenance, Article 204 requires the licensee to file for Commission approval documentation of project financing for construction, operation, and maintenance of the project at least 90 days before starting any construction associated with the project.

E. Use and Occupancy of Project Lands and Waters

75. Requiring a licensee to obtain prior Commission approval for every use or occupancy of project land would be unduly burdensome. Therefore, Article 411 allows the licensee to grant permission, without prior Commission approval, for the use and occupancy of project lands for such minor activities as landscape planting. Such uses must be consistent with the purposes of protecting and enhancing the scenic, recreational, and environmental values of the project.

F. Review of Final Plans and Specifications

76. Article 301 requires the licensee to provide the Commission's Division of Dam Safety and Inspection (D2SI)-Atlanta Regional Office (ARO) with final contract drawings and specifications, together with a quality control and inspection program, a temporary construction emergency action plan, the erosion management plan and a supporting design report consistent with the Commission's engineering guidelines.

G. Cofferdam and Deep Excavation Construction Drawings

77. Article 302 requires the licensee to provide the Commission's D2SI-ARO with cofferdam construction drawings.

H. Inspection by Independent Consultant

78. Due to the unmaintained condition of the Bynum Project and the lack of stability analyses for the project structures, Article 303, in accordance with section 12.38 of the Commission's regulations,⁷⁷ requires a one-time independent consultant's inspection report.

⁷⁷ 18 C.F.R. § 12.38 (2019).

I. Public Safety Plan

79. Article 304 requires the licensee to provide the Commission's D2SI-ARO with a public safety plan.

J. Modification of Project Facilities

80. Article 305 requires the licensee to coordinate any modifications resulting from the license's environmental requirements that would affect project works or operation with the Commission's Division of Dam Safety and Inspections – Atlanta Regional Engineer.

COMMISSION APPROVAL OF RESOURCE PLANS, NOTIFICATION, AND FILING OF STATE AND FEDERAL COMPREHENSIVE PLANS

81. Section 10(a)(2)(A) of the FPA⁷⁸ requires the Commission to consider the extent to which a project is consistent with federal or state comprehensive plans for improving, developing, or conserving a waterway or waterways affected by the project.⁷⁹ No federal or state agencies filed comments citing to comprehensive plans. Staff reviewed eight qualifying comprehensive plans that are relevant to the Bynum Project.⁸⁰ No conflicts between these plans and the project as licensed herein were found.

OTHER CONSIDERATIONS

A. Safe Management, Operation, and Maintenance of the Project

82. Staff reviewed McMahan Hydro's preliminary plans to operate the project as described in the license application. Staff concluded, and we agree, that the project will be safe if refurbished, operated, and maintained in accordance with the Commission's standards and oversight, and the provisions of this license.⁸¹

B. Need for Power

83. To assess the need for power, staff looked at the needs in the operating region in which the project is located. Project power will be used to meet regional electrical

⁷⁸ 16 U.S.C. § 803(a)(2)(A).

⁷⁹ Comprehensive plans for this purpose are defined at 18 C.F.R. § 2.19 (2019).

⁸⁰ The list of applicable plans can be found in section 5.4 of the EA.

⁸¹ EA at 53.

demand. The project will be located within the SERC-East subregion (SERC-E) of the North American Electric Reliability Council (NERC). NERC annually forecasts electrical supply and demand nationally and regionally for a 10-year period. According to NERC's December 2017 forecast, the total internal demand projected for this region is expected to increase by 1.4 percent from 2018 to 2027.⁸² The project's power and contribution to the region's diversified generation mix will help meet the need for power in the region.

C. Project Economics

84. In determining whether to issue a license for a hydroelectric project, the Commission considers a number of public interest factors, including the economic benefits of project power. Under the Commission's approach to evaluating the economics of hydropower projects, as articulated in *Mead Corp., Publishing Paper Division*,⁸³ the Commission uses current costs to compare the costs of the project and likely alternative power with no forecasts concerning potential future inflation, escalation, or deflation beyond the license issuance date. The basic purpose of the Commission's economic analysis is to provide a general estimate of the potential power benefits and the costs of a project, and of reasonable alternatives to project power.⁸⁴

85. In applying this analysis to the Bynum Project, staff considered three options: no action, McMahan Hydro's proposal, and the project as licensed herein. Under the no action alternative, the project would not be refurbished. Under McMahan Hydro's alternative, the project would have an installed capacity of 600 kW, and would generate an average of 2,461 MWh of electricity annually. According to the EA, the average annual project cost would be about \$147,955, or \$60.12/MWh.⁸⁵ When the estimate of

⁸² EA at 2.

⁸³ 72 FERC ¶ 61,027 (1995) (*Meade Corp.*).

⁸⁴ *Mead Corp.*, 72 FERC ¶ 61,027 at 61,068.

⁸⁵ EA at 59. PK Ventures takes issue with the EA's estimate of the cost to purchase the project facilities, *see* EA at 58 (Table 10), asserting that staff provided no support for its estimate and did not consider fair market value or the "highest and best use" of its property. *See* PK Ventures, EA Comments, Docket No. P-4093, at 11 (filed Nov. 26, 2018). The EA simply provides a general estimate that is intended to inform the Commission's economic analysis of the project. The estimate has no bearing on the value that may be assigned in any future proceedings regarding acquisition of project property, whether in negotiations or eminent domain proceedings. As previously noted, the hydropower facilities at the proposed project site have not been operated or maintained in the last decade and rehabilitation work is needed to restore generation at

average generation is multiplied by the alternative power cost of \$61.76/MWh, the total value of the project's power is approximately \$152,000 in 2018 dollars.⁸⁶ Therefore, in the first year of operation, the project power would cost \$4,036, or \$1.64/MWh, less than the cost of alternative power.⁸⁷

86. The EA concluded that, as licensed herein with staff measures, the levelized annual cost of operating the project will be about \$145,347, or \$59.06/MWh.⁸⁸ As noted above, based on the same amount of estimated average generation of 2,461 MWh, the total value of the project's power is approximately \$152,000 in 2018 dollars. Therefore, as licensed herein with staff measures, in the first year of operation, project power will cost \$6,644, or \$2.70/MWh, less than the cost of alternative power.⁸⁹

87. PK Ventures questions staff's estimate of the value of generation, including the regional price of power applied and the lack of consideration of other sources of value, such as renewable energy certificates. Again, staff's conclusion as to the value of generation is not intended to be a precise finding, but rather provides the Commission with a general estimate on this matter. As the EA explains, the Commission compares the current project cost to an estimate of the cost of obtaining the same amount of energy and capacity using the most likely alternative source of power for the region (cost of alternative power).⁹⁰ Consistent with Commission practice when values for alternative power are not provided in the license application, staff uses and discloses in the EA alternative power values from the United States Energy Information Administration's

the site, including replacing the seals on the intake gates, clearing the intake canal of vegetation, and refurbishing the electrical components in the powerhouse. Staff made a reasonable valuation of the inoperable, deteriorated facilities by examining the value of other, well-maintained, operating projects and making a downward adjustment to account for the current inoperable condition of the project. The FPA does not require that the Commission make a finding as to the "highest and best use" of project property.

⁸⁶ EA at 59.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Due to a rounding error, these figures vary slightly from the corresponding values provided in the EA (i.e., \$6,669, or \$2.71/MWh). *See id.* (Table 11).

⁹⁰ EA at 57.

Annual Energy Outlook.⁹¹ Ancillary benefit values, such as renewable energy certificates, are not part of staff's basic, standardized comparison of generation values.

88. However, in considering public interest factors, the Commission takes into account that hydroelectric projects offer unique operational benefits to the electric utility system (ancillary service benefits). These benefits include the ability to help maintain the stability of a power system, such as by quickly adjusting power output to respond to rapid changes in system load; and to respond rapidly to a major utility system or regional blackout by providing a source of power to help restart fossil-fuel based generating stations and put them back on line.

COMPREHENSIVE DEVELOPMENT

89. Sections 4(e) and 10(a)(1) of the FPA⁹² require the Commission to give equal consideration to the power development purposes and to the purposes of energy conservation; the protection, mitigation of damage to, and enhancement of fish and wildlife; the protection of recreational opportunities; and the preservation of other aspects of environmental quality. Any license issued shall be such as in the Commission's judgment will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for all beneficial public uses. The decision to license this project, and the terms and conditions included herein, reflect such consideration.

90. The EA for the project contains background information, analysis of effects, and support for related license articles. Based on the record of this proceeding, including the EA and the comments thereon, licensing the Bynum Project as described in this order would not constitute a major federal action significantly affecting the quality of the human environment. The project will be safe if operated and maintained in accordance with the requirements of this license.

91. Based on our independent review and evaluation of the Bynum Project, recommendations from the resource agencies and other stakeholders, and the no-action alternative, as documented in the EA, we have selected the Bynum Project, with the staff-recommended measures, and find that it is best adapted to a comprehensive plan for improving or developing the Haw River.

92. The Commission selected this alternative because: (1) issuance of an original license will serve to provide a beneficial, dependable, and inexpensive source of electric energy; (2) the required environmental measures will protect and enhance fish and

⁹¹ EA at 58 (Table 10).

⁹² 16 U.S.C. §§ 797(e) and 803(a)(1) (2018).

wildlife resources, water quality, recreation resources, and historic properties; and (3) the project will provide 600 kW of electric generation capacity from a renewable resource.

LICENSE TERM

93. Section 6 of the FPA⁹³ provides that original licenses for hydropower projects shall be issued for a period not to exceed 50 years. On October 19, 2017, the Commission established a 40-year default license term policy for original and new licenses, effective as of October 26, 2017.⁹⁴ The Policy Statement provides for exceptions to the 40-year default license term under certain circumstances: (1) establishing a shorter or longer license term if necessary to coordinate license terms for projects located within the same river basin; (2) deferring to a shorter or longer license term explicitly agreed to in a generally-supported comprehensive settlement agreement; and (3) establishing a longer license term upon a showing by the license applicant that substantial voluntary measures were either previously implemented during the prior license term, or substantial new measures are expected to be implemented under the new license.

94. Because none of the above exceptions apply to the Bynum Project, a 40-year license term is appropriate.

The Commission orders:

(A) This license is issued to McMahan Hydro (licensee), for a period of 40 years, effective the first day of the month in which this order is issued, to construct, operate, and maintain the Bynum Project. This license is subject to the terms and conditions of the Federal Power Act (FPA), which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the FPA.

(B) The project consists of:

- (1) All lands, to the extent of the licensee's interests in these lands, described in the project description and the project boundary discussion of this order.
- (2) Project works consisting of: (1) a 900-foot-long, 10-foot-high stone masonry dam consisting of a 750-foot-long uncontrolled spillway section

⁹³ 16 U.S.C. § 799 (2018).

⁹⁴ *Policy Statement on Establishing License Terms for Hydroelectric Projects*, 82 Fed. Reg. 49,501 (Oct. 26, 2017), 161 FERC ¶ 61,078 (2017) (Policy Statement).

and a 150-foot-long, non-overflow section; (2) a 20-acre impoundment; (3) an intake structure with two 6-foot-wide Tainter gates; (4) a 2,000-foot-long, 40-foot-wide power canal; (5) a concrete and brick powerhouse containing one 600-kilowatt generating unit; (6) a canal drainage gate immediately upstream of the powerhouse; (7) a 500-foot-long, 50-foot-wide tailrace; and (8) a 100-foot-long, 0.48-kilovolt transmission line.

The project works generally described above are more specifically described by those portions of Exhibits A below:

Page 6, A-2 Project Facilities

Page 8, A-3 Proposed Mode of Operation

The Exhibit A described above is approved and made part of this license. The Exhibit F drawings and exhibit G map filed as part of the application for license do not conform to the Commission's regulations and are not approved.

(C) The following sections of the FPA are waived and excluded from this license for this minor project:

4(b), except the second sentence; 4(e), insofar as it relates to approval of plans by the Chief of Engineers and the Secretary of the Army; 6, insofar as it relates to public notice and to the acceptance and expression in this license of terms and conditions of the Act that are waived here; 10(c), insofar as it relates to depreciation reserves; 10(d); 10(f); 14, except insofar as the power of condemnation is reserved; 15; 16; 19; 20; and 22.

(D) This license is also subject to the articles set forth in Form L-12 (Oct. 1975), entitled "Terms and Conditions of License for Constructed Minor Project Affecting the Interests of Interstate or Foreign Commerce" (*see* 54 F.P.C. 1792, *et seq.*), as reproduced at the end of this order, and the following additional articles:

Article 201. *Administrative Annual Charges.* The licensee must pay the United States annual charges, effective the first day of the month in which this license is issued, and as determined in accordance with provisions of the Commission's regulations in effect from time to time, for the purpose of reimbursing the United States for the cost of administration of Part 1 of the Federal Power Act. The authorized installed capacity for that purpose is 600 kilowatts (kW). Under the regulations currently in effect, projects with an authorized installed capacity of less than or equal to 1,500 kW will not be assessed an annual charge.

Article 202. *Exhibit F Drawings and Exhibit G Map.* Within 90 days of the issuance of this license, the licensee must file, for Commission approval, revised exhibit

F drawings and a revised exhibit G map. The revised exhibit F drawings must show a plan view of the spillway section and a section view of the non-overflow dam. The revised exhibit G map must show the correct title block in the correct location. The exhibit F drawings must comply with sections 4.39 and 4.41(g), and the exhibit G map must comply with sections 4.39 and 4.41(h) of the Commission's regulations.

Article 203. *Project Land Rights Progress Report.* No later than four years after license issuance, the licensee must file a report with the Commission describing the status of acquiring title in fee or the rights for all the lands within the project boundary. The report must provide an overview map of each parcel and summary table identifying the licensee's rights over each parcel within the project boundary. The report must also include specific supporting documentation showing the status of the land rights on all parcels of land within the project boundary that: (1) have been acquired up to the date of filing of the report, including pertinent deeds, lease agreements, and/or bill of sale information that specifically verify the licensee's rights; and (2) the licensee's plan and schedule for acquiring all remaining project lands prior to the five-year deadline, including a history of actions taken, current owner information, the type of ownership to be acquired whether in fee or by easement, and the timeline for completing property acquisition.

Article 204. *Documentation of Project Financing.* At least 90 days before starting rehabilitation, the licensee must file with the Commission, for approval, the licensee's documentation for the project financing. The documentation must show that the licensee has acquired the funds, or commitment for funds, necessary to rehabilitate the project in accordance with this license. The documentation must include, at a minimum, financial statements, including a balance sheet, income statement, and a statement of actual or estimated cash flows over the license term which provide evidence that the licensee has sufficient assets, credit, and projected revenues to cover project construction, operation, and maintenance expenses, and any other estimated project liabilities and expenses.

The financial statements must be prepared in accordance with generally accepted accounting principles and signed by an independent certified public accountant. The licensee must not commence project rehabilitation before the filing is approved.

Article 205. *As-built Exhibits.* Within 90 days of completion of rehabilitation of the facilities authorized by this license, the licensee must file for Commission approval, revised exhibits A, F, and G, as applicable, to describe and show those project facilities as built.

Article 301. *Contract Plans and Specifications.* At least 60 days prior to the start of any construction, the licensee must submit one copy of its plans and specifications and supporting design document to the Commission's Division of Dam Safety and

Inspections (D2SI)-Atlanta Regional Engineer, and two copies to the Commission (one of these shall be a courtesy copy to the Director, D2SI). The submittal to the D2SI-Atlanta Regional Engineer must also include as part of preconstruction requirements: a Quality Control and Inspection Program, Temporary Construction Emergency Action Plan, and Erosion Management Plan. The licensee may not begin construction until the D2SI-Atlanta Regional Engineer has reviewed and commented on the plans and specifications, determined that all preconstruction requirements have been satisfied, and authorized start of construction.

Article 302. Cofferdam and Deep Excavation Construction Drawings. Should construction require cofferdams or deep excavations, the licensee must: (1) have a Professional Engineer who is independent from the construction contractor, review and approve the design of contractor-designed cofferdams and deep excavations prior to the start of construction; and (2) ensure that construction of cofferdams and deep excavations is consistent with the approved design. At least 30 days before starting construction of any cofferdams or deep excavations, the licensee must submit one copy to the Commission's Division of Dam Safety and Inspections (D2SI)-Atlanta Regional Engineer and two copies to the Commission (one of these copies shall be a courtesy copy to the Commission's Director, D2SI), of the approved cofferdam and deep excavation construction drawings and specifications, and the letters of approval.

Article 303. Inspection by Independent Consultant. In accordance with Part 12D § 12.38 of the Commission's regulations, a one-time independent consultant's inspection of the project must be completed and the report on the inspection filed within two years of the issuance date of the order. Information on specific inspection and report requirements can be found in Part 12D § 12.35 and § 12.37 of the Commission's regulations.

Article 304. Public Safety Plan. Within 60 days from the issuance of the license, the licensee must submit one copy to the Commission's Division of Dam Safety and Inspections (D2SI)-Atlanta Regional Engineer and two copies to the Commission (one of these copies shall be a courtesy copy to the Commission's Director, D2SI) of a Public Safety Plan. The plan must include a description of all safety devices and signage needed to warn the public of fluctuations in flow from the project or otherwise protect the public in the use of project lands and waters. The plan must also include a map showing the location of all public safety measures. For guidance on preparing public safety plans the licensee can review the Guidelines for Public Safety at Hydropower Projects on the FERC website.

Article 305. Project Modification Resulting from Environmental Requirements. If environmental requirements under this license require modification that may affect the project works or operations, the licensee must consult with the Commission's Division of Dam Safety and Inspections (D2SI)-Atlanta Regional Engineer. Consultation must allow

sufficient review time for the Commission to ensure that the proposed work does not adversely affect the project works, dam safety, or project operation.

Article 401. Project Operation. The licensee must operate the Bynum Hydroelectric Project as follows:

- (1) in run-of-river mode with a normal maximum elevation of 315 feet above mean sea level, and, in doing so, the licensee must act to minimize the fluctuation of the impoundment surface elevation by maintaining a discharge from the project so that all outflows approximate the sum of inflows to the project;
- (2) limit impoundment level fluctuations to 0.1 foot below top of the dam; and
- (3) release over the project dam into the bypassed reach a continuous minimum flow of 240 cfs or project inflow, whichever is less, from March 1 through April 30 and release a continuous minimum flow of 120 cfs, or project inflow, whichever is less, from May 1 through the last day of February.

Planned Deviations

Run-of-river operation, the impoundment level fluctuation limit, and minimum flow releases may be temporarily modified for short periods, of up to 3 weeks, after mutual agreement among the licensee and the U.S. Fish and Wildlife Service, the North Carolina Department of Environmental Quality's Division of Water Resources, and the North Carolina Wildlife Resources Commission (collectively resource agencies). After concurrence from the resource agencies, the licensee must file a report with the Secretary of the Commission as soon as possible, but no later than 14 calendar days after the onset of the planned deviation. Each report must include: (1) the reasons for the deviation and how project operations were modified; (2) the duration and magnitude of the deviation; (3) any observed or reported environmental effects; and (4) documentation of consultation with the resource agencies. For planned deviations exceeding 3 weeks, the licensee must file an application for a temporary amendment of the operational requirements of this license, and receive Commission approval prior to implementation.

Unplanned Deviations:

Run-of-river operation, the impoundment level fluctuation limit, and minimum flow releases may be temporarily modified if required by operating emergencies beyond the control of the licensee (*i.e.*, unplanned deviations). For any unplanned deviation that lasts longer than 3 hours **or** results in visible environmental effects such as a fish kill, a turbidity plume, bank erosion, or downstream flooding, the licensee must file a report as soon as possible with the resource agencies, and with the Commission no later than 14 calendar days after the onset of each such incident. The report must include (1) the cause of the deviation; (2) the duration and magnitude of the deviation; (3) any pertinent

operational and/or monitoring data; (4) a timeline of the incident and the licensee's response; (5) any comments or correspondence received from the resource agencies, or confirmation that no comments were received from the resource agencies; (6) documentation of any observed or reported environmental effects; and (7) a description of measures implemented to prevent similar deviations in the future.

For unplanned deviations lasting 3 hours or less that do not result in visible environment effects, the licensee must file an annual report, by March 1, describing each incident that occurred during the prior January 1 through December 31 time period. The report must include for each 3 hour or less deviation: (1) the cause of the deviation; (2) the duration and magnitude of the deviation; (3) any pertinent operational and/or monitoring data; (4) a timeline of the incident and the licensee's response; (5) any comments or correspondence received from the resource agencies, or confirmation that no comments were received from the resource agencies; and (6) a description of measures implemented to prevent similar deviations in the future.

Article 402. Impoundment Drawdown and Refill Management Plan. At least 90 days prior to the start of project operation, the licensee must file, for Commission approval, a Reservoir Drawdown and Refill Plan that describes site-specific operations, environmental protection measures, and consultation and notification procedures that will be implemented for planned, non-emergency reservoir drawdowns that would not be handled under the temporary modification clause contained in Article 401. The purpose of the plan is to minimize, to the extent possible, consultation and approvals required for individual, routine, scheduled non-emergency drawdowns where the licensee and resource agencies agree that effects to natural resources and recreation are minimal. If agreement among the licensee and resource agencies is not achieved, or if additional statutory consultation under the National Historical Preservation Act (NHPA), Endangered Species Act (ESA), or other federal acts may be necessary, the licensee must not begin a planned, non-emergency drawdown until the Commission approves a variance from Article 401.

At a minimum, the Reservoir Drawdown and Refill Management Plan must include:

- (1) provisions that will be implemented to limit the frequency of scheduled drawdowns over the term of the license;
- (2) identification of the maximum drawdown rate, drawdown depth, and refill rates that will be implemented during drawdowns performed under this article, and other measures to be taken to minimize effects on aquatic and terrestrial resources at the project reservoir and downstream;

- (3) a summary of how compliance with other license requirements that could be affected by reservoir drawdowns would be met during drawdowns performed under this article, and a statement that any necessary temporary variances from such requirements would be approved by the Commission prior to initiating any drawdowns performed under this article;
- (4) a provision to notify U.S. Fish and Wildlife Service, the North Carolina Department of Environmental Quality's Division of Water Resources, and the North Carolina Wildlife Resources Commission at least 45 days before the start of any drawdowns performed under this article, and allowing these entities at least 30 days in which to provide comments on the drawdown;
- (5) identification of site-specific public notification methods to be implemented at commonly-used recreation access points, and methods to notify private shoreline property owners, for adequate periods prior to any drawdowns performed under this article;
- (6) a provision to notify the Commission at least 10 days prior to any proposed drawdown event;
- (7) provisions for determining the need for consultation under the NHPA, ESA, or other federal Acts prior to any planned drawdown, and obtaining documentation that such consultation is either completed or not necessary for drawdowns performed under this article;
- (8) a provision to file with the Commission a report including evidence of successful completion of elements (1) through (6) above, with copies of any comments received and explanations of how any comments were addressed, within 10 days of any drawdown performed under this article; and
- (9) a provision to notify, in writing, the Secretary of the Commission, U.S. Fish and Wildlife Service, the North Carolina Department of Environmental Quality's Division of Water Resources, and the North Carolina Wildlife Resources Commission, as soon as possible, but no later than 24 hours after becoming aware of, any deviation from the drawdown and refill rates or other elements contained in the plan approved under this article.

The Reservoir Drawdown and Refill Management Plan must be developed after consultation with U.S. Fish and Wildlife Service, the North Carolina Department of Environmental Quality's Division of Water Resources, and the North Carolina Wildlife Resources Commission. The licensee must include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the

agencies' comments are accommodated by the plan. The licensee must allow a minimum of 30 days for the agencies to comment and to provide recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing must include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan must not begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee must implement the plan, including any changes required by the Commission.

Article 403. Operation Compliance Monitoring. At least 90 days prior to the start of project operation, the licensee must file, for Commission approval, an operation compliance monitoring plan that describes how the licensee will document compliance with the operational requirements of this license.

The plan must include, but not necessarily be limited to, the following:

- (1) a detailed description of how the licensee will document compliance with:
(a) run-of-river operation, the minimum reservoir surface elevation, and the minimum flows required by Article 401 and (b) the provisions of the reservoir drawdown and refill operation required by Article 402;
- (2) a provision to install, operate, and maintain a pressure transducer and staff gage in the reservoir immediately upstream of the project's Bynum Dam with the pertinent minimum reservoir surface elevation for project operation as required by Article 401 clearly marked on the staff gage;
- (3) a description of the pressure transducers, staff gages, and any other gages or measuring devices, or techniques that will be used to monitor compliance;
- (4) a description of the specific locations of all gages or other measuring devices;
- (5) a description of the procedures for maintaining and calibrating monitoring equipment;
- (6) a description of the frequency of recording for each gage or other measuring device;
- (7) a provision to maintain a daily log of project operation;
- (8) the protocols or methods to be used for reporting the monitoring data to the Commission;

- (9) an implementation schedule.

The plan must be developed after consultation with U.S. Fish and Wildlife Service, the North Carolina Department of Environmental Quality's Division of Water Resources, and the North Carolina Wildlife Resources Commission. The licensee must include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee must allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing must include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan must not begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee must implement the plan, including any changes required by the Commission.

Article 404. Reservation of Authority to Prescribe Fishways. Authority is reserved to the Commission to require the licensee to construct, operate, and maintain, or to provide for the construction, operation, and maintenance of such fishways as may be prescribed by the Secretary of the Interior pursuant to section 18 of the Federal Power Act.

Article 405. Erosion Management. At least 90 days before the start of any land-disturbing or land-clearing activities, the licensee must file with the Commission, for approval, a plan to control erosion and sedimentation likely to result from project-related activities.

The plan must be based on project and site-specific geological, soil, and groundwater conditions. The plan, at a minimum, must include:

- (1) a detailed description of actual site conditions (i.e., soil type, vegetative cover, topography, etc.);
- (2) site-specific measures proposed to control erosion, to prevent slope instability, and to minimize the quantity of sediment resulting from land disturbing activities and project operation;
- (3) drawings, and specific topographic locations of all proposed control measures;
- (4) provisions for effectiveness monitoring; and

- (5) an implementation schedule.

The licensee must prepare the plan after consultation with U.S. Fish and Wildlife Service, the North Carolina Department of Environmental Quality's Division of Water Resources, and the North Carolina Wildlife Resources Commission. The licensee must include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee must allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing must include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. No land-disturbing or land-clearing activities under this article may begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee must implement the plan, including any changes required by the Commission.

Article 406. Debris Management. At least 90 days prior to the commencement of project operation, the licensee must file with the Commission, for approval, a debris management plan for the disposal and management of organic debris and inorganic trash collected from the dam crest and trashracks.

The plan must include, but not necessarily be limited to, the following:

- (1) procedures for separation of organic debris and inorganic trash;
- (2) procedures for off-site disposal of inorganic trash;
- (3) procedures for reintroducing organic debris to the Haw River downstream of the dam, as appropriate; and
- (4) an implementation schedule.

The licensee must prepare the plan after consultation with the North Carolina Department of Environmental Quality's Division of Water Resources and U.S. Department of the Interior's Fish and Wildlife Service. The licensee must include with the plan, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee must allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not

adopt a recommendation, the filing must include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Project operation must not begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee must implement the plan, including any changes required by the Commission.

Article 407. Impoundment Sediment Disposal. At least 90 days before the start of any land-clearing, land-disturbing, or spoil-producing activities associated with reservoir sediment removal, the licensee must file with the Commission, for approval, a plan to remove and dispose of accumulated sediment from the project reservoir. The plan, at a minimum, must include:

- (1) a description of the licensee's mitigation measures to minimize inputs of sediment into the water column;
- (2) a detailed description of licensee's planned measures to safely dispose of disturbed sediments;
- (3) details for monitoring and maintenance programs during project sediment-disturbing activities; and
- (4) an implementation schedule.

The licensee must prepare the plan after consultation with U.S. Fish and Wildlife Service, the North Carolina Department of Environmental Quality's Division of Water Resources, and the North Carolina Wildlife Resources Commission. The licensee must include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee must allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt an agency's recommendation, the filing must include the licensee's reasons, including those that are based on project-specific information.

The Commission reserves the right to require changes to the plan. No land-disturbing, sediment disturbing, or land-clearing activities associated with this measure must begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee must implement the plan, including any changes required by the Commission.

Article 408. Recreation Plan. Within 180 days of license issuance, the licensee must file with the Commission for approval, a Recreation Plan. The plan, at a minimum, must include:

- (1) the proposed provisions in Appendix 5 of McMahan Hydro's license application for: (a) improving the existing portage trail by removing impediments to access and installing a new wooden stair system; (b) improving an existing, but unmaintained, hiking trail from Bynum Dam to the powerhouse to connect the state-maintained trails which exist upstream and downstream of project lands; and (c) installing signs to inform the public of recreational amenities;
- (2) a construction and implementation schedule for the recreation facilities and associated amenities specified in item (1);
- (3) provisions for maintaining the recreation facilities and associated amenities specified in item (1) over the license term; and
- (4) a provision to consult in 2030 with the agencies listed directly below to reevaluate the adequacy of the project's recreation facilities and to file a report with the Commission describing the results of the consultation, including any recommendations for facility improvements or modifications to the recreation plan, and how the licensee plans to address the recommendations.

The plan must be developed in consultation with the North Carolina Department of Environmental Quality, North Carolina Wildlife Resources Commission, Chatham County Parks and Recreation Department, and the Carolina Canoe Club. The licensee must include with the plan documentation of consultation, copies of recommendations on the completed plan after it has been prepared and provided to the entities above, and specific descriptions of how the entities' comments are accommodated in the plan. The licensee must allow a minimum of 30 days for the entities to comment and to make recommendations prior to filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing must include the licensee's reasons based on project-specific reasons.

The Commission reserves the right to require changes to the plan. The plan must not be implemented until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee must implement the plan, including any changes required by the Commission.

Article 409. Protection of Previously Undiscovered Cultural Resources. If the licensee discovers any unidentified cultural resources during construction, operation, or maintenance of project works or other facilities at the project, the licensee must stop all

land-clearing and land-disturbing activities in the vicinity of the resource and consult with the North Carolina State Historic Preservation Officer (SHPO) to determine the need for any cultural resource studies or measures. If no studies or measures are needed, the licensee must file with the Commission documentation of its consultation with the North Carolina SHPO.

If a discovered cultural resource is determined to be eligible for the National Register of Historic Places (National Register), the licensee must file for Commission approval a historic properties management plan (HPMP) prepared by a qualified cultural resource specialist after consultation with the North Carolina SHPO. In developing the HPMP, the licensee must use the Advisory Council on Historic Preservation and the Federal Energy Regulatory Commission's *Guidelines for the Development of Historic Properties Management Plans for FERC Hydroelectric Projects*, dated May 20, 2002. The HPMP must include the following items: (1) a description of each discovered property, indicating whether it is listed in or eligible to be listed in the National Register; (2) a description of the potential effect on each discovered property; (3) proposed measures for avoiding or mitigating adverse effects; (4) documentation of consultation; and (5) a schedule for implementing mitigation and conducting additional studies. The Commission reserves the right to require changes to the HPMP.

The licensee must not resume land-clearing or land-disturbing activities in the vicinity of a cultural resource discovered during construction, until informed by the Commission that the requirements of this article have been fulfilled.

Article 410. Protection of Cultural Resources. Prior to implementing any project modifications not specifically authorized by this license, including but not limited to, land-clearing or land-disturbing activities, or changes to project operation or facilities, the licensee must consult with the North Carolina State Historic Preservation Officer (SHPO) to determine the effects of the activities and the need for any cultural resource studies or measures. If no studies or measures are needed, the licensee must file with the Commission documentation of its consultation with the North Carolina SHPO.

If a project modification is determined to affect an historic property, the licensee must file for Commission approval a Historic Properties Management Plan (HPMP) prepared by a qualified cultural resource specialist after consultation with the North Carolina SHPO. In developing the HPMP, the licensee must use the Advisory Council on Historic Preservation and the Federal Energy Regulatory Commission's *Guidelines for the Development of Historic Properties Management Plans for FERC Hydroelectric Projects*, dated May 20, 2002. The HPMP must include the following items: (1) a description of each historic property; (2) a description of the potential effect on each historic property; (3) proposed measures for avoiding or mitigating adverse effects; (4) documentation of the nature and extent of any consultation; and (5) a schedule for implementing mitigation and conducting additional studies.

The Commission reserves the right to require changes to the HPMP. The licensee must not implement any project modifications, other than those specifically authorized in this license, until informed by the Commission that the requirements of this article have been fulfilled.

Article 411. Use and Occupancy. (a) In accordance with the provisions of this article, the licensee must have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission approval. The licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the licensee must also have continuing responsibility to supervise and control the use and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the licensee must take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, canceling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The type of use and occupancy of project lands and waters for which the licensee may grant permission without prior Commission approval are: (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more than 10 water craft at a time and where said facility is intended to serve single-family type dwellings; (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline; and (4) food plots and other wildlife enhancement. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the licensee must require multiple use and occupancy of facilities for access to project lands or waters. The licensee must also ensure, to the satisfaction of the Commission's authorized representative, that the use and occupancies for which it grants permission are maintained in good repair and comply with applicable state and local health and safety requirements. Before granting permission for construction of bulkheads or retaining walls, the licensee must: (1) inspect the site of the proposed construction, (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that the proposed construction is needed and would not change the basic contour of the impoundment shoreline. To implement this paragraph (b), the licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the licensee's costs of

administering the permit program. The Commission reserves the right to require the licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The licensee may convey easements or rights-of-way across, or leases of project lands for: (1) replacement, expansion, realignment, or maintenance of bridges or roads where all necessary state and federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kV or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project impoundment. No later than January 31 of each year, the licensee must file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary state and federal approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary federal and state water quality certification or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary federal and state approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 water craft at a time and are located at least one-half mile (measured over project waters) from any other private or public marina; (6) recreational development consistent with an approved report on recreational resources of an Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from project waters at normal surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year. At least 60 days before conveying any interest in project lands under this paragraph (d), the licensee must file a letter with the Commission, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G map may be used), the nature of the proposed use, the identity of any federal or state agency official consulted, and any federal or state approvals required for the proposed use. Unless the Commission's authorized representative, within 45 days from the filing date,

requires the licensee to file an application for prior approval, the licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraph (c) or (d) of this article:

- (1) Before conveying the interest, the licensee must consult with federal and state fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.
- (2) Before conveying the interest, the licensee must determine that the proposed use of the lands to be conveyed is not inconsistent with any approved report on recreational resources of an Exhibit E; or, if the project does not have an approved report on recreational resources, that the lands to be conveyed do not have recreational value.
- (3) The instrument of conveyance must include the following covenants running with the land: (i) the use of the lands conveyed must not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; (ii) the grantee must take all reasonable precautions to ensure that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project; and (iii) the grantee must not unduly restrict public access to project waters.
- (4) The Commission reserves the right to require the licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude land conveyed under this article only upon approval of revised Exhibit G drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project must be consolidated for consideration when revised Exhibit G drawings would be filed for approval for other purposes.

(g) The authority granted to the licensee under this article must not apply to any part of the public lands and reservations of the United States included within the project boundary.

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(E) The licensee must serve copies of any Commission filing required by this order on any entity specified in the order to be consulted on matters relating to that filing. Proof of service on these entities must accompany the filing with the Commission.

(F) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the FPA, 16 U.S.C. § 825l (2018), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2019). The filing of a request for rehearing does not operate as a stay of the effective date of this license or of any other date specified in this order. The licensee's failure to file a request for rehearing shall constitute acceptance of this order.

By the Commission. Commissioner Glick is concurring in part and dissenting in part with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Form L-12
(October, 1975)

FEDERAL ENERGY REGULATORY COMMISSION

**TERMS AND CONDITIONS OF LICENSE FOR CONSTRUCTED
MINOR PROJECT AFFECTING THE INTERESTS OF
INTERSTATE OR FOREIGN COMMERCE**

Article 1. The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: Provided, however, That if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. The project area and project works shall be in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Commission any substantial alteration or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized herein; and any emergency alteration, addition, or use so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct.

Article 4. The project, including its operation and maintenance and any work incidental to additions or alterations authorized by the Commission, whether or not conducted upon lands of the United States, shall be subject to the inspection and supervision of the Regional Engineer, Federal Energy Regulatory Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such

purposes. The Licensee shall cooperate fully with said representative and shall furnish him such information as he may require concerning the operation and maintenance of the project, and any such alterations thereto, and shall notify him of the date upon which work with respect to any alteration will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall submit to said representative a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of any such alterations to the project. Construction of said alterations or any feature thereof shall not be initiated until the program of inspection for the alterations or any feature thereof has been approved by said representative. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

Article 5. The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights or occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

Article 6. The Licensee shall install and thereafter maintain gages and stream-gaging stations for the purpose of determining the stage and flow of the stream or streams on which the project is located, the amount of water held in and withdrawn from storage, and the effective head on the turbines; shall provide for the required reading of such gages and for the adequate rating of such stations; and shall install and maintain standard meters adequate for the determination of the amount of electric energy generated by the project works. The number, character, and location of gages, meters, or other measuring

devices, and the method of operation thereof, shall at all times be satisfactory to the Commission or its authorized representative. The Commission reserves the right, after notice and opportunity for hearing, to require such alterations in the number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, as are necessary to secure adequate determinations. The installation of gages, the rating of said stream or streams, and the determination of the flow thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of the project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

Article 7. The Licensee shall, after notice and opportunity for hearing, install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so.

Article 8. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other projects or power systems and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

Article 9. The operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Commission may prescribe for the purposes hereinbefore mentioned.

Article 10. On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for

any damages or expenses which the joint use causes the Licensee to incur. Any such compensation shall be fixed by the Commission either by approval of an agreement between the Licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot concurrently be submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

Article 11. The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.

Article 12. Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of the Licensee's lands and interests in lands, reservoirs, waterways and project works as may be reasonably required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be reasonably prescribed by the Commission in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under this license.

Article 13. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting: Provided, That the Licensee may reserve from public access such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

Article 14. In the construction, maintenance, or operation of the project, the Licensee shall be responsible for, and shall take reasonable measures to prevent, soil erosion on lands adjacent to streams or other waters, stream sedimentation, and any form of water or air pollution. The Commission, upon the request or upon its own motion,

may order the Licensee to take such measures as the Commission finds to be necessary for these purposes, after notice and opportunity for hearing.

Article 15. The Licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which results from the clearing of lands or from the maintenance or alteration of the project works. In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. All clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 16. If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency having jurisdiction over its lands or the Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of nonpower facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

Article 17. The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and regulations, or an annual license under the terms and conditions of this license.

Article 18. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

McMahan Hydroelectric LLC

Project No. P-14858-000

(Issued September 20, 2019)

GLICK, Commissioner, *concurring in part and dissenting in part*:

1. I concur in part and dissent in part from today’s order. Although I agree that the North Carolina Department of Environmental Quality (North Carolina DEQ) waived its authority under section 401 of the Clean Water Act,⁹⁵ I disagree with important aspects of how the Commission reached that conclusion. Specifically, I disagree with the Commission’s suggestion that additional information submitted by an applicant is irrelevant when determining whether a state waived its section 401 authority. But we need not conclusively resolve this issue because the record indicates that the applicant withdrew and resubmitted its section 401 application at the state’s direction for the purposes of avoiding waiver and without any substantial intervening modification. That is sufficient to find that the state waived its section 401 authority.

2. Section 401 of the Clean Water Act requires applicants for federal license that “may result in any discharge into the navigable waters”—a category that includes hydroelectric licenses issued by the Commission—to secure a certificate from the state in which the “discharge originates or will originate.”⁹⁶ The Clean Water Act, however, imposes a time limit on states’ review of a section 401 application: “If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.”⁹⁷

3. In *Hoopa Valley Tribe v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit held that “a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one

⁹⁵ 33 U.S.C. § 1341(a)(1) (2018).

⁹⁶ *Id.*

⁹⁷ *Id.*

year.”⁹⁸ The court reasoned that because the same request had been pending for more than a year, it exceeded the maximum period of review allowed under the provision of section 401 quoted above.⁹⁹ The court, however, did not address the situation in which the applicant withdraws and resubmits a modified application, rather than submitting the same application for over a decade, as the applicant did in *Hoopa Valley*.¹⁰⁰ Indeed, the court explicitly did not discuss the situation in which an applicant “withdrew its request and submitted a wholly new one in its place” or the issue of how “how different a request must be to constitute a ‘new request’ such that it restarts the one-year clock.”¹⁰¹

4. Nothing in *Hoopa Valley*’s reasoning requires the Commission to determine that a state waives its water quality certification authority when the applicant withdraws and resubmits an application that has been significantly modified since the previous submission. Nevertheless, today’s order appears to suggest that additional information submitted to the state after the initial application is irrelevant to determining whether the state waived its authority, unless it reflects a major physical modification of the project. I disagree. I believe that it is possible that a significant modification to a pending section 401 application may justify withdrawing and resubmitting that application without running afoul of section 401’s time limitation. The Commission disagrees, noting that a state asks for information all the time, sometimes relating to significant matters.¹⁰² It is true that considering whether a significant supplemental submission restarts the one-year clock might make it more difficult for the Commission to find that a state has waived its section 401 authority. But that is not, in my opinion, a persuasive reason to ignore the effects that such submissions might have on the one-year clock.

5. But we do not need to answer that question in order to resolve this proceeding. The record indicates that, on February 11, 2019, at the direction of North Carolina DEQ, McMahan Hydroelectric LLC (McMahan) withdrew and resubmitted the section 401 application that it filed on February 20, 2018. The record further indicates that McMahan did not significantly modify or supplement that application between February 20, 2018, and when it was resubmitted on February 11, 2019. As of the date of this order, North

⁹⁸ 913 F.3d 1099, 1103 (D.C. Cir. 2019).

⁹⁹ *Id.* at 1105.

¹⁰⁰ *Id.* at 1104.

¹⁰¹ *Id.*; *see also id.* at 1105 (“[T]he record indicates that [the applicant’s] water quality certification request has been complete and ready for review for more than a decade.”).

¹⁰² *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185, at n.43 (2019).

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Carolina DEQ has not acted on McMahan's application. That is sufficient for us to conclude that North Carolina waived its section 401 authority.

For these reasons, I respectfully concur in part and dissent in part.

Richard Glick
Commissioner

Document Content(s)

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Exhibit B

171 FERC ¶ 61,046
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

McMahan Hydroelectric, LLC

Project No. 14858-002

ORDER DENYING REHEARING AND STAY

(Issued April 16, 2020)

1. On September 20, 2019, the Commission issued an order granting an original license to McMahan Hydroelectric, LLC (McMahan Hydro) pursuant to Part I of the Federal Power Act (FPA) to operate and maintain the Bynum Hydroelectric Project No. 14858 (Bynum Project).¹ The North Carolina Department of Environmental Quality (North Carolina DEQ) and PK Ventures I (PK Ventures) sought rehearing. PK Ventures also sought a stay of the License Order. For the reasons discussed below, we deny rehearing and stay.

I. Background

2. The Bynum Project is located on the Haw River in Bynum, Chatham County, North Carolina. In 1985, the Commission authorized hydropower development at the Bynum Project by issuing a 30-year license to Tuscarora Yarns, Inc. to operate and maintain the Bynum Project No. 4093.² PK Ventures subsequently acquired the facilities in 1986 and requested that the license be transferred to it, but then failed to provide the required documentation to effectuate the transfer.³ The project has not operated for the past 10 years and its license expired on April 30, 2015.⁴

¹ *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (2019) (License Order).

² *Tuscarora Yarns, Inc.*, 31 FERC ¶ 62,273 (1985). The Commission later approved transfer of the license to Bynum Hydro Company (Bynum Hydro). *Tuscarora Yarns, Inc. & Bynum Hydro Co.*, 34 FERC ¶ 62,155 (1986).

³ *See PK Ventures I Ltd. P'ship*, 153 FERC ¶ 61,040, at P 2 (2015).

⁴ License Order, 168 FERC ¶ 61,185 at PP 3, 12.

3. As discussed in more detail in the License Order, after license expiration, the Commission solicited applications for a license to operate the project.⁵ On March 30, 2015, McMahan Hydro filed an application for a license to operate and maintain the Bynum Project.

4. On September 20, 2019, the Commission issued McMahan Hydro an original license concluding, among other things, that North Carolina DEQ had waived its authority to issue a water quality certification pursuant to section 401 of the Clean Water Act (CWA)⁶ for the project.⁷ On the same day, North Carolina DEQ issued a certification for the project.

5. PK Ventures argues that the Commission lacks jurisdiction over the Bynum Project and therefore improperly issued the License Order, which PK Ventures claims threatens its property rights.⁸ North Carolina DEQ and PK Ventures argue that, in the License Order, the Commission applied an unjustifiably broad reading of the U.S. Court of Appeals for the D.C. Circuit's decision in *Hoopa Valley Tribe v. FERC*⁹ when finding that North Carolina had waived water quality certification.¹⁰ We disagree and affirm the Commission's authority to issue the License Order and make the waiver determination, as discussed below.

II. Procedural Matters

A. Answer to Request for Rehearing

6. On November 1, 2019, North Carolina DEQ filed both a motion for leave to answer and an answer to PK Ventures' request for rehearing. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to a request for rehearing.¹¹ Accordingly, we deny North Carolina DEQ's motion and reject its answer.

⁵ *Id.* P 4.

⁶ 33 U.S.C. § 1341(a)(1) (2018).

⁷ *Id.* P 37.

⁸ *Id.* at 5, 19-26.

⁹ 913 F.3d 1099, 1103 (D.C. Cir. 2019) (*Hoopa Valley*).

¹⁰ License Order, 168 FERC ¶ 61,185 at P 34 n.24.

¹¹ 18 C.F.R. § 385.713(d)(1) (2019).

B. Stay Request

7. PK Ventures requests that the Commission stay the License Order pending rehearing and any subsequent judicial review.¹² This order addresses and denies PK Ventures' request for rehearing; accordingly, we dismiss as moot the request to stay the proceeding during the pendency of the rehearing period. With regard to PK Ventures' request to stay the proceeding after the rehearing period, PK Ventures provides no discussion, support, or reasons for granting stay. Accordingly, we deny the request.

III. Discussion

A. Commission Jurisdiction under Section 23 of the FPA

8. PK Ventures contends that the Commission failed to make a necessary navigability determination for the Haw River,¹³ claims that the Commission admits that the river is a non-navigable waterway, and that the Commission accordingly lacks jurisdiction over the project.¹⁴

9. Section 23(b)(1) of the FPA sets forth several grounds for the Commission to exercise licensing authority over hydroelectric projects.¹⁵ PK Ventures references one: the requirement that a non-federal hydroelectric project be licensed if it is located on navigable waters of the United States.¹⁶ In addition, however, section 23(b)(1) also requires that a non-federal hydroelectric project be licensed if it meets the following three-part test: (a) it is located on a body of water over which Congress has commerce clause jurisdiction; (b) has undergone project construction on or after August 26, 1935; and (c) affects the interests of interstate or foreign commerce.¹⁷ The Commission determined in the License Order that the Haw River is a commerce clause stream, that the project underwent post-1935 construction, and that the project will affect interstate

¹² PK Ventures Rehearing and Stay Request at 5.

¹³ *Id.* at 5, 22.

¹⁴ *Id.* at 22 (citing License Order, 168 FERC ¶ 61,185 at P 26).

¹⁵ 16 U.S.C. § 817(1) (2018).

¹⁶ *Id.*

¹⁷ *Id.*

commerce through its connection to the interstate grid.¹⁸ Therefore, because the project meets all of the factors of the three-part test, it is required to be licensed; consequently, the Commission did not need to make a navigability determination for the Haw River.¹⁹

10. PK Ventures claims that the project does not satisfy the three-part test because the project did not undergo post-1935 construction. PK Ventures argues that project was built in 1874, and that the Commission erroneously concluded there was post-1935 construction based upon a “1940” date on the project’s turbine.²⁰ PK Ventures argues there is no evidence that the apparent turbine replacement amounted to a new dam or other project work begun after 1935,²¹ or that the project underwent any construction that altered its operation, given that the Bynum Project retained its 1874 stone masonry dam, spillway, reservoir, powerhouse, and single generating unit.²²

11. While ordinary maintenance, repair, and reconstruction activity does not constitute post-1935 construction, the enlargement of generating capacity, or of the impoundment/diversion structure, or the construction of other significant physical plant features does.²³ The Commission explained in the License Order that the project underwent post-1935 construction because the Bynum Project’s generating facilities were converted from mechanical hydropower to electrical hydropower after 1935.²⁴ The Commission cited PK Ventures’ filings describing the powerhouse as containing a

¹⁸ License Order, 168 FERC ¶ 61,185 at P 26.

¹⁹ We note, even if the project were not required to be licensed under section 23(b) of the FPA, the Commission possesses the authority under section 4(e) of the FPA to grant licenses voluntarily sought for projects on Commerce Clause waters. *See* 16 U.S.C. § 797(e) (2018); *Cooley v. FERC*, 843 F.2d 1464, 1467 (D.C. Cir. 1988) (recognizing that the Commission is authorized to issue licenses to projects located on non-navigable Commerce Clause streams, regardless of the date of construction).

²⁰ PK Ventures Rehearing and Stay Request at 20-21.

²¹ *Id.* at 20-21 (citing *Puget Sound Power & Light Co.*, 557 F.2d 1311, 1314-15 (9th Cir. 1977) (*Puget Sound*)).

²² *Id.* at 23.

²³ *Puget Sound*, 557 F.2d at 1314-15.

²⁴ License Order, 168 FERC ¶ 61,185 at P 26, n.17 (citing the EA at 54; McMahan Hydro’s March 30, 2015 Final License Application at 48; PK Ventures April 30, 2010 Pre-Application Document, Project No. P-4093, at 11 (describing the powerhouse as containing a “Leffel Type S 1940” turbine)).

“Leffel Type S 1940” turbine as evidence the project underwent this conversion after 1935.²⁵ PK Ventures argues that a filing referencing the 1940 turbine is not substantial evidence,²⁶ but we note that the Commission’s finding is consistent with other evidence of the project’s construction date. In the 1982 license application, Tuscarora Yarns stated that the project generated power using an electric generator equipped with a Leiffel S Turbine²⁷ and that the “facility has been in operation for the past forty years as is, and we plan to continue the same operation.”²⁸ Indeed, it would be difficult to credit any assertion (and PK Ventures makes no such argument) that a 1940 turbine could have been installed prior to that date.

12. PK Ventures next argues that even if the turbine was replaced, that replacement, without more, is only normal maintenance and repair activity.²⁹ We disagree. The Bynum Project’s installation of the turbine and generator in 1940 did not constitute a replacement, but rather a conversion that changed a mechanical energy facility with no hydroelectric generation to a hydroelectric project with 600 kilowatts (kW) of new hydroelectric generating capacity.³⁰ As PK Ventures acknowledges, the creation of new hydroelectric capacity constitutes post-1935 construction under section 23(b)(1) of the FPA.³¹ With regard to PK Ventures’ suggestion that a hydroelectric turbine existed

²⁵ *Id.*

²⁶ PK Ventures Rehearing and Stay Request at 20-22.

²⁷ Tuscarora Yarns Application for a Minor License at 10 (Oct. 7, 1982) (P-4093).

²⁸ *Id.* at 23.

²⁹ In support PK Ventures also argues that the License Order relied on *Aquenergy Systems, Inc. v. FERC*, 857 F.2d 227 (4th Cir. 1988) (*Aquenergy*), which established the exception to *Puget Sound* for post-abandonment construction. PK Ventures Request for Rehearing at 22-23 (citing *Thomas Hodgson & Sons v. FERC*, 49 F.3d 822, 826 (1st Cir. 1995) (ruling that post-abandonment construction cannot be found without physical repair or reconstruction)). The License Order cited *Aquenergy* to support that installing a generator and associated electrical equipment constitutes post-1935 construction. In that case, however, restoring the project to service required substantial reconstruction and occurred after a 30-year period of complete abandonment of the project. Here, as PK Ventures acknowledges, there is no evidence of post-abandonment construction. PK Ventures Rehearing and Stay Request at 22. Therefore, we need not address PK Ventures’ arguments related to post-abandonment construction.

³⁰ License Order, 168 FERC ¶ 61,185 at P 11.

³¹ PK Ventures Rehearing and Stay Request at 20 (citing *L.S. Starrett Co. v. FERC*, 650 F.3d 19, 27 (1st Cir. 2011) (finding reasonable the Commission’s

before 1935 and the Leffel Type S 1940 turbine installation was a replacement, PK Ventures offers no evidence to support this suggestion, and fails to rebut the clear evidence that the Bynum Project was converted from mechanical energy to hydroelectric power after 1935.

13. PK Ventures also claims the Commission failed to recognize that the Bynum Project has no effect on interstate commerce because the project does not currently displace power on the interstate electrical grid. PK Ventures argues that the project has not operated for 10 years and PK Ventures, should it choose to operate the project, is free to produce power for non-grid use.³²

14. PK Ventures misunderstands the Commission's criteria when assessing whether a proposed project impacts interstate commerce. A determination as to whether a proposed project would affect interstate commerce rests on the proposed use of the project's power, not on the existing state of the project. The Commission determined in the License Order that the Bynum Project, as proposed by McMahan Hydro, will affect interstate commerce through its connection to the interstate power grid.³³ PK Ventures does not address this determination; accordingly, we affirm the Commission's determination in the License Order that the Bynum Project will affect interstate commerce.³⁴

interpretation of "construction" to include an increase in generating capacity of 86 kW); *Puget Sound*, 557 F.2d at 1316 (noting that post-1935 construction requires an increase in generating capacity)). *See also Bass/Wilson Properties, LLC*, 150 FERC ¶ 62,066, at P 5 (2015) (determining that installing new hydroelectric generating capacity constitutes post-1935 construction within the meaning of FPA section 23(b)(1)).

³² PK Ventures Rehearing and Stay Request at 3, 24.

³³ License Order, 168 FERC ¶ 61,185 at P 26 (citing *Habersham Mills v. FERC*, 976 F.2d 1381, 1384-85 (11th Cir. 1992) (holding that small hydroelectric projects that are connected to the interstate grid, even if they have no interstate sales, affect interstate commerce by displacing power from the grid, and the cumulative effect of the national class of these small projects is significant for purposes of FPA section 23(b)(1)); EA at 2 (explaining that McMahan Hydro plans to operate the project, which has an installed capacity of 600 kW and can generate an average of 2,461 megawatt-hours of electricity annually).

³⁴ License Order, 168 FERC ¶ 61,185 at P 26.

B. PK Ventures' Property Rights

15. PK Ventures argues that because, in its view as discussed above, the Commission lacks statutory authority to issue a license for the Bynum Project, section 21 of the FPA,³⁵ which confers upon licensees the right to condemn the necessary property for the location and operation of the project, has no effect. Therefore, PK Ventures asserts, the License Order stands in contravention of the FPA, the United States Constitution, the Constitution of North Carolina, and unspecified federal and state laws protecting property and water rights.³⁶

16. We disagree. As discussed above and affirmed in this order, the Commission had authority to license the proposed project and properly issued the license.³⁷ Thus, McMahan Hydro may, if necessary, obtain the necessary project property rights by means of the eminent domain power conferred by section 21 of the FPA.³⁸

17. PK Ventures argues that the Commission failed to establish a project boundary leaving uncertain the extent to which property and other rights held by PK Ventures may be subject to the License Order and section 21 of the FPA.³⁹ An established project boundary is not a prerequisite to the Commission's issuance of a license; the final boundary, and any necessary property rights are frequently obtained thereafter.⁴⁰ Article 202 of the License Order requires the licensee to file, within 90 days of the issuance date of the license, a set of revised exhibit G maps, which includes the final project boundary,⁴¹ and Article 203 of the license requires McMahan Hydro to report to the Commission within four years on the status of the property rights McMahan Hydro

³⁵ 16 U.S.C. § 814 (2018).

³⁶ PK Ventures Rehearing and Stay Request at 25-26.

³⁷ License Order, 168 FERC ¶ 61,185 at P 26.

³⁸ *Id.* P 27.

³⁹ PK Ventures Rehearing and Stay Request at 5, 26.

⁴⁰ License Order, 168 FERC ¶ 61,185 at P 27 (citing *Swift Creek Power Co., Inc.*, 83 FERC ¶ 61,238, at 62,038 (1998); *Nw. Power Co.*, 59 FERC ¶ 61,132, at 61,492 (1992)).

⁴¹ *Id.* at Article 202. McMahan Hydro's Exhibit G drawings are currently pending before the Commission. McMahan Hydro Revised Exhibit-G Map for the Bynum Hydro Project (Dec. 18, 2019).

holds on lands within the project boundary.⁴² These actions will resolve the issues raised by PK Ventures.

C. Clean Water Act Section 401 Water Quality Certification

1. Clean Water Act Section 401 Certification Timeline

18. Under section 401(a)(1) of the CWA, any applicant seeking a federal license for an activity that “may result in any discharge into the navigable waters,” such as a Commission-issued hydroelectric license, must first seek water quality certification from the state or states in which a discharge may occur.⁴³ However, certification requirements shall be waived 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.”⁴⁴

19. On March 3, 2017, McMahan Hydro sent North Carolina DEQ, and North Carolina DEQ received, a request for water quality certification.

20. On April 26, 2017, North Carolina DEQ requested additional information to supplement McMahan Hydro’s application. Specifically, North Carolina DEQ indicated that it would put McMahan Hydro’s application on hold until McMahan Hydro provided a water quality monitoring plan and a copy of the Commission’s Draft Environmental Assessment (EA) for the project.⁴⁵ On December 21, 2017, McMahan Hydro submitted a water quality monitoring plan to North Carolina DEQ.⁴⁶

21. That same day, McMahan Hydro contacted a North Carolina DEQ employee via e-mail, stating that McMahan Hydro would like to discuss refiling the section 401

⁴² License Order, 168 FERC ¶ 61,185 at P 27. In addition, Standard Article 5 of the license requires McMahan Hydro to obtain the property rights necessary to operate the project within five years, and, if necessary, obtain any necessary property rights through the use of eminent domain pursuant to FPA section 21. License Order, 168 FERC ¶ 61,185 at P 27 (citing 16 U.S.C. § 814 (other citations omitted)).

⁴³ 33 U.S.C. § 1341(a)(1).

⁴⁴ *Id.*

⁴⁵ License Order, 168 FERC ¶ 61,185 at P 34 n.25 (citing McMahan Hydro’s March 19, 2018 Copy of Request to Withdraw and Re-apply for Water Quality Certification).

⁴⁶ *Id.* P 34.

certification application because the Commission had yet to issue the EA.⁴⁷ On January 3, 2018, the North Carolina DEQ employee instructed McMahan Hydro to send a letter stating that McMahan Hydro would like to withdraw and reapply.⁴⁸ On February 20, 2018, McMahan Hydro submitted a letter via e-mail, requesting to withdraw and refile its application.⁴⁹ On February 22, 2018, North Carolina DEQ acknowledged McMahan Hydro's request, stating that "[a]ll application materials will be retained and a new application fee is not required."⁵⁰

22. On October 25, 2018, the Commission staff issued the EA.⁵¹ On December 20, 2018, North Carolina DEQ acknowledged that it had received the EA and provided comments to McMahan Hydro on the water quality monitoring plan.⁵² At North Carolina DEQ's request, on January 18, 2019, McMahan Hydro submitted a revised water quality monitoring plan.⁵³

23. On January 25, 2019, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) decided *Hoopa Valley*, answering in the affirmative the question

⁴⁷ See *id.* P 35 n.25 (citing McMahan Hydro's January 3, 2018 Hydro Monitoring Plan Proposal, accessed on North Carolina DEQ's electronic document database for Bynum Hydro Project (FERC #4093), <https://edocs.deq.nc.gov/WaterResources/0/doc/663438/Page1.aspx?searchid=5601113c-b8be-4604-9441-c5bcf5195d14> (e-mail from Andrew McMahan to North Carolina DEQ's Jennifer Burdette)).

⁴⁸ See *id.* (e-mail from Jennifer Burdette to Andrew McMahan) (instructing McMahan Hydro that "[t]o refile your application, you will need to send a letter stating that you would like to withdraw your application and reapply prior to March 3, 2017 [sic]. We do not charge an additional review fee when the delay is beyond the applicant's control as in your situation").

⁴⁹ See *id.* P 35 n.29 (citing McMahan Hydro's March 19, 2018 Copy of Request to Withdraw and Re-apply for Water Quality Certification (e-mail from Andrew McMahan to North Carolina DEQ's Karen Higgins)).

⁵⁰ *Id.* P 35, n.30 (citing e-mail from Karen Higgins to Andrew McMahan).

⁵¹ *Id.* P 8.

⁵² *Id.* P 36 (citing McMahan Hydro's March 13, 2019 Copy of Revised Water Quality Monitoring Plan, Docket No. P-14858, at 1-2).

⁵³ *Id.* P 36 n.33 (citing McMahan Hydro's March 13, 2019 Copy of Revised Water Quality Monitoring Plan, Docket No. P-14858, at 4-14).

“whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year.”⁵⁴

24. On February 7, 2019, a North Carolina DEQ employee informed McMahan Hydro of the impending one year deadline: “[P]lease remember to send [North Carolina DEQ’s section 401 supervisor] a request to withdraw and reapply (I think the deadline is by February 20th).”⁵⁵ Four days later, on February 11, 2019, McMahan Hydro emailed a letter to North Carolina DEQ which simultaneously withdrew and refiled its application for the second time. By email sent February 20, 2019, North Carolina DEQ confirmed that McMahan Hydro’s application had been withdrawn and resubmitted.⁵⁶

25. As discussed, on September 20, 2019, when the Commission issued McMahan Hydro an original license, the Commission concluded that North Carolina DEQ had waived its authority to issue a water quality certification for the project.⁵⁷

2. The Commission’s Waiver Determination was Supported by Record Evidence

26. Both North Carolina DEQ and PK Ventures argue that the Commission erred in finding that North Carolina DEQ waived its certification authority. North Carolina DEQ also claims that the License Order is ambiguous as to when North Carolina DEQ waived its authority.⁵⁸

27. In *Hoopa Valley*, the D.C. Circuit undertook “an undemanding inquiry” into whether the withdrawal and resubmission scheme in that case would reset the statutory clock “because Section 401’s text is clear” that waiver occurs if the state refuses or fails

⁵⁴ *Hoopa Valley*, 913 F.3d at 1103.

⁵⁵ License Order, 168 FERC ¶ 61,185 at P 36 (citing McMahan Hydro’s March 13, 2019 Copy of Revised Water Quality Monitoring Plan at 15 (e-mail from North Carolina DEQ’s Chonticha Mcdaniel to Andrew McMahan)).

⁵⁶ *Id.* (citing McMahan Hydro’s March 13, 2019 Copy of Request to Withdraw and Re-apply for Water Quality Certification (Feb. 20, 2019 e-mail from Andrew McMahan to Karen Higgins)).

⁵⁷ *Id.* P 37.

⁵⁸ North Carolina DEQ Rehearing Request at 17-18.

to act after the absolute maximum period of one year.⁵⁹ The court concluded that “[t]he pendency of the requests for state certification in this case have far exceeded the one-year maximum” when the applicant for water quality certification had for a number of years sent an identical letter to the state certifying agencies purporting to withdraw and resubmit the very same certification request that had been pending before that withdrawal.⁶⁰ The court explained that, in that case, the clock did not restart because “withdrawals-and-resubmissions were not just similar requests, they were not new requests at all.”⁶¹

28. At a minimum, McMahan Hydro’s second withdrawal and resubmission of its request on February 20, 2019, did not restart the time limit for North Carolina DEQ to act on the preexisting request.⁶² On February 7, 2019, a North Carolina DEQ employee informed McMahan Hydro of the impending one year deadline and requested that McMahan Hydro withdraw and resubmit by February 20, 2019.⁶³ North Carolina DEQ characterizes this communication as a courtesy email⁶⁴ and claims that McMahan Hydro indicated that it intended to withdraw and resubmit its application during a prior meeting.⁶⁵ But no additional information had been submitted to North Carolina DEQ after January 18, 2019,⁶⁶ and the only purpose of the communication was to request that McMahan Hydro withdraw and resubmit its request before the impending one-year

⁵⁹ *Hoopa Valley*, 913 F.3d at 1103-04.

⁶⁰ *Id.* at 1104.

⁶¹ *Id.*

⁶² This assumes for the sake of argument that McMahan Hydro’s February 22, 2018 resubmitted application constituted a new application; however as discussed below, we separately find that the first resubmission was not a valid new request that restarted the one-year clock for waiver. *See infra* at PP 29-30.

⁶³ *See* License Order, 168 FERC ¶ 61,185 at P 36 (citing McMahan Hydro’s March 13, 2019 Copy of Revised Water Quality Monitoring Plan at 15 (e-mail from North Carolina DEQ’s Chonticha Mcdaniel to Andrew McMahan) (“ . . . [P]lease remember to send [North Carolina DEQ’s section 401 supervisor] a request to withdraw and reapply (I think the deadline is by February 20th).”)).

⁶⁴ North Carolina DEQ Rehearing Request at 15.

⁶⁵ *Id.* at 7.

⁶⁶ License Order, 168 FERC ¶ 61,185 at P 36.

deadline.⁶⁷ Because there was no change to McMahan Hydro's certification application or its project and its resubmission was at the behest of North Carolina DEQ, we find that North Carolina DEQ waived section 401 certification by failing to act by February 20, 2019.⁶⁸

29. We also find that North Carolina waived section 401 certification after McMahan Hydro's first withdrawal and resubmission of its request, accepted by North Carolina DEQ on February 22, 2018. After McMahan Hydro submitted its certification application on March 3, 2017, North Carolina DEQ requested that McMahan Hydro submit the project's draft EA and a water quality plan to supplement its application.⁶⁹ McMahan Hydro subsequently submitted a water quality monitoring plan to North Carolina DEQ,⁷⁰ but, as North Carolina DEQ points out, it was McMahan Hydro that contacted North Carolina DEQ to discuss refiling the certification request because the Commission had yet to issue the EA before the one-year deadline.⁷¹ Although this

⁶⁷ See *id.* (citing McMahan Hydro's March 13, 2019 Copy of Request to Withdraw and Re-apply for Water Quality Certification (e-mail from Andrew McMahan to Karen Higgins)).

⁶⁸ See *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129, at P 37 (2019) (explaining that the fact that a state is reviewing additional information does not toll the one-year waiver deadline and that "a single withdrawal and resubmission could amount to waiver."); see also *S. Cal. Edison Co.*, 170 FERC ¶ 61,135, at PP 23-29 (2020) (finding that the record showed the state agency's direct participation in a withdrawal and resubmittal scheme based in part on the emails that the state agency staff sent annually ahead of the one-year deadline requesting the licensee to withdraw and resubmit its certification application).

⁶⁹ License Order, 168 FERC ¶ 61,185 at P 34 n.25 (citing McMahan Hydro's March 19, 2018 Copy of Request to Withdraw and Re-apply for Water Quality Certification at 1).

⁷⁰ We note that North Carolina DEQ failed to act or respond to McMahan Hydro's water quality plan after submission on December 21, 2017, and that North Carolina did not provide any comments until December 20, 2018, more than one year after McMahan Hydro's original March 3, 2017 request. See *id.* PP 34-36.

⁷¹ See *id.* P 35 n.27 (citing McMahan Hydro's January 3, 2018 Hydro Monitoring Plan Proposal, accessed on North Carolina DEQ's electronic document database for Bynum Hydro Project (FERC #4093), <https://edocs.deq.nc.gov/WaterResources/0/doc/663438/Page1.aspx?searchid=5601113c-b8be-4604-9441-c5bcf5195d14> (e-mail from Andrew McMahan to North Carolina DEQ's Jennifer Burdette)).

withdrawal and resubmission was initiated by McMahan Hydro, we are not persuaded that this was a unilateral action by the applicant. North Carolina DEQ instructed McMahan Hydro to send a letter indicating that McMahan Hydro would like to withdraw and reapply and also indicated that no additional review fee was necessary.⁷² McMahan Hydro's February 20, 2018 withdrawal-and-resubmittal letter did not convey any substantive information to North Carolina DEQ, but merely withdrew and resubmitted the very same water quality certification request that had been pending before North Carolina DEQ on that date. Accordingly, consistent with the court's holding in *Hoopa Valley*, we affirm the determination in the License Order that North Carolina DEQ waived its authority to issue a section 401 water quality certification.

30. We note that to the extent a state lacks sufficient information to act on a certification request, it has a complete remedy: it can deny certification. Delay beyond the statutory deadline, however, is not an option. We also note that, as discussed above, before the deadline for action on the second certification request, North Carolina DEQ had in hand for over a month all the information it had previously requested. Consequently, North Carolina DEQ's belated September 20, 2019 "certification," issued on the same day that the Commission had previously publicly announced that it would act in the licensing proceeding,⁷³ had no force and effect.⁷⁴

3. The Commission did not violate the plain language and intent of Clean Water Act

31. North Carolina DEQ next argues that the Commission cannot find waiver under section 401 of the CWA when McMahan Hydro withdrew its certification request before the one-year statutory period expired.⁷⁵ North Carolina DEQ argues that section 401 of

⁷² See *id.* P 35 n.26 (e-mail from Jennifer Burdette to Andrew McMahan) (instructing McMahan Hydro that "[t]o refile your application, you will need to send a letter stating that you would like to withdraw your application and reapply prior to March 3, 2017 [sic]. We do not charge an additional review fee when the delay is beyond the applicant's control as in your situation").

⁷³ Sunshine Act Meeting Notice, September 19, 2019 Meeting (Sept. 12, 2019), <https://www.ferc.gov/CalendarFiles/20190912183440-CA09-19-019.pdf>.

⁷⁴ *S. Cal. Edison Co.*, 170 FERC ¶ 61,135, at P 37 ("[O]nce a state agency has waived its authority to act on a water quality certification application, the water quality conditions are not mandatory and acceptance of the conditions is a matter within the federal agency's discretion."); *Pac. Gas & Elec. Co.*, 170 FERC ¶ 61,232, at P 44 (2020) (explaining that a post-waiver certification by the state is invalid).

⁷⁵ North Carolina DEQ Rehearing Request at 9.

the CWA does not prohibit an applicant from withdrawing its request before the one-year period. North Carolina DEQ did not fail or refuse to act on McMahan Hydro's requests, because those requests were voluntarily withdrawn.⁷⁶

32. In *Hoopa Valley*, the D.C. Circuit explained that coordinated withdrawals and resubmissions of the same certification request amount to a "failure or refusal to act" under section 401 of the CWA,⁷⁷ and nothing in the CWA permits the Commission to make "an exception for an individual request made pursuant to a coordinated withdrawal and resubmission scheme."⁷⁸ As discussed, McMahan Hydro, in coordination with North Carolina DEQ, withdrew and resubmitted the same certification requests pending before North Carolina DEQ and did not convey any information indicating any alteration in the project, let alone filing a new application.⁷⁹

33. North Carolina DEQ also argues that the Commission's waiver is contrary to the legislative intent behind section 401, which North Carolina DEQ claims was enacted to ensure that federal licensing or permitting agencies cannot override state water quality permits.⁸⁰ North Carolina argues that legislative history shows that the waiver provision was intended to address "sheer inactivity by the State," not the kind of ongoing coordination that North Carolina DEQ engaged in with McMahan Hydro.⁸¹

34. North Carolina DEQ misreads the purpose of section 401's one-year time limitation as being limited to preventing only "sheer inactivity."⁸² This reading undercuts the statute's purpose because section 401 was enacted, not just to prevent inactivity, but to "prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401."⁸³ Thus, the D.C. Circuit has explained that where an applicant for water quality certification each year sent a "letter

⁷⁶ *Hoopa Valley*, 913 F.3d at 1104.

⁷⁷ *See id.* at 1105.

⁷⁸ *Id.* at 1104.

⁷⁹ *See supra* at PP 28-29.

⁸⁰ North Carolina DEQ Rehearing Request at 10.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Hoopa Valley*, 913 F.3d at 1101 (citing *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011)).

indicating withdrawal of its water quality certification request and resubmission of the very same,” “[s]uch an arrangement does not exploit a statutory loophole; it serves to circumvent [the Commission’s] congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.”⁸⁴ As in *Hoopa Valley*, North Carolina DEQ’s and McMahan Hydro’s coordinated withdrawal and resubmittal of the certification request delayed state action beyond the statute’s prescribed one-year deadline and circumvented the Commission’s “regulatory authority of whether and when to issue a federal license.”⁸⁵

4. No Formal Agreement is Necessary under *Hoopa Valley*

35. North Carolina DEQ contends that it did not waive its authority under section 401, because North Carolina DEQ did not enter into a formal agreement with McMahan Hydro to defer the one-year statutory limit.⁸⁶ The state claims (without providing supporting evidence as to the applicant’s intent) that McMahan Hydro voluntarily withdrew and resubmitted its application with the understanding that North Carolina DEQ did not have a sufficient record or sufficient time to comply with notice and comment procedures in order to grant the requested certification within one year.⁸⁷ North Carolina DEQ also argues that the Commission’s waiver determination was arbitrary and capricious because the Commission failed to seek any input from North Carolina DEQ on whether North Carolina DEQ formed an agreement with McMahan Hydro to circumvent section 401 of the CWA.⁸⁸ To that end, North Carolina DEQ included a declaration from a North Carolina DEQ employee to support its claim that it did not enter into a formal agreement with McMahan Hydro.⁸⁹

36. In *Hoopa Valley*, the D.C. Circuit held that “a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws and resubmits its request for water quality certification over a

⁸⁴ *Id.* at 1104.

⁸⁵ *Id.* at 1103. *See, e.g., Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129, at P 34 n.80 *reh’g denied*, 169 FERC ¶ 61,199 (2019) (explaining even where there are multiple withdrawals and resubmittals, there only needs to be a failure to act in one 12-month period to find waiver).

⁸⁶ North Carolina DEQ Rehearing Request at 12-13.

⁸⁷ *Id.* at 6-7.

⁸⁸ *Id.* at 16.

⁸⁹ *Id.* at 16-17.

period of time greater than one year.”⁹⁰ In *Placer County Water Agency*, the Commission determined that *Hoopa Valley* does not require a formal agreement between a licensee and a state certifying agency, but that exchanges between entities could amount to an ongoing agreement.⁹¹ Based on the record in that case, we determined that the state and the licensee had a functional agreement because they worked to ensure that withdrawal and resubmission would take place each year, creating a procedure that delayed a certification decision by over six years.⁹² Similarly, in *Southern California Edison Company*, the Commission reiterated that no formal, written agreement was necessary when the state coordinated with the applicant to withdraw and resubmit the certification request and did so for the purpose of avoiding waiver.⁹³

37. As discussed above, the exchanges between McMahan Hydro and North Carolina DEQ on timing amounted to an ongoing agreement that allowed North Carolina DEQ to delay acting within the CWA section 401 one-year deadline. North Carolina DEQ instructed McMahan Hydro to send a letter indicating that it would like to withdraw and reapply for water quality certification before the end of the one-year period in 2018,⁹⁴ and again instructed McMahan Hydro to withdraw and resubmit its certification request before the impending deadline in 2019.⁹⁵ The record does not reflect evidence that McMahan Hydro displayed any desire for the state to delay action. Consistent with the Commission’s determinations in *Placer County*⁹⁶ and *Southern California Edison*

⁹⁰ *Hoopa Valley*, 913 F.3d at 1103.

⁹¹ 169 FERC ¶ 61,046, at P 18 (2019) (*Placer County*).

⁹² *Id.*

⁹³ 170 FERC ¶ 61,135, at PP 20, 23 (2020) (finding waiver when the state indicated that if it could not act within the one-year deadline, it would request the licensee to withdraw and resubmit its certification application and subsequently sent annual emails ahead of the one-year deadline with this request).

⁹⁴ License Order, 168 FERC ¶ 61,185 at P 35, n.26 (e-mail from Jennifer Burdette to Andrew McMahan) (instructing McMahan Hydro that “[t]o refile your application, you will need to send a letter stating that you would like to withdraw your application and reapply prior to March 3, 2017 [sic]. We do not charge an additional review fee when the delay is beyond the applicant’s control as in your situation”).

⁹⁵ *Id.* at P 36 (citing McMahan Hydro’s March 13, 2019 Copy of Revised Water Quality Monitoring Plan at 15 (e-mail from North Carolina DEQ’s Chonticha Mcdaniel to Andrew McMahan)).

⁹⁶ 169 FERC ¶ 61,046, at P 18.

Company,⁹⁷ in these circumstances, a formal agreement between a licensee and a state certifying agency is not necessary.

38. Contrary to North Carolina DEQ's claim, the Commission was under no obligation to seek input from North Carolina DEQ on whether an agreement was formed. Nothing prevented the state from explaining its actions, yet it elected not to do so until after we had acted on the merits. In any case, North Carolina DEQ's affidavit stating that it did not have a formal agreement with McMahan Hydro is unconvincing and irrelevant. As discussed above, the Commission did not need to determine that North Carolina DEQ and McMahan Hydro entered into formal agreement, but rather properly relied on North Carolina DEQ's coordination with McMahan Hydro.⁹⁸ Finally, North Carolina DEQ had, and availed itself of, the opportunity to respond to the determination, in its request for rehearing.⁹⁹

5. PK Ventures' CWA Section 401 Arguments

39. PK Ventures argues that under North Carolina regulations, a project owner must sign an application for a section 401 certification. Because PK Ventures did not sign McMahan Hydro's application, PK Ventures claims that the application does not meet North Carolina's regulations and is invalid.¹⁰⁰ PK Ventures goes on to argue that this invalid request was then effectively withdrawn on April 4, 2019, when McMahan Hydro requested that North Carolina DEQ put its application on hold, in violation of section 4.34(b)(5)(i) of the Commission's regulations.¹⁰¹ PK Ventures also contends because McMahan Hydro violated North Carolina regulations, its representation before the

⁹⁷ 170 FERC ¶ 61,135 at PP 20, 23.

⁹⁸ *See supra* at PP 28-29, 37.

⁹⁹ Even if North Carolina DEQ did not anticipate that the License Order would determine that the state had waived certification, the opportunity to seek rehearing is an adequate opportunity to challenge the Commission's decision. *Cf. Blumenthal v. FERC*, 613 F.3d 1142, 1145-46 (D.C. Cir. 2010) (finding that rehearing provides an adequate opportunity to respond to new evidence).

¹⁰⁰ PK Ventures Rehearing and Stay Request at 11-12.

¹⁰¹ *Id.* at 8-10 (citing 18 C.F.R. § 4.34(b)(5)(i) (2019)).

Commission that it had validly requested its certification violates the False Claims Act¹⁰² and Commission regulations governing market manipulation.¹⁰³

40. It is unclear that PK Ventures can properly raise these issues here. Alleged violations of state procedures (other than those mandated by the CWA, such as the public notice requirement in section 401(a)(1))¹⁰⁴ must be raised before the state. Further, PK Ventures misconstrues the Commission's regulations. Section 4.34(b)(5)(i) of the Commission's regulations requires that an applicant for a federal license file, within 60 days from the date of issuance of the Commission's notice that an application is ready for environmental analysis, the requested water quality certification and/or provide the date that water quality certification was requested or indicate whether the state waived certification.¹⁰⁵ This filing requirement has no bearing on an applicant's administrative requests before a state nor does it affect how a certification request is treated under a state law. As noted above, PK Ventures' claims that McMahan Hydro specifically requested a hold on the certification on April 4, 2019. PK Ventures' claim that such a hold or stay violates North Carolina regulations and its argument that North Carolina law requires that the project owner sign the water quality certification application are matters of state law beyond the Commission's authority to consider under the CWA.¹⁰⁶ Indeed, if McMahan had violated North Carolina regulations – something the state does not assert – that would have been a matter for the state to address. Similarly, PK Ventures' claimed violation of the False Claims Act and asserted evidence of market manipulation are beyond the scope of this licensing proceeding. In any event, PK Ventures does not adequately explain the

¹⁰² *Id.* at 14 (citing 16 U.S.C. § 1001 (2018)).

¹⁰³ *Id.* PK Ventures cites 18 C.F.R. § 1c for this proposition, but we assume it was referring to 18 C.F.R. Part 1c (2019).

¹⁰⁴ 33 U.S.C. § 1341(a)(1) (2018).

¹⁰⁵ 18 C.F.R. § 4.34(b)(5)(i) (2019). The Commission issued this notice on February 14, 2017. 82 Fed. Reg. 10,571 (Feb. 14, 2017). McMahan Hydro provided this information to the Commission in Docket No. P-4093-035 on March 29, 2017.

¹⁰⁶ *See City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (explaining that the Commission has an obligation to confirm that the state has satisfied section 401 in a way that satisfies the restrictions of that subsection, but it is not required to inquire into every state law requirement under the CWA, “especially to the extent doing so would place FERC in the position of applying state law standards”). Moreover, as discussed, the Commission determined that North Carolina DEQ had already waived water quality certification by this date.

grounds for those claims, although they appear to hinge only on PK Ventures' asserted violations of state law which are, as noted, beyond our authority.

41. PK Ventures further avers that the Commission failed to comply with the referral procedures set forth in the CWA.¹⁰⁷ Section 401(a)(2) of the CWA provides “[u]pon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator [of the Environmental Protection Agency (EPA)] of such application and certification.”¹⁰⁸ The purpose of this section is to allow the Administrator to determine whether a discharge from the project will affect the water quality of any state other than the state in which the discharge will originate and, if so, to notify the second state.¹⁰⁹ Because the Commission found that North Carolina DEQ waived certification, the Commission was under no obligation to further notify the Administrator of the EPA.¹¹⁰ Moreover, we note there is nothing in the record to suggest that the project would have adverse impacts on another state's water quality. In any event, PK Ventures cites no authority to show that even a clear failure to comply with section 401(a)(2) would invalidate the license issued in these proceedings.

¹⁰⁷ PK Ventures Request for Rehearing and Stay at 15 (citing 33 U.S.C. § 1341(a)(2) (2018)).

¹⁰⁸ 33 U.S.C. § 1341(a)(2). *See Avista Corp.*, 127 FERC ¶ 61,265, at P 97 (2009) (noting that section 401(a)(2) directs a federal licensing agency to follow certain procedures that are designed to protect the water quality of a state other than that in which the project discharge originates).

¹⁰⁹ *See Avista Corp.*, 127 FERC ¶ 61,265 at P 98.

¹¹⁰ The Commission also publicly noticed McMahan Hydro's application. 80 Fed. Reg. 23,525 (Apr. 28, 2015).

Project No. 14858-002

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The Commission orders:

(A) North Carolina DEQ's and PK Ventures' requests for rehearing are hereby denied, as discussed in the body of this order.

(B) PK Ventures' request for stay pending rehearing is hereby dismissed as moot and its request for stay pending appeal is denied, as discussed in the body of this order.

(C) North Carolina DEQ's answer to PK Ventures' request for rehearing is hereby rejected, as discussed in the body of this order.

By the Commission. Commissioner Glick is concurring in part and dissenting in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

McMahan Hydroelectric LLC

Project No. P-14858-002

(Issued April 16, 2020)

GLICK, Commissioner, *concurring in part and dissenting in part*:

1. I agree with the Commission that the North Carolina Department of Environmental Quality (North Carolina DEQ) waived its authority under section 401 of the Clean Water Act¹ because it did not act on a substantially unrevised section 401 application for more than a year, instead participating in a withdrawal-and-resubmission scheme intended to avoid that one-year deadline. Nevertheless, I dissent in part because the Commission goes out of its way to make a superfluous second waiver finding.² I would decide this proceeding on the straightforward basis on which we all agree. Accordingly, I concur in part and dissent in part.

2. Section 401 requires applicants for a federal license that “may result in any discharge into the navigable waters”—a category that includes hydroelectric licenses issued by the Commission—to secure a certificate from the state in which the “discharge originates or will originate.”³ Section 401, however, imposes a time limit on states’ review of a certificate request: “If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.”⁴ Prior to the D.C. Circuit’s decision in *Hoopa Valley*, the Commission took the position that an applicant’s withdrawal and resubmission of a section 401 application was sufficient to restart the one-year deadline.⁵

3. *Hoopa Valley* rejected that interpretation in a proceeding that addressed the long-delayed relicensing proceeding for PacifiCorp’s Klamath River Hydroelectric Facility

¹ 33 U.S.C. § 1341(a)(1) (2018).

² 913 F.3d 1099, 1101 (D.C. Cir. 2019), *pet. for cert. denied sub nom. Cal. Trout v. Hoopa Valley Tribe*, 2019 WL 6689876 (Dec. 9, 2019).

³ 33 U.S.C. § 1341(a)(1).

⁴ *Id.*

⁵ *Hoopa Valley*, 913 F.3d at 1104.

along the border between California and Oregon.⁶ To make a long story short, several years ago PacifiCorp apparently came to the conclusion that relicensing the facility would not be cost-effective.⁷ PacifiCorp then entered an agreement with the two states and a variety of stakeholders to hold the relevant state licensing proceedings in abeyance while it pursued options for decommissioning the facility.⁸ One of the state licensing proceedings PacifiCorp sought to delay involved its requests for a certificate pursuant to section 401. To avoid section 401's one-year limitation, PacifiCorp agreed to annually withdraw and resubmit its section 401 application before the one-year limit expired—a task it accomplished each year by submitting a one-page letter, stating its intent to withdraw and resubmit its application.⁹

4. In *Hoopa Valley*, the court held that PacifiCorp's particular withdrawal-and-resubmission tactic did not restart the one-year limitation on the states' review of its section 401 application,¹⁰ meaning that the states had waived their section 401 authority by failing to act on PacifiCorp's application within a year. But the court went out of its way to limit its ruling to the facts before it. The court explained that its decision resolved “a single issue: whether a state waives its Section 401 authority when, pursuant to an agreement between a state and an applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year.”¹¹

5. Most importantly for the purposes of today's order, the court expressly avoided addressing what happens when the applicant modifies its section 401 application before the one-year period elapses. The court explicitly “decline[d] to resolve the legitimacy” of an arrangement in which an applicant withdrew its 401 application and submitted a new

⁶ *Id.* at 1101.

⁷ *Id.* at 1101-02.

⁸ *Id.* at 1101.

⁹ *Id.* at 1102-04. That process had gone on for “more than a decade” by the time that the D.C. Circuit decided *Hoopa Valley*. *Id.* at 1104.

¹⁰ *Id.* at 1103.

¹¹ *Id.*; see also *id.* at 1104 (noting that the D.C. Circuit had not previously addressed “the specific factual scenario presented in this case, *i.e.*, an applicant agreeing with the reviewing states to exploit the withdrawal-and-resubmission of water quality certification requests over a lengthy period of time”).

one in its place.¹² Similarly, the court did not address “how different a [section 401 application] must be to constitute a ‘new request’ such that it restarts the one-year clock.”¹³ In addition, throughout the opinion, the court referenced a slew of factors that might limit the scope of its decision, including the parties “deliberate and contractual idleness,”¹⁴ the fact that the purpose of the agreement was to delay the license process,¹⁵ the fact that PacifiCorp “never intended to submit a ‘new request,’”¹⁶ and the decade-long licensing delay caused by the scheme.¹⁷

6. That makes *Hoopa Valley* a hard case to apply. On the one hand, the court made clear that the Commission’s prior interpretation—that any withdrawal and resubmission of a section 401 application restarted the one-year period for review—was wrong. Although that is enough to decide a handful of relatively easy cases, it tells us little about the majority of fact patterns likely to come before this Commission. Indeed, as noted, the court enumerated, but did not decide, a host of questions that will ultimately determine the scope of the waiver rule announced in *Hoopa Valley*.

7. This case could have been one of the relatively easy ones. As the Commission explains, McMahan Hydroelectric, LLC (McMahan Hydro) sent North Carolina DEQ its first section 401 application on March 3, 2017.¹⁸ On April 26, 2017, North Carolina DEQ requested significant additional information, including a water quality monitoring plan, which had not previously been provided.¹⁹ McMahan Hydro submitted that information on December 21, 2017, and, that same day, contacted North Carolina DEQ to discuss withdrawing and resubmitting its application, which it ultimately did on

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* (“This case presents the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification.”); *id.* at 1105 (describing the set of facts before the court as one “in which a licensee entered a written agreement with the reviewing states to delay water quality certification”).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *McMahan Hydroelectric, LLC*, 171 FERC ¶ 61,046, at P 19 (2020) (Rehearing Order).

¹⁹ *Id.* P 20.

February 20, 2018.²⁰ Roughly a year later, at North Carolina DEQ's request, McMahan Hydro withdrew and resubmitted its application a second time on February 11, 2019,²¹ with the only intervening changes to the application being certain revisions to the water quality monitoring program made in response to comments by North Carolina DEQ.²²

8. As I explained in my partial dissent from the underlying order, the facts surrounding the second withdrawal and resubmission are sufficient for us to conclude that North Carolina waived its section 401 authority.²³ As noted, McMahan Hydro had pending before North Carolina DEQ a substantially unmodified application from February 20, 2018, (the date of its first withdrawal and resubmission) through February 20, 2019 (nine days after its second withdrawal and resubmission).²⁴ The principal change made during that period was the relatively minor revisions to the water quality monitoring program made in response to North Carolina DEQ's comments.²⁵ Those changes were not, in my opinion, sufficient to constitute a new application. Accordingly, the February 11, 2019 withdrawal and resubmission, made at North Carolina DEQ's behest, did not restart the one-year deadline, meaning that McMahan Hydro had substantially the same application pending before the North Carolina DEQ for more than a year. That is sufficient to conclude that the state waived its section 401 rights.²⁶

9. The Commission, however, goes on to find a second waiver based on McMahan Hydro's first withdrawal and resubmission.²⁷ As I explained in my statement on the underlying order, I see no need for that superfluous second finding. In any case, I note that, in the underlying order, the Commission suggested that only a major physical

²⁰ *Id.* PP 20-21.

²¹ At which point the D.C. Circuit had issued its decision in *Hoopa Valley*.

²² *Id.* PP 22, 24.

²³ *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (2019) (License Order) (Glick, Comm'r, concurring in part and dissenting in part at P 5).

²⁴ *See supra* P 7. North Carolina DEQ ultimately acted on that application on September 20, 2019, the day the Commission issued the License Order. Rehearing Order, 171 FERC ¶ 61,046 at P 30.

²⁵ *See supra* P 7.

²⁶ Rehearing Order, 171 FERC ¶ 61,046 at P 28.

²⁷ License Order, 168 FERC ¶ 61,185 (Glick, Comm'r concurring in part and dissenting in part at PP 4-5).

modification to a project could create a new application, at least absent some undefined “unusual circumstances.”²⁸ Today’s order does not repeat that point—a step in the right direction from my perspective. Nothing in the Clean Water Act or *Hoopa Valley* requires us so drastically limit what might constitute a new section 401 application. Congress enacted section 401 so that states can ensure that a federally licensed or certificated project does not violate state or federal water quality standards and to permit states to impose such conditions as are necessary to ensure that result.²⁹ Significant changes in how a project is monitored could well determine whether a state can make the water quality findings required by section 401, even if those changes do not require a new license application with the Commission.³⁰ Taking the position that *only* a revised application with this Commission could result in a new section 401 application would discount the complex and nuanced review that many states undertake in implementing their section 401 authority.

For these reasons, I respectfully concur in part and dissent in part.

Richard Glick
Commissioner

²⁸ License Order, 168 FERC ¶ 61,185 at P 38 & n.43.

²⁹ See *PUD No. 1 of Jefferson Cnty. v. Wa. Dep’t of Ecology*, 511 U.S. 700, 707-08 (1994); see also *S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 386 (2006) (explaining why “Congress provided the States with power to enforce ‘any other appropriate requirement of State law’” pursuant to their section 401 authority).

³⁰ *PUD No. 1 of Jefferson Cnty*, 511 U.S. at 707 (listing the provisions of the Clean Water Act that a state must find a discharge consistent with as part of its section 401 determination).

Document Content(s)

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Exhibit C

**LIST OF PARTIES SERVED
PURSUANT TO LOCAL RULE 15(C)(2)**

The following parties are included on the Federal Energy Regulatory Commission's official service list of parties admitted to participate in dockets P-14858 and P-4093 before the Commission:

Party	
McMahan Hydroelectric LLC	Andrew McMahan McMahan Hydroelectric LLC 105 Durham Eubanks Road Pittsboro, North Carolina 27312 United States andrewjcmcmahan@gmail.com
North Carolina Wildlife Resources Commission	Christopher Goudreau Hydropower & Special Projects North Carolina Wildlife Resources Commission 645 Fish Hatchery Road Marion, North Carolina 28752-8254 United States chris.goudreau@ncwildlife.org
PK Ventures I Limited Partnership	David Moore Earth and Water Law, LLC Smith, Gambrell & Russell 1230 Peachtree Street Suite 1900 Atlanta, Georgia 30309-3592 United States david.moore@earthandwatergroup.com
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