

CASE DECIDED JANUARY 25, 2019

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

NO. 14-1271

HOOPA VALLEY TRIBE, *Petitioner*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*

AMERICAN RIVERS, *et. al, Intervenors*

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

**BRIEF OF CALIFORNIA STATE WATER RESOURCES CONTROL
BOARD AS *AMICUS CURIAE* IN SUPPORT OF INTERVENORS'
PETITION FOR PANEL REHEARING OR REHEARING *EN BANC***

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COMBINED CERTIFICATES

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

A. *Parties and Amici.* All parties, intervenors, and *amici* appearing before this Court are listed in the Intervenors' Petition for Panel Rehearing or Rehearing *En Banc* and the Parties' briefs in this case, No. 14-1271.

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

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

March 18, 2019

/s/ Eric M. Katz

Eric M. Katz

TABLE OF CONTENTS

	Page
INTRODUCTION AND INTEREST OF AMICUS CURIAE.....	1
ARGUMENT	2
I. Equitable Tolling Precludes Finding that the California Board Waived Its Section 401 Certification Authority	2
A. Section 401’s One-Year Deadline is Non- Jurisdictional and Therefore May be Equitably Tolled	2
B. Equitable Tolling is Warranted in Light of the States’ Reasonable Reliance on FERC’s Interpretation of Section 401	4
CONCLUSION.....	13
CERTIFICATE OF COMPLIANCE.....	14
ADDENDUM TO BRIEF OF AMICUS CURIAE.....	15
CERTIFICATE OF SERVICE.....	24

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bowden v. United States</i> 106 F.3d 433 (D.C. Cir. 1997).....	4
<i>Bull S.A. v. Comer</i> 55 F.3d 678 (D.C. Cir. 1995).....	4, 7
<i>Georgia-Pacific Corp. v. U.S. Environmental Protection Agency</i> 671 F.2d 1235 (9th Cir. 1982).....	4
<i>Jarrell v. U.S. Postal Serv.</i> 753 F.2d 1088 (D.C. Cir. 1985).....	6
<i>Menominee Indian Tribe of Wisconsin v. United States</i> 136 S. Ct. 750 (2016).....	4
<i>Millennium Pipeline Co., L.P. v. Gutierrez</i> 424 F. Supp. 2d 168 (D.D.C. 2006).....	3
<i>Sossa v. Diaz</i> 729 F.3d 1225 (9th Cir. 2013).....	6
<i>UAW v. Brock</i> 783 F.2d 237 (D.C. Cir. 1986).....	6
<i>United States v. Kwai Fun Wong</i> 135 S. Ct. 1625 (2015).....	3
ADMINISTRATIVE CASES	
<i>Barrish & Sorenson Hydroelectric Co., Inc.</i> 68 FERC ¶ 62,161 (Aug. 12, 1994).....	5
<i>Cent. Vt. Pub. Serv. Co.</i> 113 FERC ¶ 61,167 (Nov. 17, 2005).....	5

TABLE OF AUTHORITIES
(continued)

	Page
<i>Constitution Pipeline Co., LLC</i>	
162 FERC ¶ 61,014 (Jan. 11, 2018)	3, 5
<i>Ridgewood Maine Hydro Partners, L.P.</i>	
77 FERC ¶ 62,201 (Dec. 27, 1996)	5
 STATUTES	
16 United States Code	
§ 1456(c)(3)(A)	3
33 United States Code	
§ 1341	1-6, 8-13
§ 1341(a)	2
§ 1341(a)(1)	3, 5
§ 1369(b)(1)(F)	4
Cal. Water Code	
§ 174	1
§ 175	1
§ 13000	1
§ 13001	1
§ 13100	1
§ 13160	1
§ 13330	9
 REGULATIONS	
18 Code of Federal Regulations	
§ 4.34(b)(5)(iii)	3
California Code of Regulations Title 23	
§ 3855(b)(1)(B)(2)	1
§ 3859(a)	10
§ 3867(a)(1)	9

GLOSSARY

California Board	<i>Amicus Curiae</i> California State Water Resources Control Board
EIS	Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
KHSA	Klamath Hydroelectric Settlement Agreement
Section 401	33 U.S.C. § 1341

INTRODUCTION AND INTEREST OF AMICUS CURIAE

Amicus curiae California State Water Resources Control Board

(California Board) is the state agency responsible for protecting, preserving, and restoring California's water resources. Cal. Water Code §§ 174, 175, 13000, 13001, 13100. The California Board implements the federal Clean Water Act in California, and is the California state agency authorized to grant, waive, or deny water quality certification under Section 401 of the Act. 33 U.S.C. § 1341; Cal. Water Code § 13160; Cal. Code Regs. tit. 23, § 3855(b)(1)(B)(2). Due to Federal Power Act preemption, it is generally only through the California Board's Section 401 authority that the State of California can ensure that Federal Energy Regulatory Commission (FERC) licensed projects comply with state and federal water quality laws.

The California Board supports Intervenors' petition for rehearing, and also endorses the arguments advanced by the State of Oregon in its proposed *amicus curiae* brief, but will not discuss those issues here. Rather, for the sake of brevity, this brief focuses on just one issue: equitable tolling. If the Court declines to revisit the panel's conclusion that FERC has erred for 25 years by interpreting Section 401 to restart the states' one-year certification clock when an application is resubmitted, the Court should hold that the states' deadlines to act were equitably tolled in cases in which applicants

used the withdraw-and-resubmit process prior to the panel’s decision here. The States acted diligently to preserve their certification authority in light of FERC’s interpretation of Section 401, and reliance on FERC’s long-standing interpretation was reasonable and constitutes an exceptional circumstance which excused the States from acting sooner. This important issue warrants rehearing considering the numerous projects around the Nation in which applicants have used the withdraw-and-resubmit process to safeguard state authority to ensure that address significant, federally licensed projects will comply with state water quality laws.

ARGUMENT

I. EQUITABLE TOLLING PRECLUDES FINDING THAT THE CALIFORNIA BOARD WAIVED ITS SECTION 401 CERTIFICATION AUTHORITY

A. Section 401’s One-Year Deadline is Non-Jurisdictional and Therefore May Be Equitably Tolled

Section 401 provides that a state agency waives its certification authority if it “fails or refuses to act on a request for certification[] within a reasonable period of time (which shall not exceed one year)” 33 U.S.C. § 1341(a). FERC allows states a full year to act on an applicant’s Section 401 application for complex hydroelectric relicensing projects.

18 C.F.R. § 4.34(b)(5)(iii); *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 at PP 20-21 (Jan. 11, 2018).

The doctrine of equitable tolling presumptively applies to federal statutory deadlines such as this one unless Congress has “clearly stated” a different intent, most commonly by expressly providing that the deadline is jurisdictional. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631 (2015). There is no evidence that Congress intended Section 401’s deadline to be jurisdictional; it does not speak to the “power” or “authority” of states to act. *Id.* at 1632. Instead, Section 401 provides that state certification authority “shall be waived” if not exercised within a year. 33 U.S.C. § 1341(a)(1). Thus, under the well-established principle that “most time bars are nonjurisdictional,” Section 401’s deadline is subject to equitable tolling. *Kwai Fun Wong*, 135 S. Ct. at 1632.

Courts have held that similar statutory deadlines are subject to equitable tolling. For example, the Coastal Zone Management Act gives states six months to certify whether a project is consistent with the state’s coastal management program. 16 U.S.C. § 1456(c)(3)(A). The Court held “that statutory deadlines such as found in the CZMA are subject to waiver, estoppel and equitable tolling.” *Millennium Pipeline Co., L.P. v. Gutierrez*, 424 F. Supp. 2d 168, 177 (D.D.C. 2006) (emphasis added). Other time

limits in the Clean Water Act, such as the deadline to seek review of the EPA Administrator's action issuing or denying a permit, are likewise subject to equitable tolling. *See Georgia-Pacific Corp. v. U.S. Environmental Protection Agency*, 671 F.2d 1235, 1239-40 & nn.13-14 (9th Cir. 1982) (citing 33 U.S.C. § 1369(b)(1)(F)). Just like these statutory deadlines, Section 401's one-year certification deadline is not jurisdictional and may be equitably tolled.

B. Equitable Tolling Is Warranted in Light of the States' Reasonable Reliance on FERC's Interpretation of Section 401

Statutory deadlines are equitably tolled "if the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 755 (2016) (internal citations omitted). In particular, this Court has repeatedly held that equitable tolling is appropriate where a party is "misled about the running of a limitations period ... by a government official's advice upon which they reasonably relied." *Bowden v. United States*, 106 F.3d 433, 438 (D.C. Cir. 1997) (citing *Jarrell v. U.S. Postal Serv.*, 753 F.2d 1088, 1092 (D.C. Cir. 1985)); accord *Bull S.A. v. Comer*, 55 F.3d 678, 681 (D.C. Cir. 1995).

Under that standard, this case warrants equitable tolling, as do other cases in which states reasonably relied on FERC’s longstanding recognition of the withdraw-and-resubmit procedure in proceedings prior to the panel’s decision in this case. By 1994, FERC had determined that an applicant’s withdrawal and resubmission of a certification request restarts the state’s one-year certification clock. *Barrish & Sorenson Hydroelectric Co., Inc.*, 68 FERC ¶ 62,161, 64,258 (Aug. 12, 1994); *see also Ridgewood Maine Hydro Partners, L.P.*, 77 FERC ¶ 62,201, 64,425 (Dec. 27, 1996). In 2005—two years before PacifiCorp first withdrew and resubmitted its original Section 401 application to the California Board (JA 126-127)—FERC reaffirmed this view and expressly acknowledged that the withdrawal and resubmission of an application starts a new one-year clock. *Cent. Vt. Pub. Serv. Co.*, 113 FERC ¶ 61,167, 61,653 at P 19 (Nov. 17, 2005).

FERC reaffirmed this interpretation as recently as 2018. “We reiterate that once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under section 401(a)(1).” *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 at P 23 (Jan. 11, 2018). There can be no disagreement that FERC, applicants such as PacifiCorp, and

the states all understood that an applicant's resubmission of a Section 401 application restarted a state's one-year certification period.

This Court has now rejected that interpretation of the statute. The California Board supports Intervenor's request for rehearing on that issue, but for purposes of equitable tolling, the key point is that the board and other state agencies reasonably relied on FERC's contrary understanding, and therefore the one-year certification deadline should be equitably tolled until the date of the panel's decision in this case.

States' reliance on FERC's longstanding approval of the withdraw-and-resubmit procedure was reasonable considering FERC's central role in the regulatory scheme. Federal law assigns FERC the sole authority to relicense hydropower facilities, and here the California Board "acted in accordance with the agency's own announced interpretation of the statute" contained in FERC orders published in the exercise of that authority. *UAW v. Brock*, 783 F.2d 237, 248 (D.C. Cir. 1986). Reasonable reliance of this sort on a mistaken pronouncement of a government official or agency in a position of authority constitutes the type of "extraordinary circumstance" warranting equitable tolling. *Sossa v. Diaz*, 729 F.3d 1225, 1229-30 (9th Cir. 2013) (equitable tolling where federal habeas petitioner reasonably relied on unauthorized extensions of time issued by magistrate judge); *see Jarrell*, 753

F.2d at 1091-92 (equitable tolling where Title VII plaintiff reasonably relied on advice of EEO officer).

This Court applied equitable tolling in *Bull*, 55 F.3d 678. There, the Commissioner of Patents and Trademarks informed a trademark registrant that the statutory deadline to seek renewal of that trademark occurred on a particular date. *Id.* at 679. It turned out that the Commissioner had erred in interpreting the statute, leading to an incorrect calculation of the deadline. *Id.* at 680. The Court held, however, that the registrant’s deadline to file a renewal application was equitably tolled. The Court reasoned that “the trademark’s registration renewal deadline is properly analyzed as a statute of limitations” subject to equitable tolling, and that such tolling was warranted based on the trademark holder’s “justifiable reliance” on the Commissioner’s interpretation. *Id.* at 681-82. This was true even though this Court later rejected the Commissioner’s interpretation. *Id.* at 680. The Court held that it was not reasonable to hold the applicant “to knowledge of a byzantine statutory scheme in the face of official notification from the agency’s highest authority” of the appropriate deadline. *Id.* at 682.

The situation here is even more compelling than in *Bull*. The California Board relied on FERC’s interpretation—repeatedly announced in the form of numerous Commission orders cited above—that the withdrawal

and resubmission of Section 401 applications, like PacifiCorp's here, started a new one-year period for state agencies to act. The California Board conformed its actions accordingly to preserve its statutory authority based on FERC's officially announced interpretation. FERC was fully informed that the California Board interpreted PacifiCorp's action of withdrawing and resubmitting an application as restarting a new one-year certification clock (JA 126-217, 326-327), and FERC acknowledged that the board had not waived its certification authority considering PacifiCorp's withdrawal and resubmission of its application (JA 324-325).

Given FERC's interpretation that prevailed until the panel's decision here, the California Board (and its Oregon counterpart) acted diligently in pursuing its right to exercise Section 401 certification authority over PacifiCorp's relicensing application. It is beyond the scope of this amicus brief to catalogue all of the actions the California Board took concerning PacifiCorp's Section 401 application. However, these included: (i) relaying to PacifiCorp the information the California Board would need to act upon an application once submitted (*e.g.*, California Board's Request for Judicial Notice, Dec. 1, 2015, Ex. I, CB0178-238); (ii) submitting detailed comments to FERC on the deficiencies in its EIS with respect to water quality (*e.g.*, *id.* Ex. L, CB0327-48); (iii) submitting comments to FERC and PacifiCorp as to

the information the California Board needed to process PacifiCorp's application (*e.g.*, *id.* Ex. J, CB0239-326); (iv) commencing its own environmental review due to FERC's inadequate EIS (*e.g.*, *id.* Ex. M, CB0349-361); (v) monitoring PacifiCorp's implementation of water quality mitigation measures and other actions required by the KHSA, and the development of information necessary to further both the board's relicensing certification and the KHSA process (*e.g.*, *id.* Ex. P, CB0374-78; JA 499-502, 508-509, 522-523); and (vi) conducting further environmental review of PacifiCorp's substantially revised Section 401 application (*e.g.*, *id.* Ex. C, CB0046-59).¹ PacifiCorp ultimately withdrew its Section 401 application on June 23, 2016, and has not resubmitted it.² Intervenors' Joint Supplemental Brief, June 8, 2018, at 3, 6.

As the repeated communications to FERC demonstrate, those actions did not reflect an effort to thwart federal relicensing. Rather, the parties reasonably used the withdraw-and-resubmit procedure to ensure that any

¹ Had any interested entity believed that the California Board failed to timely act at any time during this process, it could have petitioned the California Board to act. Cal. Code Regs. tit. 23, § 3867, subd. (a)(1). If not satisfied with the board's response, it could then have sought state judicial review. Cal. Water Code § 13330. No party availed itself of these remedies.

² The panel's decision is arguably moot given PacifiCorp's ultimate withdrawal of its certification application and FERC's placing of PacifiCorp's relicensing application in abeyance.

relicensing of the Klamath Hydroelectric Project—which was the subject of lengthy and complex negotiations involving numerous stakeholders, including multiple federal agencies—would be in compliance with state water quality standards.

Had the California Board been aware that FERC’s guidance was wrong and that the withdrawal-and-resubmit procedure would *not* reset the one-year certification deadline, the board would have denied PacifiCorp’s certification requests without prejudice, because none of those requests contained the information necessary to ensure that relicensing would be consistent with state water quality standards. Cal. Code Regs. tit. 23, § 3859(a) (California Board “shall issue certification or deny certification ... before the federal period for certification expires”).

Failure to apply equitable tolling here and in other cases pending prior to the panel’s decision will have distinctly inequitable consequences: California and other states will be deemed to have unwittingly waived their Section 401 certification authority, potentially excluding *any* state-imposed water quality protective conditions from new licenses that will last for as long as 50 years with profound and undisputed effects on the states’ waters. That would undermine the statutory scheme Congress carefully crafted and threaten significant negative environmental consequences.

Relying on the panel’s decision, applicants for FERC licenses around the country have already asked FERC to find that states waived their Section 401 certification authority. For example, the Nevada Irrigation District, which operates the 16 dams and related facilities in Northern California comprising the Yuba-Bear Hydroelectric Project, FERC Project No. P-2266, seeks FERC relicensing of the facilities for 30 to 50 additional years. The district withdrew and resubmitted its application for Section 401 certification rather than have it denied for not including the information necessary for the California Board to process it. On February 19, 2019, just three weeks after the panel issued its opinion in this case, the Nevada Irrigation District submitted a request to FERC to find that the California Board has waived its Section 401 authority.³ A similar situation has arisen with respect to Placer County Water Agency’s hydroelectric relicensing project on the Middle Fork American River, FERC Project No. P-2079. On February 22, 2019, that agency similarly petitioned FERC to find that the California Board

³ These documents are available on FERC’s website, but the website does not allow a direct hyperlink to them. They can be located by going to the FERC’s elibrary, <https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>, and searching by the applicable FERC docket number (e.g., P-2266) for the calendar dates identified above.

waived its Section 401 authority with respect to the relicensing of that project as well.⁴

The potential effects of the panel's decision are not limited to California. Other hydroelectric project applicants have filed similar petitions urging FERC to find that state agencies waived their Section 401 certification authority. For example, Exelon operates the Conowingo Hydroelectric Project, FERC Project No. P-405, on the Susquehanna River in Maryland and seeks to relicense its project. In February 2019, Exelon petitioned FERC to find that Maryland has waived its Section 401 certification authority over that project because a Section 401 application has been withdrawn and resubmitted. Rehearing to confirm that the states' deadline to act on Section 401 applications that were withdrawn and resubmitted by applicants prior to the panel's decision is necessary to avoid the inevitable water quality consequences that would persist for decades.

The California Board thus supports Intervenors' petition respectfully requesting that this Court grant rehearing to determine, among other things,

⁴ To be clear, the California Board does not concede that these petitions asking FERC to find waiver of Section 401 certification are meritorious, even under the panel decision in this case. But rehearing is warranted to address the confusion and uncertainty that has given rise to these petitions and others.

whether equitable tolling precludes a finding that the California Board and its Oregon counterpart waived their Section 401 certification authority in this case and other proceedings pending prior to the panel's decision. In the alternative, the California Board respectfully requests that the Court issue an amended opinion clarifying that the issue of equitable tolling remains open for FERC to consider in the first instance on remand.

CONCLUSION

The California Board respectfully requests that Intervenors' rehearing petition be granted.

Dated: March 18, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(b)(4) and 32(g), I hereby certify that the foregoing Brief of *Amicus Curiae* in Support of Intervenors' Petition for Panel Rehearing or Rehearing *En Banc* contains 2,597 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and is therefore within the applicable word limit. This Brief also complies with the typeface and type-style requirements of Rule 32(a)(5) and (a)(6) because this document has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman size 14.

March 18, 2019

/s/ Eric M. Katz
Eric M. Katz

**ADDENDUM TO BRIEF OF AMICUS CURIAE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
Cir. Rule 28(a)(5)**

TABLE OF CONTENTS

Except for the following, all applicable statutes and regulations are set forth in the Intervenor's Petition for Panel Rehearing or Rehearing *En Banc*

1. Cal. Water Code § 174
2. Cal. Water Code § 175
3. Cal. Water Code § 13000
4. Cal. Water Code § 13001
5. Cal. Water Code § 13100
6. Cal. Water Code § 13160
7. Cal. Water Code § 13330
8. Cal. Code Regs. tit. 23, § 3855
9. Cal. Code Regs. tit. 23, § 3859
10. Cal. Code Regs. tit. 23, § 3867

1. Cal. Water Code § 174

(a) The Legislature hereby finds and declares that in order to provide for the orderly and efficient administration of the water resources of the state, it is necessary to establish a control board that shall exercise the adjudicatory and regulatory functions of the state in the field of water resources.

2. Cal. Water Code § 175

(a) There is in the California Environmental Protection Agency the State Water Resources Control Board consisting of five members appointed by the Governor. One of the members appointed shall be an attorney admitted to practice law in this state who is qualified in the fields of water supply and water rights, one shall be a registered civil engineer under the laws of this state who is qualified in the fields of water supply and water rights, one shall be a registered professional engineer under the laws of this state who is experienced in sanitary engineering and who is qualified in the field of water quality, and one shall be qualified in the field of water quality. One of the above-appointed persons, in addition to having the specified qualifications, shall be qualified in the field of water supply and water quality relating to irrigated agriculture. One member shall not be required to have specialized experience.

(b) Each member shall represent the state at large and not any particular portion thereof and shall serve full time. The board shall, to the extent possible, be composed of members from different regions of the state. The appointments made by the Governor shall be subject to confirmation by the Senate in accordance with Article 2 (commencing with Section 1770) of Chapter 4 of Division 4 of Title 1 of the Government Code.

3. Cal. Water Code § 13000

The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state.

The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.

The Legislature further finds and declares that the health, safety and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state; that the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation originating inside or outside the boundaries of the state; that the waters of the state are increasingly influenced by interbasin water development projects and other statewide considerations; that factors of precipitation, topography, population, recreation, agriculture, industry and economic development vary from region to region within the state; and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy.

4. Cal. Water Code § 13001

It is the intent of the Legislature that the state board and each regional board shall be the principal state agencies with primary responsibility for the coordination and control of water quality. The state board and regional boards in exercising any power granted in this division shall conform to and implement the policies of this chapter and shall, at all times, coordinate their respective activities so as to achieve a unified and effective water quality control program in this state.

5. Cal. Water Code § 13100

There is in the California Environmental Protection Agency the State Water Resources Control Board and the California regional water quality control boards. The organization, membership, and some of the duties of the state board are provided for in Article 3 (commencing with Section 174) of Chapter 2 of Division 1 of this code.

6. Cal. Water Code § 13160

The state board is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act and any other federal act, heretofore or hereafter enacted, and is (a) authorized to give any certificate or statement required by any federal agency pursuant to any such federal act that there is reasonable assurance that an activity of any person subject to the jurisdiction of the state board will not reduce water quality below applicable standards, and (b) authorized to exercise any powers delegated to the state by the Federal Water Pollution Control Act (33 U.S.C. 1251, et seq.) and acts amendatory thereto.

7. Cal. Water Code § 13330

(a) Not later than 30 days from the date of service of a copy of a decision or order issued by the state board under this division, other than a decision or order issued pursuant to Article 7 (commencing with Section 13550) of Chapter 7, any aggrieved party may file with the superior court a petition for writ of mandate for review of the decision or order. An aggrieved party must file a petition for reconsideration with the state board to exhaust that party's administrative remedies only if the initial decision or order is issued under authority delegated to an officer or employee of the state board and the state board by regulation has authorized a petition for reconsideration. The state board shall order or deny reconsideration on a petition therefor not later than 90 days from the date the state board adopts the decision or order.

8. Cal. Code Regs. tit. 23, § 3855

(a)(1) An application for water quality certification shall be filed with the regional board executive officer in whose region a discharge may occur except as provided in Subsection (b) of this Section.

(2) Notice of the application shall be sent by the applicant to the state board executive director whenever the proposed activities may involve a FERC-licensed facility.

(b)(1) An application for water quality certification shall be filed with the state board executive director, and notification of the application provided by the applicant to each regional board executive officer in whose region a discharge may occur, whenever a potential discharge from a proposed activity:

(A) may fall under the jurisdiction of more than one regional board, or

(B) is involved or associated with one or more of the following:

1. an appropriation of water, subject to Part 2 (commencing with Section 1200) of Division 2 of the Water Code;
2. a hydroelectric facility, and the proposed activity requires a FERC license or amendment to a FERC license; or
3. any other diversion of water for domestic, irrigation, power, municipal, industrial, or other beneficial use.

(2)(A) For an application subject to Subsection (b)(1)(A) of this Section, copies of the application shall be provided by the applicant to the executive officers of those regional board regions that may be affected by a proposed activity. Those executive officers shall transmit to the executive director, before the federal period for certification expires, any appropriate recommendations and conditions necessary to ensure that the proposed activities will comply with water quality standards and other appropriate requirements within their regions.

(B) For applications subject to Subsection (b)(1)(B) of this Section, the executive director shall forward to the executive officer of the appropriate

regional board copies of any portions of the application that may be relevant to adverse water quality impacts, other than specific impacts resulting from alteration/modification to instream flows, from the proposed activity. The executive officer shall review for water quality concerns the relevant portions of the application and transmit back to the executive director any appropriate recommendations and conditions necessary to ensure that the activity will comply with water quality standards and other appropriate requirements.

9. Cal. Code Regs. tit. 23, § 3859

(a) After review of the application, all relevant data, and any recommendations of a regional board, other state and federal agencies, and any interested person, the state board, the executive director, when acting as the state board's designee, or executive officer, as provided in Subsection (c) of this Section, shall issue certification or deny certification for any discharge resulting from a pertinent activity before the federal period for certification expires. Conditions shall be added to any certification, if necessary, to ensure that all activities will comply with applicable water quality standards and other appropriate requirements. Copies of any certification or denial of certification issued shall be sent to the applicant, the state board (if not the certifying agency), appropriate regional board(s) (if not the certifying agency[ies]), EPA, the federal agency, and all other parties known to be interested no later than three (3) days, after taking the certification action. A written certification or denial shall include:

(1) the name(s) of the receiving water body(ies) and the number(s) of the hydrologic unit(s) that contain(s) the receiving water body(ies), if available;

(2) the certification action being taken and a complete list of any conditions; and

(3) a suitable summary of the information provided by the applicant as listed in Subsections 3856(a), (b), (c), and (h) of this Chapter.

(b) After such review, if it is clear that all proposed activity(ies) will comply with water quality standards and other appropriate requirements, the state board, executive director, regional board, or executive officer, as provided in

Subsection 3859(c) of this Chapter, may issue a standard certification, subject only to the conditions in Section 3860 of this Chapter.

(c) For applications submitted pursuant to Subsection 3855(a) of this Chapter, the regional board or executive officer shall take a certification action under this Section. For applications submitted pursuant to Subsection 3855(b) of this Chapter, the state board or executive director shall take a certification action under this Section.

10. Cal. Code Regs. tit. 23, § 3867

(a)(1) An aggrieved person may petition the state board to reconsider an action or failure to act taken by the executive director, a regional board, or an executive officer under Articles 1 through 5 of this Chapter. The executive director may be designated by the state board to reconsider such an action or failure to act by an executive officer or regional board.

(2) A fee determination under subdivision (1) of subdivision (b) of section 3833 or section 3833.1, made by the state board or by an officer or employee of the board acting under delegated authority, is subject to reconsideration in accordance with chapter 4 (commencing with Section 1120) of part 1 of division 2 of the Water Code and the procedures set forth in Article 12 (commencing with section 768) of chapter 2 of division 3 of this title, and is not subject to the procedures set forth in this section. The petition also shall specify why the petitioner believes that no fee is due or how the petitioner believes that the amount of the fee has been miscalculated.

(b)(1) The state board and the executive director, when acting as the state board's designee, may undertake such reconsideration on their own motion. They shall notify the applicant (if any), the federal agency, and all interested persons known to the state board or executive director and give those notified the opportunity to submit information and comments before taking a final reconsideration action (as listed in Subsection 3869(a) of this Chapter).

(2) If such reconsideration is initiated more than thirty (30) days after the certification action in question, any rescission or amendment of the certification action resulting from such reconsideration shall not apply to any activities subject to a federal license or permit that:

(A) was issued in reliance on that certification action, and

(B) was issued before the federal agency was notified that such reconsideration had been initiated.

(3) Nothing in Subsection (b) of this Section is intended to limit the authority of a federal agency to issue a new or amended license or permit that incorporates any changes ordered by the state board or executive director following reconsideration of a certification action.

(c) A petition for reconsideration shall be submitted in writing to and received by the state board within 30 days of any action or failure to act taken by the executive director, a regional board, or an executive officer under Articles 1 through 5 of this Chapter.

(d) A petition shall contain:

(1) the name, address, and telephone number of the petitioner;

(2) the specific action or failure to act which the state board is requested to reconsider and a copy of any document issuing or denying certification that is referred to in the petition;

(3) the date on which the certification action or failure to act occurred;

(4) a full and complete statement of reasons why the action or failure to act was inappropriate or improper;

(5) the manner in which the petitioner is aggrieved;

(6) the specific action by the state board which the petitioner requests;

(7) a list of persons, if any, other than the petitioner and applicant, if not the petitioner, known to have an interest in the subject matter of the petition;

(8) a statement that the petition has been sent to the appropriate regional board or executive officer and to the applicant, if not the petitioner; and

(9) a copy of a request to the executive director or appropriate executive officer for preparation of the state board or regional board staff record, if applicable and available, which will include a tape recording or transcript of any pertinent regional board or staff hearing.

(10) A summary of the manner in which and to what extent the petitioner participated in any process (e.g., public hearing testimony, discussion with agency personnel, correspondence), if available, leading to the action or failure to act in question. If a process for participation was available, but the applicant did not participate, the petition shall include an explanation for the petitioner's failure to participate.

CERTIFICATE OF SERVICE

The undersigned certifies that on March 19, 2019, the foregoing Brief of California State Water Resources Control Board as Amicus Curiae in Support of Intervenors' Petition for Panel Rehearing or Rehearing *En Banc* was served electronically through the Court's CM/ECF system on all ECF-registered counsel as indicated below:

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