

172 FERC ¶ 61,064
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Pacific Gas and Electric Company

Project No. 2105-126

DECLARATORY ORDER ON WAIVER OF WATER QUALITY CERTIFICATION

(Issued July 16, 2020)

1. On April 24, 2020, Pacific Gas and Electric Company (PG&E), licensee for the Upper North Fork Feather River Hydroelectric Project No. 2105 (Upper North Fork Project), filed a petition for an order declaring 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 a water quality certification with respect to the relicensing of the Upper North Fork Project. This order grants the petition.

I. Background

2. On January 24, 1955, the Commission's predecessor, the Federal Power Commission, issued PG&E a 50-year license, effective November 1, 1954, for the Upper North Fork Project, located on the North Fork Feather River and Yellow Creek in Plumas County, California.² On October 23, 2002, PG&E submitted a timely application for a new license for the project. The license expired on October 31, 2004, and PG&E continues to operate the project under an annual license.³

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, such as PG&E's operation of the Upper North Fork 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.⁴ If the state "fails or refuses to act on

¹ 33 U.S.C. § 1341(a)(1) (2018).

² *Pacific Gas and Electric Co.*, 14 FPC 518 (1955).

³ See Notice of Authorization for Continued Project Operation (Nov. 16, 2004).

⁴ 33 U.S.C. § 1341(a)(1). Section 401(d) provides that a certification and the conditions contained therein shall become a condition of any federal license or

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.⁵ Further, the licensing or permitting agency may not grant a license or permit until certification has been granted or waived.⁶

4. PG&E requested water quality certification for relicensing of the Upper North Fork Project on October 9, 2002,⁷ and the California Board confirmed receipt the next day.⁸ In its October 31, 2002 acknowledgment letter, the California Board stated that “PG&E’s letter, received October 10, 2002, initiates a one-year time clock for the [Board] to act on this request for 401 Certification.”⁹ The letter further noted that various resource issues were not adequately addressed, and that PG&E must provide additional information so that the California Board can complete its “[California Environmental Quality Act (CEQA)] mandate and affirmatively certify the project.”¹⁰ Last, the letter stated that:

A final environmental document must be provided to [Board] staff no later than July 10, 2003, to allow adequate time for review and to prepare water quality certification recommendations for action by the [Executive Director]. If the final environmental document is not provided by the date identified above, [Board] staff will recommend denial of water quality certification without prejudice subject to completion of an adequate environmental document. If the final environmental document is not available for PG&E’s timely submittal to [Board] staff, PG&E may choose

authorization that is issued. *Id.* § 1341(d). *See City of Tacoma, Washington v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

⁵ 33 U.S.C. § 1341(a)(1).

⁶ *Id.*

⁷ PG&E April 24, 2019 Petition for Declaratory Order at Attachment A (Petition for Declaratory Order), PG&E October 9, 2002 Letter to California Board.

⁸ *Id.* at Attachment B, California Board October 31, 2002 Letter to PG&E.

⁹ *Id.*

¹⁰ *Id.*

to avoid a denial action by withdrawing the request for 401 Certification and subsequently refileing it when the environmental document is final.¹¹

5. Thereafter, PG&E withdrew and resubmitted its certification request by substantially identical letters dated September 15, 2003, September 7, 2004, August 29, 2005, August 8, 2006, July 20, 2007, July 9, 2008, June 16, 2009, June 2, 2010, May 6, 2011, April 18, 2012, April 8, 2013, March 27, 2014, March 23, 2015, March 14, 2016, March 7, 2017, and February 26, 2018.¹² In each letter, PG&E indicated that it was simultaneously withdrawing and refileing its previous request and did not indicate any changes to the request.

6. Each year, the California Board sent PG&E letters acknowledging its withdrawal and resubmittal request. In 2003 and 2004, the acknowledgment letters referenced information that the California Board stated must be supplied by PG&E in order to complete its water quality certification decision and included language similar to the October 31, 2002 letter quoted above.¹³

7. On April 30, 2004, PG&E filed a settlement agreement pertaining to the relicensing of the project. The Commission's notice of settlement stated that the settlement agreement resolved "all lake level and streamflow issues for ecological purposes, river-based recreational uses, and other resolved subjects in support of [the Forest Service] issuing its recommended conditions," but that water temperature issues remained unresolved.¹⁴

8. The California Board's 2005 acknowledgement letter stated that PG&E, the Board, and two consultants had entered into a memorandum of understanding to complete an additional environmental document, known as an environmental impact report, for compliance with CEQA.¹⁵ The letter also included similar language as prior letters about withdrawal and resubmittal.¹⁶

¹¹ *Id.*

¹² *Id.* at Attachment A.

¹³ *Id.* at Attachment B.

¹⁴ Notice of Settlement Agreement and Soliciting Comments (Sep. 15, 2004).

¹⁵ Petition for Declaratory Order at Attachment B, California Board September 29, 2005 Letter to PG&E.

¹⁶ *Id.*

9. In its 2006 acknowledgement letter, the California Board stated that if PG&E did not provide requested supplemental information with 30 days or in an otherwise timely manner, Board staff would recommend to its executive director that PG&E's application be denied without prejudice.¹⁷ The 2007 acknowledgment letter stated that the Board, with PG&E's cooperation, "obtained fundamental data to advance the process" and "[sought] the continued cooperation of PG&E in obtaining adequate information" to complete the CEQA process, although the letter referenced no specific information requests.¹⁸

10. Similar to the 2006 letter, the California Board's 2008 letter stated that if PG&E "does not provide requested supplemental information or provide the final environmental documentation before the one-year federal period for certification expires, [Board] staff will recommend denial of water quality certification without prejudice. Alternatively, the applicant could choose to withdraw its request for water quality certification and file a new application . . ." ¹⁹ However, the letter referenced no specific information requests.

11. In its 2009, 2010, and 2011 letters, the California Board stated that it "may request additional information to clarify, amplify, correct, or otherwise supplement the contents of the application."²⁰ Additionally, the letters stated that the Board "must be provided with and have ample time to properly review a final copy of valid CEQA documentation before taking certification action . . . [and] cannot issue a certification without a final copy of a valid CEQA document, and if this document is not provided to the [Board]," staff may recommend denial of water quality certification without prejudice.²¹

12. The 2012 acknowledgment letter included substantially identical language and also noted, for the first time, that PG&E's application "meet[s] the application filing requirements specified in Cal. Code Regs., tit. 23, section 3856."²² The California

¹⁷ *Id.* at Attachment B, California Board September 1, 2006 Letter to PG&E.

¹⁸ *Id.* at Attachment B, California Board August 8, 2007 Letter to PG&E.

¹⁹ *Id.* at Attachment B, California Board July 17, 2008 Letter to PG&E.

²⁰ *Id.* at Attachment B, California Board June 26, 2009 Letter to PG&E, California Board June 16, 2010 Letter to PG&E & California Board May 12, 2011 Letter to PG&E.

²¹ *Id.* at Attachment B, California Board June 26, 2009 Letter to PG&E, California Board June 16, 2010 Letter to PG&E & California Board May 12, 2011 Letter to PG&E.

²² *Id.* at Attachment B, California Board April 25, 2012 Letter to PG&E.

Although it is clear that a state agency's one-year review period begins with the agency's receipt of an application for water quality certification and not from a date that the agency deems the application complete, *see California v. FERC*, 966 F.2d 1541, 1552-53

Board's letters from 2013 to 2018 continued to state that the Board may request supplemental information but did not mention the possibility of denial without prejudice.²³ The record does not reflect that at any time from 2006 to 2018 the Board requested any supplemental information from PG&E.

13. 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*,²⁴ 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.

14. On February 22, 2019, the California Board denied without prejudice PG&E's request for water quality certification, stating that the CEQA process had not been completed, and that "[i]n order to maintain an active water quality certification application, PG&E will need to request certification for the [p]roject."²⁵

15. On March 6, 2019, PG&E filed a new request for water quality certification with the California Board, which stated that "PG&E had intended to again withdraw and refile its request for water quality certification but received a [California Board] letter dated February 22, 2019, stating that PG&E's request for water quality certification had been denied without prejudice and that PG&E would need to file a new request for water

(9th Cir. 1992) (affirming Commission application of regulation establishing state agency receipt of certification application as beginning of one-year review period), the California Board's statement that PG&E's application met the filing requirements of California Code of Regulations, Title 23, Section 3856 (Contents of a Complete Application) precludes any argument on this score. Each subsequent letter included similar language.

²³ Petition for Declaratory Order at Attachment B, California Board April 15, 2013 Letter to PG&E, California Board April 2, 2014 Letter to PG&E, California Board March 27, 2015 Letter to PG&E, California Board March 17, 2016 Letter to PG&E, California Board March 15, 2017 Letter to PG&E, & California Board March 9, 2018 Letter to PG&E.

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

²⁵ Petition for Declaratory Order at Attachment C, California Board February 22, 2019 Letter.

quality certification.”²⁶ The Board sent an acknowledgement letter substantially identical to those sent in previous recent years.²⁷

16. The California Board again denied without prejudice PG&E’s request for water quality certification on March 4, 2020, stating that the CEQA process had not been completed, and that the “[Board] encourages PG&E to submit a new formal request for certification.”²⁸ PG&E did not subsequently file a new request for water quality certification with the California Board.

17. On April 24, 2020, PG&E filed a petition for an order declaring that the California Board waived its authority under section 401(a)(1) of the CWA²⁹ to issue water quality certification with respect to the relicensing of the Upper North Fork Project.

18. On May 19, 2020, with no application pending before it, the California Board filed with the Commission a draft water quality certification and revised draft environmental impact report for the Upper North Fork Project.

II. Procedural Issues

19. On May 6, 2020, the Commission issued public notice of PG&E’s petition for declaratory order, establishing June 5, 2020, as the deadline for filing comments.³⁰ The California Board, California Department of Fish and Wildlife (California Fish and Wildlife), and the California Sportfishing Protection Alliance and American Whitewater (Recreation Groups) each filed timely comments opposing PG&E’s petition.

20. The Forest Supervisor for the Plumas National Forest (Forest Supervisor)³¹ filed timely comments asking the Commission to delay its decision on PG&E’s petition and any subsequent order issuing a new license until the parties involved in the settlement agreement can meet to address the need for updated protection, mitigation, and

²⁶ *Id.* at Attachment A, PG&E March 6, 2019 Letter to California Board.

²⁷ *Id.* at Attachment B, California Board March 25, 2019 Letter to PG&E.

²⁸ *Id.* at Attachment C, California Board March 4, 2020 Letter.

²⁹ 33 U.S.C. § 1341(a)(1) (2018).

³⁰ Because PG&E 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.

³¹ The comments were filed on behalf of the U.S. Department of Agriculture, U.S. Forest Service, Plumas and Lassen National Forests.

enhancement measures. The Forest Supervisor also requests PG&E to call a meeting among the parties to the settlement agreement to discuss needed changes to the agreement.

21. We decline to delay our decision on PG&E's petition and note that the Forest Supervisor's requests are outside the scope of this order, which solely addresses whether the California Board has waived its water quality certification authority under section 401 of the CWA with respect to the relicensing of the Upper North Fork Project. Nothing precludes the settling parties from convening the meeting requested by the Forest Supervisor or submitting an updated settlement agreement.

III. Discussion

22. The "waiver" provision in 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."³² For the reasons discussed below, we find that the California Board waived its authority under section 401.

A. Hoopa Valley and Commission Precedent

23. 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."³³ The court concluded that where a licensee each year sent a letter indicating withdrawal of its certification request and resubmission of the same,³⁴ "[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."³⁵ 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

³² 33 U.S.C. § 1341(a)(1).

³³ 913 F.3d at 1103.

³⁴ In *Hoopa Valley*, the court noted that before each calendar year passed, the applicant sent a "letter indicating withdrawal of its water quality certification request and resubmission of the very same . . . in the same one-page letter. . . ." *Id.* at 1104 (emphasis in original).

³⁵ *Id.*

indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters."³⁶

24. Following *Hoopa Valley*, the Commission found that the California Board waived its section 401 authority in *Placer County Water Agency*.³⁷ 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.³⁸ The Commission found that the record showed that the entities worked to ensure that the withdrawal and refile happened each year,³⁹ 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.⁴⁰ 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.⁴¹

25. Similarly, in *Southern California Edison Co.*, the Commission found that the California Board waived its section 401 authority with respect to the relicensing of six projects that comprise the Big Creek hydroelectric system.⁴² 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's direct participation in the withdrawal and resubmittal scheme. The Board staff sent emails in some years ahead of the upcoming one-year deadline that explicitly requested withdrawal and resubmittal.⁴³ In addition, the Board, commenting

³⁶ *Id.*

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

³⁸ *Placer County*, 167 FERC ¶ 61,056 at P 16; *see also McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185, at PP 33-38 (2019), *reh'g denied*, 171 FERC ¶ 61,046 (2020); *Pacific Gas and Electric Co.*, 170 FERC ¶ 61,232, at P 27 (2020) (*Pacific Gas and Electric*); *Southern California Edison Co.*, 170 FERC ¶ 61,135, at P 23 (2020) (*Southern California Edison*).

³⁹ *Placer County*, 167 FERC ¶ 61,056 at P 12.

⁴⁰ *Placer County*, 169 FERC ¶ 61,046 at P 17.

⁴¹ *Id.* PP 12, 18.

⁴² *Southern California Edison*, 170 FERC ¶ 61,135.

⁴³ *Id.* P 25.

on the draft EIS, stated that “[i]f the one year federal period for certification is insufficient for the [] Board to act, staff will recommend that [Southern California Edison] withdraw and resubmit their request for [water quality certification] for the six Big Creek Projects.”⁴⁴ The Commission found this evidence sufficiently demonstrated the state’s coordination with the licensee and supported a waiver finding.⁴⁵

26. Thereafter, in *Pacific Gas and Electric*,⁴⁶ 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.⁴⁷ We found that the record showed that the Board expected the applicant to withdraw and refile and the applicant cooperated.⁴⁸ In its comments on the EIS, the Board had indicated that the “usual process” involves the applicant voluntarily withdrawing and refileing its application.⁴⁹ 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.⁵⁰ The Commission found, as it had previously, that a “state’s reason for delay [is] immaterial.”⁵¹

⁴⁴ *Id.* P 24; *see also id.* PP 23-29.

⁴⁵ *Id.* P 25.

⁴⁶ 170 FERC ¶ 61,232.

⁴⁷ *Id.* P 27.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* PP 31-33.

⁵¹ *Id.* P 35 (citing *Placer County*, 169 FERC ¶ 61,046 at P 20).

27. Most recently, in *Nevada Irrigation District*,⁵² *Yuba County Water Agency*,⁵³ *South Feather Water and Power Agency*,⁵⁴ and *Merced Irrigation District*,⁵⁵ 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. The Commission found unpersuasive the arguments that the licensee, as the respective lead agency for CEQA, controlled the timing for the CEQA analysis, and reiterated that “state’s reason for delay is immaterial.”⁵⁶ Further, the Commission reaffirmed that section 401 of the CWA is clear, and that failure to act within the one-year time limit is dispositive regardless of whether the timing of the water quality certification, even if it extends beyond one year, would not disrupt the relicensing proceeding.⁵⁷

B. Application of Hoopa Valley and Commission Precedent to the Relicensing Proceeding for the Upper North Fork Project

28. Commenters argue that *Hoopa Valley* does not support a finding of waiver in this proceeding.⁵⁸ They claim that: (1) there was no agreement for PG&E to withdraw and resubmit its application; (2) PG&E acted unilaterally in withdrawing and resubmitting its application each year before the deadline; (3) PG&E contributed to the delay because its application lacked critical information and was augmented over time; (4) PG&E failed to exhaust all state administrative remedies; (5) *Hoopa Valley* should not be retroactively applied to PG&E’s water quality certification; and (6) waiver would negatively affect the

⁵² 171 FERC ¶ 61,029 (2020).

⁵³ 171 FERC ¶ 61,139 (2020) (*Yuba County*).

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

⁵⁵ 171 FERC ¶ 61,240 (2020).

⁵⁶ *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 28; *Yuba County*, 171 FERC ¶ 61,139 at P 25; *Merced Irrigation District*, 171 FERC ¶ 61,240 at P 32; *South Feather*, 171 FERC ¶ 61,242 at P 31.

⁵⁷ *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 29; *Yuba County*, 171 FERC ¶ 61,139 at P 27; *Merced Irrigation District*, 171 FERC ¶ 61,240 at P 32; *South Feather*, 171 FERC ¶ 61,242 at P 31.

⁵⁸ California Board June 5, 2020 Response at 1; California Fish and Wildlife June 2, 2020 Response at 7; Recreation Groups June 5, 2020 Response at 22-23.

relicensing proceeding by interfering with the agreement among the relicense parties on water quality conditions.⁵⁹

1. A Formal Agreement Is Not Necessary to Find Waiver

29. The California Board, California Fish and Wildlife, and Recreation Groups argue that *Hoopa Valley* does not apply because the parties did not explicitly, and in writing, agree to a withdrawal-and-resubmittal scheme.⁶⁰ As we have stated previously, an explicit written agreement to withdraw and refile is not necessary to support a finding of waiver.⁶¹

30. The California Board expected that PG&E would withdraw and refile its application and PG&E cooperated. In various acknowledgement letters, the California Board stated that PG&E may withdraw and refile the request for certification.⁶² This coordination between the Board and PG&E is sufficient evidence that the California Board sought the withdrawal and resubmittal of the PG&E application to circumvent the one-year statutory deadline for the state agency to act. Here, as in *Placer County*, *Southern California Edison*, *Pacific Gas and Electric*, *Nevada Irrigation District*, and *Yuba County*, where the record indicates that PG&E's water quality certification request has been complete and ready for review for several years – in particular between 2013-2018 – the California Board's efforts constituted a failure to act within the meaning of

⁵⁹ California Board June 5, 2020 Response at 9-19; California Fish and Wildlife June 2, 2020 at 7; Recreation Groups June 5, 2020 Response at 22-23.

⁶⁰ California Board June 5, 2020 Response at 9-10, 12; California Fish and Wildlife June 2, 2020 at 7; Recreation Groups June 5, 2020 Response at 22.

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

⁶² See, e.g., Petition for Declaratory Order at Attachment B, California Board October 1, 2003 Letter to PG&E (stating that PG&E may withdraw and resubmit if a final environmental document was not available for the Board's use), California Board September 14, 2004 Letter to PG&E (same), California Board September 29, 2005 Letter to PG&E (same), California Board July 17, 2008 Letter to PG&E (stating that if PG&E may withdraw and resubmit if it did not provide requested supplemental information within the one-year period or if the "final environmental documentation" was not available).

section 401, in order to provide the Board additional time beyond the one-year deadline to act.⁶³

2. PG&E Did Not Act Unilaterally; California Board Was Complicit

31. The California Board and California Fish and Wildlife allege that PG&E withdrew its requests for certification voluntarily and unilaterally in order to avoid denial of its application.⁶⁴ We have rejected similar arguments in prior proceedings. For example, in *Southern California Edison*,⁶⁵ several of the California Board's communications mentioned denial without prejudice; however, others did not. The Commission determined that the "denial without prejudice" was general language that referenced a scenario that never materialized.⁶⁶ Ultimately, the Commission 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.⁶⁷ In reaching this decision, the Commission also relied on

⁶³ *Placer County*, 169 FERC ¶ 61,046 at P 18 (finding waiver because no new Section 401 application was actually refiled because the parties only exchanged correspondence indicating that they would refile without actually doing so); *Southern California Edison*, 170 FERC ¶ 61,135 at P 25 (finding waiver where the Board sent annual reminder emails in advance of the one-year deadline); *Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 27 (finding waiver where the applicant withdrew and refiled its application eight times via letter without ever submitting new information); *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 23 (finding waiver where the Board commented on the EIS that the applicant would likely withdraw and refile its certification application); *Yuba County*, 171 FERC ¶ 61,139 at P 20 (finding waiver where the California Board emailed the applicant a reminder to withdraw and refile its certification application ahead of the one-year deadline).

⁶⁴ California Board June 5, 2020 Response at 9, 11; California Fish and Wildlife June 2, 2020 Response at 7.

⁶⁵ 170 FERC ¶ 61,135 at PP 26-28; *see also Constitution Pipeline Company, LLC*, 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 and that the state would have likely denied the applications otherwise).

⁶⁶ *Southern California Edison*, 170 FERC ¶ 61,135 at P 27.

⁶⁷ *Id.* at 28.

record evidence that showed the California Board's direct participation in the withdrawal and resubmittal scheme, namely annual reminder emails that the Board sent to the licensee just before the one-year deadline requesting withdrawal and resubmission of the application.⁶⁸ However, the Commission 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.⁶⁹

32. Here, too, we find that the California Board expected and encouraged PG&E to serially withdraw and resubmit nearly identical application requests to avoid the CWA's one-year waiver deadline. The California Board accepted PG&E's withdrawal/resubmission letters year after year from 2002 to 2018, waiting nearly 17 years to issue its first denial without prejudice. While some of the Board's acknowledgement letters mentioned denial without prejudice as a possibility, several others, including those sent each year from 2013 to 2018, do not. Additionally, the Board acknowledges that it "provided information concerning PG&E's options," including withdrawal and resubmittal, in the event that the Board was unable to issue certification before the yearly deadline.⁷⁰ Accordingly, the California Board's contention that PG&E acted unilaterally ignores its own role in the process.

33. The California Board also argues that, unlike in *Hoopa Valley*, PG&E's application "lacked critical information concerning the feasibility of infrastructure improvements, operational changes, or other measures that could be implemented in order to bring the [p]roject into compliance with the water quality objectives for temperature," and that PG&E's application was "augmented over time with substantive new information."⁷¹ The Board contends it could not issue water quality certification until these impacts were analyzed, as required by CEQA.⁷² PG&E contends that any information requested by the California Board throughout the certification process is

⁶⁸ *Id.* at 25.

⁶⁹ *Id.*

⁷⁰ California Board June 5, 2020 Response at 10.

⁷¹ *Id.* at 9-11.

⁷² *Id.* at 11.

beyond the scope of the California Board's authority and does not rise to the level of a material change that would trigger a new one-year review period.⁷³

34. The Commission has stated that “an applicant’s submittal of additional information at a certifying agency’s request generally would not rise to the level of a material change to a project’s plan of development, such that an application to amend a pending license application, and a new certification request, would be warranted.”⁷⁴ Nevertheless, whether the information the California Board sought rises to such a level is irrelevant. Although the California Board claims that it repeatedly requested information from PG&E on its ability to control water temperatures in the North Fork Feather River, it admits that most of the modeling PG&E’s consultants undertook regarding this question occurred between 2004 and 2009, and no later than 2016.⁷⁵ Even if the one-year clock under the CWA were to have restarted with PG&E’s next withdrawal and resubmittal on March 7, 2017, the California Board failed to act within one year from that date and thus waived its authority.

3. Reason for Delay Is Immaterial

35. The Board argues that “the primary reason for delay has been the need to resolve the outstanding issue concerning the [p]roject’s ability to comply with water quality objectives for temperature”⁷⁶ and states that it could not issue water quality certification until environmental documentation had been prepared to comply with CEQA.⁷⁷ The California Board cites several water quality modeling undertakings and subsequent

⁷³ Petition for Declaratory Order at 7-9 (citing *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 at P 38).

⁷⁴ *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 at P 38.

⁷⁵ California Board June 5, 2020 Response at 6-7 (citing Declaration of Jeff Wetzel in Support of State Water Resources Control Board’s Comments on Pacific Gas and Electric Company’s Petition for Declaratory Order, ¶¶ 7, 8, 11 & 15 (Wetzel Declaration) (filed as an attachment to the California Board comments)). Further, correspondence between the California Board and PG&E makes no suggestion of specific outstanding information requests at any point past 2006. Petition for Declaratory Order at Attachment B, California Board September 1, 2006 Letter to PG&E (stating that if PG&E does not provide requested supplemental information with 30 days or in an otherwise timely manner, that the California Board staff will recommend to its executive director that PG&E’s application be denied without prejudice).

⁷⁶ California Board June 5, 2020 Response at 12-13.

⁷⁷ *Id.* at 11.

reports completed from 2004 to 2016 that it claims were necessary for the development of water quality certification conditions.⁷⁸ Additionally, the California Board asserts that its review of PG&E's application and many other projects was delayed by the 2012 to 2016 drought emergency in California.⁷⁹ The Recreation Groups also argue that working to resolve water temperature and dissolved oxygen issues are not immaterial reasons for delay because they are "quintessential water quality issues."⁸⁰

36. We are unpersuaded by these arguments. "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.'"⁸¹ As we have explained in prior proceedings, the state's reason for delay is thus immaterial.⁸² Accordingly, a state may not extend the one-year deadline to act even if a state process, such as preparing environmental documentation to comply with CEQA, may, in practice, often take more than a year to complete.⁸³ We note that to the extent a state lacks sufficient information to act on a certification request, it has a remedy: it can deny certification. Delay beyond the statutory deadline, however, is not an option.⁸⁴ We further note that from 2006 on, the Board repeatedly raised the possibility

⁷⁸ *Id.* at 6-7 (citing Wetzel Declaration, ¶¶ 7, 8, 11 & 15).

⁷⁹ *Id.* at 7 (citing Cal. Executive Orders B-17-2014, B-37-16 and Wetzel Declaration, ¶ 17).

⁸⁰ Recreation Groups June 5, 2020 Response at 22-23.

⁸¹ *New York DEC v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018); *see also Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 35.

⁸² *Placer County*, 169 FERC ¶ 61,046 at P 20 (noting that the California Board's representations regarding its limited resources between 2012 and 2014 because of the drought do not explain the failure to act each year from 2015 through 2018); *see also South Feather*, 171 FERC ¶ 61,242 at PP 29-30; *Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 35; *Constitution Pipeline Company, LLC*, 168 FERC ¶ 61,129 at P 37.

⁸³ *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); *see also Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 35 (finding that the California Board's representations regarding its limited resources during the drought period do not explain the failure to act in 2010 through 2013).

⁸⁴ *See Hoopa Valley*, 913 F.3d at 1104-1105 ("Congress intended Section 401 to curb a *state's* 'dalliance or unreasonable delay'. . . . This Court has repeatedly

that it would request further information, but never did so. Vague references to the need to complete the CEQA process cannot forestall operation of section 401's one-year deadline. As we have previously explained,⁸⁵ the creation of a state process that effectively makes action on certification application within one year unlikely does not excuse noncompliance with the federal statutory deadline.

4. Pursuing State Remedies Not Required

37. The California Board argues that the Commission should not find waiver because PG&E failed to exhaust state administrative remedies to pursue reconsideration of or challenge to the February 22, 2019 and March 4, 2020 denials without prejudice or any previous alleged failure to act.⁸⁶ Thus, the California Board contends that PG&E has waived any right to allege waiver on these bases.⁸⁷ 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.⁸⁸

5. Hoopa Valley Applies Retroactively

38. The California Board avers that equitable tolling should apply to section 401's one-year deadline because the California Board relied on the Commission's previous

recognized that the waiver provision was created 'to prevent a State from indefinitely delaying a federal licensing processing.'" (emphasis in original) (citation omitted)).

⁸⁵ *South Feather*, 171 FERC ¶ 61,242 at P 31; *see also Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 28; *Yuba County*, 171 FERC ¶ 61,139 at P 25.

⁸⁶ California Board June 5, 2020 Response at 13-15.

⁸⁷ *Id.*

⁸⁸ *See South Feather*, 171 FERC ¶ 61,242 at P 31; *Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 43; *see also Millennium Pipeline Co.*, 860 F.3d 696, 700-701 (D.C. Cir. 2017); *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."). The California Board's citations to Supreme Court precedent dealing with general principles of exhaustion and administrative law are therefore similarly misplaced. *See California Board June 5, 2020 Response* at 14-15 (citing *Smith v. Berryhill*, 139 S. Ct. 1765, 1779 (2019); *Ross v. Blake*, 136 S. Ct. 1850 (2016)).

determinations interpreting section 401.⁸⁹ Similarly, the Recreation Groups argue that *Hoopa Valley* should not be applied retroactively because the Commission changed its policy on interpreting section 401.⁹⁰

39. In *Southern California Edison*, we held that the legal principles articulated in *Hoopa Valley* apply to waiver determination for water quality certifications issued prior to the *Hoopa Valley* decision.⁹¹ We explained that “legal rules announced in judicial decision-making typically have retroactive effect and ‘[r]etroactivity is the norm in agency adjudications[,]’... ‘no less than judicial adjudications.’”⁹² We also remain unconvinced that equitable tolling should apply to limit *Hoopa Valley*’s application.⁹³ 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.⁹⁴ We see no justification for not applying *Hoopa Valley* here.

40. The California Board also argues that PG&E lacks clean hands, and thus is not entitled to declaratory relief.⁹⁵ As we described previously under an analogous set of facts, “we are acting in law, not in equity, here and we cannot fail to apply the law based

⁸⁹ California Board June 5, 2020 Response at 15-18.

⁹⁰ Recreation Groups June 5, 2020 Response at 23.

⁹¹ 170 FERC ¶ 61,135 at PP 34-36. *See also Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 37).

⁹² *Southern California Edison*, 170 FERC ¶ 61,135 at P 35 (quoting *Constitution Pipeline Co., LLC*, 169 FERC ¶ 61,199, at P 31 (2019)). The D.C. Circuit itself declined to revisit *Hoopa Valley* to consider whether the decision should only be applied prospectively. *Constitution Pipeline Co.*, 168 FERC ¶ 61,129 at P 19, n.37.

⁹³ *See Southern California Edison*, 170 FERC ¶ 61,135 at P 36 (declining California Board’s request that the principle of equitable tolling should limit the application of *Hoopa Valley* to a prospective application).

⁹⁴ *See Placer County*, 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 Pipeline Company, LLC*, 169 FERC ¶ 61,199 at PP 29-34 (providing an in-depth discussion of the Commission’s application of *Hoopa Valley*).

⁹⁵ California Board June 5, 2020 Response at 18-19.

on an allegation regarding equities.”⁹⁶ Moreover, as explained above, we find that the California Board was complicit in the withdrawal-and-resubmission scheme.

6. Benefit to Parties from Withdrawal and Resubmittal Is Immaterial

41. Last, California Fish and Wildlife argue that a “significant investment in time and coordination by all parties, including PG&E, to reach agreement on water quality license conditions would be lost if the water quality certification is waived.”⁹⁷ The Recreation Groups argue that the fastest way to issue a license is to accept the certification.⁹⁸

42. As we have explained, the plain language of section 401 establishes a bright-line rule with respect to review: “the timeline for a state’s action regarding a request for certification ‘shall not exceed one year’ after ‘receipt of such request.’”⁹⁹ Therefore, potential benefits incurred to PG&E or other parties are immaterial to the question of whether the California Board waived its certification authority. We note that the Commission is not precluded from considering the conditions included in the draft water quality certification submitted by the California Board, as well as the technical information submitted by California Fish and Wildlife and the Recreation Groups, in making its licensing determination.¹⁰⁰

⁹⁶ *Placer County*, 169 FERC ¶ 61,046 at P 25.

⁹⁷ California Fish and Wildlife June 2, 2020 at 7.

⁹⁸ Recreation Groups June 5, 2020 Response at 23-24.

⁹⁹ *Southern California Edison*, 170 FERC ¶ 61,135 at P 30 (quoting *New York DEC v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018)).

¹⁰⁰ PG&E also requests confirmation that it is not required to submit another request for water quality certification in order to maintain its license application on file with the Commission. As we conclude that the California Board has waived its certification authority with respect to the relicensing of the Upper North Fork Project, we confirm that PG&E is not required to submit an additional water quality certification request.

The Commission orders:

Pacific Gas and Electric Company's April 24, 2020 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 Upper North Fork Feather River Hydroelectric Project No. 2105.

By the Commission. Commissioner Glick is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company

Project No. 2105-126

(Issued July 16, 2020)

GLICK, Commissioner, *concurring*:

1. I concur in the determination that the California State Water Resources Control Board (California Board) waived its authority under section 401 of the Clean Water Act.¹ As today's order explains, the California Board had pending before it a substantially identical application for more than one year.² That is sufficient to find waiver pursuant to the U.S. Court of Appeals for the District of Columbia Circuit's decision in *Hoopa Valley Tribe v. FERC*.³ Accordingly, we need not consider how significantly an application must change for it to constitute a new application for the purposes of section 401.

2. I write separately, however, to reiterate my continuing disagreement with the Commission's position articulated in *McMahan Hydroelectric, LLC* and referenced in today's order.⁴ In that proceeding, the Commission stated that, absent some as yet still undefined "unusual circumstances," additional information regarding a project that does "not rise to the level of a material change to a project's plan of development, such that an application to amend a pending license application [before this Commission] . . . would be warranted," cannot give rise to a new application under *Hoopa Valley*.⁵

3. As I have previously explained, nothing in the Clean Water Act or *Hoopa Valley* requires us to so drastically limit what might constitute a 'new' application for the purposes of section 401.⁶ Instead, Congress enacted section 401 so that states can ensure

¹ 33 U.S.C. § 1341(a)(1) (2018).

² *See Pac. Gas & Elec. Co.*, 172 FERC ¶ 61,064, at P 34 (2020) (Order).

³ 913 F.3d 1099, 1101 (D.C. Cir. 2019), *cert. denied sub nom. Cal. Trout v. Hoopa Valley Tribe*, 140 S.Ct. 650 (2019).

⁴ 168 FERC ¶ 61,185, at PP 33-38 (2019), *reh'g denied*, 171 FERC ¶ 61,046 (2020).

⁵ *See Order*, 172 FERC ¶ 61,064 at P 34 (quoting *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 at PP 33-38).

⁶ *McMahan Hydroelectric, LLC*, 171 FERC ¶ 61,046 (Glick, Comm'r, concurring

that a federally licensed or certificated project does not violate state or federal water quality standards and to permit states to impose such conditions as are necessary to ensure that result.⁷ The submission of additional information could well determine whether a state can make the water quality findings required by section 401, even if those changes do not require a new license application with this Commission.⁸ Taking the position that only a revised application to this Commission could result in a new section 401 application discounts the complex and nuanced review that many states undertake in implementing their section 401 authority.

For these reasons, I respectfully concur.

Richard Glick
Commissioner

in part and dissenting in part at P 9).

⁷ *Id.* (Glick, Comm'r, concurring in part and dissenting in part at P 9) (citing *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 707-08 (1994) and *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 386 (2006)).

⁸ *Id.* (Glick, Comm'r, concurring in part and dissenting in part at P 9) (citing *PUD No. 1 of Jefferson Cty.*, 511 U.S. at 707).