111 FERC ¶ 61,104
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

FPL Energy Maine Hydro LLC Project No. 2612-019

ORDER DENYING REHEARING

(Issued April 19, 2005)

1. On October 20, 2004, FPL Energy Maine Hydro LLC (FPL Energy), licensee for the Flagstaff Project No. 2612, filed a request for rehearing of our order of September 21, 2004.[1] In that order, we granted rehearing on an unrelated matter and stayed the new license for the Flagstaff Project because the state hearings board had denied the project's water quality certification on appeal. On rehearing, FPL Energy argues that we should deem certification waived and lift the stay. For the reasons discussed below, we deny rehearing. Our decision is in the public interest because it clarifies how we intend to proceed if a state-issued certification in support of a Commission license is invalidated after the Commission has issued its licensing decision.

BACKGROUND

2. The Commission issued a new license for the Flagstaff Project on March 30, 2004. The Appalachian Mountain Club filed a timely request for rehearing. On July 15, 2004, while rehearing was pending, the Maine Board of Environmental Protection (Maine Board) issued a decision on appeal of the project's water quality certification, denying certification without prejudice. By letter dated July 30, 2004, FPL Energy notified the Commission of the denial and requested that the Commission make no changes to the project license. [2]

[1] 108 FERC ¶ 61,261 (2004). The project is located on the Dead River in Somerset and Franklin Counties, Maine.

[2] *See* letter from Dana Paul Murch, FPL Energy, to Magalie R. Salas, FERC (filed August 9, 2004).

3. In our order of September 21, 2004, we granted rehearing and added the Appalachian Mountain Club as an entity to be consulted for purposes of the project's whitewater boating plan, lake management plan, and comprehensive recreation and land management plan. We also considered what effect should be given to the Maine Board's decision to overturn the project's water quality certification on appeal. We found that the Maine Board's decision called into question not only the project's compliance with applicable water quality standards, but the validity of the new license as well. We noted that the licensee had filed a judicial appeal with the Kennebec County Superior Court. In these circumstances, we concluded that the better course of action was to stay the new license to allow sufficient time for resolution of these issues.

4. On rehearing, FPL Energy argues that our decision to stay the new license was in error. FPL Energy maintains that we should lift the stay because the Maine Department of Environmental Protection (Maine Department) waived certification by failing to grant or deny certification within one year, as required by section 401 of the Clean Water Act (CWA). As a result, FPL Energy argues that we should remove from the license any certification conditions that were included based on the mandatory nature of the certification. In the alternative, FPL Energy argues that we must either: (1) incorporate the conditions of the certification issued on November 14, 2003, without change; or (2) conclude that the project does not require water quality certification because relicensing the project is not an activity that will result in any discharge to waters of the United States.

DISCUSSION

5. Under section 401(a)(1) of the CWA, a federal agency may not issue a license or permit for an activity that may result in any discharge to waters of the United States unless the certifying agency for the state in which the discharge originates has either issued water quality certification for the activity or has waived certification.[3] Section 401(a)(1) further provides that certification is waived if the state certifying agency fails or refuses to act on a certification request within a reasonable period of time, not to exceed one year, after receipt of such request. For hydroelectric project licenses and license amendments, Commission regulations allow the certifying agency the entire year.[4] No federal license or permit may be granted if certification has been denied. Under section 401(d) of the CWA, conditions of the certification are conditions of any federal license or permit that is issued.

[3] 33 U.S.C. § 1341(a).

[4] *See* 18 C.F.R. § 4.34(b)(5)(iii) (2004).

6. FPL Energy first argues that Maine Department waived certification for the project by failing to act within one year after receiving FPL Energy's most recent certification request.[5] FPL Energy maintains that, under Maine law, the certifying agency for purposes of CWA section 401 is the Maine Department. The Maine Department is comprised of the Commissioner of Environmental Protection (Commissioner) and the Maine Board. FPL Energy argues that, as the certifying agency, the Maine Department was required to take final action to grant or deny certification on or before November 15, 2003. However, FPL Energy maintains that the certification decision issued on November 14, 2003, was not a final decision by the Maine Department, but instead was a preliminary decision of the Commissioner, subject to appeal to the Maine Board. The Maine Board did not issue its decision on appeal until July 15, 2004, when it overturned the Commissioner's preliminary decision issuing certification and instead denied certification. FPL Energy therefore argues that the Maine Department did not issue a final decision denying certification until after the one-year deadline had passed. Accordingly, FPL Energy maintains that we must find that the Maine Department waived certification.

7. We find this argument unpersuasive. The letter informing the Commission of the certification decision issued on November 14, 2003, appears on the Maine Department's letterhead, and states: "The Maine Department of Environmental Protection has now issued Water Quality certification for the proposed initial licensing of the project. A copy of the Department Order granting this certification is attached."[6] The attached order is also on the Maine Department's letterhead, and it states in its introductory paragraph that the Maine Department has considered FPL Energy's application and has made the findings set forth in the order. Later, the order states that the Maine Department "approves" FPL Energy's application and "grants certification" subject to the conditions

[5] Maine Department received FPL Energy's certification request on November 15, 2002, and issued certification on November 14, 2003. FPL Energy notes that the prior owner of the project initially requested certification on December 28, 1995. Each year from 1996 through 2002, Maine Department requested that the prior owner or FPL Energy withdraw and refile the certification request, resulting in a period of nearly eight years during which Maine Department considered whether to issue its certification decision. FPL Energy does not argue that the Commission should find certification waived on the basis of these facts. The Commission has recognized that states may deny an application without prejudice to the applicant's ability to refile a certification request. *See* Order No. 533, Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters, FERC Stats. & Regs., Regs. Preambles 1991-1996, ¶ 30,921 at 30,135-36, 56 Fed. Reg. 23,108 at 23,126 (May 20, 1991).

[6] *See* letter from Andrew Fisk, Maine Department, to Magalie Salas, FERC, dated November 14, 2003, and Maine Department order (attached to letter).

specified in the order.[7] There is nothing to indicate that the certification is anything other than a decision of the Maine Department, and we accept it as such. We therefore reaffirm our decision that the Maine Department issued its certification decision within one year of receiving FPL Energy's request, and did not waive certification.

8. FPL Energy argues that, in order to effectuate the one-year time limit in section 401, states must issue a final certification decision within one year of receiving a certification request. Otherwise, by issuing a non-final certification, states can toll the one-year deadline and then freely amend or even revoke the certification, thus acting in a manner that is inconsistent with the language and intent of the one-year deadline in section 401. While this argument has some appeal, we see nothing in section 401 that gives the Commission any authority to determine the finality of state-issued certification decisions. Issues concerning the validity of state actions under section 401 are for state courts to decide, and federal courts and agencies are without authority to review these matters.[8]

9. In support of its argument that certification was waived because the Maine Department did not issue a final decision within one year, FPL Energy continues to rely on *Airport Communities Coalition v. Graves*.[9] In that case, the Port of Seattle needed a CWA section 404 permit to fill wetlands for construction of an airport runway. The state issued water quality certification for the permit within the one-year deadline, and Airport Communities Coalition filed an appeal of the certification. After the one-year deadline had passed, the state hearings board issued a decision affirming the certification but imposing additional conditions. Thereafter, the U.S Army Corps of Engineers issued its section 404 permit, including all of the original certification conditions and some, but not all, of the new conditions imposed on appeal.

10. Airport Communities Coalition sought judicial review, contending that the Corps was required to incorporate all of the conditions, including those added by the state hearings board on appeal, because they were issued before the Corps issued its permit. The court disagreed, stating:[10]

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[7] *See* Maine Department order at 19.

[8] *Roosevelt Campobello Int'l Park Commission v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982); *see American Rivers v. FERC*, 129 F.3d 99, 106 (2nd Cir. 1997).

[9] 280 F. Supp. 2d 1207 (W. D. Wash. 2003).

[10] *Id.* at 1216.

> [T]the time limit was inserted in order to avoid a state from interminably blocking a federal permit by stalling the Section 401 certification. Whether a state begins to act but does not complete the issuance of a certification or whether the state entirely fails to act at all, the legislative history of Section 401 makes clear that either of those two situations was unacceptable to Congress because both result in delays in issuing Federal permits.

The court therefore concluded that, under CWA section 401(d), the Corps was required to include only those certification conditions issued within one year of the Corps' published notice of the request for certification.

11. In our view, following the logic of the *Airport Communities* case would suggest not that the state waived certification, but rather that the state granted certification within the one-year deadline, and that the Commission has the discretion to consider what action may be appropriate in response to the state's subsequent decision voiding the certification. However, we have serious doubts concerning whether the Commission may properly disregard an agency or court decision that completely invalidates a state's water quality certification.

12. This brings us to FPL Energy's second argument; that the Commission may not modify the new license on the basis of the Maine Board's subsequent denial of certification. FPL Energy asserts that, if we assume for the sake of argument that the Maine Department issued a timely certification, we have no authority to modify the new license in a manner that is inconsistent with the conditions of that certification. Instead, FPL Energy maintains that, although we may choose to incorporate any modifications or additions to a certification issued after the one-year deadline, we must treat such modifications as recommendations under section 10(a) of the Federal Power Act, rather than as mandatory conditions of the CWA section 401 certification. Under this view, FPL Energy asserts that we must incorporate, without modification, all conditions of the certification, and that we have no discretion to amend or remove them in response to the Maine Board's untimely revocation of certification.[11]

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[11] FPL Energy suggests that the outcome might be different if a court, rather than a state agency, subsequently voids the certification, stating: "As long as it is the state certifying agency itself (as opposed to a court) that subsequently invalidates the certification, the *Airport Communities* case holds that the federal agency must incorporate into the federal license the certification conditions issued within the one-year deadline." Request for rehearing at 11. As discussed above, we have been unable to locate any cases, other than our own, involving a certification that is voided after issuance of a federal license or permit. Therefore, we do not know whether there may be any basis for distinguishing between the actions of a state agency and a court in that regard. In any

13. In support of this argument, FPL Energy relies on *American Rivers v. FERC*[12] for the proposition that the Commission may not alter the conditions in a section 401 certification. The company states: "To allow a state certifying agency to timely issue a certification and then to reverse itself and deny certification after the deadline creates the exact problem Congress was attempting to prevent when it inserted the one-year deadline in section 401."[13] While we agree that, under *American Rivers*, the Commission has no authority to reject the conditions of a state certification issued in accordance with CWA section 401, this does not mean that the state itself cannot do so. Indeed, we find no support in *American Rivers* for the conclusion that the Commission may properly ignore a subsequent state determination that certification is void because the certifying agency used an improper legal standard in issuing it. In our view, a decision that certification is void is fundamentally different from a decision that amends the certification conditions but does not overturn the initial certification.

14. Insofar as we can determine, there are no reported cases addressing this latter issue other than our own. In *Richard Balagur*,[14] after the Commission issued a license for a proposed hydroelectric project, a state court invalidated the project's water quality certification, holding that the certification was void *ab initio* because the Vermont Water Resources Board lacked jurisdiction to issue it. The licensee filed a request for review with the court, but also requested a stay of the license pending resolution of the legal issues involved, arguing that the state court litigation could significantly affect the licensee's ability to proceed with the project. The Commission agreed and granted the

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event, as we noted in our order of September 21, 2004, we do not view the *Airport Communities* case as purporting to establish what action a federal agency can or should take if a state certification in support of a federal license or permit is subsequently invalidated. 108 FERC ¶ 61,261 at P 9. Rather, the case simply holds that an agency is not required to incorporate into a federal license or permit any certification conditions that are issued after the one-year deadline.

[12] 129 F.3d at 107.

[13] Request for rehearing at 13.

[14] 64 FERC ¶ 61,028 (1993). The project was never constructed, and the license was eventually terminated in accordance with a settlement agreement between the licensee and the state. *See* 75 FERC ¶ 61,053 (1996) (order lifting stay of license to allow for license termination); 76 FERC ¶ 62,100 (1996) (order accepting surrender of license).

stay. Similarly, in *OMYA, Inc.*,[15] the licensee of an existing hydroelectric project sought a stay of its new license pending resolution of state court proceedings concerning the project's water quality certification. The Vermont Water Resources Board had held that certification was void because the Board lacked jurisdiction to issue it, and both the licensee and the state of Vermont sought review of the Board's decision in state court. The licensee argued that it was unclear what conditions would be included in the new license, and that the certification conditions could render the project uneconomic. Finding that the Board's decision voiding the certification created confusion and uncertainty regarding the status and content of the new license, the Commission granted the stay.

15. Like FPL Maine Energy, OMYA had argued that, because the Board invalidated the certification after the one-year deadline, certification was waived because the certifying agency failed to act on the request within one year. The Commission did not find these circumstances appropriate to deem certification waived, because the certification was regarded as valid at the time it was issued. Noting that under section 401(a)(1), the Commission may not issue a license for a hydroelectric project unless the state certifying agency has either issued or waived certification, the Commission found that a stay of the new license was appropriate.[16]

16. We recognize that this approach creates some tension with respect to compliance with the one-year deadline for certification decisions in section 401. We are concerned, however, that to do otherwise would fail to give effect to section 401's admonition that a federal agency may not issue a license unless certification has either been issued or waived, and that no license may be issued if certification is denied. Accordingly, we conclude that in order to accommodate these objectives, the better course of action is to stay the license pending resolution of issues regarding the project's water quality certification.

17. Finally, FPL Energy argues that the Commission should hold that relicensing the Flagstaff Project does not require certification under CWA section 401 and that, therefore, the new license should remain unchanged except for the removal of any certification conditions that were based on the mandatory nature of the Maine Department's certification. Essentially, FPL Energy argues that section 401 requires

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[15] 65 FERC ¶ 61,376 (1993). The Commission subsequently amended the license to reflect new conditions included as a result of the licensee's certification appeal and lifted the stay. *See* 74 FERC ¶ 61,353 (1996). The court denied the licensee's appeal of certain provisions of the new license in *OMYA, Inc. v. FERC*, 111 F.3d 179 (D.C. Cir. 1997), and the project has continued to operate under the new license.

[16] 65 FERC ¶ 61,376 at 63,021.

certification for only those activities that may result in a "discharge of pollutants," as opposed to a "discharge" of clean water that is simply moved from one location to another.

18. In support, FPL Energy first argues that no certification is required because the project will not result in a discharge. Next, it argues that the project will not result in a discharge of pollutants. We must admit to some difficulty distinguishing the two arguments, because they seem to us to be closely related in FPL Energy's presentation of them. However, we will attempt to address them as discussed in the company's rehearing request.

19. The CWA does not define the term "discharge." Instead, it provides that "the term 'discharge' when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants."[17] Concerning its first argument that the project does not result in a discharge, FPL Energy maintains that the critical issue for determining whether water quality certification is required is "whether something is added from outside the water itself."[18] The company relies on the court's statement in *North Carolina v. FERC*[19] that "the word 'discharge' contemplates the addition . . . of a substance or substances."[20] FPL Energy further argues that this interpretation is confirmed by the court's decision in *Alabama Rivers*[21] that an increased flow through the project's turbines of water containing low levels of dissolved oxygen, which the company regards as "polluted water," constitutes a discharge for purposes of section 401. The company asserts that, because operation of the project does not add anything, pollutant or otherwise, to the water, but simply moves clean water from one part of the river to another, there is no activity that may result in a discharge within the meaning of section 401, and no certification is required.

20. *North Carolina* involved a withdrawal of water from the project reservoir and a corresponding decrease in the volume of water passing through the turbines, which the court concluded could not be a discharge. Similarly, although *Alabama Rivers* involved an increased rate of discharge through the turbines of water with low dissolved oxygen levels, it was not the addition of a substance to the water but the lack of it (that is, the

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[17] 33 U.S.C. § 1362(16) (emphasis added).

[18] Request for rehearing at 15.

[19] *North Carolina v. FERC*, 112 F.3d 1175 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998).

[20] *Id.* at 1187.

[21] *Alabama Rivers Alliance v. FERC*, 325 F.3d 290 (D.C. Cir. 2003).

absence of sufficient dissolved oxygen) that was the subject of the court's concern from a water quality standpoint. Therefore, it would seem that a "discharge" could occur without the addition of some substance to the water being discharged.

21. As we observed in our earlier order, there are a number of dam-induced changes to water quality that, while not constituting a discharge of pollutants so as to require a discharge permit under CWA section 402, may nevertheless cause a dam used for hydroelectric purposes to require certification under section 401.[22] Depending on how they are operated, dams and the reservoirs they impound can result in a discharge of water that is warmer or colder, more or less turbid, or containing greater or lesser amounts of dissolved gasses or sediments, including various contaminants, than would otherwise be the case for the body of water receiving the discharge. The stated purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[23] This purpose is served by construing section 401 to require certification of a discharge that involves some alteration of the chemical, physical, or biological integrity of the water, even if it does not involve the discharge of a pollutant or pollutants.[24]

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[22] *See National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982).

[23] 33 U.S.C. § 1251(a).

[24] As defined in the CWA, "pollutant" means "dredged solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The terms "discharge of a pollutant" and "discharge of pollutants" mean: "(A) any addition of any pollutant to navigable waters from any point source [and] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). The term "pollution" means "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water. 33 U.S.C. § 1362(19). Section 304 of the CWA expressly recognizes that water "pollution" may result from "changes in the movement, flow, or circulation of any navigable waters . . . , including changes caused by the construction of dams." 33 U.S.C. § 1314(f). This suggests that, just as the term "discharge" appears to contemplate a broader class of activities than the terms "discharge of a pollutant" or "discharge of pollutants," the term "pollution" appears to encompass alterations of water that might not otherwise constitute the discharge of a pollutant or pollutants.

22. As noted, FPL Energy asserts that project operation simply moves clean water from one location to another, adding nothing to the water that is released from the project dam. However, FPL Energy has not supported this contention. In fact, there is no evidence in the record regarding the characteristics of water upstream of the project. Thus, we are unable to find that operation of the project will not result in any discharge within the meaning of section 401.[25]

23. FPL Energy next argues that certification is not required because operation of the project will not result in a discharge of pollutants. To some extent, we have already addressed this argument above. However, the company raises some purely legal arguments that warrant further discussion. For example, FPL Energy relies on the fact that the definition of "discharge," provides that "the term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants."[26] However, the company goes on to read the word "includes" as a synonym for "means," claiming that Congress used the term "discharge" as nothing more than a shorthand expression for "discharge of a pollutant or pollutants." This interpretation ignores the plain meaning of the word "includes," which implies that the term "discharge" is broader than the phrase, "discharge of a pollutant, and a discharge of pollutants." Significantly, in all other definitions found in CWA section 502, Congress used the term "means," and it used the term "includes" only in connection with the term "discharge" or when specifying certain exclusions. We find no basis for reading the word "includes" out of the statute.[27]

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[25] *See City of Augusta, Georgia*, 109 FERC ¶ 61,210 (2004). By letters to the Commission Secretary dated January 12, 2005, and March 25, 2005, FPL Energy sought to introduce additional arguments in support of its rehearing request. We have not considered these arguments, because they constitute an untimely supplement to the rehearing request. *See* 18 C.F.R. § 385.713 (requiring that requests for rehearing be filed not later than 30 days after issuance of any final decision or other final order in a proceeding).

[26] 33 U.S.C. § 1362(16).

[27] FPL Energy also argues that, under established principles of statutory construction, where a general term is followed by specific words in an enumeration, the general term is construed to embrace only things that are similar in nature to those described by the specific words. Request for rehearing at 20. We find this argument unpersuasive, again because it ignores the plain meaning of the word "includes." A discharge might possibly be a matter of concern for water quality purposes without it constituting a discharge of a pollutant or pollutants.

24. FPL Energy also maintains that section 401 requires a state to certify compliance with specified sections of the CWA that are all concerned with controlling the discharge of pollutants. However, one of the listed sections is 303, which authorizes states to adopt water quality standards. Those standards consist of not only water quality criteria, but also designated uses of navigable waters.[28] Certification conditions may require compliance with both the designated uses and water quality criteria.[29] Again, it seems that protection of designated uses may require conditions that go beyond simply regulating or prohibiting the discharge of pollutants.[30]

25. Finally, FPL Energy maintains that certification is not required because relicensing will not "result in" any new discharge, but will merely authorize the continuation of a pre-existing discharge (assuming that one exists). We disagree. Relicensing represents a new commitment of public resources for the term of the new license, rather than a continuation of the *status quo*.[31] The project needs a new license to continue operating and must ultimately shut down if a new license cannot be obtained. Thus, any pre-existing discharge will not be authorized to continue in the future unless a new license is obtained. In this sense, relicensing is an activity that may result in a discharge because, without a new license, the discharge will not be authorized to continue.

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[28] The term "navigable waters" is defined broadly in the CWA to mean "waters of the United States." 33 U.S.C. § 1362(7).

[29] *See Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 715 (1994).

[30] FPL Energy also regards as significant the fact that, in several other definitional sections of the CWA, Congress used the phrase "but is not limited to" after the word "includes," but did not do so in the definition of "discharge." Request for rehearing at 21. We attach no special meaning to the absence of this phrase, as it simply amplifies the meaning of the word "includes" without changing it. FPL Energy further argues that no case law or precedent stands for the proposition that all FPA license applications trigger CWA review. In support, the company cites *North Carolina v. FERC*, 112 F.3d at 1188. This argument is overly broad, and proves nothing. The activity in that case involved a withdrawal of water from the project reservoir, and did not require certification because it did not result in any discharge. We will continue our practice of examining each application under the FPA to determine whether it may or may or may not require certification under CWA section 401.

[31] *See Confederated Tribes and Bands of the Yakima Nation v. FERC*, 746 F.2d 466, 475-76 (9th Cir. 1984).

The Commission orders:

The request for rehearing filed in this proceeding by FPL Energy Maine Hydro LLC on October 20, 2004, is denied.

By the Commission. Chairman Wood dissenting with a separate statement attached.
Commissioner Kelliher concurring with a separate statement
(S E A L) attached.
Commissioner Kelly not participating.

Linda Mitry,
Deputy Secretary.

United States of America
Federal Energy Regulatory Commission

FPL Energy Maine Hydro, LLC Project No. 2612-019

(Issued April 19, 2005)

WOOD, Chairman, dissenting:

I do not believe that section 401 of the Clean Water Act was intended to provide state water quality certification agencies with the ability to effectively toll certification requests, or otherwise interfere with the Commission's licensing process. Under this statute, the state agency must either issue certification or deny the certification request within one-year of receipt; otherwise, the certification is deemed waived.

Here, the Maine Board timely issued certification for the Flagstaff Project, which action the Commission relied upon when issuing its new project license. However, several months after we issued the license, the Maine Board opted to reverse its determination and denied certification.

The action of the Maine Board highlights the fact that some state agencies use the section 401 certification process in a manner that I do not believe was contemplated by Congress when it required those agencies to act on certification requests within "a reasonable period of time" not to exceed one year. Indeed, in this case, FPL Energy initially filed a request for certification in 1995, and withdrew and refiled it seven times, presumably under the threat that it if it did not do so, the Maine Board would deny the request. Then, after the Maine Board finally acted on, and granted certification, it reversed itself on appeal. Thus, in effect, the Maine Board took nine years to deny certification.

The result of actions such of those of the Maine Board in this case is that certification applicants are denied the prompt action that Congress mandated, the issuance of federal permits for environmentally-acceptable energy infrastructure projects is indefinitely delayed, and the validity of licenses which the Commission has determined are in the public interest is called into question. Such outcomes make a mockery of the one-year deadline that Congress established to ensure that the states act promptly and finally on certification requests. While it is not clear on the face of the Clean Water Act whether the Commission has the authority to determine that all aspects of a state's certification process, including administrative and judicial review, must be completed with one year of the filing of a certification request, I believe that actions such as the Maine Board's are so far outside of any reasonable construction of that act and of Congress' intent that this Commission should not countenance them.

For this reason, I would grant FPL Energy's request for rehearing, deem the certification issued by the Maine Board final for purposes of our action on the license application, and lift the stay.

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Pat Wood, III
Chairman

UNITES STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

FPL Energy Maine Hydro LLC Project No. 2612-019

(Issued April 19, 2005)

KELLIHER, Commissioner, *concurring*:

I support this order, but I am writing to express my concern about the way in which Clean Water Act section 401 programs are sometimes administered by state agencies in connection with projects licensed by the Commission.

The Clean Water Act is clear that state water quality certification agencies must act on a request for certification within one year. There is, unfortunately, a long history of this not happening. It is possible to identify cases in which it has taken state agencies years, or even decades, to issue section 401 water quality certifications.

Congress included this time limit in the Clean Water Act for a reason, namely to encourage efficient decisionmaking by state agencies and discourage obstructionism.[1] The importance of timely action within the time-frames established by Congress is self-evident. The failure to comply with those requirements is not a victimless breach of the law. Consumers, applicants, the environment, and good government, for example, may suffer from the failure by state agencies to act in a timely manner. It also frustrates the will of Congress.

This problem is not new. Past studies have identified the failure to timely issue water quality certificates as the most significant impediment to timely licensing of hydroelectric projects. That remains the case today.

[1] *Airport Communities Coalition v. Graves*, 280 F. Supp. 2d 1207, 1215-16 (W.D. Wash. 2003).

The licensing of hydroelectric projects requires greater dual federal-state cooperation than perhaps any other class of energy project. For that relationship to be productive, it is important that all participants fulfill their responsibilities in a timely manner. If that does not occur, the Commission may have no choice but to revisit its practice with respect to waivers.

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Joseph T. Kelliher