

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern California Edison Company

Project Nos. 67-135  
120-029  
2085-021  
2086-040  
2174-018  
2175-022

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued July 16, 2020)

1. On February 20, 2020, the Commission granted a petition for declaratory order filed by Southern California Edison Company (SCE).<sup>1</sup> 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<sup>2</sup> (CWA) to issue water quality certification for the relicensing of six of the projects comprising the Big Creek Hydroelectric System, a seven-project integrated system with operations coordinated to maximize hydropower from the available water supply in the Upper San Joaquin River Watershed.<sup>3</sup>

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<sup>1</sup> *S. Cal. Edison Co.*, 170 FERC ¶ 61,135 (2020) (Declaratory Order).

<sup>2</sup> 33 U.S.C. § 1341(a)(1) (2018).

<sup>3</sup> SCE's petition for declaratory order covered the following projects: Big Creek Nos. 2A, 8, and Eastwood Project No. 67; Big Creek No. 3 Project No. 120; Mammoth Pool Project No. 2085; Big Creek Nos. 1 and 2 Project No. 2175; Vermilion Valley Project No. 2086; and Portal Project No. 2174. The Commission issued a new license for the seventh project comprising the Big Creek Hydroelectric System, Big Creek No. 4 Hydroelectric Project No. 2017 on December 4, 2003. *S. Cal. Edison Co.*, 105 FERC ¶ 62,146 (2003).

2. The California Board filed a timely request for rehearing. Pursuant to *Allegheny Defense Project v. FERC*,<sup>4</sup> 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),<sup>5</sup> however, we are modifying the discussion in the Declaratory Order and continue to reach the same result in this proceeding, as discussed below.<sup>6</sup>

### **I. Background**

3. The licenses for the six projects expired between 2003 and 2009, and SCE filed timely applications for new licenses between 2001 and 2007.<sup>7</sup> SCE currently operates the six projects under annual licenses until the disposition of its new license applications, which remain pending.

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 United States must provide the licensing or permitting agency water quality certification

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

<sup>5</sup> 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.”).

<sup>6</sup> *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).

<sup>7</sup> The licenses for Big Creek Nos. 2A, 8, and Eastwood Project No. 67, Big Creek No. 3 Project No. 120, and Big Creek Nos. 1 and 2 Project No. 2175 expired on February 28, 2009. See *S. Cal. Edison Co.*, 4 FERC ¶ 61,147, at 61,323 (1978); *S. Cal. Edison Co.*, 59 FPC 1810, 1819 (1977); and *S. Cal. Edison Co.*, 21 FPC 419, 422 (1959). The license for Mammoth Pool Project No. 2085 expired on November 30, 2007. *S. Cal. Edison Co.*, 18 FPC 829, 833 (1957). SCE filed applications for new licenses on February 23, 2007, and November 29, 2005, respectively. The license for Portal expired on March 31, 2005. See *S. Cal. Edison Co.*, 14 FPC 672, 674 (1955). SCE filed an application for a new license on March 27, 2003. The license for Vermilion Valley expired on August 31, 2003. See *S. Cal. Edison Co.*, 12 FPC 1267, 1269 (1953). SCE filed an application for a new license on August 30, 2001.

from the state in which the discharge originates.<sup>8</sup> No license or permit shall be granted until the certification “has been obtained or has been waived . . . .”<sup>9</sup> 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. 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.<sup>10</sup>

5. On August 29, 2001, SCE requested water quality certification for the Vermilion Valley Project No. 2086 and the California Board received the application the same day.<sup>11</sup> By letter dated August 16, 2002, SCE withdrew its application.<sup>12</sup> On October 22, 2003, SCE filed a new request for certification.<sup>13</sup> Thereafter, SCE simultaneously withdrew and refiled its request on October 12, 2004,<sup>14</sup> October 12, 2005, September 28, 2006, June 20, 2007, and June 6, 2008.<sup>15</sup>

6. On March 26, 2003, SCE requested water quality certification for the Portal Project No. 2174 and the California Board received SCE’s application on March 27, 2003.<sup>16</sup> By letter dated July 27, 2004, SCE submitted a new request for certification,

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<sup>8</sup> 33 U.S.C. § 1341(a)(1).

<sup>9</sup> *Id.*

<sup>10</sup> 33 U.S.C. § 1341(d). *See City of Tacoma, Wash. v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

<sup>11</sup> Declaratory Order, 170 FERC ¶ 61,135 at P 4 (citing Southern California Edison Co. June 17, 2019 Petition for Declaratory Order (Petition for Declaratory Order), Attachment D at 1-2).

<sup>12</sup> *Id.* (citing Petition for Declaratory Order, Attachment D at 3).

<sup>13</sup> *Id.* (citing Petition for Declaratory Order, Attachment D at 7-8).

<sup>14</sup> *Id.* (citing Southern California Edison, Letter dated October 12, 2004, Docket No. P-2086-000 (filed Oct. 27, 2004)).

<sup>15</sup> *Id.* (citing Petition for Declaratory Order, Attachment D at 26-27, 32-33, 36-37, 49-50).

<sup>16</sup> *Id.* P 5 (citing Southern California Edison, Letter dated March 26, 2003, Docket No. P-2174-012 (filed March 27, 2003); Petition for Declaratory Order, Attachment D at 6).

stating that it had withdrawn its initial application in early 2004 at the recommendation of California Board staff.<sup>17</sup> Thereafter, SCE simultaneously withdrew and refiled its request on July 5, 2005, June 28, 2006, June 20, 2007, and June 6, 2008.<sup>18</sup>

7. On March 4, 2008, SCE requested water quality certification for the remaining four Big Creek projects.<sup>19</sup>

8. On November 10, 2008, the California Board notified the Commission that it intended to issue a single water quality certification covering the six pending projects, and further stated that if the one-year period for certification was insufficient, staff would recommend that SCE withdraw and refile its request.<sup>20</sup> Thereafter, SCE withdrew and resubmitted a single certification request for all six projects by letters dated February 24, 2009, February 11, 2010, January 27, 2011, January 12, 2012, January 3, 2013, December 17, 2013, December 10, 2014, December 8, 2015, November 30, 2016, and November 20, 2017.<sup>21</sup> The California Board actively participated in this process, at times directly requesting the withdrawal and refileing.<sup>22</sup>

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<sup>17</sup> *Id.* (citing Petition for Declaratory Order, Attachment D at 18-19).

<sup>18</sup> *Id.* (citing Petition for Declaratory Order, Attachment D at 24-25, 30-31, 36-37).

<sup>19</sup> *Id.* P 6 (citing Petition for Declaratory Order, Attachment D at 38-48).

<sup>20</sup> *Id.* P 7 n.16; California Board November 10, 2008 Comments on the Draft Environmental Impact Statement for the Big Creek Hydroelectric Projects at 1.

<sup>21</sup> *Id.* P 7 (citing Petition for Declaratory Order, Attachment D at 51-53, 56-58, 62-73, 81-83, 86-91, 95-97, 100-102, 108-109).

<sup>22</sup> *Id.* P 7 n. 18. *See, e.g.*, Petition for Declaratory Order, Attachment D at 79, Email dated December 6, 2012 from Scott Frazier, California Board to Wayne Allen, SCE (“Unfortunately, the [Board] will not be able to issue water quality certification for [SCE’s] six Big Creek Hydroelectric Projects . . . before January 17, 2012. As such, I would like to request that you submit a letter withdrawing and simultaneously resubmitting SCE’s application prior to January 17.”); *id.* at 84-85, Email dated December 6, 2013 from Scott Frazier, California Board to Wayne Allen, SCE (“The [Board] will not be able to issue the water quality certification for the Six Big Creek Hydroelectric Projects . . . by January 3, 2014. As such, I would like to request that [SCE] withdraw and simultaneously resubmit its application for water quality certification no later than Friday, December 20, 2013.”); *id.* at 93-94, Email dated November 23, 2015 from Oscar Biondi, California Board to Wayne Allen, SCE (“[T]he currently filed request for water quality certification will expire on December 11, 2015.

9. During some years, approximately one month after SCE's withdrawal and resubmittal, the California Board would send SCE letters acknowledging SCE's withdrawal and resubmittal request. The March 24, 2009, March 8, 2010, and February 15, 2012 acknowledgment letters included the following language:

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

The statement regarding "requested supplemental information" notwithstanding, the record does not reflect that the California Board asked SCE for additional information.

10. On August 13, 2018, the California Board issued, for public comment, a draft water quality certification for the six projects.<sup>24</sup> Notice of the draft certification established a comment deadline of October 12, 2018, which was extended to December 7, 2018. On December 6, 2018, SCE filed comments on the draft. However, on November 16, 2018, before the public comment period closed, the California Board denied, without prejudice, SCE's certification request.<sup>25</sup> SCE did not file a new certification application.

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Could you please send a letter . . . withdrawing and resubmitting the request for water quality certification?"); *id.* at 99, Email dated November 29, 2016 from Meiling Roddam, California Board to Wayne Allen, SCE ("The action date for the 401 Water Quality Certification for the Six Big Creek Projects is December 8, 2016. If you could kindly send me the withdrawal and resubmittal letter by Monday, December 5, I would very much appreciate it."); *id.* at 107, Email dated November 20, 2017 from Meiling Colombano, California Board to Wayne Allen, SCE ("The action date for the 401 Water Quality Certification for the Six Big Creek Projects is November 30, 2017. If you could kindly send me the withdrawal and resubmittal letter by Monday, November 27, I would very much appreciate it.").

<sup>23</sup> *Id.* (citing Petition for Declaratory Order, Attachment D at 54-55, 59-60, 74-75).

<sup>24</sup> *Id.* P 9 (citing Petition for Declaratory Order, Attachment B at 24).

<sup>25</sup> *Id.* (citing Petition for Declaratory Order, Attachment C).

11. 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*,<sup>26</sup> 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.

12. On May 31, 2019, with no application pending before it, the California Board issued a final water quality certification for the six Big Creek Hydroelectric System projects.<sup>27</sup>

13. On June 17, 2019, SCE filed a petition for declaratory order, citing *Hoopa Valley* and asking the Commission to declare that the California Board had waived its certification authority with regard to the relicensing of the six Big Creek Hydroelectric System projects.<sup>28</sup>

14. On February 20, 2020, the Commission granted SCE's petition upon a finding that the California Board and SCE had worked to ensure that withdrawal and resubmission would take place each year,<sup>29</sup> that their actions amounted to an ongoing agreement to defer the one-year statutory deadline, and that under this ongoing agreement, SCE never actually filed a new request or supplemental information with the California Board and so never initiated a new one-year deadline for action.<sup>30</sup>

## II. Discussion

15. On rehearing, the California Board argues that: (1) the Commission erred in finding that the California Board and SCE had an agreement to defer CWA section 401's one-year statutory time limitation in violation in *Hoopa Valley*;<sup>31</sup> (2) it never failed to act

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<sup>26</sup> 913 F.3d 1099 (D.C. Cir.) (*Hoopa Valley*) (rejecting a coordinated withdrawal-and-resubmission scheme between the applicant and the state certifying agency), *cert. denied*, 140 S. Ct. 650 (2019).

<sup>27</sup> Declaratory Order, 170 FERC ¶ 61,135 at P 11 (citing Petition for Declaratory Order, Attachment B).

<sup>28</sup> *Id.* P 12.

<sup>29</sup> *Id.* P 29.

<sup>30</sup> *Id.* P 27.

<sup>31</sup> California Board Rehearing Request at 4-6.

within one year from receiving SCE's water quality certification request;<sup>32</sup> (3) the Commission should not have acted on SCE's request for declaratory order until SCE exhausted all remedies with the California Board;<sup>33</sup> (4) the Commission should not retroactively apply *Hoopa Valley* to the facts of this case;<sup>34</sup> and (5) SCE's request is without merit because SCE came to the Commission with unclean hands.<sup>35</sup>

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

16. 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 SCE to defer the one-year statutory limit.<sup>36</sup> The California Board first attempts to distinguish *Hoopa Valley* based on the absence of formal agreement to defer action on the requests for water quality certifications,<sup>37</sup> describing its communications with SCE as not an agreement, but rather repeated notifications that SCE should withdraw its request before each approaching one-year deadline if it desired to avoid denial without prejudice.<sup>38</sup> 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 request<sup>39</sup> 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.<sup>40</sup>

17. 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

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<sup>32</sup> *Id.* at 7-8.

<sup>33</sup> *Id.* at 8-10.

<sup>34</sup> *Id.* at 10-12.

<sup>35</sup> *Id.* at 12-13.

<sup>36</sup> *Id.* at 4-6.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 5-6.

<sup>40</sup> *Id.*

period of time greater than one year.”<sup>41</sup> 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 that the applicant cooperated in these events amounted to an ongoing agreement<sup>42</sup> that delayed a certification decision by over six years.<sup>43</sup>

18. Most recently, in *Nevada Irrigation District*,<sup>44</sup> *Yuba County Water Agency*,<sup>45</sup> *South Feather Water and Power Agency*,<sup>46</sup> and *Merced Irrigation District*,<sup>47</sup> 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.”<sup>48</sup> 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.<sup>49</sup>

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<sup>41</sup> *Hoopa Valley*, 913 F.3d at 1103.

<sup>42</sup> 169 FERC ¶ 61,046, at PP 16, 18 (2019) (*Placer Cty.*); 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).

<sup>43</sup> *Placer Cty.*, 169 FERC ¶ 61,046 at PP 16, 18.

<sup>44</sup> 171 FERC ¶ 61,029 (2020).

<sup>45</sup> 171 FERC ¶ 61,139 (2020).

<sup>46</sup> 171 FERC ¶ 61,242 (2020).

<sup>47</sup> 171 FERC ¶ 61,240 (2020).

<sup>48</sup> *S. Feather Water & 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.

<sup>49</sup> *S. Feather Water & 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

19. As in these prior cases, the exchanges between the California Board and SCE on timing amounted to an ongoing agreement that allowed the California Board to delay acting within the CWA section 401 deadline. The record here indicates not only that the state coordinated with SCE, as SCE withdrew and resubmitted its certification request for the purpose of avoiding the waiver period, but that the state effectively directed SCE to do so.<sup>50</sup> The Declaratory Order noted that in its 2008 comments filed with the Commission regarding the Big Creek certification requests, the California Board stated:

Each letter initiates a one-year time clock for the State Water Board to act on the request for [water quality certification]. If the one year federal period for certification is insufficient for the State Water Board to act, staff will recommend that SCE withdraw and resubmit their request for [water quality certification] for the six Big Creek projects.<sup>51</sup>

The Board's comments do not mention denial without prejudice as an alternative option to withdrawal and resubmittal.<sup>52</sup>

20. The Declaratory Order further states that, contrary to the California Board's description of SCE's withdrawals as solely voluntary actions, the record demonstrates that California Board staff sent emails to SCE in 2012, 2013, 2015, 2016, and 2017, each noting the upcoming one-year deadline and explicitly requesting withdrawal and resubmission.<sup>53</sup> As noted in the Declaratory Order, the record demonstrates that the California Board communicated about, expected, and requested SCE's withdrawal and resubmission, in order to circumvent the CWA's one-year deadline.<sup>54</sup>

21. Given this history, we do not agree with the California Board's claim that it was unaware of the reasons for SCE's withdrawals and refileing.<sup>55</sup> In any case, the repeated

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¶ 61,139 at P 27; *Nev. Irrigation Dist.*, 171 FERC ¶ 61,029 at P 29.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* P 24 (citing California Board November 10, 2008 Comments on the Draft Environmental Impact Statement for the Big Creek Hydroelectric Projects at 1).

<sup>52</sup> *Id.*

<sup>53</sup> Declaratory Order, 170 FERC ¶ 61,135 at P 25.

<sup>54</sup> *Id.*

<sup>55</sup> The same is true of the California Board's contention that it would have denied the applications without prejudice had it not been denied the opportunity to do so.

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 SCE that let the California Board usurp the Commission's control over whether and when a new license would issue for the six Big Creek projects.<sup>56</sup> Consistent with the Commission's prior determinations,<sup>57</sup> in these circumstances, a formal agreement between a licensee and a state certifying agency is not necessary.

22. 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

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California Board Rehearing Request at 6. 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 SCE did not withdraw and refile its applications until almost the end of the various one-year periods, nothing in SCE's actions can fairly be said to have deprived the California Board of the opportunity to act.

<sup>56</sup> See *Hoopa Valley*, 913 F.3d at 1104.

<sup>57</sup> *S. Feather Water & 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).

asserting waiver, the licensee, would have benefitted from any agreement with the California Board.<sup>58</sup> 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.<sup>59</sup> Instead, the *Hoopa Valley* decision interpreted the legal requirements of the CWA, which do not differ based on the identity of the litigants.<sup>60</sup>

23. Finally, we disagree with the California Board's argument that SCE voluntarily and unilaterally submitted new requests in order to avoid a denial without prejudice.<sup>61</sup> The California Board inaccurately attempts to distinguish the facts of this case from those in *Constitution Pipeline Co., LLC*.<sup>62</sup> The California Board asserts (without providing evidence of SCE's intent) that SCE withdrew and refiled its water quality certification applications because it knew that, under state regulations, unless and until the state completes its environmental review process, it will deny the application.<sup>63</sup> The California Board contends that these regulations distinguish the current proceeding from *Constitution*, where the Commission found that there was no evidence in the record establishing that the state water quality certification authority had conveyed the likelihood of a denial in the event that the applicant failed to withdraw its application.<sup>64</sup>

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<sup>58</sup> California Board Rehearing Request at 7-8.

<sup>59</sup> *E.g.*, Declaratory Order, 170 FERC ¶ 61,135 at P 31; *Placer County Water Agency*, 167 FERC ¶ 61,056, at P 14 (2019).

<sup>60</sup> *Id.*

<sup>61</sup> California Board Rehearing Request at 6.

<sup>62</sup> *Id.* (citing *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129 (2019) (*Constitution*)).

<sup>63</sup> California Board Rehearing Request at 6. *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).

<sup>64</sup> *Id.*

24. In *Constitution*, the state argued that the applicant resubmitted two certification requests in response to the state's indication that more time was necessary to obtain and review additional information.<sup>65</sup> The state claimed that it would have likely denied the applications otherwise.<sup>66</sup> According to the state, the parties intended not to evade section 401's requirements but to allow the applicant to avoid denial without prejudice while the state actively reviewed the new request.<sup>67</sup> The Commission rejected that argument, noting that no evidence established that these representations were ever conveyed to the applicant, and finding that the parties functionally agreed to exploit the withdrawal and resubmission process, resulting in waiver.<sup>68</sup> In addition, the Commission found that the state's claimed active and ongoing review did not cure the violation of section 401.<sup>69</sup>

25. Although the California Board asserts that the state's environmental regulations provide notice that a certification request would be denied if the CEQA analysis is not complete, this does not alter our determination that the withdrawal and resubmittal of the certification request resulted in a waiver under section 401. As stated in the Declaratory Order, several of the California Board's acknowledgement letters, sent soon after receiving SCE's withdrawal/resubmittal letter, contained stock language mentioning denial without prejudice as a possibility if SCE failed to provide supplemental information in a timely manner and offered withdrawal and resubmittal as an alternative.<sup>70</sup> However, there is no evidence that the California Board actually requested supplemental information or that SCE's subsequent resubmittal letters included any new or different information. Rather, the California Board's acknowledgement letters merely included general language referencing a scenario that never materialized. Moreover, as noted above, only one of the five emails from the California Board to SCE soliciting SCE's withdrawal and resubmission mentions the possibility that the California Board may deny SCE's application.<sup>71</sup>

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<sup>65</sup> *Constitution*, 168 FERC ¶ 61,129 at P 32.

<sup>66</sup> *Id.* P 33.

<sup>67</sup> *Id.* P 35.

<sup>68</sup> *Id.* PP 33, 37.

<sup>69</sup> *Id.* P 37.

<sup>70</sup> Declaratory Order, 170 FERC ¶ 61,135 at PP 8, 27.

<sup>71</sup> *Id.* P 27, n.50.

26. 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*.<sup>72</sup>

**B. The California Board Did Not Act Within One Year**

27. The California Board next argues that the Commission cannot find waiver under section 401 of the CWA when SCE withdrew its certification request before the one-year statutory period expired.<sup>73</sup> The 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 SCE's requests because those requests were voluntarily withdrawn.<sup>74</sup>

28. 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,<sup>75</sup> 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."<sup>76</sup> SCE, 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.<sup>77</sup>

29. Arguments that SCE filed a new application are unconvincing. Although in some of the letters accepting SCE's withdrawal and resubmittal, the California Board included general language stating that it might request additional information regarding the

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<sup>72</sup> *Id.* P 29; see also *S. Feather Water & 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.

<sup>73</sup> California Board Rehearing Request at 7-8.

<sup>74</sup> *Id.* at 7.

<sup>75</sup> *Hoopa Valley*, 913 F.3d at 1105.

<sup>76</sup> *Id.* at 1104.

<sup>77</sup> See *supra* PP 7-8.

application,<sup>78</sup> there is no evidence that the Board ever did so in the 18-year period from 2001 until it purported to act in 2019. Nothing in the record indicates that between 2009 and 2017, SCE ever filed a new application.<sup>79</sup> Because the parties only exchanged correspondence indicating that they would refile (a new application or supplemental information) without actually doing so — there was not a new filing that triggered a new statutory period of review for the California Board. Accordingly, the California Board failed to act on SCE’s request for certification within one year of the pending request.

30. The California Board’s coordination with SCE has prejudiced the Commission and the public interest by delaying our licensing proceeding and undermining the Commission’s regulation of the Big Creek projects, in direct contravention of the Clean Water Act, as construed by the *Hoopa Valley* court.<sup>80</sup> 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.<sup>81</sup> We are not persuaded by the California Board’s attempt to distinguish the withdrawals and resubmittals of SCE’s application from the facts of *Hoopa Valley*.

31. Finally, we note the California Board’s assertion that it worked diligently to continue reviewing the water quality certification applications.<sup>82</sup> The Board argues that its review of SCE’s applications was not held in abeyance due to an agreement with the applicant, but was delayed instead due to a drought emergency in California.<sup>83</sup> Notwithstanding these challenges, we find these arguments without merit. To the extent 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.

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<sup>78</sup> *See supra* P 8.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*; *Hoopa Valley*, 913 F.3d at 1105.

<sup>81</sup> California Board Rehearing Request at 8.

<sup>82</sup> *Id.* at 5.

<sup>83</sup> *Id.*

### C. State Law Remedies Are Irrelevant Here

32. 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 SCE's failure to exhaust its state administrative remedies.<sup>84</sup> The Board states that the Commission misunderstood the broad scope of its argument that because SCE failed to exhaust its administrative remedies under state law regarding PG&E's waiver claim, SCE has waived its right to now allege the waiver of section 401 on those bases.<sup>85</sup>

33. We disagree. Section 401 does not require that the applicant pursue administrative remedies under state law to trigger the one-year certification deadline or effectuate the waiver of the certification requirement.<sup>86</sup> 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.<sup>87</sup> Whether an applicant could or did exhaust administrative remedies under state law has no bearing on the operation of federal law or the Commission's determination of waiver.<sup>88</sup>

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<sup>84</sup> *Id.* at 9-10.

<sup>85</sup> *Id.*

<sup>86</sup> See *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 700 (D.C. Cir. 2017) (*Millennium Pipeline*) (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.").

<sup>87</sup> The D.C. Circuit 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 Env'tl. Mgmt.*, 524 F.3d 1330, 1333 (D.C. Cir. 2008) (explaining that after waiver, states' preliminary decisions under section 401 "would be too late in coming and therefore null and void").

<sup>88</sup> *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

#### D. Retroactive Application of *Hoopa Valley*

34. 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.<sup>89</sup> We recognize that the California Board was acting consistent with its past practice when it “notified SCE that the one-year deadline under Section 401 was approaching and that, if SCE desired to avoid having its request for certification denied without prejudice, it could withdraw its request.”<sup>90</sup> 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.<sup>91</sup> For this reason, the California Board’s argument regarding past practice is misplaced. As we have previously 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.’”<sup>92</sup> Indeed, the *Hoopa Valley* court denied petitions for rehearing that asked the court to apply the court’s ruling prospectively.<sup>93</sup>

35. We continue to find that equitable tolling does not apply to limit *Hoopa Valley*’s application.<sup>94</sup> 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.<sup>95</sup> We reject the California Board’s claim that the Commission applies an expansive interpretation of

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reference to federal law, not state procedure[s]).

<sup>89</sup> California Board Rehearing Request at 5-6.

<sup>90</sup> *Id.* at 4.

<sup>91</sup> See *Constitution Pipeline Co., LLC*, 169 FERC ¶ 61,199, at P 30 (2019); see also *S. Feather Water & Power Agency*, 171 FERC ¶ 61,242 at P 33.

<sup>92</sup> *Id.* P 31 (quoting *Am. Telephone and Telegraph Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006)).

<sup>93</sup> *Hoopa Valley Tribe v. FERC*, No. 14-1271, 2019 WL 3958147 (D.C. Cir. 2019) (denying petition for rehearing *en banc*).

<sup>94</sup> Declaratory Order, 170 FERC ¶ 61,135 at P 36.

<sup>95</sup> *Id.*

*Hoopa Valley* equivalent to a new policy from the Commission and see no justification for not applying *Hoopa Valley* here.

**E. No Violation of the Clean Hands Doctrine**

36. The California Board states that the Commission failed to consider that an entity asking for equitable relief must come with clean hands.<sup>96</sup> With respect to the allegation that SCE lacks clean hands, here we are acting in 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 SCE's.<sup>97</sup>

37. The California Board asserts that regardless of waiver, the Commission will avoid delay by including the late-issued water quality certification in the licenses because otherwise, the Commission would have to review and apply relevant water quality standards to the new licenses.<sup>98</sup> 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.<sup>99</sup> The Commission stated that it would consider the conditions from the May 31, 2019 certification as recommendations.<sup>100</sup> As the licenses remain pending with the Commission, we decline to go further.

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<sup>96</sup> California Board Rehearing Request at 12-13.

<sup>97</sup> *Supra* PP 7-8.

<sup>98</sup> California Board Rehearing Request at 12.

<sup>99</sup> Declaratory Order, 170 FERC ¶ 61,135 at P 37 (citing *Central Vt. Pub. Serv. Corp.*, 113 FERC ¶ 61,167, at P 20 (2005)).

<sup>100</sup> *Id.*

The Commission orders:

In response to 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 )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.