

172 FERC ¶ 61,065
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. 606-040

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued July 16, 2020)

1. On March 19, 2020, the Commission granted a petition for declaratory order filed by Pacific Gas and Electric Company (PG&E).¹ The Commission determined that the California State Water Resources Control Board (California Board) had waived its authority under section 401(a)(1) of the Clean Water Act (CWA)² to issue water quality certification for PG&E's proposed surrender of its license for the Kilarc-Cow Creek Hydroelectric Project No. 606 (Kilarc-Cow Project).

2. The California Board filed a timely request for rehearing of the Declaratory Order.³ Pursuant to *Allegheny Defense Project v. FERC*,⁴ the rehearing requests filed in this proceeding may be deemed denied by operation of law. As permitted by section 313(a) of the Federal Power Act (FPA),⁵ however, we are modifying the discussion in the

¹ *Pac. Gas & Elec. Co.*, 170 FERC ¶ 61,232 (2020) (Declaratory Order).

² 33 U.S.C. § 1341(a)(1) (2018).

³ California Board April 20, 2010 Request for Rehearing (Rehearing Request).

⁴ *Allegheny Defense Project v. FERC*, No. 17-1098 (D.C. Cir. June 30, 2020).

⁵ 16 U.S.C. § 825l(a) (2018) (“Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.”).

Declaratory Order and continue to reach the same result in this proceeding, as discussed below.⁶

I. Background

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 must provide to the federal licensing or permitting agency water quality certification from the state in which the discharge originates.⁷ No license or permit shall be granted until the certification “has been obtained or has been waived”⁸ 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 the certification requirement is waived.⁹

4. On March 12, 2009, PG&E filed with the Commission an application to surrender its license for the Kilarc-Cow Project, located on the South Cow and Old Cow Creeks in Shasta County, California.¹⁰ On August 18, 2009, the California Board received a request from PG&E for water quality certification for the project’s surrender.¹¹ The California Board’s acknowledgment letter, dated September 16, 2009, stated that

⁶ *Allegheny Defense Project*, slip op. at 30. The Commission is not changing the outcome of the Declaratory Order. See *Smith Lake Improvement & Stakeholders Ass’n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁷ 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 authorization that is issued. *Id.* § 1341(d). See *City of Tacoma, Wash. v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

⁸ 33 U.S.C. § 1341(a)(1) (2018).

⁹ 33 U.S.C. § 1341(a)(1) (2018).

¹⁰ PG&E, License Surrender Application, Project 606-027 (filed Mar.12, 2009). Pursuant to a 2005 agreement with stakeholders, including the California Board, PG&E agreed to support decommissioning the project instead of filing an application for a new license. PG&E, Petition for Declaratory Order, Project 606-037, at 1-2 (filed May 15, 2019). PG&E’s application to surrender its license for the Kilarc-Cow Project is currently pending before the Commission.

¹¹ Declaratory Order, 170 FERC ¶ 61,232 at P 5 (citing PG&E Petition at Attachment B, California Board’s September 16, 2009 Letter at 1; PG&E Petition at 2 (noting that California Board received its application on August 18, 2009)).

“[PG&E’s] letter initiates a one-year time clock from the date received for the [California Board] to act on the request for water quality certification[.]” and “serves as public notice that an application for water quality certification is pending before the [California Board].”¹²

5. On June 22, 2010, Commission staff issued a draft Environmental Impact Statement (EIS) for the proposed surrender, noting that the California Board’s decision on the water quality certification application was due by August 18, 2010.¹³ On July 30, 2010, PG&E withdrew and refiled its application.¹⁴ On August 25, 2010, the California Board stated in a comment on the draft EIS that for section 401, “the usual process involves the applicant of a [w]ater [q]uality [c]ertification voluntarily withdrawing their application before the one year deadline and resubmitting their application afterwards.”¹⁵

6. On August 16, 2011, Commission staff issued a final EIS.

7. On July 5, 2012, PG&E withdrew and refiled, for the third time, its water quality certification application.¹⁶

8. In a July 30, 2012 letter, the California Board determined that the final EIS prepared by the Commission did not fully comply with California Environmental Quality Act (CEQA); thus, the Board issued a notice of preparation of its environmental impact

¹² *Id.* P 8 (citing California Board September 16, 2009 Letter at 1).

¹³ *Id.* P 6 (citing draft EIS at 5-6).

¹⁴ *Id.* P 7 (citing PG&E Petition at Attachment A, PG&E July 30, 2010 Letter to California Board (“As the current application for water quality certification is set to expire, PG&E hereby simultaneously withdraws its outstanding request for water quality certification, and re-files its request for water quality certification.”)).

¹⁵ *Id.* P 8 (quoting California Board, Comment on the Draft EIS, Project 606-027, at 1 (filed (Aug. 25, 2010))).

¹⁶ *Id.* P 10 (PG&E Petition at Attachment A, PG&E July 5, 2012 Letter to California Board (“As the current application for water quality certification is set to expire, PG&E hereby simultaneously withdraws its outstanding request for water quality certification, and re-files its request for water quality certification.”)).

report on March 12, 2013, hosted a public scoping meeting on April 10, 2013, and solicited and received numerous comments concerning the proposed surrender.¹⁷

9. PG&E withdrew and refiled its water quality certification application six more times: on June 13, 2013; May 30, 2014; May 21, 2015; May 4, 2016; April 26, 2017; and April 9, 2018.¹⁸

10. 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*¹⁹ 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.

11. On April 5, 2019, the California Board denied without prejudice PG&E's request for water quality certification, indicating that the CEQA process had not been completed, and "encouraged [PG&E] to submit a new formal request for certification[.]"²⁰ PG&E did not file a new request.

12. On May 1, 2019, the California Board issued a notice of availability for public comment of a draft CEQA environmental impact report for the surrender of the Kilarc-Cow Project.²¹

¹⁷ *Id.* (citing California Water Board March 12, 2013 Notice of Preparation, https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/kilarc_cow/).

¹⁸ *Id.* P 11 (citing PG&E Petition at Attachment A; PG&E Petition at Attachment B; California Board June 27, 2013 letter set June 13, 2014 as the new deadline; California Board June 9, 2014 letter set June 3, 2015 as the new deadline; California Board June 12, 2015 letter set May 21, 2016 as the new deadline; California Board May 5, 2017 letter set April 26, 2018 as the new deadline; and California Board April 19, 2018 letter set April 9, 2019 as the new deadline; California Board's June 6, 2016 Letter setting May 4, 2017 as the new deadline).

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

²⁰ Declaratory Order, 170 FERC ¶ 61,232 at P 13 (citing PG&E Petition at Attachment C, California Board April 5, 2019 Denial of PG&E Water Quality Certification at 1).

²¹ Despite its denial of PG&E's water quality certification and no pending request, the California Board issued its Notice of Completion, Notice of Availability, and the Draft

13. On May 15, 2019, PG&E filed the instant petition for declaratory order, asking the Commission to declare that the California Board had waived its certification authority for the surrender of the Kilarc-Cow Project.

14. On November 27, 2019, nine years and seven months after receiving PG&E's initial application for water quality certification, the California Board issued a Final Environmental Impact Report pursuant to CEQA, as well as a final water quality certification for the Kilarc-Cow Project surrender.²²

15. On January 30, 2020, PG&E filed a supplement to its petition for declaratory order, requesting that the Commission declare the November 27, 2019 certification void *ab initio* under federal law, or, alternatively, reject all conditions included in the certification. On February 28, 2020, the California Board filed an answer to PG&E's supplement to the petition.

16. On March 19, 2020, the Commission granted PG&E's petition. The Commission acknowledged that there is no evidence of a formal agreement, as existed in *Hoopa Valley*, between PG&E and the California Board specifically directing PG&E to indefinitely repeat the withdrawal and resubmission of its request.²³ However, the Commission noted the California Board's explanation that its "usual process" takes more than one year and involves the applicant withdrawing and resubmitting its application.²⁴ In the Declaratory Order, the Commission found that there is no indication that PG&E's

Environmental Impact Report on April 8, 2019, requesting comments by May 24, 2019, California Water Boards, *Kilarc-Cow Creek Hydroelectric Project License Surrender*, https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/kilarc_cow/.

²² On December 26, 2019, PG&E filed a petition for reconsideration of the water quality certification with the California Board, arguing, in part, that because PG&E's application was not pending at the time the California Board issued the water quality certification, the certification is not valid. PG&E December 26, 2019 Petition for Reconsideration of the Water Quality Certification for the Kilarc-Cow Creek Hydroelectric Project License Surrender. The California Board has not acted on the petition.

²³ Declaratory Order, 170 FERC ¶ 61,232 at P 27.

²⁴ *Id.* PP 27, 31. The Commission also noted that the California Board's regulations provide that if the environmental review required by the state's CEQA review takes longer than the one year allowed by section 401, then either the California Board will deny the request for certification without prejudice or the applicant will withdraw its request. *See id.* P 31 n.65.

withdrawal and refiling was anything but compliance with this “usual process,” as dictated by the California Board, so that the California Board’s argument that it was required to divine PG&E’s intent was unconvincing.²⁵ The Commission explained that the California Board’s efforts gave it more than ten years beyond the statute’s one-year deadline to act.²⁶ For these and other reasons, the Commission concluded that the California Board failed to act within the one-year period running from PG&E’s initial request for a water quality certification on August 13, 2009, so the California Board waived the certification requirement under section 401.²⁷

II. Discussion

17. On rehearing, the California Board argues that: (1) the Commission erred in finding that the California Board and PG&E had an agreement to defer CWA section 401’s one-year statutory time limitation in violation of *Hoopa Valley*;²⁸ (2) it never failed to act within one year from receiving PG&E’s water quality certification request;²⁹ (3) the Commission should not have acted on PG&E’s request for declaratory order until PG&E exhausted all remedies with the California Board;³⁰ (4) the Commission should not retroactively apply *Hoopa Valley* to the facts of this case;³¹ and (5) PG&E’s request is without merit because PG&E came to the Commission with unclean hands.³²

A. No Formal Agreement is Necessary Under *Hoopa Valley*

18. The California Board contends that it did not waive its authority under CWA section 401 because it did not enter into a formal agreement with PG&E to defer the one-

²⁵ *Id.* P 27.

²⁶ *Id.*

²⁷ *Id.* P 33.

²⁸ California Board Rehearing Request at 8-16.

²⁹ *Id.* at 16-21.

³⁰ *Id.* at 21-24.

³¹ *Id.* at 24-29.

³² *Id.* at 29-30.

year statutory limit.³³ The California Board attempts to distinguish *Hoopa Valley* based on the absence of formal agreement to defer action on the requests for water quality certification,³⁴ describing its communications with PG&E as not an agreement, but rather “courtesy” notifications that PG&E should withdraw its request before each approaching one-year deadline if it desired to avoid denial without prejudice.³⁵ The California Board claims (without providing supporting evidence) that the withdrawals and resubmittals occurred at the applicant’s request in order to avoid denial of the request³⁶ and asserts that such a scenario does not constitute the kind of agreement found objectionable in *Hoopa Valley*, and should not be used as a basis for finding waiver.³⁷

19. In *Hoopa Valley*, the D.C. Circuit held 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.”³⁸ Thereafter, in *Placer County Water Agency*, the Commission determined that *Hoopa Valley* does not require a formal agreement between a licensee and a state certifying agency, but that yearly exchanges between these entities making clear that the California Board expected that the applicant would withdraw and refile its applications and that the applicant cooperated in these events amounted to an ongoing agreement³⁹ that delayed a certification decision by over six years.⁴⁰ In *Southern California Edison Company*, the Commission reiterated that no formal, written agreement was necessary when the state coordinated with the applicant to withdraw and resubmit the certification request and did so for the purpose of avoiding waiver.⁴¹

³³ *Id.* at 8-15.

³⁴ *Id.* at 8-16.

³⁵ *Id.* at 9.

³⁶ *Id.* at 12-16.

³⁷ *Id.*

³⁸ *Hoopa Valley*, 913 F.3d at 1103.

³⁹ *Placer County Water Agency*, 169 FERC ¶ 61,046, at PP 16, 18 (2019) (*Placer County*); *accord McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185, at P 37 (2019); *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129, at PP 33-34 (2019).

⁴⁰ *Placer County*, 169 FERC ¶ 61,046 at PP 16, 18.

⁴¹ *Southern California Edison Company*, 170 FERC ¶ 61,135, at PP 20, 23 (2020) (finding waiver when the state indicated that if it could not act within the one-year

20. Most recently, in *Nevada Irrigation District*,⁴² *Yuba County Water Agency*,⁴³ *South Feather Water and Power Agency*,⁴⁴ and *Merced Irrigation District*,⁴⁵ 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 the “state’s reason for delay is immaterial.”⁴⁶ 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.⁴⁷

21. As in these prior cases, the exchanges between the California Board and PG&E amounted to an ongoing agreement that allowed the California Board to delay acting within the CWA section 401 deadline. The record here indicates that the California Board expected and encouraged water quality certification applicants to serially withdraw and resubmit an identical application to avoid the CWA’s one-year waiver deadline.⁴⁸ With respect to PG&E’s certification application, the California Board acknowledged when it commented on Commission staff’s draft EIS for PG&E’s surrender of its license, and in every letter the Board sent acknowledging receipt of PG&E’s resubmitted certification application, that the water quality certification could not be issued without a

deadline, it would request the licensee to withdraw and resubmit its certification application and subsequently sent annual emails ahead of the one-year deadline with this request).

⁴² 171 FERC ¶ 61,029 (2020).

⁴³ 171 FERC ¶ 61,139 (2020).

⁴⁴ 171 FERC ¶ 61,242 (2020).

⁴⁵ 171 FERC ¶ 61,240 (2020).

⁴⁶ *S. Feather Water and Power Agency*, 171 FERC ¶ 61,242 at P 31; *Merced Irrigation Dist.*, 171 FERC ¶ 61,240 at P 32; *Yuba Cty. Water Agency*, 171 FERC ¶ 61,139 at P 25; *Nev. Irrigation Dist.*, 171 FERC ¶ 61,029 at P 28.

⁴⁷ *S. Feather Water and Power Agency*, 171 FERC ¶ 61,242 at P 31; *Merced Irrigation Dist.*, 171 FERC ¶ 61,240 at P 32; *Yuba Cty. Water Agency*, 171 FERC ¶ 61,139 at P 27; *Nev. Irrigation Dist.*, 171 FERC ¶ 61,029 at P 29.

⁴⁸ Declaratory Order, 170 FERC ¶ 61,232 at P 31.

final CEQA document.⁴⁹ In its comments on the draft EIS, the California Board stated that the CEQA document had not yet been prepared. The California Board further stated, it “would have issued a denial of [w]ater [q]uality [c]ertification if forced to act by August 18, 2010.”⁵⁰ The Board clarified that the “usual process involves the applicant . . . voluntarily withdrawing their application . . . and resubmitting their application afterwards.”⁵¹ And, the Board acknowledged that it “provided PG&E with courtesy notifications of the pending expiration of the one-year deadline when applicable.”⁵² Accordingly, PG&E followed this “usual process” as dictated by the Board. The California Board’s contention that PG&E’s actions contributed to the delay ignores its own role in the process.

22. Given this history, we do not agree with the California Board’s claim that it was unaware of the reasons for PG&E’s withdrawals and refilings.⁵³ In any case, the repeated withdrawal and refile of the same application gave the California Board several years beyond section 401’s one-year deadline to act. These actions and the contemporaneous statements amount to an ongoing agreement with PG&E that let the California Board usurp the Commission’s control over whether and when a surrender would be issued for

⁴⁹ California Board, Comment on the Draft EIS, Project 606-027, at 1 (filed Aug. 25, 2010).

⁵⁰ *Id.*

⁵¹ *Id.* P 8. Indeed, state regulations codify this practice. *See* Cal. Code Regs, tit. 23, § 3836(b) (“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).

⁵² Declaratory Order, 170 FERC ¶ 61,232 at P 31 (citing California Board June 21, 2019 Filing at 6).

⁵³ The same is true of the California Board’s contention that it would have denied the applications without prejudice if PG&E had not withdrawn and refiled its application. The California Board cites no evidence in support of its claim. But, in any event, the agency could have denied an application at any time during the year following its receipt and, particularly given that PG&E did not withdraw and refile its applications until almost the end of the various one-year periods, nothing in PG&E’s actions can fairly be said to have deprived the California Board of the opportunity to act.

the Kilarc-Cow Project.⁵⁴ Consistent with the Commission's prior determinations,⁵⁵ in these circumstances, a formal agreement between a licensee and a state certifying agency is not necessary.

23. We disagree with the California Board's assertion that *Hoopa Valley* does not apply here because in *Hoopa Valley* the petitioner was a third-party stakeholder excluded from and harmed by the formal agreement. The Board argues that here the party asserting waiver, the licensee would have benefitted from any agreement with the California Board.⁵⁶ In recent proceedings, we have explained that nothing in the court's reasoning in *Hoopa Valley* rested on the identity of the party that brought the case.⁵⁷

⁵⁴ See *Hoopa Valley*, 913 F.3d at 1104.

⁵⁵ *S. Cal. Edison Co.*, 170 FERC ¶ 61,135 at PP 23-25 (finding state waiver where the state commented to the Commission that the state would recommend withdrawal and resubmittal of the applicant's request, and the state did email the applicant to request withdrawal and resubmission in five subsequent years); *S. Feather Water and Power Agency*, 171 FERC ¶ 61,242 at P 22 (finding state waiver where a month before the one-year certification deadline the state requested a withdrawal and resubmittal letter, and the following year sent a similar request, stating "you know the drill"); *Merced Irrigation Dist.*, 171 FERC ¶ 61,240 at P 26 (finding state waiver where the state sent an email noting the approaching one-year certification deadline and asking the applicant to withdraw and simultaneously resubmit the application); *Yuba Cty. Water Agency*, 171 FERC ¶ 61,139 at P 20 (finding waiver where the state informed the applicant a month prior to the one-year certification deadline that the state cannot complete the analysis required for the certification and asking the applicant to submit a withdraw/resubmit of the application); *Nev. Irrigation Dist.*, 171 FERC ¶ 61,029 at PP 5-11, 29 (finding waiver where, in comments to the Commission's draft environmental document, the state indicated that it would not issue a water quality certification prior to completing its state environmental review process and that the most likely action will be that the applicant will withdraw and resubmit applications for the water quality certifications prior to each one year deadline if the state is not ready to issue its water quality certifications and where the applicant did withdraw and resubmit annually, noting each time that the state had all information required for a complete application). *Placer Cty.*, 169 FERC ¶ 61,046 at P 18 (finding waiver where the state sent the applicant emails explicitly requesting withdrawal and resubmission of the water quality certification application).

⁵⁶ California Board Rehearing Request at 18-19.

⁵⁷ E.g., *S. Cal. Edison Co.*, 170 FERC ¶ 61,135 at P 31; *Placer Cty. Water Agency*, 167 FERC ¶ 61,056, at P 14 (2019).

Instead, the *Hoopa Valley* decision interpreted the legal requirements of the CWA, which should not differ based on the identity of the litigants.⁵⁸

24. We conclude, as we did in the Declaratory Order, that the California Board's actions and inactions regarding the withdrawals and resubmittals resulted in waiver, consistent with the *Hoopa Valley* opinion and our application in *Placer County* and *Southern California Edison*.⁵⁹

B. The California Board Did Not Act Within One Year

25. The California Board next argues that the Commission cannot find waiver under section 401 of the CWA when PG&E withdrew its certification request before the one-year statutory period expired.⁶⁰ The California Board states that CWA section 401 does not prohibit an applicant from withdrawing its request before the one-year period, contending that it did not fail or refuse to act on PG&E's requests because those requests were voluntarily withdrawn.⁶¹

26. In *Hoopa Valley*, the D.C. Circuit explained that coordinated withdrawals and resubmissions of the same certification request amount to a "failure or refusal to act" under section 401 of the CWA,⁶² and nothing in the CWA permits the Commission to make "an exception for an individual request made pursuant to a coordinated withdrawal and resubmission scheme."⁶³ PG&E, in coordination with the California Board, withdrew and resubmitted the same certification requests pending before the California Board and did not convey any information indicating any alteration in the project, let alone file a new application. PG&E followed the California Board's "usual process" that involved the "applicant ... voluntarily withdrawing their application ... and resubmitting

⁵⁸ *Id.*

⁵⁹ Declaratory Order, 170 FERC ¶ 61,232 at P 27; *see also S. Feather Water and Power Agency*, 171 FERC ¶ 61,242 at P 23; *Merced Irrigation Dist.*, 171 FERC ¶ 61,240 at P 26; *Yuba Cty. Water Agency*, 171 FERC ¶ 61,139 at P 20; *Nev. Irrigation Dist.*, 171 FERC ¶ 61,029 at PP 23, 27; *Placer Cty.*, 169 FERC ¶ 61,046 at P 18.

⁶⁰ California Board Rehearing Request at 16-21.

⁶¹ *Id.* at 17-18.

⁶² *Hoopa Valley*, 913 F.3d at 1105.

⁶³ *Id.* at 1104.

their application afterwards.”⁶⁴ Additionally, the California Board acknowledges that it “provided PG&E with courtesy notifications of the pending expiration of the one-year deadline when applicable.”⁶⁵

27. Arguments that PG&E filed a new application are unconvincing. Although in the letters accepting PG&E’s withdrawal and resubmittal, the California Board included general language stating that it might request additional information regarding the application,⁶⁶ there is no evidence that the Board ever did so in the 10-year period from 2009 until it purported to act in 2019. On rehearing, the California Board provides no evidence that PG&E’s nine letters purporting to simultaneously withdraw and resubmit its request for certification added information of any kind. Accordingly, the California Board failed to act on PG&E’s request for certification within one year of the pending request.

28. The California Board’s coordination with PG&E has prejudiced the Commission and the public interest by delaying our decision making about the proposed surrender of the Kilarc-Cow Project, in direct contravention of the CWA, as construed by the D.C. Circuit in *Hoopa Valley*.⁶⁷ The California Board contends that *Hoopa Valley* addressed indefinite delay caused by the licensee and state agreeing to hold the state’s review in abeyance, but that *Hoopa Valley* did not address, unplanned delay pending the California Board’s completion of the environmental documentation necessary for state issuance of certification, as it says occurred here.⁶⁸ We are not persuaded by the California Board’s attempt to distinguish the withdrawals and resubmittals of PG&E’s application from the facts of *Hoopa Valley*.

⁶⁴ Declaratory Order, 170 FERC ¶ 61,232 at PP 8, 27.

⁶⁵ Declaratory Order, 170 FERC ¶ 61,232 at P 31 (citing California Board June 21, 2019 Filing at 6).

⁶⁶ PG&E Petition at Attachment B (California Board September 16, 2009 Letter to PG&E at 1, California Board July 30, 2012 Letter to PG&E at 2, Board’s June 27, 2013 Letter to PG&E at 2, California Board June 9, 2014 Letter to PG&E at 2, California Board June 12, 2015 Letter to PG&E at 2, California Board May 5, 2017 Letter to PG&E at 2, and California Board April 19, 2018 Letter to PG&E at 2). *See also* California Board June 6, 2016 Letter at 1.

⁶⁷ *Id.*; *Hoopa Valley*, 913 F.3d at 1105.

⁶⁸ California Board Rehearing Request at 9-10, 28.

29. Finally, we note the California Board's assertion that it worked diligently to continue reviewing the water quality certification applications.⁶⁹ The Board argues that its review of PG&E's applications was not held in abeyance due to an agreement with PG&E, but was delayed instead due to a drought emergency in California.⁷⁰ Notwithstanding these challenges, we find these arguments without merit. To the extent that a state lacks sufficient information to act on a certification request, it has a complete remedy: it can deny certification. Delay beyond the statutory deadline, however, is not an option.

C. State Law Remedies Are Irrelevant Here

30. The California Board next asserts that the Commission should decline to reach a decision on the merits of whether certification has been waived due to PG&E's failure to exhaust its state administrative remedies.⁷¹ The Board states that the Commission misunderstood the broad scope of its argument that because PG&E failed to exhaust its administrative remedies under state law regarding PG&E's waiver claim, PG&E has waived its rights to now allege the waiver of section 401 on those bases.⁷²

31. We disagree. Section 401 does not require that the applicant pursue administrative remedies under state law to effectuate the waiver of the certification requirement.⁷³ The certification requirement in section 401 is waived by operation of section 401, if the state fails or refuses to act by the one-year deadline.⁷⁴ Whether an applicant could or did

⁶⁹ *Id.* at 11-12.

⁷⁰ *Id.*

⁷¹ *Id.* at 18-19.

⁷² *Id.* at 22-24.

⁷³ See *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 700 (D.C. Cir. 2017) (describing the waiver process for a FERC-jurisdictional pipeline as follows: "Instead, the delay triggers the Act's waiver provision, and [the pipeline company] then can present evidence of waiver directly to FERC to obtain the agency's go-ahead to begin construction.").

⁷⁴ The courts have explained that "[o]nce the Clean Water Act's requirements have been waived, the Act falls out of the equation." *Millennium Pipeline*, 860 F.3d at 700. If the state has failed to act by the deadline in section 401, the state's later denial of the request has "no legal significance." *Id.* at 700-01 (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"); see also *Weaver's Cove Energy, LLC v. R.I. Dep't of*

exhaust administrative remedies under state law has no bearing on the operation of federal law or the Commission's determination of waiver.⁷⁵

D. Retroactive Application of Hoopa Valley

32. The California Board alternatively argues that deferred action in this case was due to the parties following a withdrawal-and-resubmittal scheme that the Commission tacitly approved in prior cases.⁷⁶ We recognize that the California Board was acting consistent with its past practice when it “alerted PG&E of the pending deadline” for the one-year certification period to “allow[] PG&E to decide for itself whether it wished to withdraw and resubmit its request, face denial of its request, or take some other action.”⁷⁷ 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.⁷⁸ For this reason, the California Board's argument regarding past practice is misplaced. As we described, “legal rules announced in judicial decision-making typically have retroactive effect and ‘[r]etroactivity is the norm in agency adjudications[,]’ . . . ‘no less than in judicial adjudications.’”⁷⁹ Indeed, the *Hoopa Valley* court denied petitions for rehearing that asked the court to apply the court's ruling prospectively.⁸⁰

Envtl. 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”).

⁷⁵ *S. Feather Water & Power Agency*, 171 FERC ¶ 61,242 at P 32 (stating that the issue of whether a state has 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 procedures.”).

⁷⁶ *Id.* at 12-16.

⁷⁷ *Id.* at 4.

⁷⁸ See *Constitution Pipeline Co. LLC*, 169 FERC ¶ 61,199 at P 30; see also *S. Feather Water & Power Agency*, 171 FERC ¶ 61,242 at P 33.

⁷⁹ *Id.* P 31 (quoting *Am. Telephone & Telegraph Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006)).

⁸⁰ *Hoopa Valley Tribe v. FERC*, No. 14-1271, 2019 WL 3958147 (D.C. Cir. 2019) (denying petition for rehearing *en banc*).

33. We continue to find that equitable tolling does not apply to limit *Hoopa Valley*'s application.⁸¹ 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 D.C. Circuit did not limit its ruling in *Hoopa Valley* to prospective cases.⁸² We reject the California Board's claim that the Commission applies an expansive interpretation of *Hoopa Valley* equivalent to a new policy from the Commission, and we see no justification for not applying *Hoopa Valley* here.

E. No Violation of the Clean Hands Doctrine

34. The California Board states that the Commission failed to consider that an entity asking for equitable relief must come with clean hands.⁸³ The California Board's argument is misplaced. With respect to the allegation that PG&E lacks clean hands, here we are acting under law, not in equity, and we cannot fail to apply the law based on an allegation regarding equities. The question of clean hands is irrelevant to the Commission's decision to apply *Hoopa Valley* in this case. In any event, as discussed above, the record reflects that, with respect to the "coordinated withdrawal-and-resubmission scheme," the California Board's hands are in the same state as PG&E's.⁸⁴

35. The California Board asserts that regardless of waiver, the Commission will avoid delay by including the late-issued water quality certification in an order in the Kilarc-Cow Creek surrender proceeding because otherwise, the Commission would have to review and apply relevant water quality standards to the surrender.⁸⁵ We explained in the Declaratory Order that once a state agency has waived its authority to act on a request for a water quality certification, the water quality conditions are not mandatory and acceptance of the conditions is a matter within our discretion.⁸⁶ The Commission stated that it would consider the conditions from the November 27, 2019 certification as

⁸¹ Declaratory Order, 170 FERC ¶ 61,232 at P 38; *see also Hoopa Valley Tribe v. FERC*, No. 14-1271, 2019 WL 3958147 (denying petition for rehearing *en banc* asking the court to equitably toll the section 401 deadline).

⁸² *Id.*

⁸³ California Board Rehearing Request at 29-30.

⁸⁴ *Supra* PP 17-20.

⁸⁵ *Id.* at 28.

⁸⁶ Declaratory Order, 170 FERC ¶ 61,232 at P 44; *S. Cal. Edison.*, 170 FERC ¶ 61,135 at P 37 (citing *Central Vt. Pub. Serv. Corp.*, 113 FERC ¶ 61,167, at P 20 (2005)).

recommendations.⁸⁷ As the surrender application remains pending with the Commission, we decline to go further.

The Commission orders:

In response to the California Board's request for rehearing, the Declaratory Order is hereby modified and the result is sustained, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁸⁷ *Id.*