

171 FERC ¶ 61,139
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Yuba County Water Agency

Project No. 2246-065

ORDER ON WAIVER OF WATER QUALITY CERTIFICATION

(Issued May 21, 2020)

1. On August 22, 2019, as supplemented on September 4, 2019, Yuba County Water Agency d/b/a Yuba Water Agency (Yuba County), licensee for the Yuba River Development Project No. 2246 (Yuba River Project), filed a request for the Commission to determine that the California State Water Resources Control Board (California Board or Board) waived its authority under section 401(a)(1) of the Clean Water Act (CWA)¹ to issue water quality certification for relicensing the Yuba River Project. This order makes such a determination.

I. Background

2. On May 16, 1963, the Commission issued Yuba County a 50-year license to construct, operate, and maintain what is now the Yuba River Project.² The license expired on April 30, 2016. Yuba County continues to operate the project under an annual license.

3. On April 28, 2014, Yuba County filed an application for a new license for the project and on June 5, 2017, it amended its application. On June 26, 2017, the Commission issued a notice accepting the application and indicating that it was ready for environmental analysis.

4. 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

¹ 33 U.S.C. § 1341(a)(1) (2018).

² *Yuba County Water Agency*, 29 FPC ¶ 1002 (1963). The Commission issued an order amending the license in 1966 and changed the effective date of the license from May 1, 1963 to May 1, 1966. *Yuba County Water Agency*, 35 FPC ¶ 691 (1966).

United States – like Yuba County’s operation of the Yuba River 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.³ 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.⁴

5. Yuba County requested water quality certification for the project on August 24, 2017, and the California Board received the application the same day.⁵ In its September 21, 2017 letter to Yuba County acknowledging receipt, the Board confirmed that “[Yuba County’s] letter initiates a one-year deadline from the date it was received for the [Board] to act on the request for certification” and the “deadline for certification action is August 24, 2018.”⁶ The Board did not suggest that the application was incomplete.

6. Staff from the Board emailed Yuba County on July 25, 2018, stating that the action date for the Yuba River Project was August 24, 2018; inquiring about the filing of a California Environmental Quality Act (CEQA) document for the project, noting that without the CEQA document the California Board could not complete its environmental analysis; and directing Yuba County to “submit a withdraw/resubmit of the certification application as soon as possible.”⁷ On the same day, Yuba County replied “we plan to

³ 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).

⁴ 33 U.S.C. § 1341(a)(1).

⁵ 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) (2019), Yuba County filed a copy of the request with the Commission, including proof of the date of receipt of the request. Yuba County August 25, 2017 filing, attaching a date-stamped Copy of Request for Certification.

⁶ California Board September 21, 2017 Letter Confirming Receipt of Water Quality Certification Application at 1 (filed with the Commission on October 2, 2017).

⁷ July 25, 2018 Email from Mr. Philip Choy, California Board to Mr. Geoff Rabone, Yuba County, and Mr. Jim Lynch, Consultant to Yuba County. Yuba County August 22, 2019 Petition for Waiver Determination (Petition for Waiver) Appendix B at 7.

submit the withdrawal/resubmittal letter on August 20. Will that work for you?”⁸ Later on July 25, 2018, the Board told Yuba County that “management usually gets a little antsy when our action date gets below 3 weeks because a ‘deny without prejudice’ letter takes time to route to our Executive Director. If possible, please submit the letter by next Friday.”

7. On August 3, 2018, Yuba County withdrew and resubmitted its application for water quality certification.⁹ Yuba County’s application stated that the “[p]roject has not changed, so the June 2, 2017 Amended [Final License Application], which the State Water Board has on file, contains all information required for a complete application for water quality certification.” The Board acknowledged receipt of the application on August 22, 2018, stating that the August 3, 2018 letter “serves as a formal withdrawal and re-filing request for certification” and the “new deadline for certification is August 3, 2019.”¹⁰ The Board did not dispute Yuba’s statements that the project had not changed and that the application was complete.

8. 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*,¹¹ ruling that, where a state and an applicant agree to repeatedly withdraw and refile the same water quality certification request, the state has waived certification.

9. On July 31, 2019, the California Board issued an order purporting to deny without prejudice Yuba County’s request for water quality certification, stating that the CEQA process and consultation under the Endangered Species Act (ESA) had not been

⁸ July 25, 2018 Email from Mr. Lynch, Consultant to Yuba County to Mr. Choy, California Board. Yuba County Petition for Waiver Appendix B at 7.

⁹ As required by section 5.23(b)(1) of the Commission’s Rules and Regulations, Yuba County filed a copy of the request with the Commission. Yuba County August 3, 2018 Copy of Request for Certification.

¹⁰ California Board August 22, 2018 Letter Confirming Receipt of Water Quality Certification Application at 1 (filed with the Commission on August 27, 2018).

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

completed, and that “[the California Board] encourages [Yuba County] to submit a new formal request for certification.”¹² Yuba County did not subsequently file a new request.

10. On August 22, 2019, Yuba County filed the present request with the Commission, asking us to determine that the California Board waived its certification authority for the relicensing of the Yuba River Project.

11. On March 3, 2020, the Commission issued public notice of the petition, establishing April 2, 2020, as the deadline for filing comments.¹³ The California Board, California Department of Fish and Wildlife (California Fish and Wildlife), and Foothills Water Network and its member organization (Foothills),¹⁴ each filed comments opposing Yuba County’s request.¹⁵

12. Yuba County filed an answer to the responses.¹⁶ Rule 213(a) of the Commission’s Rules of Practice and Procedure prohibits answers to answers unless otherwise ordered by the Commission.¹⁷ 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.

¹² California Board July 31, 2019 Denial without Prejudice of Water Quality Certification Application (filed with the Commission on August 1, 2019).

¹³ Because Yuba County filed its request in the relicensing docket, as to which the Commission previously provided the opportunity to intervene, the notice did not provide for intervention.

¹⁴ Foothills’ member organizations are American Rivers, American Whitewater, California Outdoors, California Sportfishing Protection Alliance, Friends of the River, Gold Country Fly Fishers, Northern California Council of Fly Fishers International (formerly Northern California Council Federation of Fly Fishers), Sierra Club, South Yuba River Citizens League, and Trout Unlimited.

¹⁵ See California Board April 2, 2020 Comments; California Fish and Wildlife March 26, 2020 Comments; Foothills April 2, 2020 and October 7, 2019 Comments. Under Rule 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(d)(2)(ii), comments on the August 22, 2019 request were due by September 21, 2019. The Commission’s March 3, 2020 public notice of the petition established a second comment deadline. *Id.* § 385.213(d)(2)(i).

¹⁶ See Yuba County April 17, 2020 Comments.

¹⁷ 18 C.F.R. § 385.213(a)(2).

II. Discussion

13. The “waiver” provision of section 401(a)(1) of the CWA is at issue here. As noted above, under section 401 of the CWA, if a state certifying agency “fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of [section 401] shall be waived with respect to such federal application.”¹⁸ For the reasons discussed below, we find that the California Board waived 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.”¹⁹ The court concluded that where a licensee each year sent a letter indicating withdrawal of its certification request and resubmission of the same request,²⁰ “[s]uch an arrangement does not exploit a statutory loophole; it serves to circumvent [FERC’s] congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.”²¹ 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.”²²

15. Following *Hoopa Valley*, the Commission found that the California Board waived its section 401 authority in *Placer County Water Agency*.²³ In *Placer County*, the

¹⁸ 33 U.S.C. § 1341(a)(1).

¹⁹ 913 F.3d at 1103.

²⁰ In *Hoopa Valley*, the court noted that “before each [full-]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).

²¹ *Id.*

²² *Id.*

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

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.²⁴ The Commission found that the record showed that the entities worked to ensure that the withdrawal and refiling happened each year,²⁵ 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.²⁶ 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.²⁷

16. Similarly, in *Southern California Edison*, the Commission found that the California Board waived its section 401 authority for relicensing six projects that comprise the Big Creek hydroelectric system.²⁸ 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,²⁹ commenting 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."³⁰ The Commission found this evidence

²⁴ *Placer County*, 167 FERC ¶ 61,056 at P 16; *see also McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185, at PP 33-38 (2019); *Pacific Gas and Electric Co.*, 170 FERC ¶ 61,232, at P 27 (2020) (*Pacific Gas and Electric*); *Southern California Edison Co.*, 170 FERC ¶ 61,135, at P 23 (2020) (*Southern California Edison*).

²⁵ *Placer County*, 167 FERC ¶ 61,056 at P 12.

²⁶ *Placer County*, 169 FERC ¶ 61,046 at P 17.

²⁷ *Id.* PP 12, 18.

²⁸ 170 FERC ¶ 61,135 (2020).

²⁹ *Id.* P 25.

³⁰ *Id.* P 24; *see also id.* PP 23-29.

demonstrated the state's coordination with the licensee and was sufficient to support a waiver finding.³¹

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.³² We found that the record showed that the Board expected the applicant to withdraw and refile its certification application and the applicant cooperated.³³ In its comments, the Board indicated that the "usual process" involved the applicant voluntarily withdrawing and refile its application.³⁴ Moreover, the Commission found unavailing the Board's assertion that it could not issue a water quality certification until the CEQA process was complete, which often takes more than one year, and determined that the general principle from *Hoopa Valley* still applied.³⁵ The Commission found, as it had previously, that a "state's reason for delay [is] immaterial."³⁶

18. Most recently, in *Nevada Irrigation District*, we again found that the 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.³⁷ The Commission found unpersuasive the argument that the Nevada Irrigation District, as the lead agency for CEQA, controlled the timing for the CEQA analysis, and reiterated that the "state's reason for delay is immaterial."³⁸ Further, we dispensed with the argument by the Board and Foothills that the timing of the water quality certification, even if it extends beyond one year, would not disrupt the relicensing proceeding because

³¹ *Id.* P 25.

³² 170 FERC ¶ 61,232 at P 27.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* PP 31-33.

³⁶ *Id.* P 35 (citing *Placer County*, 169 FERC ¶61,046 at P 20).

³⁷ 171 FERC ¶ 61,029 (2020).

³⁸ *Id.* P 28.

ESA consultation was not complete, reaffirming that section 401 of the CWA is clear, and that failure to act within the one-year time limit is absolute.³⁹

B. Application of Hoopa Valley and Commission Precedent to the Relicensing Proceeding for the Yuba River Project

19. The California Board, California Fish and Wildlife, and Foothills claim that *Hoopa Valley* does not support a finding of waiver in this proceeding.⁴⁰ They claim that there was no agreement for Yuba County to withdraw and resubmit its application, that Yuba County acted voluntarily and unilaterally in doing so each year before the deadline, that Yuba County's failure to prepare and submit a CEQA document caused delay and precluded the Board's issuance of a certification, that the Board's issuance of a certification even if taking longer than one year would not delay the Commission's licensing proceeding, and that Yuba County failed to exhaust all state administrative remedies.⁴¹

1. Agreement Not Necessary to Find Waiver

20. As we have held previously, an explicit written agreement to withdraw and refile is not necessary to support a finding of waiver.⁴² The facts in this proceeding are similar to those in *Pacific Gas and Electric* and *Nevada Irrigation District*, in that Yuba County's withdrawal and refile of its application was in response to the Board's request that it do so. Here, the Board informed Yuba County, on July 25, 2018, one month in advance of the one-year deadline that:

[Yuba County's] water quality certification action date for the Yuba River Development Project (FERC No. 2246) is August 24, 2018. A final CEQA

³⁹ *Id.* P 29.

⁴⁰ California Board April 2, 2020 Response at 1; California Fish and Wildlife March 26, 2020 Response at 2; Foothills October 7, 2019 Response at 4; Foothills April 2, 2020 Response at 5.

⁴¹ California Board April 2, 2020 Response at 4; California Fish and Wildlife March 26, 2020 at 3; Foothills October 7, 2019 Response at 4-7; Foothills April 2, 2020 Response at 5-8.

⁴² See *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; *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 23; see also *Constitution Pipeline Company, LLC*, 168 FERC ¶ 61,129, at PP 33-34 (2019).

document for the Project has not been filed; therefore, the State Water Board cannot complete the environmental analysis of the Project that is required for certification. Please submit a withdraw/resubmit of the certification application as soon as possible.⁴³

The coordination between the Board and Yuba County alone is sufficient evidence that the California Board sought the withdrawal and resubmittal of the Yuba River application to circumvent the one-year statutory deadline for the state agency to act. As in *Hoopa Valley, Placer County, Southern California Edison, Pacific Gas and Electric, and Nevada Irrigation District*, the California Board's efforts constituted a failure to act within the meaning of section 401, in order to provide the Board additional time beyond the one-year deadline to act.⁴⁴

2. California Board Was Complicit

21. The Board alleges that Yuba County presumably withdrew its requests voluntarily.⁴⁵ We rejected similar arguments in prior proceedings. In *Southern California Edison*, we found that the California Board had waived its water quality certification authority based on the fact that, in the eight-plus years of the applicant effectuating a withdrawal and resubmittal of its application with a single page letter, the applicant never filed a new application or any new supporting information.⁴⁶ In reaching this decision, we also relied on record evidence that showed the California Board's direct participation in the withdrawal and resubmittal scheme, namely annual reminder emails

⁴³ July 25, 2018 Email from Mr. Philip Choy, California Board, to Mr. Geoff Rabone, Yuba County, and Mr. Jim Lynch, Consultant to Yuba County. Yuba County Petition for Waiver Appendix B at 7.

⁴⁴ *Hoopa Valley*, 913 F.3d at 1105 (“The record indicates that PacifiCorp’s water quality certification request has been complete and ready for review for more than a decade.”); *Placer County*, 169 FERC ¶ 61,046 at P 18; *Southern California Edison*, 170 FERC ¶ 61,135 at P 25; *Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 27; *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 23.

⁴⁵ California Board April 2, 2020 Response at 3; *see also* California Fish and Wildlife March 26, 2020 Response at 4-5 (“Presumably, [Yuba County] requested withdrawal of its request for water quality verification because it viewed a voluntary withdrawal as preferable to [the Board’s] denial of its request.”).

⁴⁶ 170 FERC ¶ 61,135 at P 28; *see also Constitution*, 168 FERC ¶ 61,129 at PP 32-37 (rejecting the state’s argument that the applicant voluntarily resubmitted two certification requests in response to the state’s indication that more time was necessary to obtain and review additional information).

that the California Board sent to the licensee just before the one-year deadline, requesting withdrawal and resubmission of the application.⁴⁷ We further concluded that:

[e]ven 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 [the licensee's] withdrawal/resubmission letters, the California Board consented to the scheme of resetting the one-year deadline.⁴⁸

22. Similarly, in *Pacific Gas and Electric*, we found that the California Board expected and encouraged the certification applicant to withdraw and resubmit an identical application to avoid the CWA's one-year waiver deadline.⁴⁹ Here, too, the California Board directly asked Yuba County to withdraw and resubmit its application to avoid the CWA's one-year deadline.

3. CEQA Requirements Cannot Circumvent the CWA's One-Year Deadline for Action

23. The Board, California Fish and Wildlife, and Foothills argue that Yuba County did not prepare a CEQA document and by failing to do so prevented the Board from acting on the certification application.⁵⁰ The Commission addressed this argument in *Pacific Gas and Electric*, where the California Board, in every letter the Board sent acknowledging receipt of the resubmitted application, stated that the water quality certification could not be issued without a final CEQA document.⁵¹ We found that the California Board's contention that the applicant's actions contributed to the delay ignored the California Board's own role in the process.⁵²

24. The Board acknowledged that the water quality certification could not be issued until the CEQA process was complete and, accordingly, that Yuba County would likely

⁴⁷ *Id.* P 25.

⁴⁸ *Id.*

⁴⁹ 170 FERC ¶ 61,232 at P 31.

⁵⁰ California Board April 2, 2020 Response at 3; California Fish and Wildlife March 26, 2020 at 2-4; Foothills October 7, 2019 Response at 5-6; Foothills April 2, 2020 Response at 6-7.

⁵¹ 170 FERC ¶ 61,232 at PP 32-33

⁵² *Id.* P 31; *see also Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 26.

need to withdraw and resubmit its application.⁵³ Tellingly, as noted above, the Board did not dispute Yuba County's statements that the project had not changed between applications and that the Board had all of the information it needed to act.

25. The Board, California Fish and Wildlife, and Foothills argue that, because Yuba County is the lead agency for CEQA and controls the timing for CEQA compliance, Yuba County should not benefit from its own actions and the Board should not be deprived of its CWA certification authority.⁵⁴ This argument is unpersuasive. We find that the Board's contention that Yuba County alone is responsible for the delay in issuance of a water quality certification ignores the Board's own role in the process. The reliance on a state regulatory process (i.e., CEQA compliance) over which the Board has potentially limited control over timing and often takes more than one year to complete does not excuse the Board from complying with the statutory requirements of the CWA. Moreover, as we have explained, the "state's reason for delay [is] immaterial."⁵⁵ And courts are in agreement that "the plain language of [s]ection 401 outlines a bright-line rule regarding 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.'"⁵⁶ Accordingly, a state may not extend the one-year deadline to act even if a state process may, in practice, often take more than one year to complete.⁵⁷ We note that to the extent

⁵³ See *supra* P 6.

⁵⁴ California Board April 2, 2020 Response at 3; California Fish and Wildlife March 26, 2020 Response at 4; Foothills October 7, 2019 Response at 5-6; Foothills April 2, 2020 Response at 6-7.

⁵⁵ *Placer County*, 169 FERC ¶ 61,046 at P 20; *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 28; see also *Constitution*, 168 FERC ¶ 61,129 at P 37.

⁵⁶ *New York DEC v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018) (citing *Alabama Rivers All. v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003)); see also *Hoopa Valley*, 913 F.3d at 1101 (citing *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011)).

⁵⁷ See, e.g., *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 27 (referencing the California Board's comment that the water quality certification could not be issued until the Board's CEQA process was complete and the applicant would likely need to withdraw and resubmit its certification application).

a state lacks sufficient information to act on a certification request, it has a remedy: it can deny certification.⁵⁸ Delay beyond the statutory deadline, however, is not an option.⁵⁹

26. In addition, California Fish and Wildlife and Foothills argue that if Yuba County submits a new application to the Board including a CEQA document it would constitute a new and different application and restart the certification clock.⁶⁰ We need not reach this conclusion as this issue has not been presented to us here.⁶¹

4. ESA Consultation During Relicensing Does Not Alter the One-Year Deadline of the CWA

27. The Board argues that finding waiver here would serve no purpose, because the Commission cannot issue a license until ESA consultation is complete.⁶² Regardless of whether a water quality certification decision is the sole factor delaying a licensing proceeding, the general principle from *Hoopa Valley* still applies: where an applicant withdraws and resubmits a request for water quality certification to avoid section 401's

⁵⁸ Indeed, the state has codified a practice along these lines. *See* Cal. Code Regs., tit. 23, § 3836(c) (“If an application is determined to be complete by the certifying agency, but CEQA requires that the certifying agency review a final environmental document before taking a certification action, an extension of the federal period for certification cannot be obtained, and the federal period for certification will expire before the certifying agency can receive and properly review the necessary environmental documentation, the certifying agency shall deny without prejudice certification for any discharge resulting from the proposed activity *unless the applicant in writing withdraws the request for certification.*”) (emphasis added).

⁵⁹ *See Hoopa Valley*, 913 F.3d at 1104-05 (“Congress intended Section 401 to curb a state’s ‘dalliance or unreasonable delay’ This Court has repeatedly recognized that the waiver provision was created ‘to prevent a State from indefinitely delaying a federal licensing proceeding.’”) (emphasis in original) (citation omitted).

⁶⁰ California Fish and Wildlife March 26, 2020 Response at 5-8; Foothills October 7, 2019 Response at 8-9; Foothills April 2, 2020 Response at 13-14.

⁶¹ *See New York DEC v. FERC*, 884 F.3d at 455-56 (“[The CWA] does not specify that this time limit applies only for ‘complete’ applications. If the statute required ‘complete’ applications, states could blur this bright-line rule into a subjective standard, dictating that applications are ‘complete’ only when state agencies decide that they have all the information they need. The state agencies could thus theoretically request supplemental information indefinitely.”).

⁶² California Board April 2, 2020 Response at 2.

one-year time limit, and the state does not act within one year of the receipt of an application, the state has failed or refused to act under section 401 and thus has waived its section 401 authority.⁶³ Here, we find that the California Board failed to act within the one-year period on Yuba County's August 24, 2017 application, thereby waiving its certification authority.⁶⁴

5. Pursuing State Remedies Not Required

28. The Board argues that Yuba County failed to exhaust its administrative remedies by neither requesting reconsideration nor otherwise challenging the denial without prejudice or any alleged failure to act by the Board and has thus waived any rights to now allege waiver on these bases.⁶⁵ The Board's argument is misplaced. As we have explained, the issue of whether the California Board waived its certification authority is a federal question correctly before the Commission in the first instance, and one that must be resolved by reference to federal law, not state procedure.⁶⁶

The Commission orders:

(A) Yuba County Water Agency's August 22, 2019 request for the Commission to find waiver is granted. The Commission determines that the California State Water Resources Control Board has waived its water quality certification authority under section 401 of the Clean Water Act for relicensing Yuba County's Yuba River Development Project No. 2246.

⁶³ See *Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 39.

⁶⁴ In fact, while the Commission generally does not issue a license prior to the completion of ESA consultation, we are not prohibited from issuing a license that is contingent on the completion of consultation. See, e.g., *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1320-21 (D.C. Cir. 2015) (upholding the Commission's conditional approval of a natural gas facility construction project where the Commission conditioned its approval on the applicant securing a required federal Clean Air Act air quality permit from the state).

⁶⁵ California Board April 2, 2020 Response at n.2.

⁶⁶ See *Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 43; see also *Millennium Pipeline Co.*, 860 F.3d at 700-01; *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (“[T]he question before us focuses on FERC’s authority to decide whether the state’s purported revocation of its prior [section 401 water quality] certification satisfied the terms of section 401(a)(3) [of the CWA]. We have no doubt that the question posed is a matter of federal law, and that it is one for FERC to decide in the first instance.”).

(B) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the FPA, 16 U.S.C. § 8251 (2018), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2019).

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.