

APPENDIX

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APPENDIX A

43 F.4th 920

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

No. 20-72432, No. 20-72452, No. 20-72782,
No. 20-72800, No. 20-72958, No. 20-72973

CALIFORNIA STATE WATER
RESOURCES CONTROL BOARD,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

NEVADA IRRIGATION DISTRICT,

Intervenor.

SOUTH YUBA RIVER CITIZENS LEAGUE; CALIFORNIA
SPORTFISHING PROTECTION ALLIANCE; FRIENDS OF THE
RIVER; MOTHER LODE CHAPTER OF THE SIERRA CLUB,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

NEVADA IRRIGATION DISTRICT,

Intervenor.

CALIFORNIA STATE WATER
RESOURCES CONTROL BOARD,

Petitioner,

2a

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

YUBA COUNTY WATER AGENCY,

Respondent-Intervenor.

SOUTH YUBA RIVER CITIZENS LEAGUE; CALIFORNIA
SPORTFISHING PROTECTION ALLIANCE; FRIENDS OF THE
RIVER; MOTHER LODGE CHAPTER OF THE SIERRA CLUB,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

YUBA COUNTY WATER AGENCY,

Respondent-Intervenor.

CALIFORNIA STATE WATER
RESOURCES CONTROL BOARD,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

MERCED IRRIGATION DISTRICT,

Respondent-Intervenor.

CALIFORNIA SPORTFISHING PROTECTION ALLIANCE;
FRIENDS OF THE RIVER; SIERRA CLUB AND
ITS TEHIPITE CHAPTER,

Petitioners,

v.

3a

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,
MERCED IRRIGATION DISTRICT,
Respondent-Intervenor.

Argued and Submitted May 12, 2022
Pasadena, California
Filed August 4, 2022

On Petition for Review of an Order of the
Federal Energy Regulatory Commission,
FERC Nos. 2266-102, 2266-118,
FERC No. 2246-086, FERC Nos. 2179-043,
2467-020, 2179-048, 2467-022, FERC No. 2179-043

OPINION

FRIEDLAND, Circuit Judge:*

Section 401 of the Clean Water Act gives states the authority to impose conditions on federal licenses for hydroelectric projects to ensure that those projects comply with state water quality standards. In these consolidated cases, we consider several petitions for review of decisions by the Federal Energy Regulatory Commission (“FERC”) holding that the California Water Resources Control Board (the “State Board” or “State Water Board”) waived that authority for certain hydroelectric projects in federal relicensing proceed-

* The Honorable Carol Bagley Amon, United States District Judge for the Eastern District of New York, sitting by designation.

ings. FERC found that the State Board had engaged in coordinated schemes with the Nevada Irrigation District, the Yuba County Water Agency, and the Merced Irrigation District (collectively, the “Project Applicants”) to delay certification and to avoid making a decision on their certification requests. FERC held that, because of that coordination, the State Board had “fail[ed] or refuse[d] to act” on the requests and had therefore waived its certification authority. *See* 33 U.S.C. § 1341(a)(1). We hold that FERC’s findings of coordination are unsupported by substantial evidence. We therefore grant the petitions for review and vacate FERC’s orders.

I.

A.

The Clean Water Act provides that “[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States” to “prevent, reduce, and eliminate pollution” and to “plan the development and use (including restoration, preservation, and enhancement) of land and water resources.” 33 U.S.C. § 1251(b). To achieve those goals, Congress has enacted a scheme of cooperative federalism that gives states an important role in regulating water quality. “The states remain, under the Clean Water Act, the ‘prime bulwark in the effort to abate water pollution.’” *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (quoting *United States v. Puerto Rico*, 721 F.2d 832, 838 (1st Cir. 1983)).

As relevant here, Section 401 of the Clean Water Act “requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters.” *PUD No. 1 of Jefferson*

Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700, 707, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994) (citing 33 U.S.C. § 1341). States may adopt water quality standards that are more stringent than federal law requires, and any limitation included in the state certification becomes a condition on any federal license. *Id.* at 705, 708, 114 S.Ct. 1900. That certification process is “essential in the scheme to preserve state authority to address the broad range of pollution” that might affect water quality. *S.D. Warren Co. v. Me. Bd. of Env't Prot.*, 547 U.S. 370, 386, 126 S.Ct. 1843, 164 L.Ed.2d 625 (2006).

To prevent a state from “indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification,” Section 401 includes a deadline by which the state must act to avoid waiving its certification authority. *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). The relevant statutory language reads:

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, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State.

33 U.S.C. § 1341(a)(1). FERC, through regulations governing hydropower licensing proceedings and through agency adjudication, has interpreted the “reasonable period of time” for action under Section 401 to be the statutory maximum of one year from the receipt of the

request. 18 C.F.R. §§ 4.34(b)(5)(iii), 5.23(b)(2); *Const. Pipeline Co.*, 162 FERC ¶ 61,014, at P 16 (Jan. 11, 2018).

The consequences of a waiver are potentially significant. Federal licenses for hydroelectric projects can last up to fifty years, and the default term is forty years.¹ 16 U.S.C. § 799; Policy Statement on Establishing License Terms for Hydroelectric Projects, 82 Fed. Reg. 49501, 49503 (Oct. 26, 2017). Accordingly, if a state waives its authority to impose conditions on a hydroelectric project’s federal license through Section 401’s certification procedure, that project may be noncompliant with prevailing state water quality standards for decades.

California’s criteria for issuing water quality certifications often make it impracticable for a certification to issue within one year of a project applicant’s submitting its request. The main cause of delay appears to be California’s requirement, pursuant to the California Environmental Quality Act (“CEQA”), that the State Board receive and consider an analysis of a project’s environmental impact before granting a certification request.² See Cal. Pub. Res. Code § 21100(a) (requiring

¹ If a project’s initial license expires while the relicensing process is ongoing, FERC may issue annual, interim licenses under the same terms and conditions as the initial license. 16 U.S.C. § 808(a)(1); 18 C.F.R. § 16.18.

² After FERC issued the waiver orders challenged here, the California legislature authorized the State Board to issue certifications before completion of CEQA review where failure to issue the certification “poses a substantial risk of waiver of the state board’s certification authority” under Section 401. Cal. Water Code § 13160(b)(2); see also 2020 Cal. Stat. 1379. The new provision directs the State Board, “[t]o the extent authorized by federal law,” to “reserve authority to reopen and ... revise the certificate” as necessary after CEQA review is eventually

completion of “an environmental impact report on any project ... that may have a significant effect on the environment”); Cal. Code Regs. tit. 23, § 3856(f) (“[T]he [Section 401] certifying agency shall be provided with and have ample time to properly review a final copy of valid CEQA documentation before taking a certification action.”). California law assigns a “lead agency” (here, the Project Applicants) to prepare the CEQA evaluation and designates a “responsible agency” (here, the State Board) that must “consider[] the [evaluation] prepared by the lead agency” and decide “whether and how to approve the project involved.”³ Cal. Code Regs. tit. 14, § 15096(a). For complex projects like the ones at issue here, the CEQA process itself can often take more than a year to complete. If the materials required for CEQA are not submitted until late in the State Board’s Section 401 review period, the State Board is unlikely to be ready to issue a certification within the one-year deadline.⁴ If the

completed. Cal. Water Code § 13160(b)(2). Because that amendment took effect after the events at issue here, it has no bearing on our analysis.

³ In cases like ours, where the project applicant is a public agency, the project applicant is the “lead agency” that must complete the CEQA evaluation. By contrast, in cases where the project applicant is a private entity, the State Board is both the “lead agency” and the “responsible agency” and, accordingly, must complete the CEQA process itself. *See* Cal. Code Regs. tit. 14, § 15051.

⁴ FERC used to “deem the one-year waiver period to commence when the certifying agency found the request acceptable for processing,” but it has since departed from that interpretation. *See California ex rel. State Water Res. Control Bd. v. FERC*, 966 F.2d 1541, 1552 (9th Cir. 1992). Apparently as a result, submitting a Section 401 certification request in California does not require the project applicant to provide all the materials that the State Board will eventually need for final approval.

project applicants do not give the State Board a sufficient opportunity to “receive and properly review the necessary environmental documentation” under CEQA by the end of the review period, California regulations require the State Board to “deny without prejudice certification ... unless the applicant in writing withdraws the request for certification.” *Id.* tit. 23, § 3836(c).

Because it is often not feasible for a Section 401 certification to issue within one year of its submission, a practice has developed over the last several decades—in California and in other states—whereby project applicants withdraw their requests for certification before the end of the one-year review period and resubmit them as new requests, rather than have their original requests denied. The theory behind this practice is that a withdrawn-and-resubmitted request starts a new one-year review period, affording the project applicant more time to comply with procedural and substantive prerequisites to certification and the state more time to decide whether and under what conditions it will grant the certification request. Although FERC expressed misgivings in some orders that withdrawal-and-resubmission could lead to delays in federal licensing, FERC accepted the withdrawal-and-resubmission practice for many years. *See, e.g., Barrish & Sorenson Hydroelectric Co.*, 68 FERC ¶ 62,161, 64,258 (Aug. 12, 1994) (noting that the applicant “withdrew and refiled” its Section 401 request the day before the one-year review deadline); *Bradwood Landing LLC*, 126 FERC ¶ 61,035, at P 24 n.26 (Jan. 15, 2009) (observing that the project applicant’s withdrawal-and-resubmission of its request for certification from the state of Oregon “restarted the statutory one-year period” for the state certifying agency); *Const. Pipeline Co.*, 162 FERC

¶ 61,014, at P 23 (Jan. 11, 2018) (“We reiterate that once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under section 401(a)(1).”), *reh’g denied*, 164 FERC ¶ 61,029, at P 17 (July 19, 2018) (reaffirming that conclusion).

In 2019, however, the D.C. Circuit held that California and Oregon had waived their certification authority by entering a formal contract with a project applicant to delay federal licensing proceedings through the continual withdrawal-and-resubmission of the applicant’s certification requests. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019). The court held that the states’ engagement in a “coordinated withdrawal-and-resubmission scheme” constituted a “failure” or “refusal” to act under the meaning of Section 401. *Id.* at 1104–05. In response to *Hoopa Valley*, FERC changed its position. In a series of orders, including those at issue here, FERC concluded that states had waived their Section 401 certification authority by coordinating with project applicants on the withdrawal-and-resubmission of Section 401 certification requests, even in the absence of an explicit contractual agreement to do so.

B.

These petitions for review challenge three orders issued by FERC holding that California waived its authority to issue water quality certifications for the Yuba-Bear Project (operated by the Nevada Irrigation District⁵), the Yuba River Project (operated by the Yuba County Water Agency), and the Merced River

⁵ The word “Nevada” in Nevada Irrigation District refers to Nevada County, California.

and Merced Falls Projects (together, the “Merced Projects”) (operated by the Merced Irrigation District). We now summarize the relevant facts underlying each of those three orders.

1.

In 1963, FERC issued the Nevada Irrigation District (“NID”) a fifty-year license to operate the Yuba-Bear Hydroelectric Project on the Middle Yuba, South Yuba, and Bear Rivers, in Sierra, Placer, and Nevada Counties, California. In 2011, two years before the license expired, NID applied for a renewal of the license, as required by statute. The relicensing application is still pending,⁶ and since the original license expired in 2013, NID has operated the Yuba-Bear Project on interim, annual licenses under the original license terms.⁷ Because FERC licensed the Yuba-Bear Project before the enactment of Section 401, those interim licenses are not subject to state-imposed conditions under a Section 401 water quality certification.

On March 15, 2012, NID submitted a request for water quality certification to the State Board. The request stated that “NID intends to be the Lead Agency for the purpose of compliance with the requirements of [CEQA], and will coordinate with the [State] Board and other responsible agencies.” The State Board acknowledged receipt of the request, confirmed that the request met the state’s filing requirements, and notified NID that the request was pending before

⁶ Licensing, Federal Energy Regulatory Commission, <http://www.ferc.gov/licensing> (follow hyperlink entitled “Pending License, Relicense, and Exemption Applications” (updated July 15, 2022)).

⁷ See *supra* note 1.

the State Board. The State Board reminded NID that, “[a]lthough a final CEQA document is not required for [a] complete application for certification, CEQA requirements must be satisfied before the State Water Board can issue certification.”

NID apparently never prepared the CEQA evaluation required by California regulations. According to a status report sent by the State Board to FERC, the State Board was still “[a]waiting commencement of [the] CEQA process by [NID]” as of December 2019, more than seven years after NID submitted its initial certification request.

On March 1, 2013—two weeks before the State Board’s deadline to act on the certification request—NID filed a letter with the State Board withdrawing and resubmitting its application for water quality certification. NID reiterated its intent to act as the lead agency for CEQA purposes. The State Board acknowledged receipt of the withdrawal-and-resubmission and stated: “The new deadline for certification action is February 28, 2014.”

Soon after, FERC issued a draft of its own environmental impact statement, as required by federal law. The draft noted NID’s withdrawal-and-resubmission and the State Board’s new February 2014 deadline to act on the certification request. The State Board submitted comments on the draft, including both substantive comments on various water quality concerns and comments attempting to clarify the expected timeline for a Section 401 certification. The latter set of comments stated:

The CEQA process has not started, and will not be finished by the spring of 2014. The most likely action will be that the Licensees will withdraw

and resubmit their respective applications for water quality certification before the one year deadline if the State Water Board is not ready to issue its water quality certifications. Otherwise, the State Board will deny certification without prejudice.

As noted above, NID never prepared a CEQA evaluation. Instead, it continued to withdraw and resubmit its certification request each year, for the five years between 2014 and 2018. In response to each withdrawal-and-resubmission, the State Board acknowledged receipt and conveyed the new deadline for certification action.

In 2019, on the day the D.C. Circuit decided *Hoopa Valley*, the State Board denied without prejudice NID's last request for Section 401 certification. In the letter notifying NID of the denial, the State Board explained that "[w]ithout completion of the CEQA process, the State Water Board cannot issue a certification." NID then sought a declaratory order from FERC that the State Board had waived its Section 401 certification authority.

FERC granted NID's request, holding that the State Board had waived its certification authority for the Yuba-Bear Project. FERC reasoned that, although *Hoopa Valley* had involved a formal contract between the parties to defer certification and delay federal licensing proceedings, "an explicit agreement to withdraw and refile is not necessary" to a finding of waiver. Rather, evidence of a "functional agreement" or evidence of "the state's coordination with the licensee" would suffice to show that the state had "fail[ed] or refuse[d] to act" under Section 401. Turning to the evidence in the instant case, FERC first noted that the State Board had consented to NID's decision to

continually withdraw and resubmit its certification requests rather than issue a denial. As evidence of the State Board's coordination in a withdrawal-and-resubmission scheme, FERC pointed to the State Board's comments on FERC's draft environmental impact statement, quoted above, describing the State Board's expectation that NID would withdraw and resubmit its request. FERC also asserted that California regulations "codify" the withdrawal-and-resubmission practice. Finally, FERC found it "[t]elling[]" that the State Board had "failed to dispute NID's repeated statements" in its withdrawal-and-resubmission letters that "the Board had all of the information it needed to act."

2.

The administrative record underlying FERC's Yuba River Project order is similar to the record from the Yuba-Bear Project. In 1963, FERC issued the Yuba County Water Agency ("YCWA") a fifty-year license to operate the Yuba River Development Project on the Yuba, North Yuba, and Middle Yuba Rivers in Sierra, Yuba, and Nevada Counties. YCWA filed an application for a new license in June 2017. As with the Yuba-Bear Project, the Yuba River Project has been operating under interim, annual licenses while its relicensing application is pending, and those interim licenses are not subject to state-imposed Section 401 conditions.⁸

On August 24, 2017, YCWA submitted a request for water quality certification to the State Board and affirmed its role as the lead agency for CEQA compliance. The State Board acknowledged receipt of

⁸ See *supra* notes 1 & 6.

the request and stated that the deadline for certification action was one year later.

On July 25, 2018, a month before the end of the one-year review period, a member of the State Board's staff emailed YCWA to remind it of the upcoming deadline. The email stated:

YCWA's water quality certification action date for the Yuba River Development Project (FERC No. 2246) is August 24, 2018. A final CEQA document for the Project has not been filed; therefore, the State Water Board cannot complete the environmental analysis of the Project that is required for certification.

Please submit a withdraw/resubmit of the certification application as soon as possible. Let me know if you have any questions.

YCWA responded that it planned to submit the withdrawal-and-resubmission letter on August 20. The State Board staff member replied: "My management usually gets a little antsy when our action date gets below 3 weeks because a 'deny without prejudice' letter takes time to route to our Executive Director. If possible, please submit the letter by next Friday."

On August 3, 2018, YCWA filed a withdrawal-and-resubmission letter with the State Board, reiterating its intent to act as the lead agency for CEQA purposes. The State Board acknowledged receipt of the withdrawal-and-resubmission letter and stated: "The new deadline for certification action is August 3, 2019."

Like NID, YCWA apparently never prepared a CEQA evaluation. A State Board status report to FERC indicated that it was still "[a]waiting com-

mencement of [the] CEQA process by YCWA” in December 2019. After the D.C. Circuit decided *Hoopa Valley*, the State Board denied without prejudice YCWA’s resubmitted request for certification, relying on YCWA’s failure to begin the CEQA process. YCWA then sought a declaratory order from FERC that the State Board had waived its Section 401 certification authority.

FERC concluded that the State Board had waived its certification authority for the Yuba River Project, employing essentially the same reasoning as in its Yuba-Bear Project order. This time, FERC found evidence of coordination in the email exchange between the State Board’s staff member and YCWA, reasoning that YCWA’s “withdrawal and refiling of its application was in response to the [State] Board’s request that it do so.” FERC asserted that “[t]he coordination” demonstrated by that exchange “alone [was] sufficient evidence that the [State] Board sought the withdrawal and resubmittal of the Yuba River application to circumvent the one-year statutory deadline for the state agency to act.” As in the Yuba-Bear Project order, FERC also pointed to California’s “codification” of the withdrawal-and-resubmission practice in its regulations and to the State Board’s failure to “dispute Yuba County’s statements that ... the [State] Board had all of the information it needed to act.”

3.

The administrative record underlying FERC’s Merced Projects order resembles the administrative records from the Yuba-Bear and Yuba River Projects. In 1963 and 1969, respectively, FERC issued licenses to the Merced Irrigation District (“MID”) to operate the Merced River Hydroelectric Project for a fifty-year term and to its predecessor licensee, Pacific Gas and

Electric Company (“PG&E”), to operate the Merced Falls Hydroelectric Project for a forty-five-year term. The Merced Projects are located on the Merced River in Merced and Mariposa Counties. As with the Yuba-Bear and Yuba River Projects, the Merced Projects are currently operating under interim, annual licenses while relicensing is pending.⁹

On May 20 and May 21, 2014, MID and PG&E¹⁰ submitted to the State Board requests for water quality certifications for the Merced Projects. The State Board acknowledged receipt of the requests, conveyed the one-year deadline for action, and warned that, “[i]f the information necessary for compliance with CEQA is not provided to the State Water Board, staff may recommend denial of certification without prejudice.”

In April 2015, one month before the original one-year deadline, a State Board member emailed MID to remind it of the upcoming deadline. The email stated:

Merced Irrigation District’s application for water quality certification for the Merced River Hydroelectric Project, FERC Project No. 2179[,] expires on May 21, 2015. Please withdraw the [sic] and simultaneously resubmit an application for water quality certification prior to May 13, 2015. If you have any questions regarding this request or this process, please feel free to contact me. Please

⁹ See *supra* notes 1 & 6.

¹⁰ PG&E transferred its license for the Merced Falls Project to MID in 2017, making MID the applicant in the relicensing proceeding before FERC. For the Merced Falls Project, between the initial certification request in 2014 and the license transfer in 2017, it was the State Board—not PG&E—that was the lead agency for the purpose of CEQA compliance.

respond by email verifying receipt of this correspondence.

MID apparently never prepared the CEQA evaluation required by California regulations—the State Board said in a status report to FERC that it was still “[a]waiting commencement of [the CEQA] process” for both Merced Projects in December 2019. Instead, each year between 2015 and 2018, MID and PG&E withdrew and resubmitted their water quality certification requests before the expiration of the State Board’s one-year period of review. In response, the State Board acknowledged receipt of the withdrawal-and-resubmission letters, conveyed the new deadlines for certification action, and warned that failure to comply with CEQA could result in denial of certification without prejudice.

After the D.C. Circuit decided *Hoopa Valley*, the State Board denied without prejudice MID’s resubmitted requests for certification, relying on MID’s failure to comply with CEQA. MID then sought a declaratory order from FERC that the State Board had waived its Section 401 certification authority.

FERC concluded that the State Board had waived its certification authority for the Merced Projects, again using nearly identical reasoning as in its Yuba-Bear Project and Yuba River Project orders. In particular, FERC pointed to “the four years of the applicants[] withdrawing and resubmitting their applications” and to the April 2015 email from the State Board staff member to MID as evidence that the State Board had engaged in a coordinated scheme to continually reset its one-year deadline and avoid taking action on the certification request. As in the other orders, FERC noted that California’s regulations “codify” the withdrawal-and-resubmission practice

and highlighted the State Board’s failure to “request additional information regarding the [Section 401 requests.]”

* * *

In sum, in all three challenged orders, FERC held that the Project Applicants’ withdrawals-and-resubmissions of their Section 401 certification requests did not restart the State Board’s one-year review clock because the State Board “coordinated” with the Project Applicants in a scheme to avoid deciding the request within the statutory deadline.

The State Board and various environmental organizations timely petitioned our court for review of all three orders.

II.

“We review FERC decisions to determine whether they are ‘arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or not in accordance with the law.’” *California ex rel. Harris v. FERC*, 784 F.3d 1267, 1272 (9th Cir. 2015) (quoting *Cal. Dep’t of Water Res. v. FERC*, 341 F.3d 906, 910 (9th Cir. 2003)). “[S]ubstantial evidence constitutes more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the evidence is susceptible of more than one rational interpretation, we must uphold [FERC’s] findings.” *Fall River Rural Elec. Coop. v. FERC*, 543 F.3d 519, 525 (9th Cir. 2008) (second alteration in original) (quoting *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003)). Although we must accept reasonable inferences drawn by an agency, “[s]ubstantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise

only a conjecture or a possibility.” *Woods v. United States*, 724 F.2d 1444, 1451 (9th Cir. 1984).

III.

As noted above, FERC changed its position on withdrawal-and-resubmission following the D.C. Circuit’s decision in *Hoopa Valley*. *Hoopa Valley* concerned a series of dams along the Klamath River in California and Oregon that were operated by PacifiCorp pursuant to a federal license. 913 F.3d 1099, 1101 (D.C. Cir. 2019). As PacifiCorp’s license was due to expire, PacifiCorp asked FERC to relicense the upper dams and decommission the lower dams. *Id.* PacifiCorp requested Section 401 certifications from California and Oregon. *Id.* While those requests were pending, a consortium of parties—including PacifiCorp, the two states, and various other interested groups—entered negotiations to address certain risks associated with decommissioning the lower dams. *Id.* Those negotiations culminated in a formal agreement, in which the states promised that they would not take any action on the certification requests and PacifiCorp promised to withdraw and resubmit them annually as necessary to preserve the states’ certification authority. *Id.* at 1101–02. The goal of that arrangement was to pause federal licensing proceedings until PacifiCorp had satisfied various preconditions for decommissioning specified in the agreement, including adopting interim environmental measures and securing federal funds for the project. *Id.* Pursuant to the agreement, PacifiCorp’s water quality certification requests remained undecided by California and Oregon even though they “ha[d] been complete and ready for review for more than a decade.” *Id.* at 1105.

The Hoopa Valley Tribe, which was not a party to the contractual agreement and whose reservation is

downstream of the dams, petitioned FERC for a declaratory order that California and Oregon had waived their Section 401 certification authority. *Id.* at 1102. FERC declined to find a waiver, *id.*, in keeping with its long-held position that the withdrawal-and-resubmission procedure restarted a state’s one-year review period. The D.C. Circuit disagreed, concluding that California and Oregon had demonstrated “deliberate and contractual idleness” by “shelving water quality certifications” pursuant to the “coordinated withdrawal-and-resubmission scheme” required by the parties’ contractual agreement. *Id.* at 1104–05. Accordingly, the court held that the states had failed or refused to act on the certification requests within one year and had therefore waived their certification authority under Section 401. *Id.*

Following *Hoopa Valley*, FERC began finding waiver in many cases where project applicants had withdrawn and resubmitted certification requests. FERC has applied *Hoopa Valley* not only to cases involving express agreements to delay certification through withdrawal-and-resubmission, like the agreement at issue in *Hoopa Valley* itself, but also to cases involving what FERC has deemed more informal, coordinated schemes. *E.g.*, *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185, at P 37 (Sept. 20, 2019), *vacated by N.C. Dep’t of Env’t Quality v. FERC (NCDEQ)*, 3 F.4th 655 (4th Cir. 2021); *Placer Cnty. Water Agency*, 167 FERC ¶ 61,056, at P 12 (Apr. 18, 2019).

In defining its standard for waiver, FERC draws a line between a “coordinated” scheme and a “unilateral” withdrawal-and-resubmission by the project applicant. In its brief to our court, FERC takes the position that “an applicant’s unilateral withdrawal and resubmittal is not imputed to the State” and therefore

does not trigger a waiver. Ordinarily, FERC acknowledges, “[o]nce an applicant withdraws a request, it is not clear that the State retains power to act on it”; the withdrawal of the request removes it from the state’s consideration, and the resubmission of the certification request begins a new one-year review period. Accordingly, where the evidence shows that the state has merely acquiesced in a project applicant’s own decision to withdraw and refile—and, especially, where the state would have no discernible motive for attempting to procure a withdrawal-and-resubmission—FERC’s position is that the state has not waived its certification authority. *See, e.g., Village of Morrisville*, 174 FERC ¶ 61,141, at P 22 (Feb. 24, 2021) (“[The Vermont certifying agency’s] mere acceptance of Morrisville’s requests to withdraw and refile is not evidence of a functional agreement between the parties with the motivation to restart the one-year clock.”), *modifying on reh’g* 173 FERC ¶ 61,156 (Nov. 19, 2020).

By contrast, FERC contends that “where the State coordinates in an applicant’s withdrawal of its request, the State has affirmatively ‘fail[ed] or refus[ed] to act’ on it within one year,” and thus waived its Section 401 certification authority. FERC emphasizes that “it is a State’s efforts to avoid the one-year deadline by way of withdrawal and resubmittal that reflect the ‘State’s dalliance or unreasonable delay.’” (quoting *Hoopa Valley*, 913 F.3d at 1104). In other words, according to FERC, “the dispositive factor” is whether the state coordinates with the project applicant “to afford itself more time to decide a certification request.” Under that standard, where the state has sought a withdrawal-and-resubmission for its own purposes—perhaps, for example, because it lacks an adequate basis to deny certification but needs more

time to craft certification conditions—the state has engaged in a coordinated scheme to avoid the one-year deadline for action.

We need not decide whether the coordination standard FERC advances is consistent with the text of Section 401 because we agree with the State Board and the environmental organizations that FERC’s findings of coordination are not supported by substantial evidence in the record.¹¹ Instead, the evidence shows only that the State Board acquiesced in the Project Applicants’ own decisions to withdraw and resubmit their applications rather than have them denied.¹²

¹¹ Because the Environmental Protection Agency (“EPA”) is charged with administering the Clean Water Act, including Section 401, EPA’s interpretations of the Act, rather than FERC’s, are entitled to deference under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). In 2020, after the events at issue here, EPA promulgated a final rule interpreting the waiver provision in Section 401 for the first time, and EPA has since proposed a new rule that would revise and replace the 2020 rule. *See* 40 C.F.R. pt. 121 (codifying Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42210 (July 13, 2020)); Clean Water Act Section 401 Water Quality Certification Improvement Rule, 87 Fed. Reg. 35318 (proposed June 9, 2022) (to be codified at 40 C.F.R. pts. 121, 122, & 124). We need not consider EPA’s interpretations of Section 401 because they apply only prospectively and because, in any event, we do not reach the statutory-interpretation issue.

¹² Because we vacate FERC’s orders on substantial-evidence grounds, we also do not reach the State Board’s arguments that FERC’s “coordination” standard cannot be applied retroactively either under *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), or under *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322 (9th Cir. 1982).

In the Yuba-Bear Project order, FERC relied almost entirely on comments that the State Board submitted in response to FERC's draft environmental impact statement. As described above, those comments stated: "The CEQA process has not started The most likely action will be that [NID] will withdraw and resubmit Otherwise, the State Water Board will deny certification without prejudice." From those comments, FERC concluded that NID had not "acted voluntarily and unilaterally" in withdrawing and resubmitting its certification request because the State Board "expected NID to withdraw and refile its application."

Far from showing that the State Board coordinated a scheme to delay a decision on certification, the State Board's comments (which were not even conveyed directly to NID) show merely that the State Board predicted that NID would decide to withdraw and resubmit. The State Board observed that NID had not started the CEQA process and that, as a result, "[t]he most likely action" was that NID would withdraw and resubmit its request. The statement describes the State Board's prediction but gives no indication that the State Board was working to engineer that outcome. Indeed, the State Board went on to say that it was fully prepared to "deny certification without prejudice" if NID took a different course. The comments do not suggest that the State Board was motivated to delay certification by way of withdrawal-and-resubmission.¹³

¹³ FERC speculates in its brief that the State Board might have preferred withdrawal-and-resubmission because, unlike a denial without prejudice, the withdrawal-and-resubmission might not be subject to judicial review in state court. There is no evidence in the record that the State Board was motivated to avoid judicial review. And, in any event, the parties have given us no reason to

FERC’s order ignored the import of other evidence in the record that furnishes crucial context: It was NID that had failed to comply with CEQA, and thus it was NID—not the State Board—that apparently had a motive for delay. If, conversely, NID had complied with its legal obligations under state law, then statements like those quoted above might suggest that the State Board was seeking to extend its own decision-making window by instructing NID to withdraw and resubmit the application. Here, though, the comments indicate only that the State Board predicted that NID would withdraw its application because of NID’s own failure to comply with CEQA—and that the State Board would deny the certification request without prejudice if NID chose not to withdraw it, as state law would have required, *see* Cal. Code Regs. tit. 23, § 3836(c). In short, the State Board’s comments show only that it consented to NID’s own decision to withdraw and resubmit its certification requests.

The evidence supporting FERC’s waiver finding in the Yuba River Project order is similarly inadequate. FERC relied almost exclusively on an email exchange between a member of the State Board’s staff and YCWA, in which the staff member reminded YCWA that the “final CEQA document for the Project has not

believe that a state-court challenge to such a denial would have succeeded, given that the Project Applicants had not submitted the materials required by CEQA. *See* Cal. Code Regs. tit. 23, § 3836(c) (providing that, in the absence of required CEQA documentation, “the certifying agency shall deny without prejudice certification for any discharge resulting from the proposed activity”); *Turlock Irrigation Dist.*, 174 FERC ¶ 61,042, at PP 31-33 (Jan. 19, 2021) (noting that state law governs the validity of the State Board’s action to deny certification pursuant to state water quality standards), *petition for review denied by Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179 (D.C. Cir. 2022).

been filed” and asked YCWA to “[p]lease submit a withdraw/resubmit of the certification application as soon as possible.” The staff member noted in a follow-up email that the reason for the urgency was that “a ‘deny without prejudice’ letter takes time to route to our Executive Director.”

Considered in context, those emails do not support FERC’s finding of coordination. Because YCWA had not complied with CEQA, the State Board could not grant a Section 401 certification. Cal. Code Regs. tit. 23, § 3836(c). The staff member’s request that YCWA send a withdrawal-and-resubmission letter merely reflected his prediction that YCWA would choose the withdrawal-and-resubmission path rather than have its certification denied by the Board. After all, the withdrawal-and-resubmission mechanism had become a standard practice employed by project applicants who had not yet complied with CEQA—a practice that both the State Board and FERC had long accepted. The follow-up email confirms that understanding. The State Board was prepared to deny certification but wanted to prepare such a denial before the deadline if YCWA chose not to withdraw; from the State Board’s perspective, withdrawal-and-resubmission and denial without prejudice were functional substitutes that would have had the same practical effect. Like the State Board’s comments on the Yuba-Bear Project, the State Board’s communication here shows only that the State Board acquiesced in YCWA’s own decision to withdraw its requests.

Finally, in the Merced River Project order, FERC again relied primarily on a single email from the State Board, which, for similar reasons, cannot support FERC’s waiver finding. The email asked that MID “[p]lease withdraw the [sic] and simultaneously resub-

mit an application for water quality certification prior to” the deadline.¹⁴ Once again, context is critical to understanding the message: MID had not complied with its obligation to furnish the CEQA documents required by state law. For that reason, the State Board anticipated that MID would withdraw and resubmit its certification request, as was the common practice, and accepted MID’s decision to do so. Nothing in the record suggests that the State Board was unprepared to deny the requests in accordance with state regulations if MID chose not to withdraw and resubmit, *see* Cal. Code Regs. tit. 23, § 3836(c), or that the State Board had any motive to delay a certification decision by coordinating a withdrawal-and-resubmission.

Indeed, for all three projects, it seems that the State Board, unlike the Project Applicants, would have had an interest in moving along the environmental-review process. The Project Applicants were operating under interim, annual licenses that were not subject to state-imposed water quality conditions. *See supra* notes 1 & 6. Completing the Section 401 certification process would have allowed the State Board to impose conditions on any eventual new license. The evidence shows that, for all three projects, the State Board was at least actively engaged in relicensing proceedings by, for example, participating in the pre-application process

¹⁴ As noted above, *see supra* note 10, the State Board was the lead CEQA agency for the Merced Falls Project before PG&E transferred its license to MID. FERC has not offered a similar email or any other evidence that might support a waiver determination for the Merced Falls Project; nor has FERC argued that the State Board’s initial role provides a basis for treating the Merced Falls Project differently from the Merced River Project. *See United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) (en banc) (“Generally, an appellee waives any argument it fails to raise in its answering brief.”).

to design the necessary environmental studies, submitting comments on FERC’s draft environmental analyses, and providing regular status updates to FERC on pending certification requests. The Project Applicants, by contrast, stood to benefit from any delays because a Section 401 certification likely would have imposed additional environmental-protection measures. *See Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179, 1183 n.6 (D.C. Cir. 2022) (noting that applicants operating under interim, annual licenses have “an incentive to delay” because their expired, decades-old licenses “presumably include[] far fewer environmental conditions” than current law requires).

FERC’s remaining evidence is no more persuasive. In all three orders under review, FERC pointed to the serial withdrawals-and-resubmissions themselves. But, as FERC’s own position recognizes, “an applicant’s unilateral withdrawal and resubmittal is not imputed to the State.” Even under FERC’s interpretation of the statute, the mere fact that withdrawals-and-resubmissions occurred cannot demonstrate that the State Board was engaged in a coordinated scheme to delay certification.

FERC also observed in all three waiver orders that California’s regulations “codify [the] practice” of withdrawal-and-resubmission—and, in its brief to our court, FERC offers those regulations as additional evidence that the State Board directed the Project Applicants to withdraw their certification requests. FERC is wrong to describe California’s regulations as “prescribing withdrawal as a response to the impending risk of federal waiver.” Those regulations instead state that, where a project applicant has failed to comply with CEQA, “the certifying agency *shall deny without prejudice certification* for any discharge re-

sulting from the proposed activity unless the applicant in writing withdraws the request for certification.” Cal. Code Regs. tit. 23, § 3836(c) (emphasis added).¹⁵ The most that can be said about the regulations is that they acknowledge applicants’ longstanding practice—accepted by FERC for decades—of withdrawing and resubmitting Section 401 certification requests to avoid having them denied for failure to comply with state environmental-review requirements.

Finally, all three orders also relied on the State Board’s alleged failure to dispute statements by the Project Applicants “that the Board had all of the information it needed” or to request additional information. FERC’s orders mischaracterize the record. The State Board never disputed that the Project Applicants had met the minimum filing requirements to *submit* a Section 401 certification request. But the State Board continually reminded NID, YCWA, and MID that it did not have the information it would need to *grant* a request—namely, the CEQA evaluation that California law required, Cal. Code Regs. tit. 23, § 3856(f).

In short, the records in all three orders under review demonstrate that the Project Applicants chose to withdraw and resubmit their certification requests because they had not complied with California’s CEQA regulations. Without a complete CEQA evaluation, the State Board was legally obligated to deny the requests without prejudice, and the record suggests that the

¹⁵ As mentioned above, *see supra* note 2, the California legislature recently amended state law to permit the State Board to issue a Section 401 certification without a final CEQA evaluation under certain circumstances. We express no view on how that amendment might affect the operation of this regulation going forward.

State Board was prepared to do so. To avoid such a denial, the Project Applicants employed the common and long-accepted withdrawal-and-resubmission maneuver, with the State Board's acquiescence.¹⁶ We note that, if the Project Applicants had preferred not to undertake withdrawal-and-resubmission, they could have declined to do so, forced the State Board to deny their certification requests, and, if they believed the denials were unwarranted, challenged them in state court. The Project Applicants chose not to take that path—and nothing in the record shows that the State Board encouraged that choice. Under FERC's own coordination standard, a state's mere acceptance of a withdrawal-and-resubmission is not enough to show that the state engaged in a coordinated scheme to avoid its statutory deadline for action. Accordingly, FERC's orders cannot stand.

¹⁶ Although it appears that, from the State Board's perspective, withdrawal-and-resubmission and denial without prejudice were functionally equivalent, the Project Applicants apparently had reasons to prefer withdrawal-and-resubmission. At oral argument, FERC suggested that "there are risks that come with a denial" for the applicant, suggesting that a denial might "affect[] their investor decisions" and could also "imperil their federal license." Oral Argument at 33:01-33:16. The latter concern apparently stems from the fact that a denial without prejudice might signal to FERC that the project applicant is not diligently pursuing Section 401 certification—which could constitute grounds for dismissal of the federal licensing application, *see Turlock Irrigation Dist.*, 174 FERC ¶ 61,042, at PP 37-38 (Jan. 19, 2021). The Project Applicants confirmed at oral argument that they preferred to avoid denials without prejudice: "You say denial without prejudice, but denial is denial no matter what label you put on it. Then the applicants would have been in the position of deciding whether they had to appeal or not, if they didn't appeal, whether they might be estopped from appealing in the future." Oral Argument at 52:50-53:12.

The Fourth Circuit recently reached the same conclusion in a case with similar facts. *See NCDEQ*, 3 F.4th 655. In that case, FERC had also found waiver based on email correspondence from the certifying agency reminding the project applicant of the deadline for withdrawal-and-resubmission. *Id.* at 662–64. The Fourth Circuit vacated FERC’s order, concluding that, even “[a]ssuming without deciding that a State may waive its certification authority under [Section] 401 by coordinating with an applicant in a scheme to defeat the statutory review period through a process of withdrawing and resubmitting the certification application,” the correspondence between the certifying agency and the project applicant was not substantial evidence of coordination. *Id.* at 676.

We agree with the Fourth Circuit’s observation in *NCDEQ* that “it must take more than routine informational emails to show coordination” because the states’ “rights and responsibilities to ensure compliance with their own water-quality standards are too important to be so easily stripped away.” *Id.* at 675. Because the default term of a federal license is forty years, a state’s waiver could result in a hydroelectric project’s being noncompliant with a state’s standards for decades. Considering those dramatic consequences, FERC’s coordination findings cannot rest on such thin evidence as a simple courtesy email reminding an applicant of an impending deadline.

IV.

For the foregoing reasons, we conclude that FERC’s orders are not supported by substantial evidence. We therefore VACATE those orders and REMAND for further proceedings consistent with this opinion.

APPENDIX B

171 FERC P 61029 (F.E.R.C.), 2020 WL 1895118
FEDERAL ENERGY REGULATORY COMMISSION

Commission Opinions, Orders and Notices

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

Nevada Irrigation District

Project No. 2266-102

**ORDER ON WAIVER OF WATER QUALITY
CERTIFICATION**

(Issued April 16, 2020)

1. On February 19, 2019, Nevada Irrigation District (NID), licensee for the Yuba-Bear Hydroelectric Project No. 2266 (Yuba-Bear Project), filed a request for the Commission to determine that the California State Water Resources Control Board (California Board or Board) waived its authority under section 401(a)(1) of the Clean Water Act (CWA)¹ to issue water quality certification regarding the relicensing of the Yuba-Bear Project. This order makes such a determination.

I. Background

2. On June 24, 1963, the Commission issued NID a 50-year license, effective May 1, 1963, for the Yuba-Bear Project, located on the Middle Yuba, South Yuba, and Bear Rivers in Sierra, Nevada, and Placer Counties,

¹ 33 U.S.C. § 1341(a)(1) (2018).

California.² On April 15, 2011, NID submitted a timely application for a new license for the project.

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 NID's operation of the Yuba-Bear Project, must provide the licensing or permitting agency a water quality certification from the state in which the discharge originates or evidence of waiver thereof.³ If the state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request," then certification is waived.⁴ Further, the licensing or permitting agency may not grant a license or permit until certification has been granted or waived.⁵

4. NID requested water quality certification for relicensing of the Yuba-Bear Project on March 15, 2012, and the California Board received the request on the same day.⁶ In its March 29, 2012 acknowledgment letter, the Board stated that NID is "notified that [its]

² *Nevada Irrigation Dist.*, 29 F.P.C. 1256 (1963). The license expired on April 30, 2013. NID continues to operate the project under an annual license.

³ 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, Washington v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

⁴ 33 U.S.C. § 1341(a)(1).

⁵ *Id.*

⁶ NID Request at Appendix B, NID March 15, 2012 Letter to California Board.

application for certification is pending before the [California Board].”⁷

5. On March 1, 2013, NID withdrew and resubmitted its application for water quality certification.⁸ NID stated that “[t]he project has not changed, so the April 15, 2011 FERC application, which the Board has on file, contains all information required for a complete application for a water quality certificate.”⁹ In its March 27, 2013 acknowledgment letter, the Board stated that “NID’s [March 1, 2013] letter initiates a one-year deadline from the date it was received for the [California Board] to act on the request for certification” and “[t]he new deadline for certification action is February 28, 2014.”¹⁰ The Board did not dispute that the initial application had been complete.

⁷ NID Request at Appendix B, California Board March 29, 2012 Letter to NID at 1. The Board acknowledged that NID satisfied the application filing requirements specified in California Code of Regulations, Title 23, Section 3856. 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 (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 NID’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. A similar statement was included in each of the California Board’s subsequent acknowledgment letters to NID.

⁸ NID Request at Appendix B, NID March 1, 2013 Letter to California Board.

⁹ *Id.* at 1.

¹⁰ NID Request at Appendix B, California Board March 27, 2013 Letter to NID at 1.

6. On May 17, 2013, Commission staff issued a draft environmental impact statement (EIS) analyzing the effects of the relicensing.¹¹ The draft EIS noted that the California Board's decision on the section 401 water quality certification application was due by March 1, 2014.¹²

7. In comments filed on August 22, 2013, the California Board stated that Commission staff mischaracterized the water quality certification process. The Board asserted that it "must also comply with the California Environmental Quality Act (CEQA)" in order to issue a water quality certification.¹³ The Board stated that because the CEQA process would not be finished by spring 2014, "[t]he most likely action will be that the [l]icensees will withdraw and resubmit their respective applications for water quality certifications before the one year deadline if the [Board] is not ready to issue its water quality certifications."¹⁴

8. On February 21, 2014, NID withdrew and resubmitted its application for water quality certification.¹⁵ NID noted that it had amended its license application on April 18, 2012, but that the project had not changed

¹¹ The draft EIS also analyzed the effects of relicensing the Drum-Spaulding Hydroelectric Project No. 2310 (Drum-Spaulding Project).

¹² Commission May 17, 2013 draft EIS (draft EIS) at 7.

¹³ California Board's August 22, 2013 Comments on draft EIS at 1.

¹⁴ *Id.* The Board's comments refer to the water quality certification applications for the Yuba-Bear Project and the Drum-Spaulding Project.

¹⁵ NID Request at Appendix B, NID February 21, 2014 Letter to California Board.

since that time.¹⁶ Accordingly, NID stated that the Board already had on file “all information required for a complete application for a water quality certificate.”¹⁷ In its March 11, 2014 acknowledgment letter, the Board stated that “NID’s [February 21, 2014] letter initiates a one-year deadline from the date it was received for the [California Board] to act on the request for certification” and “[t]he new deadline for certification action is February 21, 2015.”¹⁸ The Board did not dispute NID’s statements that the project had not changed and that the Board had on file all necessary information.

9. On December 19, 2014, Commission staff issued a final EIS, which provided staff-recommended measures to be included in any new license that may be issued for the Yuba-Bear Project.¹⁹

10. On February 16, 2015, NID withdrew and resubmitted its application for water quality certification for the third time.²⁰ Similar to its response to the previous withdrawal letters, the California Board’s March 18, 2015 letter acknowledged that NID’s application “initiates a one-year deadline from the date it was

¹⁶ *Id.* at 1. Although the April 18, 2012 amendment application predates NID’s March 1, 2013 withdrawal and resubmittal of its water quality certification application, NID did not note the amended application in its March 1, 2013 letter.

¹⁷ *Id.* at 1.

¹⁸ NID Request at Appendix B, California Board March 11, 2014 Letter to NID at 1.

¹⁹ The final EIS noted that the California Board had until February 21, 2015 to act on the request. Commission December 19, 2014 final EIS at 9.

²⁰ NID Request at Appendix B, NID February 16, 2015 Letter to California Board.

received for the [California Board] to act on the request for certification” and set February 17, 2016 as the new deadline.²¹

11. NID withdrew and resubmitted its water quality certification application three more times: on February 9, 2016, February 3, 2017, and January 29, 2018.²²

12. 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*,²³ holding that, where a state and an applicant agree to repeatedly withdraw and refile the same water quality certification request, the state has waived certification.

13. Also on January 25, 2019, the California Board denied without prejudice NID’s request for water quality certification, stating that the CEQA process and consultation under the Endangered Species Act (ESA) had not been completed, and that “[i]n order to maintain an active certification application, NID will need to request certification for the [p]roject.”²⁴ NID

²¹ NID Request at Appendix B, California Board March 18, 2015 Letter to NID at 1.

²² NID Request at Appendix B: California Board’s March 9, 2016 Letter to NID set February 9, 2017 as the new deadline; the March 3, 2017 Letter set February 3, 2018 as the new deadline; and the February 14, 2018 Letter set January 29, 2019 as the new deadline.

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

²⁴ NID Request at Appendix A, California Board January 25, 2019 Letter Denying Without Prejudice NID’s Water Quality Certification at 1-2.

did not subsequently file a new request for water quality certification with the California Board.

14. On February 19, 2019, NID filed its request with the Commission, asking us to determine that the California Board waived its certification authority for the relicensing of the Yuba-Bear Project.

15. On March 5 and March 18, 2019, the Foothills Water Network (Foothills) and the California Board, respectively, filed responses to NID's request, asking that the Commission deny the request to find waiver.

II. Discussion

16. 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.”²⁵

17. For the reasons discussed below, we find that the California Board waived its authority under section 401.

A. *Hoopa Valley* and Commission Precedent

18. 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.”²⁶ The court concluded that where a licensee each year sent a letter indicating

²⁵ 33 U.S.C. § 1341(a)(1).

²⁶ 913 F.3d at 1103.

withdrawal of its certification request and resubmission of the same,²⁷ “[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 hydro-power project.”²⁸ In fact, “[b]y shelving water quality certifications, the states usurp FERC’s control over whether and when a federal license will issue. Thus, if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC’s jurisdiction to regulate such matters.”²⁹

19. Following *Hoopa Valley*, the Commission found that the California Board waived its section 401 authority in *Placer County Water Agency*.³⁰ 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.³¹ The Commission found that the record

²⁷ 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).

²⁸ *Id.*

²⁹ *Id.*

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

³¹ *Placer County*, 167 FERC ¶ 61,056 at P 16; *see also McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185, at PP 33-38 (2019); *see also 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*).

showed that the entities worked to ensure that the withdrawal and refile happened each year,³² 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.³³ 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.³⁴

20. Similarly, in *Southern California Edison Co.*,³⁵ 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. 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, including the Board's comments on the draft EIS in which the Board 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."³⁶ The Commission found that this statement coupled with the emails that the Board staff sent annually ahead of the one-year deadline requesting

³² *Placer County*, 167 FERC ¶ 61,056 at P 12.

³³ *Placer County*, 169 FERC ¶ 61,046 at P 17.

³⁴ *Id.* PP 12, 18.

³⁵ 170 FERC ¶ 61,135.

³⁶ *Id.* P 24; *see also id.* PP 23-29.

the licensee to withdraw and resubmit its certification application, demonstrated the state's coordination with the licensee and was sufficient to support a waiver finding.³⁷

21. Thereafter, in *Pacific Gas and Electric Co.*,³⁸ 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.³⁹ We found that the record showed that the Board expected the applicant to withdraw and refile and the applicant cooperated.⁴⁰ In its comments on the draft EIS, the Board had indicated that the "usual process" involves the applicant voluntarily withdrawing and refileing its application.⁴¹ Moreover, the Commission found 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, unavailing and that the general principle from *Hoopa Valley* still applied.⁴²

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

22. The California Board and Foothills claim that *Hoopa Valley* does not support a finding of waiver in

³⁷ *Id.* P 25.

³⁸ 170 FERC ¶ 61,232.

³⁹ *Id.* P 27.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* PP 31-33.

this proceeding.⁴³ They claim that there was no agreement for NID to withdraw and resubmit its application, and that NID acted voluntarily and unilaterally in doing so each year before the deadline.⁴⁴

23. As we have held previously, an explicit written agreement to withdraw and refile is not necessary.⁴⁵ The facts in this proceeding are similar to those in *Pacific Gas and Electric Co.*, in that the Board expected NID to withdraw and refile its application and NID did so. In its comments on the draft EIS, the Board even stated that it was “most likely” that NID would withdraw and resubmit its application “before the one year deadline if the [Board] [was] not ready to issue its water quality certification[.]”⁴⁶ As in *Hoopa Valley, Placer County, Southern California Edison Co.*, and *Pacific Gas and Electric Co.*, the California Board’s efforts constituted a failure to act within the

⁴³ California Board March 18, 2019 Response at 2; Foothills March 5, 2019 Response at 2. Foothills also contends that the Commission should not apply the findings in *Hoopa Valley* to any pending licensing proceeding until judicial appeal of the decision has been exhausted. Foothills March 5, 2019 Response at 1-2. On December 9, 2019, the United States Supreme Court denied certiorari, making the *Hoopa Valley* decision final. *See California Trout v. Hoopa Valley Tribe*, 140 S. Ct. 650 (2019).

⁴⁴ California Board March 18, 2019 Response at 2-4; Foothills March 5, 2019 Response at 2-3.

⁴⁵ *See Pacific Gas and Electric Co.*, 170 FERC ¶ 61,232 at P 27; *Southern California Edison Co.*, 170 FERC ¶ 61,135 at P 23; *Placer County*, 167 FERC ¶ 61,056 at PP 17-18; *see also Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129 at PP 33-34 (*Constitution*).

⁴⁶ California Board’s August 22, 2013 Comments on draft EIS at 1.

meaning of section 401 and gave it nearly six years beyond the one-year deadline to act.⁴⁷

24. The Board argues that “[c]onsistent with logic and Commission precedent, ... an applicant’s decision to withdraw its request for certification before expiration of the certification period eliminates any need to approve or deny the withdrawn request.”⁴⁸ Similarly, Foothills argues that the Commission should not find waiver where the Board relied on the Commission’s long-standing practice of accepting withdrawals and resubmittals as restarting the one-year waiver deadline.⁴⁹ We disagree. In *Hoopa Valley*, the court faulted the Commission for concluding that, although the many resubmissions from the hydroelectric license applicant “involved the same [p]roject, each resubmission was an independent request, subject to a new period of review.”⁵⁰ Despite previous Commission orders concluding that once an application is withdrawn, the refiling restarts the one-year period, the court explained that a state’s obligation “to act on a request for certification” within one year applies to a specific request and “cannot be reasonably interpreted to mean that the period of review for one request affects that of any other request.”⁵¹

⁴⁷ *Hoopa Valley*, 913 F.3d at 1105 (“The record indicates that PacifiCorp’s water quality certification request has been complete and ready for review for more than a decade.”); *Placer County*, 169 FERC ¶ 61,046 at P 18; *Southern California Edison Co.*, 170 FERC ¶ 61,135 at P 25; *Pacific Gas and Electric Co.*, 170 FERC ¶ 61,232 at P 27.

⁴⁸ California Board March 18, 2019 Response at 3.

⁴⁹ Foothills March 5, 2019 Response at 2.

⁵⁰ 913 F.3d at 1104.

⁵¹ *Id.*

25. The Board alleges that NID presumably withdrew its requests voluntarily to avoid the Board denying its application.⁵² In addition, both the Board and Foothills argue that the certification process was upheld by the CEQA process, for which NID was the lead agency and controlled the timing.⁵³ We rejected similar arguments in prior proceedings. In *Southern California Edison Co.*, we found that the California Board had waived its water quality certification authority based on the fact that in the eight-plus years of the applicant effectuating a withdrawal and resubmittal of its application with a single page letter, the applicant never filed a new application or any new supporting information.⁵⁴ In reaching this decision, we also relied on record evidence that showed the California Board's direct participation in the withdrawal and resubmittal scheme, namely annual reminder emails that the Board sent to the licensee just before the one-year deadline requesting withdrawal and resubmission of the application.⁵⁵ We further concluded that

[e]ven absent this evidence, prior to and upon receipt of each withdrawal, the California Board had the option of denying certification within the one year it was afforded under the CWA. Therefore, by accepting each of [the licensee's]

⁵² California Board March 18, 2019 Response at 2.

⁵³ *Id.* at 3; Foothills March 5, 2019 Response at 2.

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

⁵⁵ *Southern California Edison Co.*, 170 FERC ¶ 61,135 at P 25.

withdrawal/resubmission letters, the California Board consented to the scheme of resetting the one-year deadline.⁵⁶

26. Similarly, in *Pacific Gas and Electric Co.*, we found that the California Board expected and encouraged the certification applicant to serially withdraw and resubmit an identical application to avoid the CWA's one-year waiver deadline.⁵⁷ With respect to the applicant's certification application for the surrender of its license, the California Board acknowledged when it commented on the draft EIS, and in every letter the Board sent acknowledging receipt of the resubmitted application, that the water quality certification could not be issued without a final CEQA document.⁵⁸ We found that the California Board's contention that the applicant's actions contributed to the delay ignored the California Board's own role in the process.⁵⁹

27. Here, too, the California Board expected NID to repeatedly withdraw and resubmit its application to avoid the CWA's one-year deadline. The Board acknowledged in its comments on the draft EIS that the water quality certification could not be issued until the CEQA process was complete and, accordingly, that NID would likely need to withdraw and resubmit its application.⁶⁰ Tellingly, as noted above, the Board did

⁵⁶ *Id.*

⁵⁷ 170 FERC ¶ 61,232 at P 31.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *See supra* P 7. Indeed, state regulations codify this practice. *See* Cal. Code Regs, tit. 23, § 3836(c) ("If an application is determined to be complete by the certifying agency, but CEQA requires that the certifying agency review a final environmental document before taking a certification action, an extension of the federal period for certification cannot be obtained, and the federal

not dispute NID's repeated statements that the project had not changed between applications and that the Board had all of the information it needed to act.

28. The Board and Foot hills's arguments that, because NID is the lead agency for CEQA and controls the timing for CEQA compliance, NID should not benefit from its own actions and the Board should not be deprived of its CWA certification authority are unpersuasive.⁶¹ We find that the Board's contention that NID alone is responsible for the delay in issuance of a water quality certification ignores the Board's own role in the process. The California Board has admitted that its administrative process often takes more than the one year permitted by the CWA. The state's reliance on a regulatory process (i.e., CEQA) over which it has potentially limited control over timing and that often takes more than one year to complete does not excuse compliance with the CWA. Moreover, as we have explained, the "state's reason for delay [is] immaterial."⁶² "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.'"⁶³

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).

⁶¹ See California Board March 18, 2019 Response at 2-3; Foothills March 5, 2019 Response at 2-3.

⁶² *Placer County*, 169 FERC ¶ 61,046 at P 20; see also *Constitution*, 168 FERC ¶ 61,129 at P 37.

⁶³ See, e.g., *New York DEC v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018).

29. Lastly, the Board and Foothills argue that finding waiver here would serve no purpose because the Commission cannot issue a license until ESA consultation is complete.⁶⁴ Regardless of whether a water quality certification decision is the sole factor delaying a licensing proceeding, the general principle from *Hoopa Valley* still applies: where an applicant withdraws and resubmits a request for water quality certification to avoid section 401's one-year time limit, and the state does not act within one year of the receipt of an application, the state has failed or refused to act under section 401; thus has waived its section 401 authority.⁶⁵ Here, we find that the California Board failed to act within the one-year period on NID's March 15, 2012 application, thereby waiving its certification authority.

The Commission orders:

Nevada Irrigation District's February 19, 2019 request for the Commission to find waiver is granted. The Commission determines that the California State Water Resources Control Board has waived its water quality certification authority under section 401 of the Clean Water Act with respect to the relicensing of NID's Yuba-Bear Hydroelectric Project No. 2266.

By the Commission.

(SEAL)

Kimberly D. Bose

Secretary

⁶⁴ California Board March 18, 2019 Response at 2; Foothills March 5, 2019 Response at 3.

⁶⁵ *Constitution*, 168 FERC ¶ 61,129 at P 31.

APPENDIX C

172 FERC P 61082 (F.E.R.C.), 2020 WL 4200746
FEDERAL ENERGY REGULATORY COMMISSION

Commission Opinions, Orders and Notices

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

Nevada Irrigation District

Project No. 2266-118

ORDER ADDRESSING ARGUMENTS RAISED ON
REHEARING

(Issued July 21, 2020)

1. On April 16, 2020, the Commission granted a request for waiver filed by Nevada Irrigation District (NID) (Order on Waiver).¹ The Commission determined that the California State Water Resources Control Board (California Board) waived its authority under section 401(a)(1) of the Clean Water Act² (CWA) to issue water quality certification for the relicensing of the Yuba-Bear Hydroelectric Project No. 2266 (Yuba-Bear Project).

2. On May 15 and May 18, 2020, the California Board and the Foothills Water Network, respectively, filed timely requests for rehearing. Pursuant to *Allegheny Defense Project v. FERC*,³ the rehearing requests filed in this proceeding may be deemed

¹ *Nev. Irrigation District*, 171 FERC ¶ 61,029 (2020) (Order on Waiver).

² 33 U.S.C. § 1341(a)(1) (2018).

³ *Allegheny Defense Project v. FERC*, No. 17-1098, 2020 WL 3525547 (D.C. Cir. June 30, 2020).

denied by operation of law. As permitted by section 313(a) of the Federal Power Act (FPA),⁴ however, we are modifying the discussion in the Order on Waiver and continue to reach the same result in this proceeding, as discussed below.⁵

3. On June 4, 2020, NID filed a motion for leave to answer and answer to the requests for rehearing filed by the California Board and Foothills Water Network. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure⁶ prohibits answers to a request for rehearing. Accordingly, we deny NID's motion and reject its filing.

4. On rehearing, the California Board and the Foothills Water Network argue that: (1) the Commission erred in finding that the California Board and NID had an agreement to defer CWA section 401's one-year statutory time limitation in violation of *Hoopa Valley Tribe v. FERC (Hoopa Valley)*;⁷ (2) the California Board never failed to act within one year from receiving

⁴ 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.").

⁵ *Allegheny Defense Project*, slip op. at 30. The Commission is not changing the outcome of the Order on Waiver. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁶ 18 C.F.R. § 385.713(d)(1) (2019).

⁷ California Board Rehearing Request at 4-7; Foothills Water Network Rehearing Request at 15-23; *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019) (rejecting a coordinated withdrawal-and-resubmission scheme between the applicant and the state certifying agency).

NID's water quality certification request;⁸ (3) the Commission should not have acted on NID's petition for declaratory order until NID exhausted all remedies with the California Board;⁹ (4) the Commission lacks authority under the FPA and the CWA to invalidate the state's water quality certification procedures;¹⁰ (5) the Commission should not retroactively apply *Hoopa Valley* to the facts of this case;¹¹ and (6) NID's request is without merit because NID came to the Commission with unclean hands.¹²

5. For the reasons discussed in the Order on Waiver¹³ and as further explained in Commission precedent,¹⁴ we continue to find that the Order on Waiver's determination that the California Board had waived its authority under CWA section 401(a)(1) to

⁸ California Board Rehearing Request at 7-9; Foothills Water Network Rehearing Request at 11-15.

⁹ California Board Rehearing Request at 9-10.

¹⁰ Foothills Water Network Rehearing Request at 27-29.

¹¹ California Board Rehearing Request at 10-12; Foothills Water Network Rehearing Request at 25-27.

¹² California Board Rehearing Request at 12; Foothills Water Network Rehearing Request at 23-25.

¹³ Order on Waiver, 171 FERC ¶ 61,029 at PP 23-29.

¹⁴ *Pac. Gas & Elec. Co.*, 172 FERC ¶ 61,064 (2020); *S. Feather Water & Power Agency*, 171 FERC ¶ 61,242 (2020); *Merced Irrigation Dist.*, 171 FERC ¶ 61,240 (2020); *Yuba Cty. Water Agency*, 171 FERC ¶ 61,139 (2020); *Pac. Gas & Elec. Co.*, 170 FERC ¶ 61,232, *modified*, 172 FERC ¶ 61,065 (2020); *S. Cal. Edison Co.*, 170 FERC ¶ 61,135, *modified*, 172 FERC ¶ 61,066 (2020); *Placer Cty. Water Agency*, 167 FERC ¶ 61,056, *reh'g denied*, 169 FERC ¶ 61,046 (2019); *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (2019), *reh'g denied*, 171 FERC ¶ 61,046 (2020); *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129, *reh'g denied*, 169 FERC ¶ 61,199 (2019).

issue water quality certification for the relicensing of the Yuba-Bear Project No. 2266.

6. Specifically, we find that the Order on Waiver sufficiently addressed: (1) the existence of an agreement between the California Board and NID in violation of *Hoopa Valley*;¹⁵ (2) the California Board's failure to act on NID's water quality certification within one year;¹⁶ and (3) whether NID came to the commission with unclean hands.¹⁷ No further discussion is warranted.

7. We note that petitioners, for the first time on rehearing, argue that NID must exhaust all administrative remedies with the California Board before seeking a petition for declaratory order with the Commission and that the Commission cannot invalidate the state's water quality certification procedures or retroactively apply *Hoopa Valley* to the facts of this case. The Commission looks with disfavor on parties raising issues for the first time on rehearing that could have been raised earlier.¹⁸ Therefore, we dismiss

¹⁵ Order on Waiver, 171 FERC ¶ 61,029 at PP 23-25 (determining that an explicit written agreement is not necessary to find a waiver of CWA section 401 water quality certification).

¹⁶ *Id.* PP 26-27 (the California Board cannot circumvent CWA's one-year deadline to act on applications for water quality certification).

¹⁷ *Id.* P 28 (finding unpersuasive California Board's argument that NID benefitted from its own inaction).

¹⁸ See 18 C.F.R. § 385.713(c)(3) (new matters may be raised in a rehearing request only when "based on matters not available for consideration by the Commission at the time of the final decision or final order"). See also *Balt. Gas & Elec. Co.*, 91 FERC ¶ 61,270, at 61,922 (2000) ("We look with disfavor on parties raising on rehearing issues that should have been raised earlier. Such behavior is disruptive to the administrative process because

petitioners' arguments on this matter. Nonetheless, we find that section 401 does not require that the applicant pursue administrative remedies under state law to effectuate the waiver of the certification requirement.¹⁹ Additionally, the Commission took no action to invalidate the California Board's CWA section 401 procedures; rather, it determined that the application of the procedures in this proceeding violated the express language of CWA section 401.²⁰ Finally, notwithstanding the Commission's past construction of CWA 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.²¹ We see no justification for not applying *Hoopa Valley* here.

it has the effect of moving the target for parties seeking a final administrative decision.”).

¹⁹ 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.”). See also *Pac. Gas & Elec. Co.*, 172 FERC ¶ 61,065 at P 31; *S. Cal. Edison Co.*, 172 FERC ¶ 61,066 at P 33.

²⁰ Order on Waiver, 171 FERC ¶ 61,029 at P 28.

²¹ *Pac. Gas & Elec. Co.*, 172 FERC ¶ 61,064 at P 39 (“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 the ruling to prospective cases”); *Pac. Gas & Elec. Co.*, 172 FERC ¶ 61,065 at P 33 (same); *S. Cal. Edison Co.*, 172 FERC ¶ 61,066 at P 35 (same); see *Placer Cty. Water Agency*, 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 Co., LLC*, 169 FERC

52a

The Commission orders:

In response to California State Water Resource Control Board's and the Foothills Water Network's requests for rehearing, the Order on Waiver is hereby modified and the result is sustained, as discussed in the body of this order.

By the Commission.

(SEAL)

Nathaniel J. Davis, Sr.

Deputy Secretary

¶ 61,199 at PP 29-34 (providing an in-depth discussion of the Commission's application of *Hoopa Valley*).

APPENDIX D

171 FERC P 61139 (F.E.R.C.), 2020 WL 3026599
FEDERAL ENERGY REGULATORY COMMISSION

Commission Opinions, Orders and Notices

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

Yuba County Water Agency

Project No. 2246-065

**ORDER ON WAIVER OF WATER QUALITY
CERTIFICATION**

(Issued May 21, 2020)

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

I. Background

2. On May 16, 1963, the Commission issued Yuba County a 50-year license to construct, operate, and maintain what is now the Yuba River Project.² The

¹ 33 U.S.C. § 1341(a)(1) (2018).

² *Yuba County Water Agency*, 29 FPC ¶ 1002 (1963). The Commission issued an order amending the license in 1966 and

license expired on April 30, 2016. Yuba County continues to operate the project under an annual license.

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

4. Section 401(a)(1) of the CWA requires that an applicant for a federal license or permit to conduct activities that may result in a discharge into the navigable waters of the United States-like Yuba County's operation of the Yuba River Project - must provide the licensing or permitting agency a water quality certification from the state in which the discharge originates or evidence of waiver thereof.³ If the state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request," then certification is waived.⁴

5. Yuba County requested water quality certification for the project on August 24, 2017, and the California Board received the application the same

changed the effective date of the license from May 1, 1963 to May 1, 1966. *Yuba County Water Agency*, 35 FPC ¶ 691 (1966).

³ 33 U.S.C. § 1341(a)(1). Section 401(d) of the CWA provides that a certification and the conditions contained therein shall become a condition of any federal license that is issued. *Id.* § 1341(d). See *City of Tacoma, Washington v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

⁴ 33 U.S.C. § 1341(a)(1).

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

6. Staff from the Board emailed Yuba County on July 25, 2018, stating that the action date for the Yuba River Project was August 24, 2018; inquiring about the filing of a California Environmental Quality Act (CEQA) document for the project, noting that without the CEQA document the California Board could not complete its environmental analysis; and directing Yuba County to “submit a withdraw/resubmit of the certification application as soon as possible.”⁷ On the same day, Yuba County replied “we plan to submit the withdrawal/resubmittal letter on August 20. Will that work for you?”⁸ Later on July 25, 2018, the Board told Yuba County that “management usually gets a little

⁵ As required by section 5.23(b)(1)(ii) of the Commission’s Rules and Regulations, 18 C.F.R. § 5.23(b)(1)(ii) (2019), Yuba County filed a copy of the request with the Commission, including proof of the date of receipt of the request. Yuba County August 25, 2017 filing, attaching a date-stamped Copy of Request for Certification.

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

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

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

antsy when our action date gets below 3 weeks because a ‘deny without prejudice’ letter takes time to route to our Executive Director. If possible, please submit the letter by next Friday.”

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

8. On January 25, 2019, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an opinion in *Hoopa Valley Tribe v. FERC*,¹¹ ruling that, where a state and an applicant agree to repeatedly withdraw and refile the same

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

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

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

water quality certification request, the state has waived certification.

9. On July 31, 2019, the California Board issued an order purporting to deny without prejudice Yuba County's request for water quality certification, stating that the CEQA process and consultation under the Endangered Species Act (ESA) had not been completed, and that "[the California Board] encourages [Yuba County] to submit a new formal request for certification."¹² Yuba County did not subsequently file a new request.

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

11. On March 3, 2020, the Commission issued public notice of the petition, establishing April 2, 2020, as the deadline for filing comments.¹³ The California Board, California Department of Fish and Wildlife (California Fish and Wildlife), and Foothills Water Network and

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

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

its member organization (Foothills),¹⁴ each filed comments opposing Yuba County's request.¹⁵

12. Yuba County filed an answer to the responses.¹⁶ Rule 213(a) of the Commission's Rules of Practice and Procedure prohibits answers to answers unless otherwise ordered by the Commission.¹⁷ Here, we do not find this answer to provide additional information that would be helpful in our decision making. Therefore, this pleading is rejected as an impermissible answer.

II. Discussion

13. The "waiver" provision of section 401(a)(1) of the CWA is at issue here. As noted above, under section 401 of the CWA, if a state certifying agency "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of [section 401] shall be waived with

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

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

¹⁶ See Yuba County April 17, 2020 Comments.

¹⁷ 18 C.F.R. § 385.213(a)(2).

respect to such federal application.”¹⁸ For the reasons discussed below, we find that the California Board waived its authority under section 401.

A. *Hoopa Valley* and Commission Precedent

14. In *Hoopa Valley*, the D.C. Circuit found that “a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year.”¹⁹ The court concluded that where a licensee each year sent a letter indicating withdrawal of its certification request and resubmission of the same request,²⁰ “[s]uch an arrangement does not exploit a statutory loophole; it serves to circumvent [FERC’s] congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.”²¹ In fact, “[b]y shelving water quality certifications, the states usurp FERC’s control over whether and when a federal license will issue. Thus, if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC’s jurisdiction to regulate such matters.”²²

15. Following *Hoopa Valley*, the Commission found that the California Board waived its section 401

¹⁸ 33 U.S.C. § 1341(a)(1).

¹⁹ 913 F.3d at 1103.

²⁰ In *Hoopa Valley*, the court noted that “before each [full-]year passed, [the applicant] sent a letter indicating withdrawal of its water quality certification request and resubmission of the very same ... *in the same one-page letter*” *Id.* at 1104 (emphasis in original).

²¹ *Id.*

²² *Id.*

authority in *Placer County Water Agency*.²³ 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.²⁴ The Commission found that the record showed that the entities worked to ensure that the withdrawal and refiling happened each year,²⁵ given that the licensee submitted evidence that the state sent it emails about each upcoming one-year deadline for the purpose of eliciting a withdrawal and resubmission.²⁶ Based on this functional agreement and the fact that Placer County never filed a new application, the Commission concluded that the process caused lengthy delay and found that the state waived its certification authority.²⁷

16. Similarly, in *Southern California Edison*, the Commission found that the California Board waived its section 401 authority for relicensing six projects that comprise the Big Creek hydroelectric system.²⁸ There, the Commission rejected the Board's argument that *Hoopa Valley* was not applicable. While there was no explicit agreement between the applicant and the

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

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

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

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

²⁷ *Id.* PP 12, 18.

²⁸ 170 FERC ¶ 61,135 (2020).

Board, the Commission found that the record showed the Board directly participated in the withdrawal and resubmittal scheme. The Board staff sent annual emails to the licensee noting the upcoming one-year deadline and explicitly requested withdrawal and resubmittal,²⁹ commenting that “[i]f the one year federal period for certification is insufficient for the [] Board to act, staff will recommend that [Southern California Edison] withdraw and resubmit their request for [water quality certification] for the six Big Creek projects.”³⁰ The Commission found this evidence demonstrated the state’s coordination with the licensee and was sufficient to support a waiver finding.³¹

17. Thereafter, in *Pacific Gas and Electric*, the Commission found that the California Board waived its section 401 authority with respect to the surrender of the Kilarc-Cow Creek Hydroelectric Project No. 606, again stating that an explicit agreement between the applicant and the Board was not necessary to find waiver.³² We found that the record showed that the Board expected the applicant to withdraw and refile its certification application and the applicant cooperated.³³ In its comments, the Board indicated that the “usual process” involved the applicant voluntarily withdrawing and refiling its application.³⁴ Moreover, the Commission found unavailing the Board’s assertion that it could not issue a water quality certification until the CEQA process was complete, which often

²⁹ *Id.* P 25.

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

³¹ *Id.* P 25.

³² 170 FERC ¶ 61,232 at P 27.

³³ *Id.*

³⁴ *Id.*

takes more than one year, and determined that the general principle from *Hoopa Valley* still applied.³⁵ The Commission found, as it had previously, that a “state’s reason for delay [is] immaterial.”³⁶

18. Most recently, in *Nevada Irrigation District*, we again found that the Board waived its authority to issue a water quality certification where the applicant withdrew and refiled its application numerous times, even when an explicit agreement was not in place.³⁷ The Commission found unpersuasive the argument that the Nevada Irrigation District, as the lead agency for CEQA, controlled the timing for the CEQA analysis, and reiterated that the “state’s reason for delay is immaterial.”³⁸ Further, we dispensed with the argument by the Board and Foothills that the timing of the water quality certification, even if it extends beyond one year, would not disrupt the relicensing proceeding because ESA consultation was not complete, reaffirming that section 401 of the CWA is clear, and that failure to act within the one-year time limit is absolute.³⁹

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

19. The California Board, California Fish and Wildlife, and Foothills claim that *Hoopa Valley* does

³⁵ *Id.* PP 31-33.

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

³⁷ 171 FERC ¶ 61,029 (2020).

³⁸ *Id.* P 28.

³⁹ *Id.* P 29.

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

1. Agreement Not Necessary to Find Waiver

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

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

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

⁴² See *Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 27; *Southern California Edison*, 170 FERC ¶ 61,135 at P 23; *Placer County*, 167 FERC ¶ 61,056 at PP 17-18; *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 23; see also *Constitution Pipeline Company, LLC*, 168 FERC ¶ 61,129, at PP 33-34 (2019).

[Yuba County's] water quality certification action date for the Yuba River Development Project (FERC No. 2246) is August 24, 2018. A final CEQA document for the Project has not been filed; therefore, the State Water Board cannot complete the environmental analysis of the Project that is required for certification. Please submit a withdraw/resubmit of the certification application as soon as possible.⁴³

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

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

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

2. California Board Was Complicit

21. The Board alleges that Yuba County presumably withdrew its requests voluntarily.⁴⁵ We rejected similar arguments in prior proceedings. In *Southern California Edison*, we found that the California Board had waived its water quality certification authority based on the fact that, in the eight-plus years of the applicant effectuating a withdrawal and resubmittal of its application with a single page letter, the applicant never filed a new application or any new supporting information.⁴⁶ In reaching this decision, we also relied on record evidence that showed the California Board's direct participation in the withdrawal and resubmittal scheme, namely annual reminder emails that the California Board sent to the licensee just before the one-year deadline, requesting withdrawal and resubmission of the application.⁴⁷ We further concluded that:

[e]ven absent this evidence, prior to and upon receipt of each withdrawal, the California Board had the option of denying certification within the one year it was afforded under the CWA. Therefore, by accepting each of [the licensee's] withdrawal/resubmission letters, the California

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

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

⁴⁷ *Id.* P 25.

Board consented to the scheme of resetting the one-year deadline.⁴⁸

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

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

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

⁴⁸ *Id.*

⁴⁹ 170 FERC ¶ 61,232 at P 31.

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

⁵¹ 170 FERC ¶ 61,232 at PP 32-33

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

24. The Board acknowledged that the water quality certification could not be issued until the CEQA process was complete and, accordingly, that Yuba County would likely need to withdraw and resubmit its application.⁵³ Tellingly, as noted above, the Board did not dispute Yuba County's statements that the project had not changed between applications and that the Board had all of the information it needed to act.

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

⁵³ See *supra* P 6.

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

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

‘shall not exceed one year’ after ‘receipt of such request.’”⁵⁶ Accordingly, a state may not extend the one-year deadline to act even if a state process may, in practice, often take more than one year to complete.⁵⁷ We note that to the extent a state lacks sufficient information to act on a certification request, it has a remedy: it can deny certification.⁵⁸ Delay beyond the statutory deadline, however, is not an option.⁵⁹

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

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

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

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

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

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

27. The Board argues that finding waiver here would serve no purpose, because the Commission cannot issue a license until ESA consultation is complete.⁶² Regardless of whether a water quality certification decision is the sole factor delaying a licensing proceeding, the general principle from *Hoopa Valley* still applies: where an applicant withdraws and resubmits a request for water quality certification to avoid section 401's one-year time limit, and the state does not act within one year of the receipt of an application, the state has failed or refused to act under section 401 and thus has waived its section 401

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

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

⁶² California Board April 2, 2020 Response at 2.

authority.⁶³ Here, we find that the California Board failed to act within the one-year period on Yuba County's August 24, 2017 application, thereby waiving its certification authority.⁶⁴

5. Pursuing State Remedies Not Required

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

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

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

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

⁶⁶ See *Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 43; see also *Millennium Pipeline Co.*, 860 F.3d at 700-01; *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) ("[T]he question before us focuses on FERC's authority to decide whether the state's purported revocation of its prior [section 401 water quality] certification satisfied the terms of section 401(a)(3) [of the CWA].

71a

The Commission orders:

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

(B) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the FPA, 16 U.S.C. § 825/ (2018), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2019).

By the Commission.

(SEAL)

Kimberly D. Bose

Secretary

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.”).

APPENDIX E

172 FERC P 61080 (F.E.R.C.), 2020 WL 4200745
FEDERAL ENERGY REGULATORY COMMISSION

Commission Opinions, Orders and Notices

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

Yuba County Water Agency

Project No. 2246-086

ORDER DENYING REHEARING

(Issued July 21, 2020)

1. On May 21, 2020, the Commission granted a petition for declaratory order filed by Yuba County Water Agency d/b/a Yuba Water Agency (Yuba County) (Order on Waiver).¹ The Commission determined that the California State Water Resources Control Board (California Board) waived its authority under section 401(a)(1) of the Clean Water Act² (CWA) to issue water quality certification for the relicensing of the Yuba River Development Project No. 2246 (Yuba River Project). On June 22, 2020, the California Board and Foothills Water Network filed timely requests for rehearing of the Order on Waiver.

2. On July 7, 2020, Yuba County filed a motion for leave to answer and answer to the requests for rehearing filed by the California Board and Foothills Water Network. Rule 713(d)(1) of the Commission's

¹ *Yuba Cty. Water Agency*, 171 FERC ¶ 61,139 (2020) (Order on Waiver).

² 33 U.S.C. § 1341(a)(1) (2018).

Rules of Practice and Procedure³ prohibits answers to a request for rehearing. Accordingly, we deny Yuba County's motion and reject its filing.

3. On rehearing, the California Board and the Foothills Water Network argue that: (1) the Commission erred in finding that the California Board and Yuba County had an agreement to defer CWA section 401's one-year statutory time limitation in violation of *Hoopa Valley Tribe v. FERC (Hoopa Valley)*;⁴ (2) the California Board never failed to act within one year from receiving Yuba County's water quality certification request;⁵ (3) the Commission should not have acted on Yuba County's request for declaratory order until Yuba County exhausted all remedies with the California Board;⁶ (4) the Commission lacks authority under the FPA and the CWA to invalidate the state's water quality certification procedures;⁷ (5) the Commission should not retroactively apply *Hoopa Valley* to the facts of this case;⁸ and (6) Yuba County's request

³ 18 C.F.R. § 385.713(d)(1) (2019).

⁴ California Board Rehearing Request at 6-13; Foothills Water Network Rehearing Request at 15-23; *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019) (rejecting a coordinated withdrawal-and-resubmission scheme between the applicant and the state certifying agency).

⁵ California Board Rehearing Request at 11-12; Foothills Water Network Rehearing Request at 11-14, 23-25.

⁶ California Board Rehearing Request at 13-14.

⁷ Foothills Water Network Rehearing Request at 29-34.

⁸ California Board Rehearing Request at 14-16; Foothills Water Network Rehearing Request at 27-29.

is without merit because Yuba County came to the Commission with unclean hands.⁹

4. For the reasons discussed in the Order on Waiver and as further explained in Commission precedent,¹⁰ we reaffirm the Order on Waiver's determination that the California Board waived its authority under CWA section 401(a)(1) to issue water quality certification for the relicensing of the Yuba River Project No. 2246.

5. Specifically, we find that the Order on Waiver sufficiently addressed: (1) the existence of an agreement between the California Board and Yuba County in violation of *Hoopa Valley*;¹¹ (2) the California Board's failure to act on Yuba County's water quality certification within one year;¹² (3) whether Yuba County must exhaust all administrative remedies with the California Board before seeking a petition for

⁹ California Board Rehearing Request at 16-17; Foothills Water Network Rehearing Request at 25-27.

¹⁰ *Pac. Gas & Elec. Co.*, 172 FERC ¶ 61,064 (2020); *S. Feather Water & Power Agency*, 171 FERC ¶ 61,242 (2020); *Merced Irrigation District*, 171 FERC ¶ 61,240 (2020); *Nevada Irrigation Dist.*, 171 FERC ¶ 61,029 (2020); *Pac. Gas & Elec. Co.*, 170 FERC ¶ 61,232, *modified*, 172 FERC ¶ 61,065 (2020); *S. Cal. Edison Co.*, 170 FERC ¶ 61,135, *modified*, 172 FERC ¶ 61,066 (2020); *Placer Cty. Water Agency*, 167 FERC ¶ 61,056, *reh'g denied*, 169 FERC ¶ 61,046 (2019); *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (2019), *reh'g denied*, 171 FERC ¶ 61,046 (2020); *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129, *reh'g denied*, 169 FERC ¶ 61,199 (2019).

¹¹ Order on Waiver, 171 FERC ¶ 61,139 at PP 20-22 (determining that an explicit written agreement is not necessary to find a waiver of CWA section 401 water quality certification).

¹² *Id.* PP 23-26 (the California Board cannot circumvent CWA's one-year deadline to act on applications for water quality certification).

declaratory order with the Commission;¹³ and (4) whether Yuba County came to the Commission with unclean hands.¹⁴ No further discussion is warranted.

6. We note that petitioners, for the first time on rehearing, argue that the Commission cannot invalidate the state's water quality certification procedures or retroactively apply *Hoopa Valley* to the facts of this case. The Commission looks with disfavor on parties raising issues for the first time on rehearing that could have been raised earlier,¹⁵ particularly in California Board's or Foothills Water Network's prior comments on Yuba County's petition for declaratory order.¹⁶ Therefore, we dismiss petitioners' arguments on this matter. Nonetheless, we find that the Commission took no action to invalidate California Board's CWA section 401 procedures; rather, it determined that the application of those procedures in this proceeding violated the express language of CWA

¹³ *Id.* P 28 (finding that Yuba County does not have to exhaust all administrative remedies prior to seeking a waiver determination from the Commission).

¹⁴ *Id.* P 25 (finding unpersuasive the California Board's and Foothill Water Network's argument that Yuba County benefitted from its own inaction).

¹⁵ *See* 18 C.F.R. § 385.713(c)(3) (2019) (new matters may be raised in a rehearing request only when "based on matters not available for consideration by the Commission at the time of the final decision or final order"). *See also* *Balt. Gas & Elec. Co.*, 91 FERC ¶ 61,270, at 61,922 (2000) ("We look with disfavor on parties raising on rehearing issues that should have been raised earlier. Such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision.").

¹⁶ *See* California Board April 2, 2020 comments; Foothills Water Network April 2, 2020 comments.

section 401.¹⁷ Further, notwithstanding the Commission's past construction of CWA 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.¹⁸ We see no justification for not applying *Hoopa Valley* here.

The Commission orders:

California State Water Resources Control Board's and the Foothills Water Network's requests for rehearing are hereby dismissed or denied, as discussed in the body of this order.

By the Commission.

(SEAL)

Nathaniel J. Davis, Sr.

Deputy Secretary

¹⁷ *Yuba Cty. Water Agency*, 171 FERC ¶ 61,139 at P 25.

¹⁸ *Pac. Gas & Elec. Co.*, 172 FERC ¶ 61,064 at P 39 ("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"); *Pac. Gas & Elec. Co.*, 172 FERC ¶ 61,065 at P 33 (same); *S. Cal. Edison Co.*, 172 FERC ¶ 61,066 at P 35 (same); see *Placer Cty. Water Agency*, 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 Co., LLC*, 169 FERC ¶ 61,199 at PP 29-34 (providing an in-depth discussion of the Commission's application of *Hoopa Valley*).

APPENDIX F

171 FERC P 61240 (F.E.R.C.), 2020 WL 3350095
FEDERAL ENERGY REGULATORY COMMISSION

Commission Opinions, Orders and Notices

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

Merced Irrigation District

Project Nos. 2179-043, 2467-020

**ORDER ON WAIVER OF WATER QUALITY
CERTIFICATION**

(Issued June 18, 2020)

1. On May 22, 2019, Merced Irrigation District (Merced), licensee for both the Merced River Hydroelectric Project No. 2179 (Merced River Project) and the Merced Falls Hydroelectric Project No. 2467 (Merced Falls Project), filed a request for the Commission to determine that the California State Water Resources Control Board (California Board or Board) waived its authority under section 401(a)(1) of the Clean Water Act (CWA)¹ to issue water quality certification regarding the relicensing of the two projects. This order makes such a determination.

I. Background

2. On April 18, 1964, the Commission issued Merced an original 50-year license for the operation and maintenance of the Merced River Project, located on the Merced River on the border of Merced and

¹ 33 U.S.C. § 1341(a)(1) (2018).

Mariposa Counties.² The license expired on February 28, 2014, and Merced continues to operate the project under an annual license.

3. On July 28, 1969, the Commission issued a 45-year license for the operation and maintenance of the Merced Falls Project, located on the Merced River in Mariposa County, about 23 miles northeast of the city of Merced and immediately downstream of the Merced River Project.³ The license expired on March 1, 2014, and Merced continues to operate the project under an annual license.

4. On February 8, 2012, Pacific Gas & Electric (PG&E), Merced's predecessor as licensee, filed an application for a new license for the Merced Falls Project. On February 26, 2012, Merced filed an application for a new license for the Merced River Project. On March 24, 2014, Commission staff issued a notice for each project accepting the respective applications and indicating that each was ready for environmental analysis.⁴

5. 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 a water quality

² *Merced Irrigation District*, 31 FPC 897 (1964).

³ *Pacific Gas & Electric Co.*, 42 FPC 237 (1969). Pacific Gas and Electric was the original licensee for the Merced Falls Project. The license was transferred to Merced effective March 3, 2017, making Merced the applicant for the new license. *Pacific Gas and Electric Co.*, 152 FERC ¶ 62,015 (2015) (order approving transfer).

⁴ Commission staff conducted a joint environmental review of the projects culminating in a single environmental impact statement.

certification from the state in which the discharge originates or evidence of waiver thereof.⁵ If the state “fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request,” then certification is waived.⁶ Further, the licensing or permitting agency may not grant a license or permit until certification has been granted or waived.⁷

6. The California Board received PG&E’s and Merced’s water quality certification requests on May 20, 2014,⁸ and May 21, 2014,⁹ respectively.¹⁰ The Board’s June 6, 2014 acknowledgment letters for each project were substantively identical and stated that the “... letter initiates a one-year time deadline from the date it was received for the [California Board] to act on the request for [water quality certification] []” and “... serves as a formal request for certification of

⁵ 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, Washington v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

⁶ 33 U.S.C. § 1341(a)(1).

⁷ *Id.*

⁸ Merced Request at Attachment 3 (Letter to FERC Filing PG&E’s May 20, 2014, Letter to California Board Requesting 401 Water Quality Certification for the Merced Falls Project).

⁹ Merced Request at Attachment 2 (Letter to FERC Filing Merced’s May 21, 2014, Letter to California Board Requesting 401 Water Quality Certification for the Merced River Project).

¹⁰ As required by section 5.23(b)(1)(ii) of the Commission’s Rules and Regulations, 18 C.F.R. § 5.23(b)(1)(ii) (2019), PG&E and Merced each filed a copy of the request with the Commission, including proof of the date of receipt of the request.

the Project.”¹¹ The Board did not suggest the application was incomplete.¹²

7. On March 30, 2015, Commission staff issued a joint draft environmental impact statement (EIS) analyzing the effects of relicensing both projects. The draft EIS noted that with respect to the projects, the California Board had not yet acted on the certification requests although it had filed preliminary conditions for both projects on July 22, 2014.¹³

8. On April 21, 2015, the California Board emailed Merced requesting that Merced “withdraw []and simultaneously resubmit” its water quality certification prior to May 13, 2015, for the Merced River Project.¹⁴ On May 14, 2015, Merced withdrew and resubmitted its certification application for the Merced River Project with a two-page letter.¹⁵ Merced’s withdrawal and resubmittal letter stated: “by copy of this letter, Merced ID formally submits a new application. ... The Project has not changed, so the April 23, 2014 FERC

¹¹ Merced Request at Attachments 4 and 5 (California Board’s June 6, 2014 Letters at 1).

¹² *See id.* (noting in the respective Acknowledgment Letters that that PG&E and Merced had satisfied the application filing requirements specified in California Code of Regulations, Title 23, Section 3856).

¹³ Commission March 30, 2015 Draft Environmental Impact Statement for the Merced Falls and Merced River Hydroelectric Projects at 9, 12 (Draft EIS).

¹⁴ Merced Request at Attachment 21 (Board’s April 21, 2015 email to Merced). The Board’s email also invited Merced to contact the Board staff “[i]f you have any questions regarding this request or this process” There is no similar email in the record regarding the Merced Falls Project.

¹⁵ Merced Request at Attachment 6 (Merced May 14, 2015 Letter to California Board).

application, which the [Board] has on file, contains all information required for a complete application for a water quality certificate.”¹⁶

9. On May 6, 2015, PG&E withdrew and resubmitted its certification application for the Merced Falls Project with a one-page letter.¹⁷ On May 29, 2015, the California Board sent substantively identical acknowledgment letters to PG&E and Merced. The California Board stated that PG&E’s and Merced’s withdrawal and resubmittal request letters initiated a one-year deadline from the date the California Board received the letters to act on the request for certification, and the new deadlines for certification action were May 6 and May 14, 2016, respectively.¹⁸ The Board’s letters also stated that it might “request additional information to clarify, amplify, correct, or otherwise supplement the contents of the application.”¹⁹ The Board further noted that “[i]ssuance of a certification is a discretionary action that requires the State Water Board to comply with [] [CEQA]” and that “[i]f the information necessary for compliance with CEQA is not provided to the [] Board, staff may recommend denial of certification without prejudice.”²⁰

¹⁶ *Id.*

¹⁷ Merced Request at Attachment 7 (PG&E May 6, 2015 Letter to California Board).

¹⁸ Merced Request at Attachment 8 (California Board May 29, 2015 Letter to Merced at 1-2); *id.* at Attachment 9 (California Board May 29, 2015 Letter to PG&E at 1-2).

¹⁹ Merced Request at Attachment 8 (California Board May 29, 2015 Letter to Merced at 2); *id.* at Attachment 9 (California Board May 29, 2015 Letter to PG&E at 2).

²⁰ Merced Request at Attachment 8 (California Board May 29, 2015 Letter to Merced at 2); *id.* at Attachment 9 (California Board May 29, 2015 Letter to PG&E at 2).

10. On May 29, 2015, the California Board filed comments on the Commission's draft EIS. The Board asked that the Commission remove from the final EIS the statement that the water quality certifications for the projects were due on May 20, 2015, stating that "[a] certified CEQA document is required prior to acting on a WQC application. State Water Board staff does not anticipate ... [a] certified CEQA document prior to FERC's release of the final EIS."²¹

11. On December 4, 2015, Commission staff issued the final EIS, recommending that the Commission approve PG&E's and Merced's relicensing applications with staff-recommended measures and conditions from the forthcoming water quality certifications from the California Board.

12. On May 4, 2016, PG&E again withdrew and resubmitted its water quality certification for the Merced Falls Project,²² as did Merced on May 9, 2016.²³ Thereafter, Merced, now as licensee for both the Merced Falls and Merced River Projects, withdrew and resubmitted certification applications for the projects two additional times: on May 1, 2017²⁴ and

²¹ California Board May 29, 2015 Comments on Draft EIS at 8.

²² See Merced Request at Attachment 11 (PG&E's May 4, 2016 Letter to California Board). PG&E noted in the letter that on April 25, 2016, the Board notified it that its pending certification application "would be expiring soon."

²³ See Merced Request at Attachment 10 (Merced's May 9, 2016 Letter to California Board).

²⁴ Merced Request at Attachment 14 (Merced's May 1, 2017 Letter to California Board for the Merced Falls Project); *id.* at Attachment 15 (Merced's May 1, 2017, Letter to California Board for the Merced River Project).

April 24, 2018.²⁵ Each letter was substantively identical to the 2015 withdrawal and resubmittal letters. Further, Merced, in each of its letters, stated that the “project has not changed” and that the FERC application that the Board had on file contained all information required for a complete application for certification. Similar to its responses to the previous withdrawal and resubmittal letters, the California Board sent letters acknowledging the withdrawal and resubmittal requests.²⁶ The Board’s acknowledgment letters each contained the same paragraph regarding compliance with CEQA, stating that “[i]f the information necessary for compliance with CEQA is not provided to the [] Board, staff may recommend denial of certification without prejudice.”²⁷

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*,²⁸ 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.

²⁵ Merced Request at Attachment 18 (Merced’s April 24, 2018, Letter to California Board for the Merced Falls Project); *id.* at Attachment 19 (Merced’s April 24, 2018, Letter to California Board for Merced River Project).

²⁶ Merced Request at Attachments 12, 13, 16, and 17 (appending the California Board’s May 10 & 23, 2016 and May 12, 2017 Acknowledgement Letters).

²⁷ *See, e.g.*, Merced Request at Attachment 13, California Board May 23, 2016 Acknowledgement Letter at 2.

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

14. On April 22, 2019, the California Board issued an order purporting to deny without prejudice Merced's requests for water quality certification, stating that the "Board cannot issue a certification(s) for the Projects until the CEQA process is complete," and that the CEQA process has not yet begun. The order also stated that when "the application suffers from some sort of procedural inadequacy (e.g. failure to ... meet CEQA requirements), [] the [Water Board] may deny the certification without prejudice." Merced did not file new requests for certification.

15. On May 22, 2019, Merced filed its request for waiver determinations, citing *Hoopa Valley* and asking the Commission to determine that the California Board had waived its certification authority.²⁹

16. The California Board and American Rivers, American Whitewater, California Sportfishing Protection Alliance, Friends of the River, Golden West Women Flyfishers, Merced River Conservation Committee, Northern California Council Fly Fishers International,

²⁹ Merced styled its request for a waiver finding as a request for clarification, rather than as either a motion or a petition for declaratory order. We will act on Merced's request under section 309 of the FPA. 16 U.S.C. § 825h (2018) ("The Commission shall have power to perform any and all acts, and to prescribe, issue, and make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."). Going forward, when a party requests that the Commission find a State has waived its right to issue a water quality certification, the party should file its request as a petition pursuant to section 385.207 of our Rules of Practice and Procedure. 18 C.F.R. § 385.207(a) (2019) ("A person must file a petition when seeking ... (2) [a] declaratory order or rule to terminate a controversy or remove uncertainty; ... or (5) [a]ny other action which is the discretion of the Commission and for which this chapter prescribes no other form of pleading.").

and Trout Unlimited (collectively, Conservation Groups) filed responses to Merced's request asking that the Commission find the California Board has not waived certification.³⁰

II. Discussion

17. 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.”³¹

18. For the reasons discussed below, we find that the California Board waived its authority under section 401.

A. *Hoopa Valley* and Commission Precedent

19. 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.”³² The court concluded that where a licensee each year sent a letter indicating withdrawal of its certification request and resubmis-

³⁰ California Board June 27, 2019 Response (filed July 3, 2019 with the Commission); Conservation Groups June 28, 2019 Response. The Conservation Groups and the California Board are parties to both relicensing proceedings.

³¹ 33 U.S.C. § 1341(a)(1).

³² 913 F.3d at 1103.

sion of the same,³³ “[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 hydro-power project.”³⁴ In fact, “[b]y shelving water quality certifications, the states usurp FERC’s control over whether and when a federal license will issue. Thus, if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC’s jurisdiction to regulate such matters.”³⁵

20. Following *Hoopa Valley*, the Commission found that the California Board waived its section 401 authority in *Placer County Water Agency*.³⁶ 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.³⁷ The Commission found that the record showed that the entities worked to ensure that the

³³ 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).

³⁴ *Id.*

³⁵ *Id.*

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

³⁷ *Placer County*, 167 FERC ¶ 61,056 at P 16; *see also McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185, at PP 33-38 (2019); *see also 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*).

withdrawal and refiling happened each year,³⁸ given that the licensee submitted evidence that the California Board sent it emails about each upcoming one-year deadline for the purpose of eliciting a withdrawal and resubmission.³⁹ 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.⁴⁰

21. Similarly, in *Southern California Edison*,⁴¹ 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. There, the Commission rejected the Board's argument that *Hoopa Valley* was not applicable. While there was no explicit agreement between the applicant and the Board, the Commission found that the record showed the Board directly participated in the withdrawal and resubmittal scheme. The Board staff sent emails in some years ahead of the upcoming one-year deadline that explicitly requested withdrawal and resubmittal.⁴² In addition, the Board, commenting 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."⁴³ The Commission found this

³⁸ *Placer County*, 167 FERC ¶ 61,056 at P 12.

³⁹ *Placer County*, 169 FERC ¶ 61,046 at P 17.

⁴⁰ *Id.* PP 12, 18.

⁴¹ 170 FERC ¶ 61,135 (2020).

⁴² *Id.* P 25.

⁴³ *Id.* P 24; *see also id.* PP 23-29.

evidence sufficiently demonstrated the state’s coordination with the licensee and supported a waiver finding.⁴⁴

22. Thereafter, in *Pacific Gas and Electric*, the Commission found that the California Board waived its section 401 authority with respect to the surrender of the Kilarc-Cow Creek Hydroelectric Project No. 606, again stating that an explicit agreement between the applicant and the Board was not necessary to find waiver.⁴⁵ We found that the record showed that the Board expected the applicant to withdraw and refile its certification application and the applicant cooperated.⁴⁶ In its comments on the EIS, the Board indicated that the “usual process” involved the applicant voluntarily withdrawing and refileing its application.⁴⁷ 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.⁴⁸ The Commission found, as it had previously, that a “state’s reason for delay [is] immaterial.”⁴⁹

23. Most recently, in *Nevada Irrigation District*⁵⁰ and *Yuba County Water Agency*,⁵¹ we again found that

⁴⁴ *Id.* P 25.

⁴⁵ 170 FERC ¶ 61,232 at P 27 (2020).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* PP 31-33.

⁴⁹ *Id.* P 35 (citing *Placer County*, 169 FERC ¶61,046 at P 20).

⁵⁰ 171 FERC ¶ 61,029 (2020).

⁵¹ 171 FERC ¶ 61,139 (2020).

the Board waived its authority to issue a water quality certification where the applicant withdrew and resubmitted its application numerous times, even when an explicit agreement was not in place. The Commission found unpersuasive the arguments that Nevada Irrigation District and Yuba County Water Agency, as the respective lead agencies for CEQA, controlled the timing for the CEQA analysis, and reiterated that “state’s reason for delay [is] immaterial.”⁵²

B. Application of *Hoopa Valley* and Commission Precedent to the Relicensing Proceeding for the Merced Falls and Merced River Projects

24. The California Board and Conservation Groups claim that the Board did not waive its authority under section 401, as interpreted and applied in *Hoopa Valley*.⁵³ They claim: (i) there was no formal agreement for Merced to withdraw and resubmit its applications; (ii) Merced acted voluntarily and unilaterally in doing so each year before the deadline and that an applicant’s decision to withdraw its request for certification before expiration of the certification period eliminates any need to approve or deny the withdrawn request; (iii) that unlike *Hoopa Valley*, Merced is not a dependent third party seeking waiver; (iv) Merced’s failure to prepare and submit CEQA documents caused delay and precluded the Board’s issuance of certifications; and (v) that the Board’s issuance of certifications even

⁵² *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 28; *Yuba County Water Agency*, 171 FERC ¶ 61,139 at P 25.

⁵³ California Board June 27, 2019 Response at 1; Conservation Groups June 28, 2019 Response at 7.

if taking longer than one year would not delay the Commission's licensing proceeding.⁵⁴

1. Formal Agreement Not Necessary to Find Waiver; California Board Was Complicit

25. Both the Board and Conservation Groups argue that there was no formal agreement regarding Merced's withdrawal and resubmittal and no agreement to delay the issuance of the certification.⁵⁵ Instead, the Board claims that Merced voluntarily and unilaterally withdrew and resubmitted its application each year before the deadline.⁵⁶

26. As we have stated previously, an explicit written agreement to withdraw and resubmit is not necessary.⁵⁷ The facts in this proceeding are similar to those in *Pacific Gas and Electric*, in that there is sufficient evidence to determine that the Board expected Merced to withdraw and resubmit its application and Merced did so. This expectation is underlined in the April 21, 2015 email from the Board to Merced, which stated: "Merced Irrigation District's application for water quality certification for the Merced River Hydroelectric Project, FERC Project No. 2179 expires on May 21, 2015. Please withdraw the [application] and

⁵⁴ California Board June 27, 2019 Response at 2-4; Conservation Groups June 28, 2019 Response at 3-6.

⁵⁵ California Board June 27, 2019 Response at 2; Conservation Groups June 28, 2019 Response at 3.

⁵⁶ California Board June 27, 2019 Response at 2-3.

⁵⁷ See *Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 27; *Southern California Edison*, 170 FERC ¶ 61,135 at P 23; *Placer County*, 167 FERC ¶ 61,056 at PP 16-18; see also *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129 at PP 33-34 (2019) (*Constitution*).

simultaneously resubmit an application for water quality certification prior to May 13, 2015.”⁵⁸

27. With respect to the applications for both projects, the Board acknowledged when it commented on the draft EIS, and in every letter acknowledging the receipt of PG&E’s and Merced’s resubmitted applications, that water quality certification cannot be issued without a final CEQA document.⁵⁹ The letters accepting PG&E’s and Merced’s withdrawals and resubmittals also included general language that the Board might request additional information regarding the applications,⁶⁰ but there is no evidence that the Board ever did so from 2014 until it purported to act in 2019. The Board’s explanation for denying certification in 2019 was that Merced as lead agency “ha[d] not begun the CEQA process” for the Projects,⁶¹ but as we have previously concluded, the Board cannot rely on a state regulatory process (i.e., CEQA) over which it has potentially limited control over timing and that often takes more than one year to complete to excuse compliance with the CWA.⁶²

⁵⁸ Merced Request at Attachment 21 (Board’s April 21, 2015 email to Merced).

⁵⁹ California Board May 29, 2015 Comments on Draft EIS at 4; Merced Request at Attachments 8, 9, 12, 13, 16, and 17 (appending the California Board’s May 29, 2015, May 10 & 23, 2016 and May 12, 2017 Acknowledgement Letters).

⁶⁰ Merced Request at Attachments 8, 9, 12, 13, 16, and 17 (appending the California Board’s May 29, 2015, May 10 & 23, 2016 and May 12, 2017 Acknowledgement Letters).

⁶¹ California Board April 22, 2019 Denial without Prejudice of Water Quality Certification Application (filed with the Commission on April 23, 2019).

⁶² *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 28.

28. The Board alleges that Merced presumably withdrew its requests voluntarily to avoid the Board denying its application.⁶³ We rejected a similar argument in prior proceedings. In *Southern California Edison*, we found that the California Board had waived its water quality certification authority based on the fact that in the eight 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.⁶⁴ In reaching this decision, we also relied on record evidence that showed the Board's direct participation in the withdrawal and resubmittal scheme, namely annual reminder emails sent to the licensee just before the one-year deadline, requesting withdrawal and resubmission of the application.⁶⁵ We further concluded that:

[e]ven absent this evidence, prior to and upon receipt of each withdrawal, the California Board had the option of denying certification within the one year it was afforded under the CWA. Therefore, by accepting each of [the licensee's] withdrawal/resubmission letters, the California Board consented to the scheme of resetting the one-year deadline.⁶⁶

⁶³ California Board June 27, 2019 Response at 2-3.

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

⁶⁵ *Southern California Edison*, 170 FERC ¶ 61,135 at P 25.

⁶⁶ *Id.*

29. Here, too, we find, based on the four years of the applicants withdrawing and resubmitting their applications with nearly identical two-page letters and without filing a new application or any new supporting information, that the California Board de facto consented to the applicants' withdrawal and resubmission for the purpose of avoiding the CWA's one-year deadline. Accordingly, just as we found in *Placer County*, *Southern California Edison*, *Pacific Gas and Electric*, *Nevada Irrigation District*, and *Yuba County Water Agency*,⁶⁷ the California Board's actions, whether implied or explicit, constituted a failure to act within the one-year deadline of section 401 and thus waived certification.

30. The Board argues that “[c]onsistent with logic and Commission precedent, ... an applicant’s decision to withdraw its request for certification before expiration of the certification period eliminates any need to approve or deny the withdrawn request.”⁶⁸ We disagree. In *Hoopa Valley*, the court faulted the Commission for concluding that although the many resubmissions from the hydroelectric license applicant “involved the same [p]roject, each resubmission was an independent request, subject to a new period of review.”⁶⁹ Despite previous Commission orders concluding that once an application is withdrawn, the refiling restarts the one-year period, the court explained that a state’s obligation “to act on a request for certification” within one

⁶⁷ *Placer County*, 169 FERC ¶ 61,046 at P 18; *Southern California Edison*, 170 FERC ¶ 61,135 at P 25; *Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 27; *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 23; *Yuba County Water Agency*, 171 FERC ¶ 61,139 at P 20.

⁶⁸ California Board June 27, 2019 Response at 3.

⁶⁹ 913 F.3d at 1104.

year applies to a specific request and “cannot be reasonably interpreted to mean that the period of review for one request affects that of any other request.”⁷⁰

31. The Board and Conservation Groups further claim that Merced’s waiver request is distinct from the waiver request in *Hoopa Valley*, where the party claiming waiver was a dependent third party that did not control the timing of water quality certification.⁷¹ The Commission recently addressed a similar argument in *Southern California Edison*, explaining that nothing in *Hoopa Valley* rested on the identity of the party that brought the case.⁷² Instead, the *Hoopa Valley* decision interpreted the legal requirements of the CWA, which should not differ based on the identity of the litigants.⁷³ We affirm that finding here.

2. CEQA Requirements Cannot Circumvent the CWA’s One-Year Deadline for Action

32. The California Board and Conservation Groups’ argument that, because Merced is the lead agency⁷⁴ for CEQA and controls the timing for CEQA compliance, Merced should not benefit from its own inaction in failing to bring the water quality certification process

⁷⁰ *Id.*

⁷¹ California Board June 27, 2019 Response at 3; Conservation Groups June 28, 2019 Response at 4.

⁷² *Southern California Edison*, 170 FERC ¶ 61,135 at P 31 (citing *Placer County*, 167 FERC ¶ 61,056 at P 14).

⁷³ *Id.*

⁷⁴ While Merced has always been the lead agency for the Merced River Project, the California Board was the lead agency for compliance with CEQA for the Merced Falls Project from May 2014 through February 2017, at which time the license was transferred from PG&E to Merced. Merced Request at 4.

to completion is unpersuasive.⁷⁵ The Board states that as a responsible agency it cannot make use of environmental documentation or approve a project until the lead agency completes its responsibilities under the CEQA.⁷⁶ We find that the California Board's contention that Merced alone is responsible for the delay in issuance of a water quality certification ignores the Board's own role in the process. The state's reliance on a regulatory process (i.e., CEQA) over which it has potentially limited control over timing and that often takes more than one year to complete does not excuse compliance with the CWA. Moreover, as we have explained, the "state's reason for delay [is] immaterial."⁷⁷ "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.'"⁷⁸ Accordingly, a state may not extend the one-year deadline to act even if a state process may, in practice, often take more than a year to complete.⁷⁹ We note that to the extent a state

⁷⁵ California Board June 27, 2019 Response at 3; Conservation Groups June 28, 2019 Response at 5-6.

⁷⁶ California Board June 27, 2019 Response at 3.

⁷⁷ *Placer County*, 169 FERC ¶ 61,046 at P 20; *see also Constitution*, 168 FERC ¶ 61,129 at P 37.

⁷⁸ *New York DEC v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018) (citing *Alabama Rivers All. v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003)); *see also Hoopa Valley*, 913 F.3d at 1101 (citing *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011)).

⁷⁹ *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).

lacks sufficient information to act on a certification request, it has a remedy: it can deny certification.⁸⁰ Delay beyond the statutory deadline, however, is not an option.⁸¹

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

33. The Board and Conservation Groups argue that finding waiver here would serve no purpose, because the Commission cannot issue a license until ESA consultation is complete.⁸² Regardless of whether a water quality certification decision is the sole factor delaying a licensing proceeding, the general principle from *Hoopa Valley* still applies: where an applicant withdraws and resubmits a request for water quality certification to avoid section 401's one-year time limit,

⁸⁰ Indeed, the state has codified a practice along these lines. See Cal. Code Regs, tit. 23, § 3836(c) ("If an application is determined to be complete by the certifying agency, but CEQA requires that the certifying agency review a final environmental document before taking a certification action, an extension of the federal period for certification cannot be obtained, and the federal period for certification will expire before the certifying agency can receive and properly review the necessary environmental documentation, the certifying agency shall deny without prejudice certification for any discharge resulting from the proposed activity *unless the applicant in writing withdraws the request for certification.*") (emphasis added).

⁸¹ 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 recognized that the waiver provision was created 'to prevent a State from indefinitely delaying a federal licensing processing.'" (emphasis in original) (citation omitted).

⁸² California Board June 27, 2019 Response at 2; Conservation Groups June 28, 2019 Response at 6.

and the state does not act within one year of the receipt of an application, the state has failed or refused to act under section 401 and thus waived its section 401 authority.⁸³ Here, we find that the California Board failed to act within the one-year period on PG&E's May 20 and Merced's May 21, 2014 applications, respectively, hereby waiving its certification authority.⁸⁴

The Commission orders:

Merced Irrigation District's May 22, 2019 request for the Commission to find waiver is granted. The Commission determines that the California State Water Resources Control Board has waived its water quality certification authority under section 401 of the Clean Water Act with respect to the relicensing of the Merced Falls and Merced River Projects, respectively.

By the Commission.

(SEAL)

Nathaniel J. Davis, Sr.

Deputy Secretary

⁸³ *Constitution*, 168 FERC ¶ 61,129 at P 31.

⁸⁴ In fact, while the Commission generally does not issue a license prior to the completion of ESA consultation, we are not prohibited from issuing a license that is contingent on the completion of consultation. *See, e.g., Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1320-21 (D.C. Cir. 2015) (upholding the Commission's conditional approval of a natural gas facility construction project where the Commission conditioned its approval on the applicant securing a required federal Clean Air Act air quality permit from the state).

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APPENDIX G

172 FERC P 62098 (F.E.R.C.), 2020 WL 4915873
FEDERAL ENERGY REGULATORY COMMISSION

Office Director Orders

Merced Irrigation District

Project Nos. 2179-048, 2467-022

**NOTICE OF DENIAL OF REHEARINGS BY
OPERATION OF LAW**

(Issued August 20, 2020)

Rehearings have been timely requested of the Commission's order issued on June 18, 2020, in this proceeding. *Merced Irrigation District*, 171 FERC ¶ 61,240 (2020).

In the absence of Commission action on the requests for rehearing within 30 days from the date the requests were filed, the requests for rehearing may be deemed to have been denied. 16 U.S.C. § 825l(a) (2018); 18 C.F.R. § 385.713(f) (2019); *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

Kimberly D. Bose

Secretary

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APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-72432

CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

NEVADA IRRIGATION DISTRICT,

Intervenor.

No. 20-72452

FERC Nos. 2266-102
2266-118

SOUTH YUBA RIVER CITIZENS LEAGUE; *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

NEVADA IRRIGATION DISTRICT,

Intervenor.

100a

No. 20-72782

CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

YUBA COUNTY WATER AGENCY,

Respondent-Intervenor.

No. 20-72800

FERC No. 2246-086

SOUTH YUBA RIVER CITIZENS LEAGUE; *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

YUBA COUNTY WATER AGENCY,

Respondent-Intervenor.

101a

No. 20-72958

FERC Nos. 2179-043
2467-020
2179-048
2467-022

CALIFORNIA STATE WATER RESOURCES CONTROL
BOARD,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

MERCED IRRIGATION DISTRICT,

Respondent-Intervenor.

No. 20-72973

FERC No. 2179-043

CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; *et*
al.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

MERCED IRRIGATION DISTRICT,

Respondent-Intervenor.

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ORDER

Before: WATFORD and FRIEDLAND, Circuit Judges,
and AMON,* District Judge.

The panel has unanimously voted to deny Respondent-Intervenors' petition for panel rehearing. Judge Watford and Judge Friedland have voted to deny the petition for rehearing en banc, and Judge Amon so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and rehearing en banc are DENIED.

10/07/2022

* The Honorable Carol Bagley Amon, United States District Judge for the Eastern District of New York, sitting by designation.

APPENDIX I**33 U.S.C.A. § 1341****§ 1341. Certification**

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, 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 this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if

any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted,

which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment

under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

APPENDIX J**18 C.F.R. § 4.34****§ 4.34 Hearings on applications; consultation on terms and conditions; motions to intervene; alternative procedures.**

(a) Trial-type hearing. The Commission may order a trial-type hearing on an application for a preliminary permit, a license, or an exemption from licensing upon either its own motion or the motion of any interested party of record. Any trial-type hearing will be limited to the issues prescribed by order of the Commission. In all other cases the hearings will be conducted by notice and comment procedures.

(b) Notice and comment hearings.

All comments (including mandatory and recommended terms and conditions or prescriptions) on an application for exemption or license must be filed with the Commission no later than 60 days after issuance by the Commission of public notice declaring that the application is ready for environmental analysis. All reply comments must be filed within 105 days of that notice. All comments and reply comments and all other filings described in this section must be served on all persons listed in the service list prepared by the Commission, in accordance with the requirements of § 385.2010 of this chapter. If a party or interceder (as defined in § 385.2201 of this Chapter) submits any written material to the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, the party or interceder must also serve a copy of the submission on this resource agency. The Commission may allow for longer comment or reply comment periods if appropriate. A commenter or reply commenter may obtain an

extension of time from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with § 385.2008 of this chapter. Late-filed fish and wildlife recommendations will not be subject to the requirements of paragraphs (e), (f)(1)(ii), and (f)(3) of this section, and late-filed terms and conditions or prescriptions will not be subject to the requirements of paragraphs (f)(1)(iv), (f)(1)(v), and (f)(2) of this section. Late-filed fish and wildlife recommendations, terms and conditions, or prescriptions will be considered by the Commission under section 10(a) of the Federal Power Act if such consideration would not delay or disrupt the proceeding.

(1) Agencies responsible for mandatory terms and conditions and presentations. Any agency responsible for mandatory terms and conditions or prescriptions for licenses or exemptions, pursuant to sections 4(e), 18, and 30(c) of the Federal Power Act and section 405(d) of the Public Utility Regulatory Policies Act of 1978, as amended, must provide these terms and conditions or prescriptions in its initial comments filed with the Commission pursuant to paragraph (b) of this section. In those comments, the agency must specifically identify and explain the mandatory terms and conditions or prescriptions and their evidentiary and legal basis. In the case of an application prepared other than pursuant to part 5 of this chapter, if ongoing agency proceedings to determine the terms and conditions or prescriptions are not completed by the date specified, the agency must submit to the Commission by the due date:

(i) Preliminary terms and conditions or prescriptions and a schedule showing the status of the agency proceedings and when the terms and

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conditions or prescriptions are expected to become final; or

(ii) A statement waiving the agency's right to file the terms and conditions or prescriptions or indicating the agency does not intend to file terms and conditions or prescriptions.

(2) Fish and Wildlife agencies and Indian tribes. All fish and wildlife agencies must set forth any recommended terms and conditions for the protection, mitigation of damages to, or enhancement of fish and wildlife, pursuant to the Fish and Wildlife Coordination Act and section 10(j) of the Federal Power Act, in their initial comments filed with the Commission by the date specified in paragraph (b) of this section. All Indian tribes must submit recommendations (including fish and wildlife recommendations) by the same date. In those comments, a fish and wildlife agency or Indian tribe must discuss its understanding of the resource issues presented by the proposed facilities and the evidentiary basis for the recommended terms and conditions.

(3) Other Government agencies and members of the public. Resource agencies, other governmental units, and members of the public must file their recommendations in their initial comments by the date specified in paragraph (b) of this section. The comments must clearly identify all recommendations and present their evidentiary basis.

(4) Submittal of modified recommendations, terms and conditions or prescriptions.

(i) If the information and analysis (including reasonable alternatives) presented in a draft environmental document, issued for comment by the Commission, indicate a need to modify the

recommendations or terms and conditions or prescriptions previously submitted to the Commission pursuant to paragraphs (b)(1), (b)(2), or (b)(3) of this section, the agency, Indian tribe, or member of the public must file with the Commission any modified recommendations or terms and conditions or prescriptions on the proposed project (and reasonable alternatives) no later than the due date for comments on the draft environmental impact statement¹. Modified recommendations or terms and conditions or prescriptions must be clearly distinguished from comments on the draft document.

(ii) If an applicant files an amendment to its application that would materially change the project's proposed plans of development, as provided in § 4.35, an agency, Indian tribe or member of the public may modify the recommendations or terms and conditions or prescriptions it previously submitted to the Commission pursuant to paragraphs (b)(1), (b)(2), or (b)(3) of this section no later than the due date specified by the Commission for comments on the amendment.

(5)(i) With regard to certification requirements for a license applicant under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), an applicant shall file within 60 days from the date of issuance of the notice of ready for environmental analysis:

(A) A copy of the water quality certification;

¹ So in original; probably should read "document". See 68 FR 51070.

(B) A copy of the request for certification, including proof of the date on which the certifying agency received the request; or

(C) Evidence of waiver of water quality certification as described in paragraph (b)(5)(ii) of this section.

(ii) In the case of an application process using the alternative procedures of paragraph 4.34(i), the filing requirement of paragraph (b)(5)(i) shall apply upon issuance of notice the Commission has accepted the application as provided for in paragraph 4.32(d) of this part.

(iii) A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

(c) Additional procedures. If necessary or appropriate the Commission may require additional procedures (e.g., a pre-hearing conference, further notice and comment on specific issues or oral argument). A party may request additional procedures in a motion that clearly and specifically sets forth the procedures requested and the basis for the request. Replies to such requests may be filed within 15 days of the request.

(d) Consultation procedures. Pursuant to the Federal Power Act and the Public Utility Regulatory Policies Act of 1978, as amended, the Commission will coordinate as appropriate with other government agencies

responsible for mandatory terms and conditions for exemptions and licenses for hydropower projects. Pursuant to the Federal Power Act and the Fish and Wildlife Coordination Act, the Commission will consult with fish and wildlife agencies concerning the impact of a hydropower proposal on fish and wildlife and appropriate terms and conditions for license to adequately and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat). Pursuant to the Federal Power Act and the Endangered Species Act, the Commission will consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, concerning the impact of a hydropower proposal on endangered or threatened species and their critical habitat.

(e) Consultation on recommended fish and wildlife conditions; Section 10(j) process.

(1) In connection with its environmental review of an application for license, the Commission will analyze all terms and conditions timely recommended by fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act for the protection, mitigation of damages to, and enhancement of fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the proposed project. Submission of such recommendations marks the beginning of the process under section 10(j) of the Federal Power Act.

(2) The agency must specifically identify and explain the recommendations and the relevant resource goals and objectives and their evidentiary or legal basis. The Commission may seek clarification of any recommendation from the appropriate fish and

wildlife agency. If the Commission's request for clarification is communicated in writing, copies of the request will be sent by the Commission to all parties, affected resource agencies, and Indian tribes, which may file a response to the request for clarification within the time period specified by the Commission. If the Commission believes any fish and wildlife recommendation may be inconsistent with the Federal Power Act or other applicable law, the Commission will make a preliminary determination of inconsistency in the draft environmental document or, if none, the environmental assessment. The preliminary determination, for any recommendations believed to be inconsistent, shall include an explanation why the Commission believes the recommendation is inconsistent with the Federal Power Act or other applicable law, including any supporting analysis and conclusions, and an explanation of how the measures recommended in the environmental document would adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project.

(3) Any party, affected resource agency, or Indian tribe may file comments in response to the preliminary determination of inconsistency, including any modified recommendations, within the time frame allotted for comments on the draft environmental document or, if none, the time frame for comments on the environmental analysis. In this filing, the fish and wildlife agency concerned may also request a meeting, telephone or video conference, or other additional procedure to attempt to resolve any preliminary determination of inconsistency.

(4) The Commission shall attempt, with the agencies, to reach a mutually acceptable resolution of any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of the fish and wildlife agency. If the Commission decides, or an affected resource agency requests, the Commission will conduct a meeting, telephone, or video conference, or other procedures to address issues raised by its preliminary determination of inconsistency and comments thereon. The Commission will give at least 15 days' advance notice to each party, affected resource agency, or Indian tribe, which may participate in the meeting or conference. Any meeting, conference, or additional procedure to address these issues will be scheduled to take place within 90 days of the date the Commission issues a preliminary determination of inconsistency. The Commission will prepare a written summary of any meeting held under this subsection to discuss section 10(j) issues, including any proposed resolutions and supporting analysis, and a copy of the summary will be sent to all parties, affected resource agencies, and Indian tribes.

(5) The section 10(j) process ends when the Commission issues an order granting or denying the license application in question. If, after attempting to resolve inconsistencies between the fish and wildlife recommendations of a fish and wildlife agency and the purposes and requirements of the Federal Power Act or other applicable law, the Commission does not adopt in whole or in part a fish and wildlife recommendation of a fish and wildlife agency, the Commission will publish the findings and statements required by section 10(j)(2) of the Federal Power Act.

(f) Licenses and exemption conditions and required findings—

(1) License conditions.

(i) All licenses shall be issued on the conditions specified in section 10 of the Federal Power Act and such other conditions as the Commission determines are lawful and in the public interest.

(ii) Subject to paragraph (f)(3) of this section, fish and wildlife conditions shall be based on recommendations timely received from the fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act.

(iii) The Commission will consider the timely recommendations of resource agencies, other governmental units, and members of the public, and the timely recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(iv) Licenses for a project located within any Federal reservation shall be issued only after the findings required by, and subject to any conditions that may be timely received pursuant to, section 4(e) of the Federal Power Act.

(v) The Commission will require the construction, maintenance, and operation by a licensee at its own expense of such fishways as may be timely prescribed by the Secretary of Commerce or the Secretary of the Interior, as appropriate, pursuant to section 18 of the Federal Power Act.

(2) Exemption conditions. Any exemption from licensing issued for conduit facilities, as provided in section 30(b) of the Federal Power Act, or for small hydroelectric power projects having a proposed

installed capacity of 10,000 kilowatts or less, as provided in section 405(d) of the Public Utility Regulatory Policies Act of 1978, as amended, shall include such terms and conditions as the fish and wildlife agencies may timely determine are appropriate to carry out the responsibilities specified in section 30(c) of the Federal Power Act.

(3) Required findings. If, after attempting to resolve inconsistencies between the fish and wildlife recommendations of a fish and wildlife agency and the purposes and requirements of the Federal Power Act or other applicable law, the Commission does not adopt in whole or in part a fish and wildlife recommendation of a fish and wildlife agency, the Commission will publish the findings and statements required by section 10(j)(2) of the Federal Power Act.

(g) Application. The provisions of paragraphs (b) through (d) and (f) of this section apply only to applications for license or exemption; paragraph (e) applies only to applications for license.

(h) Unless otherwise provided by statute, regulation or order, all filings in hydropower hearings, except those conducted by trial-type procedures, shall conform to the requirements of subpart T of part 385 of this chapter.

(i) Alternative procedures.

(1) An applicant may submit to the Commission a request to approve the use of alternative procedures for pre-filing consultation and the filing and processing of an application for an original, new or subsequent hydropower license or exemption that is subject to § 4.38 or § 16.8 of this chapter, or for the

amendment of a license that is subject to the provisions of § 4.38.

(2) The goal of such alternative procedures shall be to:

- (i) Combine into a single process the pre-filing consultation process, the environmental review process under the National Environmental Policy Act and administrative processes associated with the Clean Water Act and other statutes;
- (ii) Facilitate greater participation by and improve communication among the potential applicant, resource agencies, Indian tribes, the public and Commission staff in a flexible pre-filing consultation process tailored to the circumstances of each case;
- (iii) Allow for the preparation of a preliminary draft environmental assessment by an applicant or its contractor or consultant, or of a preliminary draft environmental impact statement by a contractor or consultant chosen by the Commission and funded by the applicant;
- (iv) Promote cooperative efforts by the potential applicant and interested entities and encourage them to share information about resource impacts and mitigation and enhancement proposals and to narrow any areas of disagreement and reach agreement or settlement of the issues raised by the hydropower proposal; and
- (v) Facilitate an orderly and expeditious review of an agreement or offer of settlement of an application for a hydropower license, exemption or amendment to a license.

(3) A potential hydropower applicant requesting the use of alternative procedures must:

(i) Demonstrate that a reasonable effort has been made to contact all resource agencies, Indian tribes, citizens' groups, and others affected by the applicant's proposal, and that a consensus exists that the use of alternative procedures is appropriate under the circumstances;

(ii) Submit a communications protocol, supported by interested entities, governing how the applicant and other participants in the pre-filing consultation process, including the Commission staff, may communicate with each other regarding the merits of the applicant's proposal and proposals and recommendations of interested entities; and

(iii) Serve a copy of the request on all affected resource agencies and Indian tribes and on all entities contacted by the applicant that have expressed an interest in the alternative pre-filing consultation process.

(4) As appropriate under the circumstances of the case, the alternative procedures should include provisions for:

(i) Distribution of an initial information package and conduct of an initial information meeting open to the public;

(ii) The cooperative scoping of environmental issues (including necessary scientific studies), the analysis of completed studies and any further scoping; and

(iii) The preparation of a preliminary draft environmental assessment or preliminary draft

environmental impact statement and related application.

(5)(i) If the potential applicant's request to use the alternative procedures is filed prior to July 23, 2005, the Commission will give public notice in the Federal Register inviting comment on the applicant's request to use alternative procedures. The Commission will consider any such comments in determining whether to grant or deny the applicant's request to use alternative procedures. Such a decision will not be subject to interlocutory rehearing or appeal.

(ii) If the potential applicant's request to use the alternative procedures is filed on or after July 23, 2005 and prior to the deadline date for filing a notification of intent to seek a new or subsequent license required by § 5.5 of this chapter, the Commission will give public notice and invite comments as provided for in paragraph (i)(5)(i) of this section. Commission approval of the potential applicant's request to use the alternative procedures prior to the deadline date for filing of the notification of intent does not waive the potential applicant's obligation to file the notification of intent required by § 5.5 of this chapter and Pre-Application Document required by § 5.6 of this chapter.

(iii) If the potential applicant's request to use the alternative procedures is filed on or after July 23, 2005 and is at the same time as the notification of intent to seek a new or subsequent license required by § 5.5, the public notice and comment procedures of part 5 of this chapter shall apply.

(6) If the Commission accepts the use of alternative procedures, the following provisions will apply.

(i) To the extent feasible under the circumstances of the proceeding, the Commission will give notice in the Federal Register and the applicant will give notice, in a local newspaper of general circulation in the county or counties in which the project is located, of the initial information meeting and the scoping of environmental issues. The applicant will also send notice of these stages to a mailing list approved by the Commission.

(ii) Every six months, the applicant shall file with the Commission a report summarizing the progress made in the pre-filing consultation process and referencing the applicant's public file, where additional information on that process can be obtained. Summaries or minutes of meetings held in the process may be used to satisfy this filing requirement. The applicant must also file with the Commission a copy of its initial information package, each scoping document, and the preliminary draft environmental review document. All filings with the Commission under this section must include the number of copies required by paragraph (h) of this section, and the applicant shall send a copy of these filings to each participant that requests a copy.

(iii) At a suitable location, the applicant will maintain a public file of all relevant documents, including scientific studies, correspondence, and minutes or summaries of meetings, compiled during the pre-filing consultation process. The Commission will maintain a public file of the applicant's initial information package, scoping documents, periodic reports on the pre-filing

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consultation process, and the preliminary draft environmental review document.

(iv) An applicant authorized to use alternative procedures may substitute a preliminary draft environmental review document and additional material specified by the Commission instead of Exhibit E to its application and need not supply additional documentation of the pre-filing consultation process. The applicant will file with the Commission the results of any studies conducted or other documentation as directed by the Commission, either on its own motion or in response to a motion by a party to the licensing or exemption proceeding.

(v) Pursuant to the procedures approved, the participants will set reasonable deadlines requiring all resource agencies, Indian tribes, citizens' groups, and interested persons to submit to the applicant requests for scientific studies during the pre-filing consultation process, and additional requests for studies may be made to the Commission after the filing of the application only for good cause shown.

(vi) During the pre-filing process the Commission may require the filing of preliminary fish and wildlife recommendations, prescriptions, mandatory conditions, and comments, to be submitted in final form after the filing of the application; no notice that the application is ready for environmental analysis need be given by the Commission after the filing of an application pursuant to these procedures.

(vii) Any potential applicant, resource agency, Indian tribe, citizens' group, or other entity

participating in the alternative pre-filing consultation process may file a request with the Commission to resolve a dispute concerning the alternative process (including a dispute over required studies), but only after reasonable efforts have been made to resolve the dispute with other participants in the process. No such request shall be accepted for filing unless the entity submitting it certifies that it has been served on all other participants. The request must document what efforts have been made to resolve the dispute.

(7) If the potential applicant or any resource agency, Indian tribe, citizens' group, or other entity participating in the alternative pre-filing consultation process can show that it has cooperated in the process but a consensus supporting the use of the process no longer exists and that continued use of the alternative process will not be productive, the participant may petition the Commission for an order directing the use by the potential applicant of appropriate procedures to complete its application. No such request shall be accepted for filing unless the entity submitting it certifies that it has been served on all other participants. The request must recommend specific procedures that are appropriate under the circumstances.

(8) The Commission may participate in the pre-filing consultation process and assist in the integration of this process and the environmental review process in any case, including appropriate cases where the applicant, contractor, or consultant funded by the applicant is not preparing a preliminary draft environmental assessment or preliminary draft environmental impact statement,

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but where staff assistance is available and could expedite the proceeding.

(9) If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by § 388.113(c) of this chapter, to any person, the applicant shall follow the procedures set out in § 4.32(k).