

173 FERC ¶ 61,156
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Village of Morrisville, Vermont

Project No. 2629-014

DECLARATORY ORDER ON WAIVER OF WATER QUALITY CERTIFICATION

(November 19, 2020)

1. On May 28, 2020, the Village of Morrisville, Vermont (Morrisville), licensee for the Morrisville Hydroelectric Project No. 2629 (Morrisville Hydro Project), filed a petition for an order declaring that the Vermont Agency of Natural Resources (Vermont ANR) waived its authority under section 401(a)(1) of the Clean Water Act (CWA)¹ to issue a water quality certification for relicensing the Morrisville Hydro Project. This order denies the petition.

I. Background

2. On August 28, 1981, the Commission issued a 35-year license to construct, operate, and maintain the Morrisville Hydro Project.² Morrisville filed a timely application for a new license for the project on April 25, 2013. The license expired on April 30, 2015, and Morrisville continues to operate the project under an annual license.³

3. Morrisville requested water quality certification for the project on January 30, 2014, and Vermont ANR received the application the same day.⁴ In its February 3, 2014 letter to Morrisville acknowledging receipt, Vermont ANR confirmed that the application

¹ 33 U.S.C. § 1341(a)(1).

² *The Village of Morrisville, Vermont*, 16 FERC ¶ 62,346 (1981).

³ Notice of Authorization for Continued Project Operation (May 8, 2015).

⁴ As required by section 5.23(b)(1)(ii) of the Commission's Rules and Regulations, 18 C.F.R. § 5.23(b)(1)(ii) (2020), Morrisville filed a copy of the request with the Commission, including proof of the date of receipt of the request.

was administratively complete.⁵ Prior to that application, on December 27, 2013, Vermont ANR had issued preliminary terms and conditions for the water quality certification.⁶

4. In June 2014, Morrisville proposed flow measures that differed from those proposed in its January 30, 2014 application, as well as a phased-in approach to implementing the water quality conditions contained in Vermont ANR's December 2013 preliminary terms and conditions.⁷ Morrisville states that in October 2014, it and Vermont ANR discussed whether to withdraw and refile the water quality certification application, "in order to give the parties more time to solve their issues." Morrisville asserts that it was under the impression that if it did not withdraw and refile its application, Vermont ANR would issue a water quality certification with "unfavorable conditions," but if Morrisville were to withdraw and refile, there was a possibility Vermont ANR would issue a water quality certification with conditions acceptable to Morrisville.

5. On November 7, 2014, Morrisville withdrew and resubmitted its application for water quality certification. In its application, Morrisville stated that it was withdrawing and resubmitting its application "to accommodate [Vermont ANR's] review of Morrisville's various proposals, including its recently submitted phase-in proposal."⁸ Vermont ANR acknowledged receipt of the simultaneous withdrawal and refiling of the application on the same day.⁹

6. In August 2015, Morrisville asked Vermont ANR to support withdrawing and refiling the water quality certification application a second time to give Morrisville more time to review a river flow analysis and littoral habitat report, consider the use of micro-turbines, and develop a cost/benefit plan for various factors including cost of improvements, operation and management costs, cost of implementing license conditions,

⁵ Vermont ANR February 3, 2014 Letter Confirming Receipt of Water Quality Certification Application. Vermont ANR states that the proposal was not "technically complete" because Vermont ANR requested additional technical information related to the proposal. Vermont ANR July 1, 2020 Comment at 3.

⁶ Vermont ANR July 1, 2020 Comment, Attachment 3.

⁷ Vermont ANR July 1, 2020 Comment at 3-4.

⁸ Morrisville May 28, 2020 Petition for Declaratory Order, Appendix A, at 1.

⁹ Vermont ANR November 7, 2014 Acknowledgment Receipt.

and market forecasting.¹⁰ Morrisville stated that it did not want Vermont ANR to issue a water quality certificate until Morrisville had a chance to evaluate these additional considerations.¹¹

7. On September 9, 2015, Morrisville withdrew and resubmitted a third application for water quality certification. As in its earlier withdrawal and refiling letter, Morrisville stated that it was reapplying “to accommodate [Vermont ANR’s] review of Morrisville’s various proposals.”¹² Vermont ANR acknowledged receipt of the simultaneous withdrawal and refiling of the application on September 9, 2015.¹³

8. Vermont ANR issued a water quality certification on August 9, 2016.¹⁴ Morrisville appealed the water quality certificate to the Vermont Superior Court, Environmental Division, on September 13, 2016, and to the Vermont Supreme Court on October 18, 2018. On November 22, 2019, the Vermont Supreme Court affirmed in part, and reversed and remanded in part, the conditions imposed by Vermont ANR’s water quality certification.¹⁵ The Vermont Superior Court, Environmental Division issued a decision on the merits following remand on August 26, 2020.¹⁶

9. On January 25, 2019, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an opinion in *Hoopa Valley Tribe v. FERC*,¹⁷ ruling that, where a state and an applicant agree to repeatedly withdraw and refile the

¹⁰ Vermont ANR July 1, 2020 Comment, Attachment 16, at 1.

¹¹ *Id.*

¹² Morrisville May 28, 2020 Petition for Declaratory Order, Appendix A, at 4.

¹³ Vermont ANR September 9, 2015 Acknowledgment Receipt.

¹⁴ Vermont ANR August 9, 2016 Section 401 Water Quality Certification.

¹⁵ *In re Morrisville Hydroelectric Project Water Quality*, 2019 VT 84, ¶ 2, 224 A.3d 473 (Vt. 2019).

¹⁶ *In re Morrisville Hydroelectric Project Water Quality*, No. 103-9-16 Vtec (Vt. Super. Ct. Envtl. Div. Aug. 26, 2020).

¹⁷ 913 F.3d 1099 (D.C. Cir. 2019) (*Hoopa Valley*) (rejecting a coordinated withdrawal-and-resubmission scheme between the applicant and the state certifying agency).

same water quality certification request, the state has waived its certification authority. On May 28, 2020, Morrisville filed the petition at issue here.

10. On June 1, 2020, the Commission issued public notice of Morrisville's petition, establishing July 1, 2020, as the deadline for filing comments.¹⁸ Vermont ANR; American Whitewater and Vermont Paddlers Club; and the Vermont Natural Resources Council and the Vermont Council of Trout Unlimited filed comments. All commenters oppose the petition. Vermont ANR argues that we should not find waiver because: (1) waiver would be inconsistent with the CWA; (2) *Hoopa Valley* is not applicable; (3) *Hoopa Valley* cannot be applied retroactively; (4) Morrisville lacks standing; (5) Morrisville has unclean hands; and (6) laches preclude Morrisville's relief.¹⁹ American Whitewater, Vermont Paddlers Club, Vermont Natural Resources Council, and Vermont Council of Trout Unlimited also argue that *Hoopa Valley* is inapplicable.²⁰

11. On July 27, 2020, Morrisville filed an answer to the comments that discusses Morrisville's internal deliberations on whether to withdraw and refile in 2014 and email exchanges with Vermont ANR regarding whether to withdraw and refile in 2015.²¹ Morrisville claims the correspondence shows coordination between Morrisville and Vermont ANR.²² Vermont ANR filed a response to Morrisville's answer, arguing that the correspondence only shows an effort to resolve disagreements and give Morrisville time to submit additional information, and is not evidence of coordination.²³

II. Procedural Issue

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to protests or answers unless otherwise ordered by the Commission.²⁴ Because Morrisville had the opportunity to answer the comments and provided further detail about

¹⁸ 85 Fed. Reg. 34,614 (June 5, 2020).

¹⁹ Vermont ANR July 1, 2020 Comment.

²⁰ American Whitewater and Vermont Paddlers Club June 22, 2020 Joint Comment; Vermont Natural Resources Council and Vermont Council of Trout Unlimited July 1, 2020 Joint Comment.

²¹ Morrisville July 27, 2020 Response to Comments.

²² *Id.* at 3.

²³ Vermont ANR August 10, 2020 Response at 5.

²⁴ 18 C.F.R. § 385.213(a)(2) (2020).

its understanding of the matters at issue, we think it appropriate to accept Vermont ANR's response to Morrisville's answer.

III. Discussion

13. Section 401(a)(1) of the CWA requires that an applicant for a federal license or permit to conduct activities that may result in a discharge into the navigable waters of the United States, such as Morrisville's operation of the Morrisville Hydro Project, must provide the licensing or permitting agency a water quality certification from the state in which the discharge originates or evidence of waiver thereof.²⁵ If the state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request," then certification is waived.²⁶ Further, the licensing or permitting agency may not grant a license or permit until certification has been granted or waived.²⁷ For the reasons discussed below, we find that Vermont ANR did not waive its authority under section 401.

A. Hoopa Valley and Commission Precedent

14. In *Hoopa Valley*, the D.C. Circuit found that "a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year."²⁸ The court concluded that where a licensee each year sent a letter indicating withdrawal of its certification request and resubmission of the same,²⁹ "[s]uch an arrangement does not exploit a statutory loophole; it serves to circumvent [FERC's] congressionally granted authority over the licensing, conditioning,

²⁵ 33 U.S.C. § 1341(a)(1). Section 401(d) of the CWA provides that a certification and the conditions contained therein shall become a condition of any federal license that is issued. *Id.* § 1341(d). See *City of Tacoma, Washington v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

²⁶ 33 U.S.C. § 1341(a)(1).

²⁷ *Id.*

²⁸ 913 F.3d at 1103.

²⁹ In *Hoopa Valley*, the court noted that before each calendar year passed, the applicant sent a "letter indicating withdrawal of its water quality certification request and resubmission of the very same . . . in the same one-page letter . . ." *Id.* at 1104 (emphasis in original).

and developing of a hydropower project.”³⁰ In fact, “[b]y shelving water quality certifications, the states usurp FERC’s control over whether and when a federal license will issue. Thus, if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC’s jurisdiction to regulate such matters.”³¹

15. Following *Hoopa Valley*, the Commission found that the California State Water Resources Control Board (California Board or Board) waived its section 401 authority in *Placer County Water Agency*.³² In *Placer County*, the Commission held that a formal agreement between a licensee and a state was not necessary to support a finding of waiver; rather, the exchanges between the entities could amount to an ongoing agreement.³³ The Commission found that the record showed that the entities worked to ensure that the withdrawal and refiling happened each year,³⁴ given that the licensee submitted evidence that the state sent it emails about each upcoming one-year deadline for the purpose of eliciting a withdrawal and resubmission.³⁵ Based on this functional agreement and the fact that Placer County never filed a new application, the Commission concluded that the process caused lengthy delay and found that the state waived its certification authority.³⁶

16. Similarly, in *Southern California Edison*, the Commission found that the California Board waived its section 401 authority for relicensing six projects that

³⁰ *Id.*

³¹ *Id.*

³² 167 FERC ¶ 61,056, *reh’g denied*, 169 FERC ¶ 61,046 (2019) (*Placer County*).

³³ *Placer County*, 167 FERC ¶ 61,056 at P 16; *see also McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185, at PP 33-38 (2019), *reh’g denied*, 171 FERC ¶ 61,046 (2020); *Pacific Gas and Electric Co.*, 170 FERC ¶ 61,232, at P 27, *modified*, 172 FERC ¶ 61,065 (2020) (*Pacific Gas and Electric*); *Southern California Edison Co.*, 170 FERC ¶ 61,135, at P 23 (2020), *modified*, 172 FERC ¶ 61,066 (*Southern California Edison*); *Yuba County Water Agency*, 171 FERC ¶ 61,139, at P 20 (2020), *reh’g denied*, 172 FERC ¶ 61,080 (2020) (*Yuba County*).

³⁴ *Placer County*, 167 FERC ¶ 61,056 at P 12.

³⁵ *Placer County*, 169 FERC ¶ 61,046 at P 17.

³⁶ *Id.* PP 12, 18.

comprise the Big Creek hydroelectric system.³⁷ There, the Commission rejected the Board's argument that *Hoopa Valley* was not applicable. While there was no explicit agreement between the applicant and the Board, the Commission found that the record showed the Board directly participated in the withdrawal and resubmittal scheme. The Board staff sent annual emails to the licensee noting the upcoming one-year deadline and explicitly requested withdrawal and resubmittal.³⁸ In addition, the Board, commenting on the draft EIS, stated that "[i]f the one year federal period for certification is insufficient for the [] Board to act, staff will recommend that [Southern California Edison] withdraw and resubmit their request for [water quality certification] for the six Big Creek projects."³⁹ The Commission found that this evidence demonstrated the state's coordination with the licensee and was sufficient to support a waiver finding.⁴⁰

17. Thereafter, in *Pacific Gas and Electric*, the Commission found that the California Board waived its section 401 authority with respect to the surrender of the Kilarc-Cow Creek Hydroelectric Project No. 606, again stating that an explicit agreement between the applicant and the Board was not necessary to find waiver.⁴¹ We found that the record showed that the Board expected the applicant to withdraw and refile its certification application and the applicant cooperated.⁴² In its comments, the Board indicated that the "usual process" involved the applicant voluntarily withdrawing and refiling its application.⁴³ Moreover, the Commission found unavailing the Board's assertion that it could not issue a water quality certification until the California Environmental Quality Act (CEQA) process was complete, which often takes more than one year, and determined that the general principle from *Hoopa Valley* still applied.⁴⁴ The Commission found, as it had previously, that a "state's reason for delay [is] immaterial."⁴⁵

³⁷ 170 FERC ¶ 61,135.

³⁸ *Id.* P 25.

³⁹ *Id.* P 24; *see also id.* PP 23-29.

⁴⁰ *Id.* P 25.

⁴¹ 170 FERC ¶ 61,232 at P 27.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* PP 31-33.

⁴⁵ *Id.* P 35 (citing *Placer County*, 169 FERC ¶ 61,046 at P 20).

18. In *Nevada Irrigation District*,⁴⁶ *Yuba County Water Agency*,⁴⁷ *South Feather Water and Power Agency*,⁴⁸ *Merced Irrigation District*,⁴⁹ and *Pacific Gas and Electric*,⁵⁰ we again found that the California Board waived its authority to issue a water quality certification where the applicant withdrew and refiled its application numerous times, even when an explicit agreement was not in place. The Commission found unpersuasive the arguments that the licensee, as the respective lead agency for CEQA, controlled the timing for the CEQA analysis, and reiterated that “state’s reason for delay is immaterial.”⁵¹ Further, the Commission reaffirmed that section 401 of the CWA is clear, and that failure to act within the one-year time limit is dispositive regardless of whether the timing of the water quality certification, even if it extends beyond one year, would not disrupt the relicensing proceeding.⁵²

19. Most recently, in *KEI (Maine) Power Management (III) LLC, (KEI)*,⁵³ we found on rehearing that the Maine Department of Environmental Protection (Maine DEP) did not waive its certification authority where the applicant withdrew and refiled its application to give itself time to negotiate fish passage measures with resource agencies. The Commission found insufficient evidence of Maine DEP encouraging or supporting withdrawal and resubmittal, and that the record reflects the genesis of withdrawal and

⁴⁶ 171 FERC ¶ 61,029 (2020), *modified*, 172 FERC ¶ 61,082 (2020).

⁴⁷ 171 FERC ¶ 61,139 (2020).

⁴⁸ 171 FERC ¶ 61,242 (2020) (*South Feather*).

⁴⁹ 171 FERC ¶ 61,240 (2020).

⁵⁰ *Pacific Gas and Electric*, 172 FERC ¶ 61,064 (2020).

⁵¹ *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 28; *Yuba County*, 171 FERC ¶ 61,139 at P 25; *Merced Irrigation District*, 171 FERC ¶ 61,240 at P 32; *South Feather*, 171 FERC ¶ 61,242 at P 31.

⁵² *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 29; *Yuba County*, 171 FERC ¶ 61,139 at P 27; *Merced Irrigation District*, 171 FERC ¶ 61,240 at P 32; *South Feather*, 171 FERC ¶ 61,242 at P 31.

⁵³ 171 FERC ¶ 62,043 (delegated order), *modified*, 173 FERC ¶ 61,069 (2020) (*KEI Power*).

resubmittal to be on the applicant's desire to avoid receiving a certification with conditions to which it objected.⁵⁴

B. Application of Hoopa Valley and Commission Precedent to the Relicensing Proceeding for the Morrisville Hydro Project

20. Morrisville argues that *Hoopa Valley* supports a finding of waiver in this proceeding, claiming that Morrisville had an agreement with Vermont ANR to withdraw and resubmit its application.⁵⁵ Although Vermont ANR and Morrisville did not have a formal written agreement, Morrisville claims that it had a functional agreement with Vermont ANR, evidenced by Vermont ANR accepting the withdrawal and refiling letters and thanking Morrisville for its cooperation.⁵⁶ Morrisville also points to correspondence between Morrisville employees and Morrisville's contractor describing communications with Vermont ANR as evidence of an agreement. Morrisville states that the emails and other communications demonstrate that Morrisville's motivation to withdraw and refile in 2014 was to obtain more favorable conditions in the water quality certification, based on Morrisville's impression from Vermont ANR that if it did not withdraw and refile, the conditions would be unfavorable.⁵⁷ Additionally, Morrisville argues that *Hoopa Valley* supports a finding of waiver because neither refiled application significantly changed the project proposal.⁵⁸ Finally, Morrisville argues that the Commission should have found waiver on its own initiative without the necessity of filing a petition for declaratory order.⁵⁹

1. Morrisville's Unilateral Action is an Insufficient Basis for Waiver

21. While Morrisville is correct that an explicit written agreement to withdraw and refile is not necessary to support a finding of waiver, and a functional agreement is

⁵⁴ *Id.* PP 42-46.

⁵⁵ Morrisville May 28, 2020 Petition for Declaratory Order at 8.

⁵⁶ *Id.*

⁵⁷ Morrisville July 27, 2020 Response to Comments at 3.

⁵⁸ *Id.*

⁵⁹ *Id.* at 11. As we find that Vermont ANR did not waive its certification authority under section 401 of the CWA, we need not address this argument, although we note that the Commission is under no obligation to consider matters that parties have not raised.

sufficient,⁶⁰ the record does not reflect that Morrisville had a functional agreement with Vermont ANR to coordinate withdrawal and refiling for the purpose of providing the state more time to act on Morrisville's application. *Hoopa Valley* does not specify what level of coordination between the state and licensee is necessary to constitute waiver, but there must be evidence of "deliberate . . . idleness" by the state to defy the requirement of section 401 of the CWA that the state act within a reasonable period of time.⁶¹ In prior cases where we have found that the state agency functionally agreed to a withdrawal and refiling scheme, the state agency either requested or directed it with the motivation to restart the one-year clock.⁶² In contrast, where the licensee withdraws and refiles its application in order to avoid potentially unfavorable water quality certification conditions, the licensee acts unilaterally for its own benefit and by its own initiative, which is not a sufficient basis to find waiver.⁶³

22. Similar to *KEI*, here, on both occasions of withdrawing and refiling its application, Morrisville acted unilaterally and in its own interest, and nothing in the record leads us to conclude that Morrisville's withdrawal and resubmittal was made at the behest of the state certifying agency to delay a certification decision. On the contrary, in 2014, Morrisville withdrew and refiled its application to have Vermont ANR consider the licensee's newly-proposed flow conditions and a phased application of the preliminary water quality certification conditions, with the hope that the proposals would result in more favorable certification conditions for Morrisville.⁶⁴ In 2015, Morrisville withdrew and refiled to give itself more time to review study reports, consider alternatives

⁶⁰ See *Yuba County*, 171 FERC ¶ 61,139 at P 20; *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 23; *Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 27; *Southern California Edison*, 170 FERC ¶ 61,135 at P 23; *Placer County*, 167 FERC ¶ 61,056 at PP 17-18; see also *Constitution Pipeline Company, LLC*, 168 FERC ¶ 61,129, at PP 33-34 (2019).

⁶¹ 913 F.3d at 1104.

⁶² See, e.g., *Yuba County*, 171 FERC ¶ 61,139 at P 20 (California Board requested the licensee withdraw and resubmit its application to circumvent the one-year deadline); see also *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 at P 37 (state agency directed licensee on how to withdraw and refile its applications so as to not miss the one-year deadline).

⁶³ See, e.g., *KEI Power*, 173 FERC ¶ 61,069 at P 42 (Maine DEP did not waive its section 401 authority where the licensee withdrew and refiled its water quality certification application on its own initiative to provide itself time to negotiate fish passage measures with resource agencies).

⁶⁴ See Morrisville July 27, 2020 Response to Comments at 3.

(including the use of micro-turbines), and conduct a cost-benefit analysis.⁶⁵ Under these circumstances, Vermont ANR's mere acceptance of Morrisville's requests to withdraw and refile is not evidence of a functional agreement between the parties with the motivation to restart the one-year clock.⁶⁶

23. Moreover, the correspondence submitted by Morrisville does not lead us to conclude that Morrisville and Vermont ANR had a functional agreement to avoid the one-year deadline. With respect to the November 2014 withdrawal and resubmittal, Morrisville cites conversations that demonstrate the motivation for Morrisville's actions was to try and obtain more favorable certification conditions, not to allow Vermont ANR additional time to process the application.⁶⁷ In other correspondence, Morrisville employees (and contractors) speculate that the withdrawal and resubmittal of the application would benefit Vermont ANR by providing it more time to act;⁶⁸ however, Morrisville provided no evidence that Vermont ANR itself sought more time to process the application, and the direct evidence provided demonstrates that the reason for the withdraw and refiling of the application was so that Morrisville could potentially receive a certification with more favorable conditions. Similarly, the correspondence cited by Morrisville for the 2015 withdrawal and resubmittal demonstrates that Morrisville requested the additional time to review study reports, consider alternatives (including the use of micro-turbines), and conduct a cost-benefit analysis.⁶⁹ Although Vermont ANR may have provided Morrisville information as to how and when to withdraw and resubmit its application,⁷⁰ we do not find this correspondence reflects that Vermont ANR sought withdrawal and resubmittal to circumvent the one-year statutory deadline for the

⁶⁵ Vermont ANR July 1, 2020 Comment, Attachment 16, at 1.

⁶⁶ *KEI Power*, 173 FERC ¶ 61,069 at P 46 (rejecting the licensee's argument that by accepting the withdrawal and refiling of the application, the state waived its authority to issue a water quality certification).

⁶⁷ Morrisville July 27, 2020 Response to Comments at 3 ("if Morrisville withdraws and then re-applies there is no guarantee that a 401 [water quality certification] would be more favorable than [Vermont ANR's] current stance, but if [Morrisville] does not withdraw the [water quality certification] would definitely be unfavorable.").

⁶⁸ *Id.* at Attachments 1 and 2.

⁶⁹ *Id.* at Attachment 5.

⁷⁰ *Id.* at 3.

state agency to act.⁷¹ Therefore, we find that Vermont ANR's actions do not provide a sufficient basis to find that it waived its authority to issue a certification under the CWA.⁷²

2. Whether the Refiled Applications Were Materially Different from the Original Application is Inapposite

24. Morrisville argues that the Commission should find Vermont ANR waived its certificate authority because the refiled applications in 2014 and 2015 were not materially different from the original water quality certification application.⁷³ However, this alone is not dispositive in determining whether there is waiver. As previously stated, a state waives its certificate authority under section 401 if it deliberately circumvents the one-year deadline or agrees with the applicant to do so.⁷⁴ If, instead, the applicant voluntarily delays the issuance of a water quality certificate by withdrawing and refiled its application, absent an agreement with the state, then waiver is not warranted, regardless of whether or to what extent the refiled application changes from the original. Here, Morrisville by its own initiative withdrew and refiled the applications to obtain more favorable conditions and give itself more time to consider various studies and alternatives, so we need not consider the extent to which the various applications differed.

⁷¹ *KEI Power*, 173 FERC ¶ 61,069 at P 45.

⁷² In its answer, Morrisville cites to Environmental Protection Agency's Clean Water Act Section 401 Final Rule, 85 Fed. Reg. 42,210 (July 13, 2020), but does not explain why how the final rule supports its position. Accordingly, this argument is rejected. Further, because we find that Vermont ANR did not waive certification, we need not address its arguments noted in P 10 above, many of which we have rejected in previous proceedings.

⁷³ Morrisville May 28, 2020 Petition for Declaratory Order at 8.

⁷⁴ *Hoopa Valley*, 913 F.3d at 1104.

The Commission orders:

The Village of Morrisville, Vermont's May 28, 2020 petition for declaratory order is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.