

170 FERC ¶ 61,232  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Pacific Gas and Electric Company

Project Nos. 606-027  
606-037

DECLARATORY ORDER ON WAIVER OF WATER QUALITY CERTIFICATION

(Issued March 19, 2020)

1. On May 15, 2019, as supplemented on January 30, 2020, Pacific Gas and Electric Company (PG&E), licensee for the Kilarc-Cow Creek Hydroelectric Project No. 606 (Kilarc-Cow Project), filed a petition for an order declaring that the California State Water Resources Control Board (California Board or Board) waived its authority under section 401(a)(1) of the Clean Water Act (CWA)<sup>1</sup> to issue water quality certification regarding the surrender of the Kilarc-Cow Project. This order grants the petition.

**I. Background**

2. On February 8, 1980, the Commission issued PG&E a new 30-year license for the continued operation and maintenance of the Kilarc-Cow Project, located on the South Cow and Old Cow Creeks in Shasta County, California.<sup>2</sup> The license expired on March 27, 2007.<sup>3</sup> PG&E continues to operate the project under an annual license.

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

<sup>2</sup> *Pacific Gas and Electric Co.*, 10 FERC ¶ 62,112 (1980).

<sup>3</sup> The new license term was set for 30 years from March 27, 1977, the expiration of the original license. *Id.* at 63,157.

3. On March 13, 2009, PG&E filed an application to surrender its license for the project.<sup>4</sup> On May 12, 2009, Commission staff issued a notice accepting the application and indicating that it was ready for environmental analysis. The notice stated that, pursuant to section 4.34 of the Commission's regulations, the applicant must file, either: (1) a copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

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, such as PG&E's proposed surrender of the Kilarc-Cow Project,<sup>5</sup> must provide the licensing or permitting agency a water quality certification from the state in which the discharge originates or evidence of waiver thereof.<sup>6</sup> If the state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request," then certification is waived.<sup>7</sup> Further, the licensing or permitting agency may not grant a license or permit until certification has been granted or waived.<sup>8</sup>

5. The California Board received PG&E's water quality certification request on August 18, 2009.<sup>9</sup> The Board's September 16, 2009 acknowledgment letter stated that

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<sup>4</sup> Pursuant to a 2005 agreement with stakeholders, including the California Board, PG&E agreed to support decommissioning the project instead of filing an application for a new license. PG&E Petition for Declaratory Order at 1-2.

<sup>5</sup> Not all applications to surrender a licensed project require a water quality certification because certification is required only in connection with an application for a license or permit to conduct any activity that may result in a discharge. *See, e.g., Rochester Gas and Electric Corp.*, 100 FERC ¶ 61,113, at P 17 (2002). Because here the proposal involves construction that could result in a discharge, a certification is required.

<sup>6</sup> 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).

<sup>7</sup> 33 U.S.C. § 1341(a)(1).

<sup>8</sup> *Id.* § 1341(d).

<sup>9</sup> PG&E Petition at Attachment B, California Board's September 16, 2009 Letter at 1. *See also* PG&E Petition at 2 (noting that California Board received its application on August 18, 2009).

“[PG&E’s] letter initiates a one-year time clock from the date received for the [California Board] to act on the request for water quality certification[.]” and “serves as public notice that an application for water quality certification is pending before the [California Board].”<sup>10</sup>

6. On June 22, 2010, Commission staff issued a draft environmental impact statement (EIS) analyzing the effects of the proposed surrender. The draft EIS noted that the California Board’s decision on the section 401 water quality certification application was due by August 18, 2010.<sup>11</sup>

7. On July 30, 2010, PG&E withdrew and refiled its water quality certification application.<sup>12</sup>

8. On August 25, 2010, the California Board stated that Commission staff mischaracterized the water quality certification process. The Board asserted that the process “often takes more than one year from the first application date” because a certification cannot be issued without a final California Environmental Quality Act (CEQA) document.<sup>13</sup> As a CEQA document had not been prepared, the Board stated that “[it] would have issued a denial of [w]ater [q]uality [c]ertification if forced to act by August 18, 2010. Instead, the usual process involves the applicant of a [w]ater [q]uality [c]ertification voluntarily withdrawing their application before the one year deadline and

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<sup>10</sup> California Board September 16, 2009 Letter at 1. The Board acknowledged that PG&E 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 PG&E’s application met the filing requirements of California Code of Regulations, Title 23, Section 3856 (Contents of a Complete Application) precludes any argument on this score.

<sup>11</sup> Commission June 22, 2010 Draft EIS (Draft EIS) at 5-6.

<sup>12</sup> PG&E Petition at Attachment A, PG&E July 30, 2010 Letter to California Board (“As the current application for water quality certification is set to expire, PG&E hereby simultaneously withdraws its outstanding request for water quality certification, and re-files its request for water quality certification.”).

<sup>13</sup> California Board August 25, 2010 Comments on draft EIS at 1.

resubmitting their application afterwards.”<sup>14</sup> As PG&E had withdrawn and refiled its application, the Board considered the new action deadline to be July 30, 2011. Prior to that deadline, PG&E withdrew and refiled its certification application on July 25, 2011 for the second time.<sup>15</sup>

9. On August 16, 2011, Commission staff issued the final EIS, recommending that the Commission approve PG&E’s surrender application with staff-recommended measures and conditions from the forthcoming water quality certification from the California Board.<sup>16</sup>

10. On July 5, 2012, PG&E withdrew and refiled its water quality certification application for the third time.<sup>17</sup> Similar to its response to the previous withdrawal letters, the California Board’s July 30, 2012 letter acknowledged that PG&E’s application “initiates a one-year time clock from the date it was received for the [California Board] to act on the request for certification, subject to completion of the environmental review process...” and set July 6, 2013 as the new deadline.<sup>18</sup> The California Board’s letter also stated that on January 26, 2012, the Board, PG&E, and a consultant executed a memorandum of understanding for preparation of environmental documents pursuant to CEQA. Because the California Board determined that the final EIS prepared by the Commission did not fully comply with CEQA, the Board issued a notice of preparation of its environmental impact report on March 12, 2013, hosted a public scoping meeting

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<sup>14</sup> *Id.*

<sup>15</sup> PG&E Petition at Attachment A, PG&E’s July 25, 2011 Letter to California Board (“As the current application for water quality certification is set to expire, PG&E hereby simultaneously withdraws its outstanding request for water quality certification, and re-files its request for water quality certification.”).

<sup>16</sup> The final EIS noted that the California Board was expected to issue a water quality certification for the proposed surrender by July 30, 2011. Commission August 16, 2011 Final EIS (Final EIS) at xxi. However, as noted above, PG&E had withdrawn and refiled its request on July 25.

<sup>17</sup> PG&E Petition at Attachment A, PG&E July 5, 2012 Letter to California Board (“As the current application for water quality certification is set to expire, PG&E hereby simultaneously withdraws its outstanding request for water quality certification, and re-files its request for water quality certification.”).

<sup>18</sup> PG&E Petition at Attachment B, California Board July 30, 2012 Letter to PG&E.

on April 10, 2013, and solicited and received numerous comments concerning the proposed surrender.<sup>19</sup>

11. PG&E withdrew and refiled its water quality certification application six more times: on June 13, 2013, May 30, 2014, May 21, 2015, May 4, 2016, April 26, 2017, and April 9, 2018.<sup>20</sup>

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*,<sup>21</sup> ruling that, where a state and an applicant agree to repeatedly withdraw and refile the same water quality certification request, the state has waived certification.

13. On April 5, 2019, the California Board denied without prejudice PG&E's request for water quality certification, indicating that the CEQA process had not been completed, and "encouraged [PG&E] to submit a new formal request for certification[.]"<sup>22</sup> PG&E did not file a new request.

14. On May 1, 2019, the California Board filed a notice of availability for public comment of a draft CEQA environmental impact report for the surrender of the Kilarc-Cow Project.<sup>23</sup>

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<sup>19</sup> California Water Board March 12, 2013 Notice of Preparation, [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/water\\_quality\\_cert/kilarc\\_cow/](https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/kilarc_cow/).

<sup>20</sup> PG&E Petition at Attachment A; *see also* PG&E Petition at Attachment B: California Board's June 27, 2013 letter set June 13, 2014 as the new deadline; the June 9, 2014 letter set June 3, 2015 as the new deadline; the June 12, 2015 letter set May 21, 2016 as the new deadline; the May 5, 2017 letter set April 26, 2018 as the new deadline; and the April 19, 2018 letter set April 9, 2019 as the new deadline. *See also* California Board's June 6, 2016 Letter setting May 4, 2017 as the new deadline.

<sup>21</sup> 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).

<sup>22</sup> PG&E Petition at Attachment C, California Board April 5, 2019 Denial of PG&E Water Quality Certification at 1.

<sup>23</sup> Despite its denial of PG&E's water quality certification and no pending request, the California Board issued its Notice of Completion, Notice of Availability, and the Draft

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

16. On November 27, 2019, the California Board issued a Final Environmental Impact Report pursuant to CEQA, as well as a final water quality certification for the Kilarc-Cow Project surrender.<sup>24</sup>

17. On January 30, 2020, PG&E filed a supplement to its petition for declaratory order noting the November 27, 2019 certification and requesting that the Commission declare the certification void *ab initio* under federal law, or alternatively, reject all conditions included in the certification. On February 28, 2020, the California Board filed an answer to PG&E's supplement to the petition.<sup>25</sup>

## **II. Notice, Comments, and Preliminary Matters**

18. On June 6, 2019, the Commission issued public notice of the petition, setting June 21, 2019, as the deadline for interventions and protests. The California Board filed a timely notice of intervention and protest, asking the Commission to deny PG&E's petition.<sup>26</sup> Tetrick Ranch and Abbott Ditch Users (together, Tetrick Ranch), and

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Environmental Impact Report on April 8, 2019, requesting comments by May 24, 2019, [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/water\\_quality\\_cert/kilarc\\_cow/](https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/kilarc_cow/).

<sup>24</sup> On December 26, 2019, PG&E filed a petition for reconsideration of the water quality certification with the California Board, arguing, in part, that because PG&E's application was not pending at the time the California Board issued the water quality certification, the certification is not valid. PG&E December 26, 2019 Petition for Reconsideration of the Water Quality Certification for the Kilarc-Cow Creek Hydroelectric Project License Surrender. The California Board has not acted on the petition.

<sup>25</sup> In its answer, the California Board argues for incorporation of certain terms and conditions. California Board February 28, 2020 Answer to PG&E Supplement to Petition at 9-15. The Board's terms and conditions are not the subject of this order, which is to determine whether the state has waived its authority to issue a water quality certification; however, the conditions of the water quality certification will be considered as recommendations in the surrender proceeding.

<sup>26</sup> Under Rule 214(a)(2) of the Commission's Rules of Practice and Procedure, the California Board became a party to the proceeding upon timely filing a notice of intervention. 18 C.F.R. § 385.214(a) (2019).

American Rivers, American Whitewater, California Sportfishing Protection Alliance, Friends of the River, South Yuba River Citizens League, and Trout Unlimited (collectively, Environmental Intervenors) each filed a timely motion to intervene and comments opposing the petition.<sup>27</sup> Timely, unopposed motions to intervene are granted by operation of Rule 214(c) of the Commission's Rules of Practice and Procedure.<sup>28</sup>

19. The Tetrick Ranch requests that the Commission convene a technical conference to discuss and identify "reasonable alternative measures that [the Commission] determines could avoid or mitigate impacts to water rights and beneficial uses."<sup>29</sup> Issues regarding water rights are outside the scope of this declaratory order, although they may be relevant to the surrender proceeding. Therefore, we decline to convene a technical conference.

### **III. Discussion**

20. 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."<sup>30</sup>

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

#### **A. Hoopa Valley and Commission Precedent**

22. 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."<sup>31</sup> The court concluded that where a licensee each year sent a letter indicating withdrawal of its certification request and resubmission of the

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<sup>27</sup> The Environmental Intervenors request that the Commission require PG&E to refile its petition with a certificate of service, as required by 18 C.F.R. § 385.2010(j). We decline to do so, as petitioners for declaratory orders filed pursuant to Rule 207 are not required to serve the document under Rule 2010.

<sup>28</sup> 18 C.F.R. § 385.214(c) (2019).

<sup>29</sup> Tetrick Ranch June 21, 2019 Filing at 12-13.

<sup>30</sup> 33 U.S.C. § 1341(a)(1).

<sup>31</sup> 913 F.3d at 1103.

same,<sup>32</sup> “[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.”<sup>33</sup> 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.”<sup>34</sup>

23. Following *Hoopa Valley*, the Commission found that the California Board waived its section 401 authority in *Placer County Water Agency*.<sup>35</sup> 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.<sup>36</sup> The Commission found that the record showed that the entities worked to ensure that the withdrawal and refile happened each year,<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

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<sup>32</sup> 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.

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

<sup>34</sup> *Id.*

<sup>35</sup> 167 FERC ¶ 61,056, *reh ’g*, 169 FERC ¶ 61,046 (2019) (*Placer County*).

<sup>36</sup> *Placer County*, 167 FERC ¶ 61,056 at P 16; *see also McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185, at PP 33-38 (2019); *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129 (*Constitution*), *reh ’g denied*, 169 FERC ¶ 61,199 (2019).

<sup>37</sup> *Placer County*, 167 FERC ¶ 61,056 at P 12.

<sup>38</sup> *Placer County*, 169 FERC ¶ 61,046 at P 17.

<sup>39</sup> *Id.* PP 12, 18.



24. Similarly, in *Southern California Edison Company*,<sup>40</sup> 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. In *Southern California Edison*, 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."<sup>41</sup> The Commission found that this statement coupled with the emails that the Board staff sent annually ahead of the one-year deadline requesting 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.<sup>42</sup>

25. Citing *Hoopa Valley* and *Placer County*, PG&E argues that the Commission should find waiver because the facts are similar: PG&E has withdrawn and refiled the same application every year from its initial request in 2009 through 2018.<sup>43</sup>

### 1. The California Board's Actions Led to Delay

26. The California Board states that neither *Hoopa Valley* nor *Placer County* support finding waiver in this case.<sup>44</sup> The Board argues that there was no agreement regarding PG&E's withdrawal and resubmittal and no agreement to put the certification process on hold. Instead, the Board claims that PG&E voluntarily withdrew and refiled its application each year before the deadline,<sup>45</sup> and that the Commission's *Hoopa Valley* interpretation "requires a state . . . to divine the applicant's intent or purpose in withdrawing or submitting . . . ."<sup>46</sup> Tetrick Ranch and the Environmental Intervenors

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<sup>40</sup> 170 FERC ¶ 61,135 (2020) (*Southern California Edison*).

<sup>41</sup> *Id.* P 24; *see also id.* PP 23-29.

<sup>42</sup> *Id.* P 25.

<sup>43</sup> PG&E Petition at 2.

<sup>44</sup> California Board June 21, 2019 Filing at 5; California Board Answer to Supplement at 4.

<sup>45</sup> California Board June 21, 2019 Filing at 7.

<sup>46</sup> California Board Answer to Supplement at 5.

also assert that neither *Hoopa Valley* nor *Placer County* support a waiver determination because there was no formal agreement or other substantial evidence that the California Board deliberately delayed issuance of the certification.<sup>47</sup>

27. The California Board's and Environmental Intervenors' attempts to distinguish *Hoopa Valley* based on the form of agreement are unpersuasive. We agree that there is no evidence of a formal agreement between PG&E and the California Board, but an explicit written agreement is not necessary.<sup>48</sup> Here, the California Board expected that PG&E would withdraw and refile its application and PG&E cooperated. Indeed, the Board stated in its comments on the draft EIS, that its "usual process involves the applicant voluntarily withdrawing their application before the one year deadline and resubmitting their application afterwards."<sup>49</sup> There is no indication that PG&E's withdrawal and refiling was anything but compliance with this "usual process," as dictated by the Board. There was no mystery to PG&E's actions. Accordingly, the assertion that the Board was required to divine PG&E's intent is unconvincing. Further, nothing in *Hoopa Valley* suggests that a specific form of agreement was material to the court's decision. Rather the court in *Hoopa Valley* focused on whether the state agency's – there California and Oregon – inaction "usurped FERC's control over whether and when a federal license will issue."<sup>50</sup> The court found that the withdrawal-and-resubmission scheme could "indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters."<sup>51</sup> As in *Hoopa Valley*, *Placer County*, and *Southern California Edison*, the California Board's efforts constituted a

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<sup>47</sup> Tetrack Ranch June 21, 2019 Filing at 4-5.

<sup>48</sup> See *Southern California Edison*, 170 FERC ¶ 61,135 at P 23; *Placer County*, 167 FERC ¶ 61,056 at PP 17-18; see also *Constitution*, 168 FERC ¶ 61,129 at PP 33-34.

<sup>49</sup> PG&E Petition at 3 (citing California Board August 25, 2010 Comments on the Draft EIS).

<sup>50</sup> *Hoopa Valley*, 913 F.3d at 1104.

<sup>51</sup> *Id.*

failure to act within the meaning of section 401 and gave it more than 10 years beyond the one-year deadline to act.<sup>52</sup> The result is the delay of the surrender proceeding.<sup>53</sup>

28. The California Board describes PG&E's action as solely voluntary and argues that "consistent with logic, Commission policy, and reasonable interpretation of [s]ection 401," the Board did not need to approve or deny the withdrawn request.<sup>54</sup> The Board argues that "[f]or purposes of the certification deadline in Section 401, the voluntary withdrawal of a request by the applicant is legally equivalent to the state's either granting or denying certification" and that "all three actions stop the one-year clock."<sup>55</sup> The Board also argues that this is consistent with prior Commission precedent and practice and that the *Hoopa Valley* ruling should not be applied here as a matter of fairness.<sup>56</sup>

29. 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."<sup>57</sup> Despite previous Commission orders concluding that once an application is

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<sup>52</sup> *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 (noting that the Board's participation in the withdrawal/resubmittal scheme usurped the Commission's control over whether and when new licenses would issue for the Big Creek projects).

<sup>53</sup> The California Board's failure to act in a timely manner not only frustrates the will of Congress, but the environment and public safety, as evidenced by the deteriorating conditions in the reservoir, which could be addressed in the decommissioning proceeding. See August 13, 2019 Letter from Robert J. Fletcher (Land Resources Branch, Division of Hydropower Administration and Compliance) to Ms. Debbie Powell (Senior Director, PG&E) ("The canal leak has rendered the canal temporarily inoperable. . . . Because the canal feeds the reservoir, the lack of fresh water flowing into the reservoir and hot summer air temperatures have caused deteriorating conditions in the reservoir. Water levels are decreasing, which is exposing a muddy shoreline, and stocked fish have begun to die off.□ This combination of events has caused . . . some concern for public safety around the reservoir.").

<sup>54</sup> California Board Answer to Supplement at 6.

<sup>55</sup> California Board Filing at 8.

<sup>56</sup> *Id.* at 6, 9-10.

<sup>57</sup> *Hoopa Valley*, 913 F.3d at 1104.

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."<sup>58</sup>

30. In *Southern California Edison*,<sup>59</sup> we recently considered and rejected a similar argument made by the California Board that a licensee voluntarily and unilaterally submitted new requests to avoid a denial without prejudice and thus there was no waiver.<sup>60</sup> In that case, several of the California Board's acknowledgment letters and one reminder email mentioned denial without prejudice; however, other acknowledgment letters and emails did not. We found that the "denial without prejudice" was general language that referenced a scenario that never materialized.<sup>61</sup> Ultimately, 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.<sup>62</sup> 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

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<sup>58</sup> *Id.* at 1104.

<sup>59</sup> 170 FERC ¶ 61,135 at PP 26-28; *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).

<sup>60</sup> The California Board states that it "notified PG&E when the one-year deadline under Section 401 was approaching" and informed PG&E that if it "desired to avoid having its request for certification denied without prejudice, it should withdraw its request." California Board Filing at 6; *see also* PG&E Petition at 3 (stating that "PG&E was made to understand if it did not withdraw and resubmit its request for water quality certification[,], the certification would be denied"). There is no information in the record showing whether these notifications were made by telephone, in person, email or mailed correspondence, or whether the notifications were made on an annual basis.

<sup>61</sup> *Southern California Edison*, 170 FERC ¶ 61,135, at P 27.

<sup>62</sup> *Id.* at 28.

just before the one-year deadline requesting withdrawal and resubmission of the application.<sup>63</sup> We further concluded that:

Even 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.<sup>64</sup>

31. Here, the facts are slightly different from *Southern California Edison*, but the result is the same. 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. With respect to PG&E'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 PG&E's resubmitted application, that the water quality certification cannot be issued without a final CEQA document. In its comments on the draft EIS, the California Board stated, the CEQA document has not yet been prepared. The California Board further stated, it "would have issued a denial of Water Quality Certification if forced to act by August 18, 2010." The Board clarified that the "usual process involves the applicant... voluntarily withdrawing their application... and resubmitting their application afterwards."<sup>65</sup> And, the Board acknowledges that it "provided PG&E with courtesy notifications of the pending expiration of the one-year deadline when applicable."<sup>66</sup> Accordingly, PG&E followed this "usual process" as dictated by the Board. The California Board's contention that PG&E's actions contributed to the delay ignores its own role in the process.

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<sup>63</sup> *Id.* at 25.

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

<sup>65</sup> *See supra* P 8. Indeed, state regulations codify this practice. *See* Cal. Code Regs, tit. 23, § 3836(b) ("If an application is determined to be complete by the certifying agency, but CEQA requires that the certifying agency review a final environmental document before taking a certification action, an extension of the federal period for certification cannot be obtained, and the federal period for certification will expire before the certifying agency can receive and properly review the necessary environmental documentation, the certifying agency shall deny without prejudice certification for any discharge resulting from the proposed activity *unless the applicant in writing withdraws the request for certification.*") (emphasis added).

<sup>66</sup> California Board Filing at 6.

32. Moreover, there is no evidence that between 2009 through 2018, the California Board lacked the necessary environmental documentation to complete either the CEQA review or certification process.<sup>67</sup> In fact, the California Board states that its intent was to complete an environmental review and issue a water quality certification as soon as possible.<sup>68</sup> While in the letters accepting PG&E's withdrawal and resubmittal, the California Board included general language stating that it might request additional information regarding the application,<sup>69</sup> but there is no evidence that the Board ever did so in the 10-year period from 2009 until it purported to act in 2019. Indeed, the California Board's explanation for denying certification in 2019 was that "the CEQA process has not been completed for the [p]roject,"<sup>70</sup> not that it lacked information from PG&E.

33. As the Commission has stated, *Hoopa Valley* stands for the general principle that 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.<sup>71</sup> Here, we find that the California Board failed to act within the one-year period on PG&E's August 13, 2009 application, hereby waiving its certification authority.

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<sup>67</sup> The only explanation of the Board's delay in completing CEQA review was the Board's July 30, 2012 letter to PG&E acknowledging receipt of PG&E's July 6, 2012 withdrawal and resubmittal letter, which notes that the Board had executed a three-party memorandum of understanding for the development of the CEQA documents on January 26, 2012 and that the Board was waiting for "payment of work done under the MOU so that CEQA work can proceed." California Board July 30, 2012 Acknowledgment Letter at 2.

<sup>68</sup> *Id.*

<sup>69</sup> PG&E Petition at Attachment B (California Board September 16, 2009 Letter to PG&E at 1, California Board July 30, 2012 Letter to PG&E at 2, Board's June 27, 2013 Letter to PG&E at 2, California Board June 9, 2014 Letter to PG&E at 2, California Board June 12, 2015 Letter to PG&E at 2, California Board May 5, 2017 Letter to PG&E at 2, and California Board April 19, 2018 Letter to PG&E at 2). *See also* California Board June 6, 2016 Letter at 1.

<sup>70</sup> PG&E Petition at Attachment B (California Board April 5, 2019 Denial without Prejudice of Water Quality Certification at 1).

<sup>71</sup> *Constitution*, 168 FERC ¶ 61,129, at P 31.

## 2. The Delay Was Indefinite

34. The California Board argues that there was never an agreement to put the Board's processing of PG&E's certification application on hold, and that at all times the Board intended to complete its review and make a certification determination.<sup>72</sup> The Board asserts that it worked diligently under the circumstances to complete its CEQA review and documentation and to consider the conditions under which the project may comply with the CWA.<sup>73</sup> During this time, the Board states that while it was drafting a CEQA Environmental Impact Report, its role in responding to a drought in 2014 required redirection of statewide resources.<sup>74</sup> However, the record does not support the contention that the Board was making any progress toward acting on PG&E's application or that it ever would have done so had the *Hoopa Valley* not made clear that the Board's actions in this case put it at risk of a waiver finding.

35. Moreover, as we have explained, the "state's reason for delay [is] immaterial."<sup>75</sup> "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.'"<sup>76</sup> As we found in *Placer County*, the California Board's representations here regarding its limited resources during the drought period do not explain the failure to act in 2010 through 2013.<sup>77</sup> Therefore, we conclude, consistent with *Hoopa Valley* and Commission precedent, that the California Board has waived its certification authority.

### B. Retroactive Application of Hoopa Valley

36. The California Board asserts that *Hoopa Valley* should not be retroactively applied to the PG&E's water quality certification application.<sup>78</sup> The Board argues that equitable

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<sup>72</sup> California Board Filing at 5.

<sup>73</sup> *Id.* at 6.

<sup>74</sup> *Id.* at 4.

<sup>75</sup> *Placer County*, 169 FERC ¶ 61,046 at P 20; *see also Constitution*, 168 FERC ¶ 61,129 at P 37.

<sup>76</sup> *See, e.g., New York DEC v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018).

<sup>77</sup> *Placer County*, 169 FERC ¶ 61,046 at P 20.

<sup>78</sup> California Board Filing at 9 (citing *Wyo. Valley Hydro Partners*, 58 FERC ¶ 61,219, at 61,694 (1992)).

tolling should apply because as recently as January 2018, the Commission reaffirmed its longstanding interpretation that refiling of an application restarts the one-year waiver period.<sup>79</sup>

37. As we have explained, *Hoopa Valley* “simply enforces the plain language of the existing statute, as opposed to invalidating a rule previously in force or announcing a wholly new rule.”<sup>80</sup> For this reason, the California Board’s argument regarding past practice is misplaced. The California Board cites *Wyoming Valley Hydro Partners*, a rehearing order in which the Commission, while ultimately dismissing the rehearing request as premature,<sup>81</sup> clarified the applicability of two existing regulations it had promulgated, which both announced changes to existing Commission policy.<sup>82</sup> Here, we are not announcing a new Commission policy; rather, we are following *Hoopa Valley*’s articulation of the plain meaning of section 401 of the CWA.<sup>83</sup> As we have explained, “legal rules announced in judicial decision-making typically have retroactive effect and ‘[r]etroactivity is the norm in agency adjudications[,]’ . . . ‘no less than in judicial adjudications.’”<sup>84</sup>

38. We also remain unconvinced that equitable tolling should apply to limit *Hoopa Valley*’s application.<sup>85</sup> We reiterate our previous finding that, notwithstanding the Commission’s past construction of section 401, we must resolve cases before us based on

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<sup>79</sup> *Id.* at 9-10.

<sup>80</sup> *Southern California Edison*, 170 FERC ¶ 61,135 at P 35 (citing *Constitution*, 169 FERC ¶ 61,199, at P 30).

<sup>81</sup> *Wyo. Valley Hydro Partners*, 58 FERC at 61,693.

<sup>82</sup> *Id.* at 61,693-94.

<sup>83</sup> *See Southern California Edison*, 170 FERC ¶ 61,135 at P 35 (distinguishing *Wyo. Valley Hydro Partners*).

<sup>84</sup> *Id.* (quoting *Am. Telephone and Telegraph Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006)).

<sup>85</sup> *See Southern California Edison*, 170 FERC ¶ 61,135 at P 36 (declining California Board’s request that the principle of equitable tolling should limit the application of *Hoopa Valley* to a prospective application).



current law, and the *Hoopa Valley* court did not limit its ruling to prospective cases.<sup>86</sup> We see no justification for not applying *Hoopa Valley* here.

### C. Whether There is a Benefit in Finding Waiver is Irrelevant

39. The Environmental Intervenors argue that there would be no benefit to finding waiver because the California Board is moving forward with the certification.<sup>87</sup> The Board similarly argues that there is no benefit to finding waiver because PG&E is still awaiting other approvals, such as necessary U.S. Army Corps of Engineers' (Corps) permits, and a section 401 water quality certification is required before the Corps can issue its section 404 permit.<sup>88</sup> These parties contend that if the Commission proceeds without water quality certification, unnecessary delays could ensue because the Commission may ultimately have to reopen the proceeding to amend the surrender order to accommodate conditions in the Corps' 404 permit.<sup>89</sup>

40. While the California Board purported to issue a water quality certification on November 27, 2019, the fact that the Board had previously waived its certification authority rendered that action legally irrelevant.<sup>90</sup> As we have previously held, once a

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<sup>86</sup> See *Placer County*, 167 FERC ¶ 61,056 at P 15 (“The *Hoopa Valley* court did not in any way indicate that its ruling was limited solely to the case before it, and to conclude that the court’s decision does not apply to similarly-situated cases would fail to give full effect to that ruling. We are aware of no sound legal or equitable basis for doing so.”); see also *Constitution*, 169 FERC ¶ 61,199 at PP 29-34 (providing an in-depth discussion of the Commission’s application of *Hoopa Valley*).

<sup>87</sup> The Environmental Intervenors claim that the Commission’s expansion of the *Hoopa Valley* ruling could “[create] procedural roadblocks to state and tribal exercise of their authority under section 401 of the [CWA],” Environmental Intervenors June 21, 2019 Filing at 6, does not appear to be specific to PG&E declaratory petition and is therefore outside the scope of this proceeding.

<sup>88</sup> The Corps issues permits for dredging in or discharging of dredged materials into waters of the United States. 33 U.S.C. § 1344 (2018).

<sup>89</sup> California Board Filing at 12.

<sup>90</sup> *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 700-701 (D.C. Cir. 2017) (declining the project sponsor’s request that the court set a deadline for agency action, explaining that after waiver “there is nothing left for the [agency] ... to do” and “the [agency’s] decision to grant or deny would have no legal significance”); *Weaver’s Cove Energy, LLC v. Rhode Island Dep’t of Env’tl. Mgmt.*, 524 F.3d 1330, 1333 (D.C. Cir.

state agency has waived its authority to act on a water quality certification application, the water quality conditions are not mandatory and acceptance of the conditions is a matter within the federal agency's discretion.<sup>91</sup> Thus, the extent to which the Board was "moving forward" with certification is immaterial.

41. The California Board's argument regarding future action by the Corps is equally unpersuasive. As we have found, the Board has waived section 401 authority with respect to PG&E's application before us. However, waiver in the Commission's decommissioning proceeding does not suggest that there has been waiver in the Corps' separate section 404 proceeding. This is a matter to be addressed before the Corps.

#### **D. State Law Remedies Are Irrelevant Here**

42. The California Board argues that the Commission should not find waiver because PG&E failed to pursue administrative and judicial remedies under state law. According to the Board, the state regulations for water quality certification specifically allow an applicant to seek administrative reconsideration of any action or failure to act in the water quality certification process.<sup>92</sup> The Board contends that where a state has provided an administrative remedy, federal agencies should decline to hear those matters where a party fails to invoke those state remedies.

43. The California Board's argument is misplaced. The state statute cited by the Board provides that "[a]n aggrieved party must file a petition for reconsideration with the state board to exhaust that party's administrative remedies *only if the initial decision or order is issued* under authority delegated to an officer or employee of the state board and the state board has authorized a petition for reconsideration."<sup>93</sup> Here, PG&E is not challenging the issued water quality certification;<sup>94</sup> rather, PG&E is challenging whether the California Board waived its authority under section 401(a)(1) the CWA. The issue of whether the California Board waived its certification authority is a federal question

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2008) (explaining that after waiver, states' preliminary decisions under section 401 "would be too late in coming and therefore null and void."). *See also Southern California Edison*, 170 FERC ¶ 61,135 at P 32.

<sup>91</sup> *See Central Vermont Public Service Corp.*, 113 FERC ¶ 61,167, at P 20 (2005).

<sup>92</sup> California Board Filing at 11 (citing Cal. Code Regs, tit. 23, § 3867(a)).

<sup>93</sup> Cal. Water Code § 13330(a) (emphasis added).

<sup>94</sup> We note that PG&E has petitioned the Board for review of the November 27, 2019 certification. *See supra* note 24.

correctly before the Commission in the first instance, and one that must be resolved by reference to federal law, not state procedure.<sup>95</sup>

**E. November 27, 2019 Water Quality Certification**

44. PG&E questions the validity of the California Board's November 27, 2019 water quality certification.<sup>96</sup> As we have explained above, the post-waiver certification is invalid. We addressed this same argument in *Southern California Edison*, where we explained that once a state agency has waived its authority to act on a water quality certification application, the water quality conditions are not mandatory and acceptance of the conditions is a matter within our discretion.<sup>97</sup> Accordingly, in the surrender proceeding, the Commission will not disregard the Board's determinations, but rather will consider the November 27, 2019 certification conditions as recommendations, rather than mandatory conditions.

The Commission orders:

Pacific Gas & Electric Company's May 15, 2019 petition for declaratory order 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 regarding the surrender of PG&E's license for the Kilarc-Cow Creek Hydroelectric Project No. 606.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>95</sup> *Millennium Pipeline Co.*, 860 F.3d at 700-701; *see also Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (“[T]he question before us focuses on FERC’s authority to decide whether the state’s purported revocation of its prior [section 401 water quality] certification satisfied the terms of section 401(a)(3) [of the CWA]. We have no doubt that the question posed is a matter of federal law, and that it is one for FERC to decide in the first instance.”)

<sup>96</sup> PG&E Supplement to Petition at 5-6.

<sup>97</sup> *Southern California Edison.*, 170 FERC ¶ 61,135 at P 37 (citing *Central Vermont Public Service Corp.*, 113 FERC ¶ 61,167, at P 20 (2005)).