

FOR PUBLICATION

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

CALIFORNIA STATE WATER
RESOURCES CONTROL BOARD,
Petitioner,

No. 20-72432

v.

FEDERAL ENERGY REGULATORY
COMMISSION,
Respondent,

NEVADA IRRIGATION DISTRICT,
Intervenor.

SOUTH YUBA RIVER CITIZENS
LEAGUE; CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE; FRIENDS OF
THE RIVER; MOTHER LODGE CHAPTER
OF THE SIERRA CLUB,
Petitioners,

No. 20-72452

FERC Nos.
2266-102
2266-118

v.

FEDERAL ENERGY REGULATORY
COMMISSION,
Respondent,

NEVADA IRRIGATION DISTRICT,
Intervenor.

CALIFORNIA STATE WATER
RESOURCES CONTROL BOARD,
Petitioner,

No. 20-72782

v.

FEDERAL ENERGY REGULATORY
COMMISSION,
Respondent,

YUBA COUNTY WATER AGENCY,
Respondent-Intervenor.

SOUTH YUBA RIVER CITIZENS
LEAGUE; CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE; FRIENDS OF
THE RIVER; MOTHER LODGE CHAPTER
OF THE SIERRA CLUB,

No. 20-72800

FERC No.
2246-086

Petitioners,

v.

FEDERAL ENERGY REGULATORY
COMMISSION,
Respondent,

YUBA COUNTY WATER AGENCY,
Respondent-Intervenor.

CALIFORNIA STATE WATER
RESOURCES CONTROL BOARD,
Petitioner,

v.

FEDERAL ENERGY REGULATORY
COMMISSION,

Respondent,

MERCED IRRIGATION DISTRICT,
Respondent-Intervenor.

No. 20-72958

FERC Nos.
2179-043
2467-020
2179-048
2467-022

CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE; FRIENDS OF
THE RIVER; SIERRA CLUB AND ITS
TEHIPITE CHAPTER,
Petitioners,

v.

FEDERAL ENERGY REGULATORY
COMMISSION,

Respondent,

MERCED IRRIGATION DISTRICT,
Respondent-Intervenor.

No. 20-72973

FERC No.
2179-043

OPINION

On Petition for Review of an Order of the
Federal Energy Regulatory Commission

Argued and Submitted May 12, 2022
Pasadena, California

Filed August 4, 2022

Before: Paul J. Watford and Michelle T. Friedland, Circuit Judges, and Carol Bagley Amon,* District Judge.

Opinion by Judge Friedland

SUMMARY**

Federal Energy Regulatory Commission

The panel granted petitions for review, and vacated orders issued by the Federal Energy Regulatory Commission (“FERC”) in which FERC held that the California Water Resources Control Board (the “State Board”) had waived its authority to ensure that certain hydroelectric projects complied with state water quality standards.

Section 401 of the Clean Water Act requires states to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters. Under Section 401, states may impose conditions on federal licenses for hydroelectric projects to ensure that those projects comply with state water quality standards. States must act on a request for water quality certification within one year of

* The Honorable Carol Bagley Amon, United States District Judge for the Eastern District of New York, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

receiving it to avoid waiving their Section 401 certification authority.

In three FERC orders, FERC found that the State Board had engaged in coordinated schemes with the Nevada Irrigation District, the Yuba County Water Agency, and the Merced Irrigation District (“Project Applicants”) to delay certification and to avoid making a decision on their certification requests. According to FERC, the State Board had coordinated with the Project Applicants to ensure that they withdrew and resubmitted their certification requests before the State’s deadline for action under Section 401 in order to reset the State’s one-year period to review the certification requests. FERC held that, because of that coordination, the State Board had “fail[ed] or refuse[d] to act” on requests and therefore had waived its certification authority under Section 401 of the Clean Water Act. *See* 33 U.S.C. § 1341(a)(1).

The panel held that FERC’s findings of coordination were unsupported by substantial evidence. Instead, the evidence showed only that the State Board acquiesced in the Project Applicants’ own unilateral decisions to withdraw and resubmit their applications rather than have them denied. The panel held that, even assuming that FERC’s “coordination” standard was consistent with the statute, the State Board’s mere acquiescence in the Project Applicants’ withdrawals-and-resubmissions could not demonstrate that the State Board was engaged in a coordinated scheme to delay certification. Accordingly, FERC’s orders could not stand. The panel remanded for further proceedings.

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