

170 FERC ¶ 61,135
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Southern California Edison Company

Project Nos. 67-133
120-028
2085-020
2086-039
2174-017
2175-021

DECLARATORY ORDER ON WAIVER OF WATER QUALITY CERTIFICATION

(Issued February 20, 2020)

1. Southern California Edison Company (SCE) is the licensee for the Big Creek Hydroelectric System, an integrated system with operations coordinated to maximize hydropower from the available water supply in the Upper San Joaquin River Watershed. The system comprises seven projects; applications to relicense six of these projects are pending before the Commission.¹ On June 17, 2019, SCE filed a petition for an order declaring that the California State Water Resources Control Board (California Board) has waived its authority under section 401(a)(1) of the Clean Water Act² (CWA) to issue water quality certification with respect to the relicensing of the six projects. This order grants the petition.

I. Background

2. SCE's petition for declaratory order covers the following projects: Big Creek Nos. 2A, 8, and Eastwood Project No. 67; Big Creek No. 3 Project No. 120; Mammoth Pool Project No. 2085; Big Creek Nos. 1 and 2 Project No. 2175 (the Big Creek ALP³

¹ The Commission issued a new license for the Big Creek No. 4 Hydroelectric Project No. 2017 on December 4, 2003. *S. Cal. Edison Co.*, 105 FERC ¶ 62,146 (2003).

² 33 U.S.C. § 1341(a)(1) (2018).

³ SCE prepared the applications for these four projects pursuant to the Commission's Alternative Licensing Process (ALP) regulations at 18 C.F.R. § 4.34 (2019).

projects); Vermilion Valley Project No. 2086 (Vermilion Valley); and Portal Project No. 2174 (Portal). The licenses for the projects expired between 2003 and 2009, and SCE filed timely applications for new licenses between 2001 and 2007.⁴

3. 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, as would result from operation of the Big Creek Hydroelectric System projects, must provide to the licensing or permitting agency a water quality certification from the state in which the discharge originates or evidence of waiver thereof.⁵ 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.⁶

4. SCE requested water quality certification for Vermilion Valley on August 29, 2001, and the California Board received the application the same day.⁷ By letter dated August 16, 2002, SCE withdrew its application.⁸ On October 22, 2003, SCE filed a new request for certification.⁹ Thereafter, SCE simultaneously withdrew and refiled its

⁴ The licenses for three of the Big Creek ALP projects expired on February 28, 2009, and the fourth expired on November 30, 2007. *See S. Cal. Edison Co.*, 18 F.P.C. 829, 833 (1957); *S. Cal. Edison Co.*, 21 F.P.C. 419, 422 (1959); *S. Cal. Edison Co.*, 59 F.P.C. 1810, 1819 (1977); *S. Cal. Edison Co.*, 4 FERC ¶ 61,147, at 61,323 (1978). SCE filed applications for new licenses on February 23, 2007, and November 29, 2005, respectively. The license for Portal expired on March 31, 2005. *See S. Cal. Edison Co.*, 14 F.P.C. 672, 674 (1955). SCE filed an application for a new license on March 27, 2003. The license for Vermilion Valley expired on August 31, 2003. *See S. Cal. Edison Co.*, 12 F.P.C. 1267, 1269 (1953). SCE filed an application for a new license on August 30, 2001. SCE currently operates the projects under annual licenses pending disposition of its new license applications.

⁵ *See* 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).

⁶ 33 U.S.C. § 1341(a)(1).

⁷ Southern California Edison Co. June 17, 2019 Petition for Declaratory Order (Petition for Declaratory Order), Attachment D at 1-2.

⁸ *Id.*, Attachment D at 3.

⁹ *Id.*, Attachment D at 7-8.

request on October 12, 2004,¹⁰ October 12, 2005, September 28, 2006, June 20, 2007, and June 6, 2008.¹¹

5. SCE requested water quality certification for Portal on March 26, 2003, and the California Board received SCE's application on March 27, 2003.¹² By letter dated July 27, 2004, SCE submitted a new request for certification, stating that it had withdrawn its initial application in early 2004 at the recommendation of California Board staff.¹³ Thereafter, SCE simultaneously withdrew and refiled its request on July 5, 2005, June 28, 2006, June 20, 2007, and June 6, 2008.¹⁴

6. SCE requested water quality certification for the Big Creek ALP projects on March 4, 2008.¹⁵

7. On November 10, 2008, the California Board notified the Commission that it intended to issue a single water quality certification covering the six pending projects, and further stated that if the one-year period for certification was insufficient, staff would recommend that SCE withdraw and refile its request.¹⁶ Thereafter, SCE withdrew

¹⁰ Southern California Edison, Letter dated October 12, 2004, Docket No. P-2086-000 (filed Oct. 27, 2004).

¹¹ Petition for Declaratory Order, Attachment D at 26-27, 32-33, 36-37, 49-50.

¹² Southern California Edison, Letter dated March 26, 2003, Docket No. P-2174-012 (filed March 27, 2003); Petition for Declaratory Order, Attachment D at 6.

¹³ See Petition for Declaratory Order, Attachment D at 18-19.

¹⁴ *Id.*, Attachment D at 24-25, 30-31, 36-37.

¹⁵ *Id.*, Attachment D at 38-48.

¹⁶ California Board November 10, 2008 Comments on the Draft Environmental Impact Statement for the Big Creek Hydroelectric Projects at 1. As early as 2007, the Vermilion Valley and Portal withdrawal and resubmittal correspondence between the California Board and SCE reflects that the California Board sought to ultimately issue a single certification for all six pending Big Creek Hydroelectric System projects. See, e.g., Petition for Declaratory Order, Attachment D at 36-37 (reproducing the June 20, 2007 letter from SCE to the California Board).

and resubmitted a single certification request for all six projects by letters dated February 24, 2009, February 11, 2010, January 27, 2011, January 12, 2012, January 3, 2013, December 17, 2013, December 10, 2014, December 8, 2015, November 30, 2016, and November 20, 2017.¹⁷ The California Board actively participated in this process, at times directly requesting the withdrawal and refiling.¹⁸

8. During some years, approximately one month after SCE's withdrawal and resubmittal, the California Board would send SCE letters acknowledging SCE's

¹⁷ Petition for Declaratory Order, Attachment D at 51-53, 56-58, 62-73, 81-83, 86-91, 95-97, 100-102, 108-109.

¹⁸ See, e.g., *id.*, Attachment D at 79, Email dated December 6, 2012 from Scott Frazier, California Board to Wayne Allen, SCE ("Unfortunately, the [Board] will not be able to issue water quality certification for [SCE's] six Big Creek Hydroelectric Projects . . . before January 17, 2012. As such, I would like to request that you submit a letter withdrawing and simultaneously resubmitting SCE's application prior to January 17."); *id.* at 84-85, Email dated December 6, 2013 from Scott Frazier, California Board to Wayne Allen, SCE ("The [Board] will not be able to issue the water quality certification for the Six Big Creek Hydroelectric Projects . . . by January 3, 2014. As such, I would like to request that [SCE] withdraw and simultaneously resubmit its application for water quality certification no later than Friday, December 20, 2013."); *id.* at 93-94, Email dated November 23, 2015 from Oscar Biondi, California Board to Wayne Allen, SCE ("[T]he currently filed request for water quality certification will expire on December 11, 2015. Could you please send a letter . . . withdrawing and resubmitting the request for water quality certification?"); *id.* at 99, Email dated November 29, 2016 from Meiling Roddam, California Board to Wayne Allen, SCE ("The action date for the 401 Water Quality Certification for the Six Big Creek Projects is December 8, 2016. If you could kindly send me the withdrawal and resubmittal letter by Monday, December 5, I would very much appreciate it."); *id.* at 107, Email dated November 20, 2017 from Meiling Colombano, California Board to Wayne Allen, SCE ("The action date for the 401 Water Quality Certification for the Six Big Creek Projects is November 30, 2017. If you could kindly send me the withdrawal and resubmittal letter by Monday, November 27, I would very much appreciate it.").

withdrawal and resubmittal request. The March 24, 2009, March 8, 2010, and February 15, 2012 acknowledgment letters included the following language:

If SCE does not provide any requested supplemental information soon enough for the State Water Board to properly review it before the one year federal period for certification expires, State Water Board staff will recommend denial of water quality certification without prejudice. (Cal. Code Regs., tit. 23, §3837(b)(2).) Alternatively, SCE could choose to withdraw its request for water quality certification and file a new request for water quality certification (Cal. Code Regs., tit. 23, §3836(c)).¹⁹

The statement regarding “requested supplemental information” notwithstanding, the record does not reflect that the California Board asked SCE for additional information, as discussed below.

9. On August 13, 2018, the California Board issued for public comment a draft water quality certification for the six projects.²⁰ Notice of the draft certification established a comment deadline of October 12, 2018, which was extended to December 7, 2018. On December 6, 2018, SCE filed comments on the draft. However, on November 16, 2018, before the public comment period closed, the California Board denied, without prejudice, SCE’s certification request.²¹ SCE did not file a new certification application.

10. On January 25, 2019, the United States Court of Appeals for the District of Columbia Circuit issued an opinion in *Hoopa Valley Tribe v. FERC (Hoopa Valley)*,²² ruling that, where a state and an applicant agree to repeatedly withdraw and refile the same water quality certification request, the state had waived certification.

11. On May 31, 2019, with no application pending before it, the California Board issued a final water quality certification for the six Big Creek Hydroelectric System projects.²³

¹⁹ *Id.*, Attachment D at 54-55, 59-60, 74-75.

²⁰ *Id.*, Attachment B at 24.

²¹ *Id.*, Attachment C.

²² 913 F.3d 1099 (D.C. Cir.) (rejecting a coordinated withdrawal-and-resubmission scheme between the applicant and the state certifying agency), *cert. denied*, 140 S. Ct. 650 (2019).

²³ *See* Petition for Declaratory Order, Attachment B.

12. On June 17, 2019, SCE filed the instant petition for declaratory order, citing *Hoopa Valley* and asking the Commission to declare that the California Board had waived its certification authority with regard to the relicensing of the six Big Creek Hydroelectric System projects.

II. Discussion

A. Procedural Issues

13. On July 8, 2019, the Commission issued public notice of SCE's petition, setting July 23, 2019, as the deadline for intervening, protesting, or filing comments. A coalition of conservation groups²⁴ filed a timely motion to intervene and protest, and the California Board filed a timely notice of intervention and protest.

14. On August 7, 2019, SCE filed an answer to the protests. Rule 213(a) of the Commission's Rules of Practice and Procedure²⁵ prohibits answers to protests unless otherwise ordered by the Commission. Here, we do not find this answer to provide additional information that would be helpful in our decision-making. Therefore, this pleading is rejected as an impermissible answer.

15. The conservation groups argue that SCE should be required to refile its petition with a certificate of service as required by Rule 2010(j) of the Commission's Rules of Practice and Procedure.²⁶ SCE filed its petition under Rule 207(a)(2), which initiated a new Commission proceeding.²⁷ Therefore, at the time of SCE's filing, no additional parties existed for SCE to serve.²⁸ Moreover, the conservation groups have clearly demonstrated they received notification of the petition, as evidenced by their timely filing of a protest and motion for intervention.

²⁴ American Rivers, American Whitewater, California Sportfishing Protection Alliance, Friends of the River, South Yuba River Citizens League, and Trout Unlimited (the conservation groups).

²⁵ 18 C.F.R. § 385.213(a)(2) (2019).

²⁶ Conservation Groups July 23, 2019 Motion to Intervene in Opposition at 7 (citing 18 C.F.R. § 385.2010(j) (2019)) (Conservation Groups Motion).

²⁷ Notice of Petition for Declaratory Order, July 8, 2019 (assigning new subdockets).

²⁸ 18 C.F.R. § 385.2010(a)(1)(i) (requiring a "participant filing a document in a proceeding [to] serve a copy of the document on . . . [e]ach person whose name is on the official service list . . . for the proceeding or phase of the proceeding").

B. Waiver Determination

16. At issue here is the “waiver” provision in section 401(a)(1) of the CWA. As noted above, section 401(a)(1) limits the time for a state certifying agency, here the California Board, to act on a request for certification to one year after receipt of such request.²⁹

1. Hoopa Valley

17. SCE argues that, consistent with *Hoopa Valley* and the Commission’s application of *Hoopa Valley* in *Placer County Water Agency (Placer County)*,³⁰ the California Board waived its authority under CWA section 401 by engaging, for over ten years, in a withdrawal and resubmittal scheme that delayed the Commission’s ability to act on the pending relicense applications for the Big Creek Hydroelectric System projects.

18. The California Board and conservation groups disagree, arguing that *Hoopa Valley* is distinguishable from the Big Creek water quality certification process. As discussed in detail below, the California Board and conservation groups assert that *Hoopa Valley* does not support a finding of waiver here because: (1) there was no agreement to delay issuance of the water quality certification; (2) SCE cannot now claim that the voluntary withdrawal and resubmittal of its certification application is impermissible; and (3) there was no indefinite delay as the California Board issued a final certification on May 31, 2019.

19. In *Hoopa Valley*, the court answered in the affirmative the question of “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.”³¹ The court concluded that where a licensee each year³² sent a “letter indicating withdrawal of its water quality certification request and resubmission of the very same,”³³ “[s]uch an arrangement does not exploit a statutory loophole; it serves to circumvent [the Commission’s]

²⁹ 33 U.S.C. § 1341(a)(1).

³⁰ *Placer County Water Agency*, 167 FERC ¶ 61,056, at P 16 (Placer County Declaratory Order), *reh’g denied*, 169 FERC ¶ 61,046 (2019).

³¹ 913 F.3d at 1103.

³² The withdrawal/resubmission letter was sent before the 365th day since the prior resubmission of its certification application.

³³ *Hoopa Valley*, 913 F.3d at 1104.

congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.”³⁴ 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.”³⁵

20. Thereafter, 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.³⁶ There, the licensee submitted evidence that the state sent it emails about each upcoming one-year deadline for the purpose of eliciting a withdrawal and submission.³⁷ One email mentioned denial without prejudice as the alternative if the licensee did not withdraw its pending application, and two of the emails explicitly requested withdrawal and resubmission.³⁸ Based on the record evidence, we determined that both the state and the licensee worked to ensure that withdrawal and resubmission would take place each year, creating a procedure that delayed a certification decision by over six years, and that those actions amounted to an ongoing agreement.³⁹ Based on this functional agreement and the fact that a new application was never filed with the annual withdrawal/resubmission letters, but rather the parties only exchanged correspondence indicating that the licensee would refile without actually doing so, we concluded that the California Board waived its certification authority.⁴⁰

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Placer County Declaratory Order*, 167 FERC ¶ 61,056 at P 16; *see also McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185, at PP 33-38 (2019); *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129 (Constitution Remand Order), *reh’g denied*, 169 FERC ¶ 61,199 (2019).

³⁷ *Placer County Water Agency*, 169 FERC ¶ 61,046, at P 17 (2019) (*Placer County Rehearing Order*).

³⁸ *Id.*

³⁹ *Placer County Declaratory Order*, 167 FERC ¶ 61,056 at PP 12, 16.

⁴⁰ *Id.* PP 12, 18.

a. **There Was an Agreement between SCE and the California Board**

21. The California Board and the conservation groups contend that the California Board did not waive its authority under section 401, as interpreted and applied in *Hoopa Valley*, because the California Board did not enter into a formal agreement with SCE to defer action on the requests for water quality certification.⁴¹ The protesting parties assert that *Hoopa Valley* is applicable only in cases involving a formal, written agreement calling for withdrawal and resubmission.⁴²

22. Next, the California Board argues that there was not even an informal agreement to avoid waiver or delay certification. The California Board explains that its communications with SCE were not an agreement; rather, it repeatedly notified SCE that SCE should withdraw its request before the approaching one-year deadline if it desired to avoid denial without prejudice.⁴³ The California Board further explains that it considered each request separately and would have timely denied the requests without prejudice if SCE had not withdrawn them, but that SCE's voluntary withdrawal of the requests relieved the California Board's obligation to approve or deny them.⁴⁴ Both the California Board and the conservation groups claim that the California Board did not direct SCE to withdraw and refile, characterizing the withdrawal and refiling process as a choice made alone by SCE.⁴⁵ The California Board asserts that it did not waive its section 401 authority because it at no time failed or refused to act on a request for certification beyond the statute's one-year deadline; rather, the California Board repeatedly made clear to SCE that its application would be denied.⁴⁶

⁴¹ California Board July 23, 2019 Notice of Intervention at 2-3 (California Board Notice); Conservation Groups Motion at 6.

⁴² California Board Notice at 2-3 (quoting *Hoopa Valley*, 913 F.3d at 1103); Conservation Groups Motion at 6.

⁴³ California Board Notice at 3.

⁴⁴ *Id.* at 3-4 (quoting Petition for Declaratory Order, Attachment D at 54).

⁴⁵ *Id.*; Conservation Groups Motion at 6.

⁴⁶ California Board Notice at 3.

23. We disagree. First, although the record⁴⁷ does not include a formal, written agreement, as we have previously explained, the absence of a formal agreement between the state and the applicant does not distinguish *Hoopa Valley*.⁴⁸ The record here indicates not only that the state coordinated with SCE as SCE withdrew and resubmitted its certification request for the purpose of avoiding the waiver period, but that the state effectively directed SCE to do so.

24. There is ample evidence in the record showing the California Board's direct participation in the withdrawal and resubmittal scheme. First, in 2008, the California Board filed comments with the Commission regarding the Big Creek certification requests in which it noted the date that the certification applications were filed for each of the projects and stated:

Each letter initiates a one-year time clock for the State Water Board to act on the request for [water quality certification]. If the one year federal period for certification is insufficient for the State Water Board to act, staff will recommend that SCE withdraw and resubmit their request for [water quality certification] for the six Big Creek projects.⁴⁹

The Board's comments do not mention denial without prejudice as an alternative option to withdrawal and resubmittal.

25. Thereafter, California Board staff sent emails to SCE in 2012, 2013, 2015, 2016, and 2017, which note the upcoming one-year deadline and explicitly request withdrawal and resubmission.⁵⁰ Contrary to the California Board's description of SCE's withdrawals as solely voluntary actions, this record demonstrates that the California Board

⁴⁷ Because the record for the six Big Creek Hydroelectric System projects converges in 2008, we focus our analysis of whether the California Board waived its authority under section 401(a)(1) from 2008 forward.

⁴⁸ Placer County Rehearing Order, 169 FERC ¶ 61,046 at PP 16-18; *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 at P 37; Constitution Remand Order, 168 FERC ¶ 61,129 at PP 33-34.

⁴⁹ California Board November 10, 2008 Comments on the Draft Environmental Impact Statement for the Big Creek Hydroelectric Projects at 1.

⁵⁰ See *supra* P 7 & n.18; Petition for Declaratory Order, Attachment D (reproducing email messages). Only the 2012 email thread mentions denial without prejudice as an alternative. See Petition for Declaratory Order, Attachment D at 77-78, Email dated December 28, 2012 from Scott Frazier, California Board to Wayne Allen, SCE.

communicated about, expected, and requested SCE's withdrawal and resubmission to circumvent the CWA's one-year deadline. These actions amount to an ongoing agreement with SCE that let the California Board usurp the Commission's control over whether and when new licenses would issue for the six Big Creek Hydroelectric System projects.⁵¹ This coordination between the state and SCE is sufficient to find waiver as it prejudiced the Commission by delaying our licensing proceeding and undermining the Commission's regulation of the six Big Creek Hydroelectric System projects, in direct contravention of the CWA, as construed by the *Hoopa Valley* court.⁵² Even absent this evidence, prior to and upon receipt of each withdrawal, the California Board had the option of denying certification within the one year it was afforded under the CWA. Therefore, by accepting each of SCE's withdrawal/resubmission letters, the California Board consented to the scheme of resetting the one-year deadline.

26. In response to the California Board's argument that SCE voluntarily and unilaterally submitted new requests in order to avoid a denial without prejudice, we point out that we recently considered and rejected a similar argument in *Constitution Pipeline Co., LLC*.⁵³ There, the state argued that the applicant resubmitted two certification requests in response to the state's indication that more time was necessary to obtain and review additional information.⁵⁴ The state claimed that it would have likely denied the applications otherwise.⁵⁵ According to the state, the parties intended not to evade section 401's requirements but to allow the applicant to avoid denial without prejudice while the state actively reviewed the new request.⁵⁶ We rejected that argument, noting that no evidence established that these representations were ever conveyed to the applicant and finding that the parties functionally agreed to exploit the withdrawal and resubmission process, resulting in waiver.⁵⁷ We also found that the state's claimed active and ongoing review did not cure the violation of section 401.⁵⁸

⁵¹ See *Hoopa Valley*, 913 F.3d at 1104.

⁵² See *id.*

⁵³ Constitution Remand Order, 168 FERC ¶ 61,129.

⁵⁴ *Id.* P 32.

⁵⁵ *Id.* P 33.

⁵⁶ *Id.* P 35.

⁵⁷ *Id.* PP 33, 37.

⁵⁸ *Id.* P 37.

27. Here, several of the California Board's acknowledgement letters, sent soon after receiving SCE's withdrawal/resubmittal letter, contained stock language mentioning denial without prejudice as a possibility if SCE failed to provide supplemental information in a timely manner and offered withdrawal and resubmittal as an alternative.⁵⁹ However, there is no evidence that the California Board actually requested supplemental information or that SCE's subsequent resubmittal letters included any new or different information at all. Rather, the California Board's acknowledgement letters merely included general language referencing a scenario that never materialized. Moreover, as noted above, only one of the five emails from the California Board to SCE soliciting SCE's withdrawal and resubmission mentions the possibility that the California Board may deny SCE's application.⁶⁰

28. The California Board's claim that it never failed or refused to act on a request for certification within one year of a pending request is misleading. Here, nothing in the record indicates that between 2009 and 2017, SCE ever filed a new application.⁶¹ Where no new section 401 application was actually refiled—e.g., because the parties only exchanged correspondence indicating that they would refile without actually doing so—there is not a new filing with a new deadline within which the California Board may timely act. Thus, at a minimum,⁶² we find that the California Board failed to act within the one-year period on SCE's February 24, 2009 application for the six Big Creek projects, hereby waiving its certification authority under section 401.

29. In conclusion, we are not persuaded by the California Board's attempt to distinguish the withdrawals and resubmittals of SCE's certification request from the facts of *Hoopa Valley*. We conclude that the California Board's actions and inactions

⁵⁹ See *supra* P 8.

⁶⁰ See *supra* note 50.

⁶¹ See Petition for Declaratory Order at 20 and Attachment D.

⁶² As noted above, see *supra* note 47, for ease of analysis, this order only considers whether there is waiver starting with the first filing where all six Big Creek Hydroelectric System projects were consolidated into a single certification request, a letter to the California Board dated February 24, 2009. Because we find that the California Board waived its certification authority in the years between 2010 and 2017, this order does not examine whether there was waiver prior to 2010 with respect to the certification applications previously submitted for the six projects: Vermilion Valley (first filed on August 29, 2001), Portal (first filed on March 26, 2003), or the Big Creek ALP projects (first filed on March 4, 2008).

regarding the withdrawals and resubmittals resulted in waiver, consistent with the *Hoopa Valley* opinion and our application in *Placer County*.

b. SCE Prohibited from Claiming Withdrawal and Resubmittal Impermissible

30. Next, the California Board asserts that SCE should not be allowed to profit by complaining about a delay to which its own actions contributed. As we have explained, the “state’s reason for delay . . . [is] immaterial.”⁶³ The plain language of section 401 establishes a bright-line rule with respect to the beginning of review: “the timeline for a state’s action regarding a request for certification ‘shall not exceed one year’ after ‘receipt of such request.’”⁶⁴ Moreover, the California Board’s contention that SCE’s actions contributed to the delay ignores its own role in the process.

31. The California Board further seeks to distinguish *Hoopa Valley* by noting that *Hoopa Valley* involved a lawsuit by a third-party tribe seeking to enforce the CWA.⁶⁵ The Commission recently addressed a similar argument in *Placer County*, which granted a request for a declaratory order and determined that a state had waived its section 401 authority by working to ensure that withdrawal and resubmission would take place each year as part of an ongoing agreement with the licensee.⁶⁶ The Commission explained that nothing in *Hoopa Valley* rested on the identity of the party that brought the case. Instead, the *Hoopa Valley* decision interpreted the legal requirements of the CWA, which should not differ based on the identity of the litigants.⁶⁷ We affirm that finding here.

c. No Indefinite Delay

32. Both the California Board and the conservation groups assert that a finding of waiver will not prevent further delay, as the California Board issued a final water quality certification on May 31, 2019.⁶⁸ The one-year waiver period is a statutory deadline, and

⁶³ Placer County Rehearing Order, 169 FERC ¶ 61,046 at P 20.

⁶⁴ See, e.g., *New York DEC v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018).

⁶⁵ California Board Notice at 4.

⁶⁶ Placer County Declaratory Order, 167 FERC ¶ 61,056 at PP 12, 16; see also Constitution Remand Order, 168 FERC ¶ 61,129 at PP 29-30 (rejecting same argument).

⁶⁷ Placer County Declaratory Order, 167 FERC ¶ 61,056 at P 14.

⁶⁸ See California Board Notice at 4; Conservation Groups Motion at 6; Petition for Declaratory Order, Attachment B.

where, as here, the state certifying agency has waived its section 401 authority to issue a water quality certification, the later grant of a water quality certification has “no legal significance.”⁶⁹ Conservation groups incorrectly argue that “it is not the purview of the Commission” and rather a matter of state procedure to decide whether the California Board’s May 31, 2019 water quality certification is valid.⁷⁰ Since the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency either has issued water quality certification for the project or has waived certification under section 401(a)(1) of the CWA, determining whether the California Board’s water quality certification is valid falls precisely within the Commission’s purview.⁷¹ Moreover, because the certification has no effect, the California Board’s objection to SCE’s characterization of its issuance as unexpected is misplaced.⁷²

33. The California Board and the conservation groups also object to SCE’s citations to agency guidance and state procedural regulations as improper bases for finding waiver.⁷³

⁶⁹ *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 700-701 (D.C. Cir. 2017) (declining the project sponsor’s request that the court set a deadline for agency action, explaining that after waiver “there is nothing left for the [agency] . . . to do” and “the [agency’s] decision to grant or deny would have no legal significance”); *Weaver’s Cove Energy, LLC v. Rhode Island Dep’t of Env’tl. Mgmt.*, 524 F.3d 1330, 1333 (D.C. Cir. 2008) (explaining that after waiver, states’ preliminary decisions under section 401 “would be too late in coming and therefore null and void”); *see also* Placer County Rehearing Order, 169 FERC ¶ 61,046 at P 24 & n.60. We note that even where a certification is legally void, our general policy, where time permits, is to review any certification conditions as recommendations under section 10(a) of the Federal Power Act. *See FFP Missouri 15, LLC*, 162 FERC ¶ 61,237, at PP 4, 15 (2018) (explaining Commission practice of considering certification conditions as recommendations where state waived its certification authority).

⁷⁰ Conservation Groups Motion at 7.

⁷¹ *See Green Island Power Auth. v. FERC*, 577 F.3d 148, 151 (2d Cir. 2009) (explaining the Commission’s role in determining whether a certification has been granted or waived in the hydropower context); *cf. Millennium Pipeline Co.*, 860 F.3d at 698 (explaining the same in the natural gas context).

⁷² California Board Notice at 5-6

⁷³ *See, e.g., id.* at 6 (“SCE’s suggestion that the State Water Board’s issuance of the certification on May 31, 2019 violates the United States Environmental Protection Agency’s guidance document, which was issued the following week, and SCE’s contention that the Commission should evaluate the State Water Board’s action in issuing the certification, are not proper basis for declaring a waiver of

Our finding of waiver, however, is not based on these arguments, but rather rests on the record before us and applicable court and Commission precedent interpreting the CWA.

2. Retroactive Application of *Hoopa Valley*

34. The California Board asserts that *Hoopa Valley* should not be retroactively applied to the Big Creek water quality certification application. The California Board claims that determining that withdrawal and resubmittal of a certification request is grounds for waiver departs from the Commission's past practice and should only be applied prospectively.⁷⁴ Alternatively, the California Board argues that equitable tolling should apply to limit *Hoopa Valley* to prospective application.⁷⁵

35. As we recently explained, *Hoopa Valley* "simply enforces the plain language of the existing statute, as opposed to invalidating a rule previously in force or announcing a wholly new rule."⁷⁶ For this reason, the California Board's argument regarding past practice is misplaced. The California Board cites *Wyoming Valley Hydro Partners*, a rehearing order in which the Commission, while ultimately dismissing the rehearing request as premature,⁷⁷ clarified the applicability of two existing regulations it had promulgated, which both announced changes to existing Commission policy.⁷⁸ Here, we are not announcing a new Commission policy; rather, we are following *Hoopa Valley*'s articulation of the plain meaning of section 401 of the CWA.⁷⁹ As we described, "legal rules announced in judicial decision-making typically have retroactive effect and

certification and should be dismissed."); Conservation Groups Motion at 6-7 (arguing that whether the California Board's issuance contradicts its own instructions to SCE is an issue that must be resolved under state law).

⁷⁴ California Board Notice at 5 (citing *Wyo. Valley Hydro Partners*, 58 FERC ¶ 61,219, at 61,694 (1992)).

⁷⁵ *Id.*

⁷⁶ *Constitution Pipeline Co., LLC*, 169 FERC ¶ 61,199, at P 30 (2019) (Constitution Rehearing Order).

⁷⁷ *Wyo. Valley Hydro Partners*, 58 FERC at 61,693.

⁷⁸ *Id.* at 61,693-94.

⁷⁹ *See* Constitution Rehearing Order, 169 FERC ¶ 61,199 at P 30.

‘[r]etroactivity is the norm in agency adjudications[,]’ . . . ‘no less than in judicial adjudications.’”⁸⁰

36. We also remain unconvinced that equitable tolling should apply to limit *Hoopa Valley*’s application. We reiterate our previous finding that notwithstanding the Commission’s past construction of section 401, we must resolve cases before us based on current law, and the *Hoopa Valley* court did not limit its ruling to prospective cases.⁸¹ We see no justification for not applying *Hoopa Valley* here.

C. May 31, 2019 Water Quality Certification

37. SCE questions the validity of the California Board’s May 31, 2019 water quality certification.⁸² As we have long held, once a state agency has waived its authority to act on a water quality certification application, the water quality conditions are not mandatory and acceptance of the conditions is a matter within the federal agency’s discretion.⁸³ Accordingly, in the individual relicensing proceedings, the Commission will consider all of the May 31, 2019 certification conditions as recommendations under section 10(a)(1) of the Federal Power Act.⁸⁴

The Commission orders:

Southern California Edison Company’s June 17, 2019 petition for declaratory order is granted. The Commission determines that the California State Water Control Board waived its water quality certification authority under section 401 of the Clean Water Act with respect to the relicensing of the Big Creek Nos. 2A, 8, and Eastwood Project No. 67; Big Creek No. 3 Project No. 120; Mammoth Pool Project No. 2085;

⁸⁰ *Id.* P 31 (quoting *Am. Telephone and Telegraph Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006)).

⁸¹ See Placer County Declaratory Order, 167 FERC ¶ 61,056 at P 15 (“The *Hoopa Valley* court did not in any way indicate that its ruling was limited solely to the case before it, and to conclude that the court’s decision does not apply to similarly-situated cases would fail to give full effect to that ruling. We are aware of no sound legal or equitable basis for doing so.”); see also Constitution Rehearing Order, 169 FERC ¶ 61,199 at PP 29-34 (providing an in-depth discussion of the Commission’s application of *Hoopa Valley*); Placer County Rehearing Order, 169 FERC ¶ 61,046 at P 25.

⁸² Petition for Declaratory Order at 25-28.

⁸³ See *Central Vermont Public Service Corp.*, 113 FERC ¶ 61,167, at P 20 (2005).

⁸⁴ 16 U.S.C. § 803(a)(1) (2018).

Vermilion Valley Project No. 2086; Portal Project No. 2174; and Big Creek Nos. 1 and 2 Project No. 2175.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.