From: Murphy, Laura
To: schilling@allhookedup.com
Subject: Public Records Response-VT AGO 9.22.21
Date: Wednesday, September 22, 2021 3:27:00 PM
Attachments: 20210922 Murphy Response to Schilling.pdf

Dear Mr. Schilling:

Thank you for the additional two days to respond to Energy Policy Advocates' public records request of September 15, 2021. Please find attached the response and records.

Sincerely,

Laura B. Murphy
Assistant Attorney General
Environmental Protection Division
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609
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STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT
05609-1001

September 22, 2021

Rob Schilling
Executive Director
Energy Policy Advocates

By email to: Schilling@allhookedup.com

Re: Vermont Public Records Act Request

Dear Mr. Schilling:

I write in response to your Vermont Access to Public Records Act request dated September 15, 2021. In that request you sought:

1. all electronic correspondence (including but not limited to **e-mail, text messages, iMessages, MMS, SMS, or any other electronic message** sent or received on any platform), and any accompanying information (see discussion of SEC Data Delivery Standards, *infra*), including also any attachments, a) sent to or from or which copies (whether as cc: or bcc:) i) Joshua Diamond, ii) Justin Kolber and/or ii) Laura Murphy, that b) was also sent to or from or which copies (whether as cc: or bcc:), ***or which includes anywhere in the correspondence***, i) enckj@aol.com, ii) any email address ending in @climateintegrity.org, iii) any email address ending in @vtcha.org, and/or iv) pparenteau@vermontlaw.edu, which c) is dated from October 1, 2020 through today, inclusive;

and

2. copies of any consulting, non-disclosure, representation, fee, contingency, confidentially and/or common interest or other agreement whose parties include (but are not necessarily limited to) the Office of the Attorney General *and* Sher Edling, LLP, dated at any time in 2020 or 2021.

By email dated September 16, 2021, I inquired whether you would be willing to agree that emails between Pat Parenteau and me related to guest teaching and a job announcement were outside the scope of your request. By email dated September 16, 2021, you did not agree to the request but stated the Attorney General's Office could have two extra days to process this request.

In response to Request No. 1, we attach 18 records consisting of emails and email chains, including attachments. Though we are producing these records, we do not necessarily concede they are "public records" within the meaning of 1 V.S.A. § 317(b). *See Toensing v. Attorney General,* 2017 VT 99, ¶ 22, 206 Vt. 1, 178 A.3d 1000 ("We emphasize, however, that in order to qualify as a public record, a document must have been 'produced or acquired in the course of public agency business.'") (citing 1 V.S.A. § 317(b)); *Nissen v. Pierce Cnty.,* 357 P.3d 45, ¶ 21 (Wash. 2015) ("For information to be a public record, an employee must prepare, own, use, or retain it *within the scope of employment.* An employee's communication is 'within the scope of employment' only when the job requires it, the employer directs it, or it furthers the employer's interests.") (emphasis in original) (case cited in *Toensing,* 2017 VT 99, ¶ 22).

We are withholding one record under Request No. 1 because the record is exempt from disclosure pursuant to 1 V.S.A. § 317(c)(4) (attorney-client communication, attorney work product) and 1 V.S.A. § 317(c)(14) (relevant to litigation). The record is an email, with attachment, between outside counsel and me in the State's ongoing litigation, *State of Vermont v. 3M,* Docket No. 547-6-19 Cncv.

In response to Request No. 2, please be advised that we do not have any records responsive to the request.

If you feel any information or records have been withheld in error, you may appeal to Deputy Attorney General Joshua Diamond at the following email address: Joshua.Diamond@vermont.gov.

Sincerely,

/s/ Laura B. Murphy
Laura B. Murphy
Assistant Attorney General

From: Patrick Parenteau
To: Murphy, Laura
Subject: Guest Lecture?
Date: Tuesday, January 5, 2021 11:53:35 AM

Hi Laura, happy new year, and thanks for the Xmas card with those beautiful kiddos.
You up for another virtual appearance in Water Quality? We meet on Teams M-W 9:55-11:10. There are about 30 students enrolled. Was looking at March 31 as a possible date but flexible. You could use the same ppt from last time with updates. I noted the 1st Cir decision in the Morrisville case. ANR dodged the bullet on that one. I've assigned Judge Toor's decision denying the MTD in the 3 M case but I'm sure the students would like to hear more about what is happening in that case. And anything else you have in mind.
Let me know and hope all is well

From: Patrick Parenteau
To: Murphy, Laura
Subject: Correction
Date: Tuesday, January 5, 2021 2:50:12 PM

I meant the FERC Declaratory order on Morrisville not the First Circuit. Must have been daydreaming.

From: Murphy, Laura
To: Patrick Parenteau
Subject: RE: Guest Lecture?
Date: Tuesday, January 5, 2021 6:07:00 PM
Attachments: 20200701 ANR Comments on MWL Petition.pdf

Hi Pat, sounds good, I'd be happy to do the class on the 31st. I can't believe it's been almost a year since the last time and one of my first adventures on Teams. Good idea to update the prior presentation and I can include something on the PFAS case(s). Would you mind sending me the syllabus at some point so I know what they know . . . ? No worries, I knew what you meant about the First Circuit/FERC. I'm attaching the main comments we filed on that, if of interest – Morrisville has requested rehearing, which we've opposed, so we will see what happens. Thanks for asking me to teach and it will be fun to "see" you in March, and hopefully in person before too long. Hope you're taking care. Laura

---

From: Patrick Parenteau <PPARENTEAU@vermontlaw.edu>
Sent: Tuesday, January 5, 2021 11:53 AM
To: Murphy, Laura <Laura.Murphy@vermont.gov>
Subject: Guest Lecture?

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.

Hi Laura, happy new year, and thanks for the Xmas card with those beautiful kiddos.
You up for another virtual appearance in Water Quality? We meet on Teams M-W 9:55-11:10. There are about 30 students enrolled. Was looking at March 31 as a possible date but flexible. You could use the same ppt from last time with updates. I noted the 1st Cir decision in the Morrisville case. ANR dodged the bullet on that one. I've assigned Judge Toor's decision denying the MTD in the 3 M case but I'm sure the students would like to hear more about what is happening in that case. And anything else you have in mind.
Let me know and hope all is well

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Village of Morrisville, Vermont Project No. 2629-014

COMMENTS OF THE VERMONT AGENCY OF NATURAL RESOURCES ON THE VILLAGE OF MORRISVILLE'S MAY 28, 2020 PETITION FOR DECLARATORY ORDER

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INTRODUCTION

The State of Vermont Agency of Natural Resources (ANR) submits these comments on the Village of Morrisville's petition for a declaratory order that ANR has waived its authority to issue a water quality certification for the Morrisville Hydroelectric Project. The Commission should deny the petition because ANR has not waived its authority to issue the water quality certification that it issued almost four years ago.

Granting waiver would be inconsistent with the text, purpose, and legislative history of the Clean Water Act. The D.C. Circuit's decision in *Hoopa Valley Tribe v. FERC*—the basis of Morrisville's petition—is distinguishable and therefore does not apply. The Commission's new adjudicative rule regarding waiver—which is not only contrary to its old rule but also a vigorous expansion of *Hoopa Valley*—cannot apply retroactively to jeopardize potentially decades of water quality protections for the Lamoille River, Green River, and Green River Reservoir.

Additionally, Morrisville lacks any injury tied to the timing of the certification—versus to the certification's substantive water quality conditions, which Morrisville continues to challenge in state court—and therefore lacks constitutional standing to pursue waiver. Finally, Morrisville is barred from seeking waiver now considering (a) its active role in shaping the timeline for the water quality certification—including its submission of materially different proposals and its plea with ANR to accept withdrawal of its application and accompanying assurance that there was no "undu[e] delay[]" in issuing "a final

decision"—and (b) its greater-than-five-year delay in filing the current petition—including a one-and-a-half-year delay after *Hoopa Valley*.

BACKGROUND

The Morrisville Hydroelectric Project (Project) includes three power-generating facilities constructed between the 1890s and 1940s on the Lamoille and Green Rivers in Vermont: the Morrisville facility, the Cadys Falls facility, and the Green River facility. *See* Attachment 1 at 1-2. The Project received its first Federal Energy Regulatory Commission (Commission or FERC) license in 1981 and, in this docket, seeks a new license. *Id.*

The Clean Water Act (CWA or Act) requires an applicant for a federal license for any activity that may cause a discharge to waters to obtain a state certification (WQC) that the activity will comply with specified provisions of the Act and related state law. *See* § 401, 33 U.S.C. § 1341(a)(1), (d). Therefore, as part of the current relicensing, Morrisville Water & Light (MWL or Morrisville) applied to ANR for a WQC for the Project. Attachment 1 at 1.

A. Morrisville's First WQC Application – January 2014

MWL filed its original WQC application on January 30, 2014.[1] It proposed flows of 12 cubic feet per second (cfs) for the Morrisville (primary) and Cadys Falls bypasses; a 5.5 cfs year-round conservation flow for the Green River facility; an

[1] There is no dispute this is the original application date. *See* Village of Morrisville May 28, 2020 Pet. for Declaratory Order Regarding Waiver of Water Quality Certification Requirement (Petition), Docket No. P-2629-014, at 13; *Morrisville Hydroelectric Project Water Quality,* No. 103-9-16 Vtec, Summ. J. Decision, 2017 WL 6041151, at * 3 (Vt. Super. Ct. Envt'l Div. July 13, 2017) (Walsh, J.) (concluding that "MWL submitted its § 401 certification application on January 30, 2014").

increase in the flow limit from 160 cfs to 283 cfs from May to October for the Green River facility; and a 10-foot drawdown for the Green River Reservoir. *See* Attachment 2 at 23-24, 32,27, 38-40 (of PDF) (describing existing conditions and MWL proposal); Attachment 3 at 2-3 (same).

On February 28, 2014, ANR sent a letter to MWL explaining the application was administratively complete but not technically complete. *See* Attachment 4. ANR requested additional information relating to the hydraulic capacities of turbines at the Morrisville, Cadys Falls, and Green River facilities; manual run-of-river information for these facilities; a proposal to address dissolved oxygen levels at the Green River facility; and a description of the trashrack at the Green River facility. *See id*. MWL responded with some of the information on March 7, 2014, and noted the need for additional tests on the hydraulic issue. *See* Attachment 5.

ANR met with MWL on March 21, 2014, to discuss ANR's recommended flow and water management conditions, which had been issued as preliminary terms and conditions in December 2013. *See* Attachment 3.

B. Morrisville's Second WQC Application – November 2014

On June 4, 2014, MWL wrote to ANR with a new proposal for flow conditions at the facilities. *See* Attachment 6. Submitted by MWL's consultant Vanasse, Hangen, Brustlin, Inc. (VHB), the proposal called for a flow of 14 cfs in the Morrisville primary bypass from 2015 to 2029, then 28 cfs beginning in 2030. *Id.* at 4. For the Cadys Falls bypass, it recommended 28 cfs from 2015 to 2029, then 54 cfs beginning in 2030. *Id.* It proposed new conservation flows for the Green River

facility of 7 cfs until 2029, and then 7 cfs in summer, 7.9 cfs in fall/winter, and 47 cfs in spring (or inflow if less). *Id.* It proposed new peak generating flow limits at the Green River facility consistent with the limits in its current license (280 cfs in winter/spring, 160 cfs in summer/fall), and recommended development of a ramping protocol to help protect downstream aquatic habitat. *Id.* at 3. In its July 24, 2014 comments on the Draft Environmental Assessment, MWL proposed this alternative operation for the Commission's consideration as well. *See* Attachment 7; Attachment 8 at 32 (of PDF) n.21 (Final Environmental Assessment (EA) noting MWL's June 2014 proposal and stating, "[b]ecause this document appears to be part of an ongoing consultation between Morrisville and Vermont ANR, we do not evaluate the phased approach in this EA").

ANR provided comments on MWL's new proposal on July 29, 2014, and agreed to MWL's request for a meeting to discuss. *See* Attachments 9 & 10. ANR met with MWL again on October 2, 2014, and MWL followed up with another proposal on October 31, 2014, including a memo from its consultant VHB, to phase in the water quality conditions over time. *See* Attachment 11. Under this revised proposal, the current flow conditions would apply until new conditions were phased in as follows: 28 cfs in the Morrisville primary bypass within five years of the WQC; 54 cfs in the Cadys Falls bypass within ten years of the WQC; 7 cfs (or inflow if less) in summer for the Green River within eight months of the WQC; 7.9 cfs (or inflow if less) in fall/winter for the Green River within five years of the WQC; and 47 cfs (or

inflow if less) in spring for the Green River within five years of the WQC. *Id.* at 8 (of PDF).

On November 7, 2014, MWL wrote to ANR that it was withdrawing its January 2014 application to facilitate ANR's review of "Morrisville's various proposals, including its recently submitted phase-in proposal." *See* Attachment 12. The letter stated: "Please consider this letter, together with Morrisville's FERC relicensing application and all documents and information furnished to FERC and [ANR] since April 25, 2013, in support of Morrisville's initial application for certification, as Morrisville's renewed application for Section 401 water quality certification." *Id.* ANR acknowledged MWL's withdrawal and reapplication letter, and thanked MWL for its cooperation. *See* Attachment 13.

Then, based on MWL's new proposals that included hydropeaking at the Green River facility, ANR focused its efforts on analyzing scenarios for the Green River utilizing a water balance model created by an ANR hydrologist to evaluate flow and water level effects of various operations. On June 9, 2015, ANR again met with MWL and followed up with a request for more information, including operations and generation data for the Green River facility, and additional technical information regarding MWL's bypass flow studies. *See* Attachment 14.

C. Morrisville's Third WQC Application – September 2015

On June 22, 2015, MWL provided a chart with a year of hourly generation levels for the Green River facility, along with information regarding downstream flow rates during different times (e.g., conservation flows, generation flows, and

capability tests). *See id.* Then, on August 14, 2015, ANR shared with MWL its littoral habitat report and flow study analysis for the Green River. *See* Attachment 15.

After another meeting, MWL wrote to ANR on August 27, 2015, urging ANR to accept a withdrawal and reapplication for the WQC. *See* Attachment 16. MWL was "concerned about the impending deadline" and said it "would truly like to explore the options . . . discussed." *Id.* MWL said it "require[d] reasonable time to do a thorough review of the Green River Flow Analysis and Littoral Habitat reports that were received on August 14." *Id.* MWL continued: "ANR has requested information from MW&L justifying a phase in of the bypass flows. . . . I have asked a consultant to determine the cost of installing micro-turbines. This work will take several months. I believe micro turbines offer the best opportunity to reduce the generation lost from increased bypass flows as MW&L's plants." *Id.* MWL said it was "concerned that, if there is no extension, ANR will be compelled to issue[] a WQC before MW&L can complete the [listed] items." *Id.* MWL concluded: "I believe that allowing more time to work on the issues will be in everyone's best interest. This would only be the second extension, so it is not unduly delaying a final decision. I hope you agree and would support a MW&L request to extend the time (by way of a withdrawal and reapplication)." *Id.*

Accordingly, on September 9, 2015, MWL withdrew its November 7, 2014 application to facilitate ANR review of "Morrisville's various proposals, including a phase-in proposal of bypass flows," and "in consideration of other factors that have

arisen in discussions with [ANR] over the course of the past year." *See* Attachment 17. MWL asked that its letter, its FERC relicensing application, and "all documents and information furnished to FERC and [ANR] since April 25, 2013" be considered "as Morrisville's renewed application." *Id.* ANR acknowledged receipt and thanked MWL for its cooperation. *See* Attachment 18.

That fall, more meetings were held and on November 23, 2015, MWL submitted more information to ANR, including a ramping proposal for the Green River Reservoir and a counter proposal for the Green River facility's conditions and operations. *See* Attachments 19-22. Under the counter proposal, the generation flow limit would be 160 cfs subject to ramping, and a 6-foot winter drawdown would be permitted in the Reservoir. Attachment 22 at 2 (of PDF).

In December 2015, and after consultation with MWL, ANR issued its *Green River Reservoir Littoral Habitat Assessment,* which identified concerns with aquatic plant cover in the Reservoir as it related to the winter drawdown. *See* Attachments 20-23, Attachment 24 at 3 (of PDF). MWL then wrote to ANR regarding ISO-New England's (ISO-NE's) generation audits and, among other things, expressed "serious concern" with "ANR's focus on fish habitat." *See* Attachment 25. In its response, ANR noted it was still awaiting information from MWL on ISO-NE's capacity testing, spillage over the dam, and dam safety at the Green River facility. *See id.*

On December 29, 2015, MWL submitted further information in response to ANR questions on MWL's phase-in proposal for bypass and conservation flows at the three facilities. *See* Attachment 26. As MWL explained, the letter "provide[d]

additional information to support the time (phase in) requested by MW&L for the final conservation flow requirements imposed for MW&L's hydro projects." *Id.* at 2 (of PDF). MWL revised its phase-in proposal to 28 cfs in the Morrisville primary bypass within three years; 54 cfs in the Cadys Falls bypass within eight years; and the Green River conditions within five years. *Id.* at 4 (of PDF).

D. Water Quality Certification – August 2016

ANR placed the draft WQC decision on public notice on January 7, 2016 and held a public hearing on February 16, 2016. During the public comment period, 139 persons and organizations provided oral or written comments, which ANR responded to when it issued the final certification. *See* Attachment 27. On August 9, 2016, ANR issued the WQC for the Project. *See* Attachment 1. The main areas of difference between the preliminary terms and conditions that ANR issued in 2013 and the WQC were the conditions for the Green River facility, which evolved from an instantaneous run-of-river to modified run-of-river with seasonally appropriate conservation flows outside of the winter and allowance for peaking and water level management in the winter months. *Compare* Attachment 3 at 9-20, *with* Attachment 1 at 40-42, 50-55. The revisions to these conditions were based on further analysis of the habitat-flow study results for the Green River in response to MWL's proposals, the Green River Reservoir littoral habitat study results, and the Green River Reservoir water balance model developed by ANR. For the Morrisville and Cadys Falls bypass reaches, though ANR analyzed MWL's revised flow rate and

phase-in proposals, ANR determined they would not meet water quality standards. Attachment 1 at 18-21, 37-40, 49.[2]

In September, the Commission's Office of Energy Projects wrote to MWL and stated that "[o]n August 9, 2016, the Vermont Department of Environmental Conservation issued a water quality certificate [WQC] for the Morrisville Project." *See* Attachment 28. The Office requested "additional information that is needed to assess the safety of operating the Morrisville Project in accordance with the conditions of the WQC." *Id.* In response to MWL requests, the deadline for submitting the information was extended several times while litigation on the WQC was pending. *See* Attachments 29-32.

On November 7, 2018, the Office renewed its request for the information, noting that the Superior Court, Environmental Division, had upheld the Reservoir drawdown condition and therefore, "the additional information requested by Commission staff is still necessary and is now past due." *See* Attachment 33. The deadline was extended again, and then on March 24, 2020, the Office wrote to MWL requesting the information within sixty days. *See* Attachment 34. The letter explained the previous extensions had been granted "on the basis that the WQC was being appealed by the Village of Morrisville, and that the appeal process could result in changes to the WQC that could alter the information needed by

[2] When MWL appealed the WQC to the Vermont Superior Court, Environmental Division, the Court added phase-in conditions. *See Morrisville Hydroelectric Project Water Quality,* No. 103-9-16 Vtec, Decision on the Merits, 2018 WL 4838357, at *44 (Vt. Super. Ct. Envtl. Div. Sept. 18, 2018) (Walsh, J.), *reversed on other grounds by In re Morrisville Hydroelectric Project Water Quality,* 2019 VT 84, -- Vt. --, 224 A.3d 473. ANR did not challenge these phase-in conditions on appeal to the Vermont Supreme Court.

Commission staff." *Id.* Now that "the Vermont Supreme Court issued a decision that affirmed Vermont DEC's 1.5-foot winter drawdown limit," the letter explained "the entirety of the additional information requested by Commission staff is still necessary." *Id.*

E. State Court Litigation

Currently, the WQC is on remand in the Vermont Superior Court, Environmental Division. Previously, as noted by the Commission, the Vermont Supreme Court upheld ANR's 1.5-foot drawdown condition for the Green River Reservoir. *See In re Morrisville Hydroelectric Project Water Quality,* 2019 VT 84, ¶ 56, -- Vt. --, 224 A.3d 473. The Supreme Court also upheld ANR's flow condition of 100 cfs for the Cadys Falls facility. *Id.* ¶ 28. The Court affirmed a condition imposed by the Environmental Division for whitewater boating-specific releases from the Green River dam. *Id.* ¶ 71. For the flow conditions for the Morrisville and Green River facilities, the Court remanded to the Environmental Division to "reinstate the flow conditions that are consistent with the [Vermont Water Quality Standards] and ANR's definition of high-quality aquatic habitat." *Id.* ¶ 45.

Now, for the first time, rather than comply with the water quality conditions necessary to protect high-quality habitat for multiple trout and other aquatic species, and nesting loons, MWL claims ANR has waived its authority to issue the water quality certification it issued almost four years ago. For the reasons explained below, MWL is wrong.

COMMENTS

I. Granting Morrisville's petition would be inconsistent with the Clean Water Act.

Morrisville's contention that ANR has waived its 401 authority is inconsistent with the Clean Water Act. The Clean Water Act says:

> If the State, interstate agency, or Administrator, as the case may be, *fails or refuses to act* on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.

§ 401(a)(1) (emphasis added). Waiver only occurs if the state "fails or refuses to act." The CWA does not say that waiver occurs if the state "fails or refuses to *grant or deny* a certification within one year of the *original application*." MWL improperly reads these words into the statute by its insistence on waiver. *See Ct. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

Here, ANR did not fail or refuse to act within one year of any of MWL's applications. Since the first application in 2014, ANR consistently was engaged in developing the WQC and related analyses, consulting with MWL, and reviewing MWL's new proposals. *See supra* at 2-8. ANR began by informing MWL the application was not technically complete and requesting more information. *See supra* at 3. In June and October of 2014, MWL submitted new proposals to ANR, and ANR provided comments and met several times with MWL. *See supra* at 3-4. MWL then withdrew its original application on November 7, 2014. *See supra* at 5.

ANR then focused its efforts on the Green River based on MWL's new proposals, and in June 2015 requested more technical information regarding the Green River and bypass flow studies. *See id*. The parties exchanged further information related to operations, ramping, flows, and littoral habitat, and ANR met with MWL at least two times that summer to discuss. *See supra* at 5-6. MWL withdrew its application on September 9, 2015. *See supra* at 6-7. That fall, more meetings were held and more information was exchanged, including a ramping proposal and counter-proposal for the Green River facility from MWL, a revised phase-in proposal from MWL, and habitat analyses and data for the Green River Reservoir from ANR. *See supra* at 7-8. After public notice, comment, and response to comments, ANR issued the WQC in 2016. *See supra* at 8. The ongoing development, review, and exchange of information while MWL's applications were pending is not a failure or refusal to act.

Therefore, the plain text of the CWA does not support a finding of waiver here. Neither does the statute's purpose—to *protect* water quality. *See* § 101, 33 U.S.C. § 1251(a) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."). Neither does the legislative history of the waiver provision. *See, e.g.,* Conf. Rep. No. 91-940 (1970), *reprinted in* 1970 U.S.C.C.AN. 2712, 2741 (adding waiver provision "[i]n order to insure that *sheer inactivity* by the state . . . will not frustrate the federal

application") (emphasis added). This is especially true because, once MWL withdrew its applications, ANR had nothing upon which to act.[3]

Further, the Second Circuit explicitly has recognized that when an applicant withdraws and resubmits an application, the waiver timeline begins anew. In *NYDEC v. FERC,* the Court held that New York had waived its 401 authority because the timeline started when the applicant submitted its request for a certification, whether or not the application was "complete." 884 F.3d 450, 455-56 (2d Cir. 2018). However, the Court explained that its holding would not present a danger of "premature decisions" because, among other things, the state could "request that the applicant withdraw and resubmit the application." *Id.* at 456 & n.35, *citing Constitution Pipeline Co. LLC v. NYDEC,* 868 F.3d 87, 94 (2d Cir. 2017) ("noting that an applicant for a Section 401 certification had withdrawn its application and resubmitted at the Department's request—thereby restarting the one-year review period"). When this occurs, there is no failure or refusal to "act." *See id.*

[3] American Whitewater, one of the parties in the Vermont state court litigation, joined comments against the United States Environmental Protection Agency's proposed 401 Rule and made this very point. *See* Attachment 35: Hydropower Reform Coalition et al. Comments on Proposed "Updated Regulations on Water Quality Certifications," Docket No. EPA-HQ-OW-2019-0405, at 3-4, 29-30 (Oct. 21, 2019) ("Nothing in the language of § 401 suggests that a state is required to act on a request for certification that is no longer pending because it has been withdrawn."). Though in the state case American Whitewater had unsuccessfully sought a ruling that ANR waived its 401 authority, it did so based on its view of the original application date, not based on withdrawal-and-resubmittal. *See Morrisville Hydroelectric,* No. 103-9-16 Vtec, 2017 WL 6041151, at *2-3.

II. *Hoopa Valley* does not apply here.

The holding in *Hoopa Valley Tribe v. FERC,* 913 F.3d 1099 (D.C. Cir. 2019), does not apply here. In *Hoopa Valley,* applicant PacifiCorp in 2004 sought a renewed FERC license for a series of dams along the Klamath River in California and Oregon, and also sought to decommission several dams that could not cost-effectively meet environmental standards. This being a complicated process, in 2010 PacifiCorp entered into the "Klamath Hydroelectric Settlement Agreement" with several other stakeholders, including California and Oregon. The Agreement included interim environmental measures and decommissioning goals, with a target date of 2020, and also provided that PacifiCorp "'shall withdraw and re-file its applications for Section 401 certifications as necessary to avoid the certifications being deemed waived under the CWA during the Interim Period.'" 913 F.3d at 1102 (citing Agreement). In 2012, the Hoopa Valley Tribe (Hoopa) sought an order from the Commission that, among other things, California and Oregon had waived their Section 401 authority. The Commission denied that request in 2014, and Hoopa appealed to the United States Court of Appeals for the District of Columbia Circuit.

Then, because of decommissioning funding issues, a subset of parties to the Agreement entered an Amended Agreement in 2016 that would transfer decommissioning to another company, and PacifiCorp sought an amended license to this effect. The D.C. Circuit therefore held Hoopa's appeal in abeyance until 2018, but then took it up again because decommissioning had not yet occurred. The Court issued its decision on January 25, 2019. The Court said: "Resolution of this case

requires us to answer a single issue: 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." *Id.* at 1103.

In ruling that the states had waived their authority, the Court relied upon several factors:

- The pendency of the WQC application "ha[d] far exceeded the one-year maximum," with PacifiCorp submitting its application "*more than a decade*" earlier, in 2006. *Id.* at 1104 (emphasis in original).
- PacifiCorp's WQC request had been "complete and ready for review for more than a decade." *Id.* at 1105.
- And, no certifications had yet been issued. *Id.* at 1104.
- PacifiCorp's "withdrawals-and-resubmissions were not just similar requests, they were not new requests at all." *Id.* The Court did not decide "how different a request must be to constitute a 'new request' such that it restarts the one-year clock." *Id.*
- PacifiCorp had "entered a written agreement with the reviewing states to delay water quality certification." *Id.*

The Court was concerned with a state's "'dalliance or unreasonable delay,'" or a state being able to "'indefinitely delay a federal licensing proceeding.'" *Id.* at 1104-05 (citations omitted).

This case is distinguishable on many grounds. Granting Morrisville's petition would go far beyond *Hoopa Valley.*[4]

[4] In addition to its *Hoopa Valley* argument, MWL contends the Commission should find waiver because it would "remove uncertainty," obviate the need for MWL to submit dam safety analyses as directed by the Commission, and result sooner in a new FERC license. Petition at 12. MWL also suggests a waiver ruling would avoid a "conflict" between the "limited authority granted to a state certifying agency under the CWA" and the "exclusive authority of the Commission under the Federal Power Act to ensure safety of licensed works." *Id.* at 12-13. These arguments have nothing to do with the standard for waiver (whether a state "fails or refuses to act" within a certain period of time after receipt of a

A. This case is distinguishable from *Hoopa Valley* because ANR issued the WQC almost four years ago and there is no "indefinite delay."

First and foremost, there is no "indefinite delay" here. In *Hoopa Valley,* no certification had been issued and the Court focused on the length of time that had passed since the applicant filed its original application. *See id.* at 1104 (application submitted "*more than a decade"* earlier) (emphasis in original), 1105 (application "complete and ready for review for more than a decade"). The Court noted that action on the application had "far exceeded the one-year maximum." *Id.* at 1104. Here, unlike in *Hoopa Valley,* the WQC already has been issued. It was issued almost four years ago—within three years of MWL's original application, and within eight months of MWL's most recent proposals in support of MWL's 2015 application. *See supra* at 7-8. This does not "far exceed[]" one year, and it does not give rise to the "dalliance or unreasonable" delay concerns of the *Hoopa Valley* Court. *See id.* at 1104-05.

Further, the Commission repeatedly has recognized the WQC's issuance and effect, both before and after *Hoopa Valley*. *See* Attachment 28 (September 13, 2016 FERC letter requesting "additional information that is needed to assess the safety

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certification request) and the Commission should not consider them. Additionally, as explained in ANR's letter of June 10, 2020, MWL is incorrect that there is a conflict (or exclusive jurisdiction issue) between the federal Clean Water Act and the Federal Power Act. *See* ANR June 10, 2020 Resp. to the Village of Morrisville's Req. for Recission of FERC Information Req., Docket No. P-2629-014, at 2. American Whitewater's recent suggestion that the Commission—not ANR—should decide the conditions for the WQC is similarly incorrect, and inappropriate to include in comments on a waiver petition in any case. *See* American Whitewater June 22, 2020 Comments on Notice of Pet. for Declaratory Order, Docket No. P-2629-014, at 14.

of operating the Morrisville Project in accordance with the conditions of the WQC"); Attachment 33 (November 7, 2018 FERC letter requesting overdue, "necessary" information); Attachment 34 (March 24, 2020 FERC letter requesting same because Vermont Supreme Court had upheld 1.5-foot drawdown condition and "the entirety of the additional information requested by Commission staff is still necessary"). According to MWL, the Commission at any time after January 30, 2015, could have "on its own initiative . . . declared the certification requirement waived." Village of Morrisville May 28, 2020 Pet. for Declaratory Order Regarding Waiver of Water Quality Certification Requirement (Petition), Docket No. P-2629-014, at 11. However, the Commission has not done so, and instead has sought "necessary" information regarding compliance with the 1.5-foot drawdown WQC condition.

Additionally, the cases MWL cites for the proposition that waiver is "automatic" and the WQC should simply disappear after all these years are inapposite. In *Millennium Pipeline,* a certification had not yet been issued. The Court dismissed on standing and explained that, if it were to determine New York waived its 401 authority, then a decision to grant or deny would not matter. *Millennium Pipeline Co., LLV v. Seggos,* 860 F.3d 696, 700, 701 (D.C. Cir. 2017). The Court did not address waiver where a WQC already had been granted and in existence for many years—as is the case here—and certainly did not hold that such a WQC could be invalidated based on waiver.

In *Weaver's Cove,* which also was dismissed on standing, the applicant filed a waiver suit before two states had granted or denied certifications. *Weaver's Cove*

Energy, LLC v. R.I. Dep't of Envtl. Mgmt., 524 F.3d 1330, 1334 (D.C. Cir. 2008). Then, Rhode Island preliminarily denied certification and Massachusetts preliminarily granted certification. The court case was focused on certification denial, which is not at issue here. *See id.* at 1332 (describing declaration sought: "that each state agency, by failing to act upon [the] application within one year of its submission, has waived its right *to deny* the requested certification") (emphasis added). Though the Court noted that states would not have authority to issue binding certifications if they had waived their authority, *id.* at 1334, as with *Millennium Pipeline,* the Court did not address in any manner the situation presented here—a WQC that was issued almost four years ago and is not "preliminary."

In addition, while the Court seemed to accept the applicant's waiver argument as true for purposes of analysis, the Court did not necessarily adopt it. *See id.* at 1333 ("*By [the applicant's] own lights*, that is, any denial of its application for a § 401 certification would be too late in coming and therefore null and void.") (emphasis added). In its Petition, MWL omits this qualifying language. Petition at 9. Regardless, again, the *Weaver's Cove* case was concerned with waiver where a certification is denied—not granted as here. *Weaver's Cove,* 524 F.3d at 1333 ("[the applicant's] claim is that the States have waived their right to deny a certification").[5]

[5] Thus, to the extent the two FERC decisions cited by MWL rely on *Millennium Pipeline* and *Weaver's Cove* for the proposition that all certifications are null and void if the Commission later finds a waiver, that reliance is misplaced. *See* Petition at 9. In addition,

And, importantly, in all three cases (*Hoopa Valley, Millennium Pipeline, Weaver's Cove*), waiver suits were filed *before* the agencies granted or denied water quality certifications. Here, there can be no waiver where the action being "waived" occurred almost four years ago. Put differently, section 401's waiver provision—whose purpose is to prevent inaction and indefinite delay—is not needed where the action purportedly causing "delay" already has occurred.

B. This case is distinguishable from *Hoopa Valley* because MWL submitted significant new proposals and information in support of its applications.

In *Hoopa Valley,* the applicant's resubmissions were "not just similar," they were "not new requests at all." *Hoopa Valley,* 913 F.3d at 1104. In contrast here, MWL presented materially different proposals and additional information for its applications. Specifically, in support of its November 2014 application, MWL submitted revised flow condition proposals on June 4, 2014, and October 31, 2014. *See supra* at 3-5. The new proposals would have increased the bypass and conservation flows from the original application and phased them in over time—with the first proposal being for about fifteen years, and the second generally five years. *See supra id*.

Then, in support of its September 2015 application, in June 2015 MWL submitted Green River generation charts, and in November 2015 followed up with a

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even in that circumstance, "acceptance of the conditions [would be] a matter within the federal agency's discretion." *Pac. Gas & Elec. Co.,* 170 FERC ¶ 61,232, at PP 40 (2020). Here, the Commission already has indicated acceptance of the conditions in the WQC. *See supra* at 9-10 (post-WQC letters from FERC requesting information from MWL needed to comply with WQC conditions).

ramping proposal, a lower peak limit for the Green River, and a smaller proposed drawdown for the Reservoir. *See supra* at 5, 7. Shortly after, MWL also proposed shorter phase-in conditions for Morrisville and Cadys Falls (from 5 years to 3 years, and 10 years to 8 years, respectively). *See supra* at 7-8. The following chart summarizes these changes:

Condition	**Information Supporting January 2014 WQC Application**	**New Information Supporting November 7, 2014 WQC Application**		**New Information Supporting September 9, 2015 WQC Application**		
	January 2014 Proposal	**June 2014 Proposal**	**October 2014 Proposal**	**June 2015 Submittal**	**November 2015 Proposal**	**December 2015 Proposal**
Morrisville primary bypass	12 cfs	2015-2029: 14 cfs 2030-2044: 28 cfs	12 cfs Within 5 years: 28 cfs			Within 3 years: 28 cfs
Cadys Falls bypass	12 cfs	2015-2029: 28 cfs 2030-2044: 54 cfs	0 cfs Within 10 years: 54 cfs			Within 8 years: 54 cfs
Green River conservation flows	5.5 cfs	2015-2029: 7 cfs 2030-2044: 7 cfs (summer) 7.9 cfs (fall/winter) 47 cfs (spring)	7 cfs Within 8 months: 7 cfs (summer) Within 5 years: 7.9 cfs (fall/winter) 47 cfs (spring)	Additional information regarding downstream flow rates		
Green River peak flows	283 cfs	280 cfs (winter/spring) 160 cfs (summer/fall) Develop ramping protocol		Green River generation charts (hourly generation levels from June 2014-May 2015) Additional information regarding downstream flow rates	160 cfs subject to ramping Ramping proposal	Within 5 years: flow conditions Additional information regarding generation flows
Green River Reservoir	10-foot drawdown				6-foot drawdown	

ANR review	Review of habitat flow studies, development of habitat-flow relationships, and habitat optimization analysis. Conducted water quality standards analysis of proposal focused on aquatic habitat, aesthetics, and water chemistry criteria.	Constructed and utilized a water balance model to assess flows and water levels associated with MWL's new proposals at the Green River Facility. Conducted a steady state habitat analysis on proposed conservation flows and dual flow analysis of proposed new peaking flows for Green River. Performed littoral habitat study to assess drawdown due to MWL study not meeting the goals and objectives in the study plan.[6] Conducted a water quality standards analysis of interim and final flow proposals, including new MWL proposal, focused on aquatic habitat, aesthetics, and water quality criteria. Conducted a legal analysis of socioeconomic justification and phasing approach.	Utilized the water balance model to assess the flow and water levels associated with MWL's new proposal and alternatives at the Green River Facility. Conducted steady-state habitat analysis on alternative conservation flows and a dual flow analysis on new proposed peaking flows and alternatives for the Green River. Assessed proposed ramping measures and alternatives. Finalized Green River Littoral Habitat assessment. Analyzed effects of new proposed drawdown and alternatives. Conducted a water quality standards analysis of proposed drawdown and alternatives. Conducted a legal analysis of proposed phasing approach.

In each of its application letters, MWL specifically requested that ANR consider "all documents and information furnished to FERC and [ANR] since April 25, 2013," among other materials, as its renewed applications. *See supra* at 5, 7. Additionally, in its November 2014 application, MWL noted the need for ANR to review its "various proposals, including its recently submitted phase-in proposal." *See supra* at 5. Similarly, in its September 2015 application, MWL noted the need to consider its "various proposals" and "other factors that have arisen in discussions with [ANR] over the course of the past year." *See supra* at 6-7; *contrast with Nev. Irrigation Dist.*, 171 FERC ¶ 61,029, at PP 8 (2020) ("'[t]he project has not changed, so the . . . FERC application, which the Board has on file, contains all information required for a complete application for a water quality certificate'") (citing applicant

[6] *See* Attachment 36.

request); *Pac. Gas & Elec. Co.,* 170 FERC ¶ 61,232, at PP 34 (2020) ("the record does not support the contention that the Board was making any progress toward acting on PG&E's application or that it ever would have done so had the *Hoopa Valley* not made clear that the Board's actions in this case put it at risk of a waiver finding"). And, the final WQC put on notice in January 2016 reflected not only consideration of and the need to reject some of MWL's recent proposals, but also included revised conditions for the Green River facility based on review and analyses conducted in response to MWL's revised Green River proposals and information. *See supra* at 8-9, 20-21.

Therefore, even if waiver otherwise were possible in this case, there would be no waiver because MWL's submission of new, material information "restarted" the clock in 2014 and 2015. *See Hoopa Valley,* 913 F.3d at 1104 (not deciding "how different a request must be to constitute a 'new request' such that it restarts the one-year clock"); *Yuba Cnty. Water Agency,* 171 FERC ¶ 61,139, at PP 21 (2020) ("In *Southern California Edison*, we found that the California Board had waived its water quality certification authority based on the fact that, in the eight-plus years of the applicant effectuating a withdrawal and resubmittal of its application with a single page letter, the applicant never filed a new application or any new supporting information.").

C. This case is distinguishable from *Hoopa Valley* because ANR and MWL did not have a "written agreement" to "delay water quality certification."

In *Hoopa Valley,* the applicant, states, and others had entered a formal

written agreement—the "Klamath Hydroelectric Settlement Agreement." 913 F.3d at 1101, 1104 ("This case presents the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification."). There is no such agreement for the Morrisville Project.

This case also does not present the indicia of "agreement" present in the Commission cases MWL cites. In *Southern California Edison,* for five years the state had "explicitly request[ed] withdrawal and resubmission." *S. Cal. Edison Co.,* 170 FERC ¶ 61,135, at PP 25 (2020). Similarly, in *Placer County,* the state had "sent emails to Placer County in 2013, 2014, 2016, 2017, and 2018 about each upcoming one-year deadline for purposes of withdrawal and resubmission" and, in two of those years, had "explicitly request[ed] withdrawal and resubmission." *Placer Cnty. Water Agency,* 169 FERC ¶ 61,046, at PP 17 (2019). In *McMahan Hydroelectric,* the Commission found "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." *McMahan Hydroelectric, LLC,* 168 FERC ¶ 61,185, at PP 37 (2019).

Conversely here, the record does not reflect an attempt by ANR to "delay" the 401 certification by requesting or otherwise directing MWL to withdraw and resubmit its application. Instead, MWL's withdrawal letters at most state a potential intent "to accommodate [ANR's] review of Morrisville's various proposals." *See* Attachments 12 & 17. Indeed, before it withdrew its application the second

time, it was MWL who pleaded with ANR (not the other way around) to accept an application withdrawal. *See supra* at 6. MWL desired additional time to: explore options that had been discussed with ANR; review ANR's Green River flow and habitat analyses; and work with a consultant regarding phase-ins and micro-turbines. *See id*. MWL explained that this would "not unduly delay[] a final decision" and expressed its hope that ANR would "support a MW&L request to extend the time (by way of a withdrawal and reapplication)." *Id.* Otherwise, MWL worried that "ANR w[ould] be compelled to issue[] a WQC." *Id.*

This is not an "agreement" to "delay" certification. It is an applicant seeking additional time to consult with an agency in the hopes of coming to agreement on certification conditions and, as explained above, submitting significant new proposals to the agency in the process. *Contrast also with Constitution Pipeline Co., LLC,* 168 FERC ¶ 61,129, at PP 33 (2019) ("The record here indicates that the state encouraged Constitution's withdrawal and resubmission of its application for the purpose of avoiding the waiver period."); *Yuba Cnty.,* 171 FERC ¶ 61,139, at PP 20 ("Yuba County's withdrawal and refiling of its application was in response to the Board's request that it do so").

In sum, *Hoopa Valley* did not hold that every practice of "withdrawal-and-resubmission" constitutes waiver. Rather, the Court specifically acknowledged "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." 913 F.3d at 1105. The Court

did not even address waiver where a certification already is several years old. There is no "exploit" in this case. There is not even any "resubmission." MWL twice reapplied for its 401 certification, submitting important new information and proposals, and ANR issued the WQC almost four years ago. *Hoopa Valley* is inapposite.

III. *Hoopa Valley* cannot apply retroactively to this case, and the Commission also should not apply the holdings announced in its recent waiver decisions retroactively to this case.

The Commission can neither apply *Hoopa Valley* nor the Commission's recent waiver decisions retroactively to this case.

First, *Hoopa Valley* only could be retroactive in cases that it controls—e.g., in cases that are sufficiently analogous, and in jurisdictions bound to follow the D.C. Circuit. *See Shun Guan Lin v. U.S. Dep't of Justice,* 366 Fed. Appx. 272, 273 (2d Cir. 2010) (explaining retroactivity applies "to the extent th[e] decision was the controlling authority"). As explained above, this case does not fall within *Hoopa Valley's* ambit, therefore there can be no retroactive application in the first instance.

Additionally, *Hoopa Valley* only would apply to cases "open on direct review," and only if it did not fall under one of the exceptions to retroactivity. *See Reynoldsville Casket Co. v. Hyde,* 514 U.S. 749, 754-59 (1995) (discussing limitations on retroactivity of new judicial rules and noting "[n]ew legal principles, even when applied retroactively, do not apply to cases already closed"); *Harper v. Va. Dep't of Taxation,* 509 U.S. 86, 97 (1993) (applying to cases "open on direct review"). Here, the waiver issue was not pending when *Hoopa Valley* was decided

and the WQC already had been issued two-and-a-half years before. The issue was closed. Retroactivity would be inappropriate. *See, e.g., Reynoldsville,* 514 U.S. at 752 (explaining that new decisional rule applies to "all pending cases"); *Hawknet, Ltd. v. Overseas Shipping Agencies,* 590 F.3d 87, 89, 91 (2d Cir. 2009) (applying maritime attachment rule announced in 2009 case to maritime attachment lawsuit filed in 2007 because "the rule announced in that case has retroactive effect to all cases open on direct review—including this case").

Second, the Commission's decisions should not apply retroactively to this case. Though this case is distinguishable from the Commission's recent decisions granting waiver petitions (and thus should not fall within the ambit of those decisions), those decisions make clear the Commission is announcing a new adjudicative rule of its own, going beyond the scope of *Hoopa Valley.* The Commission's previous rule clearly was that withdrawal-and-resubmittal restarts the one-year waiver clock. For example:

- *Nat'l Fuel Gas Supply Corp. Empire Pipeline, Inc.,* 164 FERC ¶ 61,084, at PP 41 (2018): noting that "[o]nly if an applicant withdraws and refiles an application, no matter how formulaic or perfunctory the process, does the certifying agency's new 'receipt' of the application restart the one-year waiver period under section 401(a)(1)."

- *Constitution Pipeline Co., LLC,* 164 FERC ¶ 61,029, at PP 17, 18 (2018) (footnotes omitted): finding no waiver and explaining that "[t]he statute speaks solely to a state's action or inaction on an application, not to the repeated withdrawal and resubmission of applications. We reaffirm our conclusion that once an application for a Section 401 water quality certification 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)."

The Commission further explained that its "interpretation of Section 401 strikes the appropriate balance between the interests of the applicant and the certifying agency. An applicant is guaranteed an avenue for recourse after a year of inaction by filing a petition for a waiver determination before the Commission (as did the applicant in *Millennium Pipeline Company, L.L.C.*), or after a denial by filing a petition for review in the court of appeals. A state certifying agency remains free to deny the request for certification within one year if the agency determines that an applicant has failed to fully comply with the state's filing or informational requirements. These options do not preclude a state from assisting applicants with revising their submissions, do not harm the process of public notice and comment, and do not increase an applicant's incentive to litigate."

- *Constitution Pipeline Co., LLC,* 162 FERC ¶ 61,014, at 23 (2018) (footnote omitted): finding no waiver and explaining "[w]e 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). . . . Section 401 provides that a state waives certification when it does not act on an application within one year. The statute speaks solely to a state's action or inaction, not to the repeated withdrawal and resubmission of applications. By withdrawing its applications before a year had passed, and by presenting New York DEC with new applications, Constitution gave New York DEC new deadlines. The record does not show that New York DEC in any instance failed to act on an application that was before it for more than the outer time limit of one year."

Now, invoking *Hoopa Valley,* the Commission appears poised to grant waiver petitions *whenever* a certification is not granted or denied within one year of the original application—regardless of whether there was indefinite delay or a certification already has been issued, regardless of the reasons for issuing a certification more than one year after an applicant's original request, and regardless of whether there was a written agreement between the agency and the applicant. *See generally, e.g., S. Feather Water & Power Agency,* 171 FERC ¶ 61,242

(2020). The Commission cites a "bright line rule," *id.* at PP 31, but *Hoopa Valley* did not adopt a bright line rule, *see supra* at 14-15.

Applying this bright-line rule retroactively to this case would violate principles of fairness that are not outweighed by any "desirable effects of application of the new rule." *See NLRB v. Niagara Mach. & Tool Works,* 746 F.2d 143, 151 (2d Cir. 1984). In determining whether to apply new rules adopted in agency adjudications retroactively, the relevant factors are:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id. These factors weigh heavily against retroactivity.

First, this is not a case of first impression; the Commission previously has addressed withdrawal, resubmittal, and waiver. *See supra* at 26-27. Second, as noted above, the Commission's new rule is an abrupt departure from its old one. Even if the new rule could be viewed as "fill[ing] a void" after *Hoopa Valley,* the other retroactivity factors far outweigh any purported void. Third, if ANR had known that its statutory right to protect Vermont's waters would be forfeited merely because it did not grant or deny MWL's certification within one year of MWL's original request—versus accepting MWL's withdrawal of its application—ANR would have had no choice but to deny the certification within one year for failure to meet water quality requirements.

Fourth, the burden of retroactive application would be immense: compliance with Vermont's water quality laws no longer would be a mandatory operating condition during MWL's potentially decades-long license. And fifth, the statutory interest in granting waiver, if any, is exceedingly minimal. The CWA's purpose is to "restore and maintain the chemical, physical, and biological integrity" of the nation's waters—a purpose that would be harmed, not served, by granting waiver. *See* § 101(a). The purpose of the waiver provision itself—to prevent indefinite delay and inaction by a state—also would not be served by granting waiver here. There is no indefinite delay caused by ANR. The WQC was issued several years ago. MWL's real interest here is to avoid compliance with the water quality conditions, but this interest is not protected by the Clean Water Act, section 401, or the waiver provision.

Retroactivity of any sort is inappropriate.

IV. Morrisville lacks Article III standing.

MWL does not have standing to obtain the relief it now requests. MWL's injury must flow from the "'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for [its] complaint." *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 883 (1990) (citation omitted). As explained above, the purpose of the waiver provision is to prevent inaction or indefinite delay by a state. MWL has not suffered an injury from "inaction" or "indefinite delay," much less from the fact that the WQC was not granted or denied within one year of MWL's original application. *Contrast with Hoopa Valley,* 913 F.3d at 1102 ("Of relevance,

Hoopa—whose reservation is downstream of the Project—was not a party to either [Agreement].").

Quite the opposite, as detailed above: MWL actively sought additional time to work on its WQC proposals and submissions, and since 2016 has itself delayed providing required information on dam safety to the Commission. MWL's "injury" here is that it does not wish to comply with the WQC, and MWL continues to pursue that claim through Vermont state courts. *See supra* at 10, *infra* at 31-35. This "injury" cannot support MWL's waiver claim. *See DaimlerChrysler Corp. v. Duno,* 547 U.S. 332, 352 (2006) ("our standing cases confirm that a plaintiff must demonstrate standing for each claim he [or she] seeks to press"); *Weaver's Cove,* 524 F.3d at 1333 ("The state agencies' inaction, however, cannot support [the applicant's] standing because [the applicant] does not claim to have been injured by it. On the contrary, [the applicant's] theory of the case is that it benefited from the agencies' inaction; that is, the agencies, by failing to issue timely rulings on [the] applications, waived their rights to deny the certifications [the applicant] seeks.").

V. Morrisville may not raise the waiver issue.

The doctrines of unclean hands and laches also preclude Morrisville's waiver claim.

A. Unclean hands precludes Morrisville's relief.

First, seeking waiver now amounts to "willful act[s] . . . which rightfully can be said to transgress equitable standards of conduct." *See Starr Farm Beach Campowners' Ass'n v. Boylan,* 174 Vt. 503, 506, 811 A.2d 155, 160 (2002) (describing

doctrine of unclean hands), *cited in ChooseCo, LLC v. Lean Forward Media, Inc.,* 364 Fed. Appx. 670, 671-72 (2d Cir. 2010). As explained at length above, Morrisville actively engaged in discussions and information exchange with ANR regarding the WQC application, including submitting new proposals and twice voluntarily withdrawing its application. *See supra at* 2-8. The second time, MWL actively pleaded with ANR to accept withdrawal of its application so that ANR would not be "compelled to issue[] a WQC" before MWL could complete various WQC-related items. *See supra* at 6. MWL specifically stated that "allowing more time to work on the issues will be in everyone's best interest" and would not "unduly delay[] a final decision." *See id*. These actions, in conjunction with MWL's current waiver request, "'taint[MWL] with inequitableness or bad faith relative to the matter in which [it] seeks relief.'" *See Holm v. First Unum Life Ins. Co.,* 7 Fed. Appx. 40, 41 (2d Cir. 2001) (citation omitted). Therefore, MWL's relief should be denied under the doctrine of unclean hands.

B. Laches precludes Morrisville's relief.

Next, Morrisville's undue delay in filing the petition necessitates its denial under the doctrine of laches. Laches is "an equitable defense based on the . . . maxim *vigilantibus non dormientibus aequitas subvenit* (equity aids the vigilant, not those who sleep on their rights). It bars a plaintiff's equitable claim where [the plaintiff] is guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant." *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 259 (2d Cir. 1997) (citation and quotation marks omitted); s*ee also Ransom v.*

Bebernitz, 172 Vt. 423, 433, 782 A.2d 1155, 1162 (2001) ("[l]aches is the failure to assert a right for an unreasonable and unexplained period of time when the delay has been prejudicial to the adverse party, rendering it inequitable to enforce the right. . . . The delay must be unexcused and prejudicial.") (internal quotation marks and citation omitted). Laches exists where there is an "unreasonable lack of diligence under the circumstances in initiating an action, as well as prejudice from such a delay." *King v. Innovation Books,* 976 F.2d 824, 832 (2d Cir. 1992).

Laches applies here because Morrisville's unreasonable delay in filing the petition prejudices the ANR. First, Morrisville's delay in raising the waiver issue was unreasonable. Morrisville could have raised its current withdraw-and-resubmit waiver theory at any point after the initial one-year "waiver deadline" had passed. However, unlike the petitioner in *Hoopa Valley,* MWL apparently did not think of this theory. Additionally, whether ANR waived its authority was an issue squarely presented to the Environmental Division in 2017 when the WQC was appealed. Yet Morrisville took no position on the question. In concluding that "ANR complied with the one-year timeline in Section 401," the Environmental Division expressly noted that "while MWL has appealed parts of the § 401 certification, it does not argue that the § 401 certification is invalid for failing to comply with the one-year timeline" and "has not weighed in" on the issue. *In re*

Morrisville Hydroelectric Project Water Quality, No. 103-9-16 Vtec, slip op. at 4 (Vt. Sup. Ct. Env'tl Div. July 20, 2017) (Walsh, J.).[7]

Instead of arguing that ANR waived its authority, Morrisville litigated the substantive conditions of the WQC. The parties engaged in extensive discovery, filed numerous pretrial motions, and participated in eight days of trial in April 2018. *See In re Morrisville Hydroelectric Project Water Quality*, No. 103-9-16 Vtec, Decision on the Merits, 2018 WL 4835357, at *1-2 (Vt. Sup. Ct. Envt'l Div. Sept. 18, 2018) (Walsh, J.). Morrisville then cross-appealed to the Vermont Supreme Court on October 26, 2018, challenging the drawdown condition affirmed by the Environmental Division as well as the Court's holding on social and economic considerations. *Morrisville Hydroelectric,* 2019 VT 84, ¶ 14. While the appeal was pending, MWL took no action after the D.C. Circuit issued the *Hoopa Valley* decision on January 25, 2019. *Hoopa Valley*, 913 F.3d 1099. MWL remained silent while the parties briefed the legal issues and presented oral argument to the Vermont Supreme Court in March 2019. *See Morrisville Hydroelectric,* 2019 VT 84.

Morrisville remained silent even after the Vermont Supreme Court issued its decision on November 22, 2019, which remanded in part to the Environmental Division. *See id.* ¶ 71. Despite the United States Supreme Court denying certiorari

[7] Decision available at https://www.vermontjudiciary.org/sites/default/files/documents/Morrisvile%20Hydroelectric%20103-9-16%20Vtec%20MSJ%20Decision.pdf. Because the Environmental Division reached this conclusion in granting summary judgment to a non-moving party, the parties were given an additional 30 days to respond to the Court's conclusion that ANR had not waived its authority to issue the water quality certification. *See In re Morrisville Hydroelectric*, No. 103-9-16 Vtec, slip op. at 1 (July 20, 2017). The parties, including Morrisville, "submitted no filings" on the question. *Id.*

in *Hoopa Valley* on December 9, 2019, Morrisville continued to litigate the substantive issues before the Environmental Division on remand.[8] *Ca. Trout v. Hoopa Valley Tribe,* 140 S. Ct. 650 (2019) (denying certiorari). The remand proceeding has been under advisement for a final decision since the conclusion of legal briefing on April 15, 2020.[9] Under these circumstances, Morrisville's delay in filing the waiver petition was unreasonable and unjustifiable. It had ample opportunity to file its waiver petition before May 28, 2020.

In addition to being unreasonable, Morrisville's delay has prejudiced ANR. Since the one-year "waiver deadline" passed in January 2015, ANR has invested significant time and resources in development of and litigation regarding the WQC. Even since the *Hoopa Valley* decision almost eighteen months ago, ANR has concluded both an appeal before the Vermont Supreme Court and the remand proceeding before the Environmental Division over the substantive conditions of the WQC. Morrisville waited to file the petition over five years after the one-year "waiver deadline" it now invokes, almost four years after it appealed the water quality certification in state court, and nearly a year and a half since *Hoopa Valley* was decided, all while treating the water quality certification as validly issued by challenging its substantive conditions and keeping silent on the waiver issue. To find that ANR waived its authority now, after years of highly contested litigation

[8] The initial status conference before the Environmental Division took place the same day the U.S. Supreme Court denied certiorari.
[9] Morrisville later filed a motion to stay the Environmental Division's proceedings pending a Commission decision on the waiver petition. ANR opposed the motion and a hearing was held on June 29, 2020. The Environmental Division took the motion under advisement and indicated that a decision should be expected in 2-3 weeks.

over the substance of the certification, would undermine ANR's substantial efforts and commitment, and potentially nullify its sizable investment of time and resources over the past five-and-a-half years. As with unclean hands, MWL's request should be barred by laches.

CONCLUSION

The Commission should deny Morrisville's Petition. It would be inconsistent with the Clean Water Act to grant waiver. It would go substantially beyond the four corners of *Hoopa Valley*. It would require impermissible retroactive application of the Commission's recent waiver decisions. And, in any case, Morrisville has lost the ability to seek waiver. Morrisville lacks any injury related to waiver and the timing of the WQC's issuance and therefore lacks standing. Morrisville also actively shaped the timing of the WQC's issuance and delayed for several years before filing its Petition. ANR has not waived its statutory right to protect the Vermont waters threatened by Morrisville's Project.

Dated: July 1, 2020

THOMAS J. DONOVAN, JR.
VERMONT ATTORNEY GENERAL
On behalf of the Vermont Agency of Natural Resources

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Montpelier, Vermont this 1st day of July, 2020.

_____

Laura B. Murphy
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From: Patrick Parenteau
To: Murphy, Laura
Subject: Re: Guest Lecture?
Date: Tuesday, January 5, 2021 6:30:11 PM
Attachments: Tentative Water Quality Syllabus 2021.docx

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.

Great. Here's the syllabus. I think FERC got it right. And it adds credibility since FERC has been tough on the waiver of late.
Look forward to it.

From: Murphy, Laura <Laura.Murphy@vermont.gov>
Sent: Tuesday, January 5, 2021 6:07 PM
To: Patrick Parenteau <PPARENTEAU@vermontlaw.edu>
Subject: RE: Guest Lecture?

Hi Pat, sounds good, I'd be happy to do the class on the 31st. I can't believe it's been almost a year since the last time and one of my first adventures on Teams. Good idea to update the prior presentation and I can include something on the PFAS case(s). Would you mind sending me the syllabus at some point so I know what they know . . . ? No worries, I knew what you meant about the First Circuit/FERC. I'm attaching the main comments we filed on that, if of interest – Morrisville has requested rehearing, which we've opposed, so we will see what happens. Thanks for asking me to teach and it will be fun to "see" you in March, and hopefully in person before too long. Hope you're taking care. Laura

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From: Patrick Parenteau <PPARENTEAU@vermontlaw.edu>
Sent: Tuesday, January 5, 2021 11:53 AM
To: Murphy, Laura <Laura.Murphy@vermont.gov>
Subject: Guest Lecture?

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.

Hi Laura, happy new year, and thanks for the Xmas card with those beautiful kiddos.
You up for another virtual appearance in Water Quality? We meet on Teams M-W 9:55-11:10. There are about 30 students enrolled. Was looking at March 31 as a possible date but flexible. You could use the same ppt from last time with updates. I noted the 1st Cir decision in the Morrisville case. ANR dodged the bullet on that one. I've assigned Judge Toor's decision denying the MTD in the 3 M case but I'm sure the students would like to hear more about what is happening in that case. And anything else you have in mind.
Let me know and hope all is well