

171 FERC ¶ 61,242  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

South Feather Water and Power Agency

Project No. 2088-068

ORDER ON WAIVER OF WATER QUALITY CERTIFICATION

(Issued June 18, 2020)

1. The South Feather Water and Power Agency (South Feather) is the licensee for the South Feather Power Project No. 2088 (project). The project comprises four developments along the South Fork Feather River, Lost Creek, and Slate Creek in Butte, Yuba, and Plumas Counties, California. An application to relicense the project is pending before the Commission.<sup>1</sup> On December 12, 2019, South Feather 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<sup>2</sup> (CWA) to issue water quality certification with respect to relicensing the project.<sup>3</sup> This order makes such a determination.

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<sup>1</sup> South Feather's March 26, 2007 Application.

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

<sup>3</sup> South Feather's December 12, 2019 Request for Waiver of Section 401 Water Quality Certification (Request for Waiver). South Feather also requests the Commission exercise its discretion not to incorporate any of the WQC conditions submitted by the California Board in the new project license. The determination as to incorporating WQC conditions will be made at the time of relicensing. *See infra* section 2.C.

## I. Background

2. The original license for the project, as amended, expired on March 31, 2009.<sup>4</sup> South Feather filed a timely application for relicense on March 26, 2007. The project continues to operate under an annual license.<sup>5</sup>

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, as would result from operation of the South Feather Project, must provide to 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>

4. South Feather requested water quality certification for the project on May 16, 2008, and the California Board received the application the same day.<sup>8</sup> In its June 10, 2008 letter acknowledging receipt, the Board confirmed that South Feather’s application “meet[s] the application filing requirements” and “initiates a one-year time clock from the date received for the [California Board] to act on the request for water quality

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<sup>4</sup> The original license for the project was issued to the Oroville-Wyandotte Irrigation District on July 21, 1952. *Oroville-Wyandotte Irrigation District*, 11 FPC 1129 (1952). An amendment, effective April 1, 1959, established a license term of 50 years. *Oroville-Wyandotte Irrigation District*, 21 FPC 613, 617 (1959). On January 28, 2004, the license was amended to adopt the licensee’s new name, the South Feather Water and Power Agency. *Oroville-Wyandotte Irrigation District*, 106 FERC ¶ 62,065 (2004).

<sup>5</sup> April 14, 2009 Notice of Authorization for Continued Project Operation.

<sup>6</sup> See 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).

<sup>7</sup> 33 U.S.C. § 1341(a)(1).

<sup>8</sup> 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), South Feather filed a copy of the request with the Commission, including proof of service. South Feather’s May 16, 2008 Proof of Filing of Request for Water Quality Certificate.

certification.”<sup>9</sup> The Board noted that a final California Environmental Quality Act (CEQA) document is required before the application can be considered, but that it is not required for a certification application to be complete.<sup>10</sup>

5. South Feather withdrew and resubmitted its application for water quality certification ten times from 2009 to 2018 – by letters dated May 4, 2009, April 12, 2010, April 4, 2011, March 22, 2012, March 1, 2013, February 21, 2014, February 16, 2015, February 9, 2016, February 6, 2017, and January 29, 2018.<sup>11</sup> In each resubmittal letter, South Feather stated that “the project has not changed, so the March 26, 2008, FERC application, which the [California Board] has on file, contains all information required for a complete application for a water quality certificate.”<sup>12</sup>

6. South Feather’s request includes two emails, dated February 3, 2014 and January 29, 2015, from the California Board to South Feather requesting the withdrawal and refiling.<sup>13</sup> For example, the Board’s January 29, 2015 email stated:

I am just providing a reminder that the South Feather Project is coming up for withdraw and resubmittal on Feb 21. You can coordinate with Michelle Lobo for the submission, you know the drill.<sup>14</sup>

7. The California Board acknowledged receipt of each withdrawal and resubmittal, stating that it “resets the one-year time clock starting from the date received for the [California Board] to act on the request for water quality certification.”<sup>15</sup> The Board did not dispute South Feather’s statements that the project had not changed and that the application was complete.

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<sup>9</sup> California Board’s June 10, 2008 Letter Confirming Receipt of Water Quality Certification Application at 1.

<sup>10</sup> *Id.*

<sup>11</sup> Request for Waiver at Appendix A, 00011 (May 4, 2009), 00021 (April 12, 2010), 00027 (April 4, 2011), 00035 (March 22, 2012), 00039 (March 1, 2013), 00047 (February 21, 2014), 00055 (February 16, 2015), 00063 (February 9, 2016), 00071 (February 6, 2017), 00079 (January 29, 2018).

<sup>12</sup> *See, e.g., id.* at 00012, 00028, 00036.

<sup>13</sup> Request for Waiver at 2 and Appendix A, 000153-000154.

<sup>14</sup> *Id.* at Appendix A, 000153.

<sup>15</sup> *Id.* at 00018, 00022, 00033, 00037, 00043, 00051, 00059, 00067, 00076, 00084.

8. On December 11, 2008, the Commission completed Endangered Species Act (ESA) section 7 consultation with U.S. Fish and Wildlife (FWS) for project relicensing.<sup>16</sup> On March 6, 2009, the U.S. Forest Service (Forest Service) filed its final Federal Power Act (FPA) section 4(e) conditions for the project.<sup>17</sup> On June 4, 2009, Commission staff issued the environmental impact statement (EIS) for the proposed relicensing. On April 2, 2012, South Feather completed the final CEQA document that was needed for relicensing.<sup>18</sup> On May 11, 2016, the Commission completed ESA section 7 consultation with the National Marine Fisheries Service (NMFS) for relicensing.<sup>19</sup>

9. On November 30, 2018, the California Board issued a purported final water quality certification for the project,<sup>20</sup> which stated:

[South Feather] initially submitted an application for a certification to the State Water Board on May 18, 2008. The application initiated a one-year time period for the Executive Director to act on the request for certification. [South Feather] has subsequently withdrawn and simultaneously resubmitted its application for a certification on an annual basis since May 4, 2009. The most recent application was filed with the Executive Director on January 29, 2018.

On June 10, 2008, State Water Board staff provided notice of receipt of a complete application for the Project to the applicable parties pursuant to California Code of Regulations, title 23, section 3835, subdivision (c). State Water Board staff provided public notice of the application, pursuant to California Code of Regulations, title 23, section 3858, by posting information describing the Project on the State Water Board's website on November 17, 2009.<sup>21</sup>

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<sup>16</sup> FWS's December 11, 2008 Filing.

<sup>17</sup> Forest Service's March 6, 2009 Filing.

<sup>18</sup> California Board's Comments at n.3. California acknowledged that it had received the final CEQA document in its March 20, 2013 acknowledgment of South Feather's withdrawal and refile. *See* Request for Waiver at Appendix A, 00044.

<sup>19</sup> NMFS's May 25, 2016 Filing (Letter dated May 11, 2016).

<sup>20</sup> California Board's November 30, 2018 Water Quality Certification (filed with the Commission on December 13, 2018).

<sup>21</sup> *Id.* at 8.

10. On January 25, 2019, the United States Court of Appeals for the District of Columbia Circuit issued an opinion in *Hoopa Valley Tribe v. FERC*,<sup>22</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.

11. On December 12, 2019, South Feather filed the instant request with the Commission, citing *Hoopa Valley* and asking us to determine that the California Board had waived its certification authority with regards to the relicensing of the project and further requesting that the Commission not incorporate the certification conditions into the project license.<sup>23</sup>

12. On March 4, 2020, the Commission issued public notice of the request, establishing April 3, 2020 as the deadline for filing comments.<sup>24</sup> The California Board, California Department of Fish and Wildlife (California Fish and Wildlife), FWS, and the Forest Service each filed comments.<sup>25</sup> The California Board, California Fish and Wildlife, and FWS oppose finding waiver and contend that, regardless of our waiver decision, the Commission should adopt all conditions in the water quality certification. The Forest Service states that it intends to resolve any potential inconsistencies between

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<sup>22</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), *cert. denied*, 140 S. Ct. 650 (2019).

<sup>23</sup> South Feather Water and Power Agency did not style its request as a motion or a petition for declaratory order. We will act on South Feather’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.”).

<sup>24</sup> 85 Fed. Reg. 13,891 (Mar. 10, 2020).

<sup>25</sup> See California Board’s April 3, 2020 Comments, California Fish and Wildlife’s March 26, 2020 Comments, FWS’s April 3, 2020 Comments, and Forest Service’s March 31, 2020 Comments.

its Federal Power Act section 4(e) conditions and the California Board's Water Quality Certification conditions and explains the process to do so.

13. South Feather filed an answer to the responses.<sup>26</sup> Rule 213(a) of the Commission's Rules of Practice and Procedure prohibits answers to answers unless otherwise ordered by the Commission.<sup>27</sup> 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

14. 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 respect to such federal application."<sup>28</sup> For the reasons discussed below, we find that the California Board waived its authority under section 401.

### A. Hoopa Valley and Commission Precedent

15. 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>29</sup> The court concluded that where a licensee each year sent a letter indicating withdrawal of its certification request and resubmission of the same request,<sup>30</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>31</sup> In fact, "[b]y shelving water quality

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<sup>26</sup> See South Feather's April 10, 2020 Response to Comments.

<sup>27</sup> 18 C.F.R. § 385.213(a)(2) (2019).

<sup>28</sup> 33 U.S.C. § 1341(a)(1).

<sup>29</sup> 913 F.3d at 1103.

<sup>30</sup> 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).

<sup>31</sup> *Id.*

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>32</sup>

16. Following *Hoopa Valley*, the Commission found that the California Board waived its section 401 authority in *Placer County Water Agency*.<sup>33</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>34</sup> The Commission found that the record showed that the entities worked to ensure that the withdrawal and refiling happened each year,<sup>35</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>36</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>37</sup>

17. 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.<sup>38</sup> 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 annual emails to the licensee noting the upcoming one-year deadline and

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<sup>32</sup> *Id.*

<sup>33</sup> 167 FERC ¶ 61,056, *reh'g denied*, 169 FERC ¶ 61,046 (2019) (*Placer County*).

<sup>34</sup> *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*); *Yuba County Water Agency*, 171 FERC ¶ 61,139, at P 20 (2020) (*Yuba County*).

<sup>35</sup> *Placer County*, 167 FERC ¶ 61,056 at P 12.

<sup>36</sup> *Placer County*, 169 FERC ¶ 61,046 at P 17.

<sup>37</sup> *Id.* PP 12, 18.

<sup>38</sup> 170 FERC ¶ 61,135.

explicitly requested withdrawal and resubmittal,<sup>39</sup> 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.”<sup>40</sup> The Commission found that this evidence demonstrated the state’s coordination with the licensee and was sufficient to support a waiver finding.<sup>41</sup>

18. 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.<sup>42</sup> We found that the record showed that the Board expected the applicant to withdraw and refile its certification application and the applicant cooperated.<sup>43</sup> In its comments, the Board indicated that the “usual process” involved the applicant voluntarily withdrawing and refiling its application.<sup>44</sup> 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.<sup>45</sup> The Commission found, as it had previously, that a “state’s reason for delay [is] immaterial.”<sup>46</sup>

19. Most recently, in *Nevada Irrigation District*<sup>47</sup> and *Yuba County Water Agency*,<sup>48</sup> we again found that the Board waived its authority to issue a water quality certification where the applicant withdrew and refiled its application numerous times, even when an

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<sup>39</sup> *Id.* P 25.

<sup>40</sup> *Id.* P 24; *see also id.* PP 23-29.

<sup>41</sup> *Id.* P 25.

<sup>42</sup> 170 FERC ¶ 61,232 at P 27.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at PP 31-33.

<sup>46</sup> *Id.* at P 35 (citing *Placer County*, 169 FERC ¶ 61,046 at P 20).

<sup>47</sup> 171 FERC ¶ 61,029 (2020).

<sup>48</sup> *Yuba County*, 171 FERC ¶ 61,139.



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.”<sup>49</sup> Further, we dispensed with the argument by the Board and Foothills Water Network 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 dispositive.<sup>50</sup>

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

20. The California Board and California Fish and Wildlife contend that *Hoopa Valley* does not support a finding of waiver in this proceeding, claiming that there was no agreement for South Feather to withdraw and resubmit its application and that South Feather voluntarily acted to withdraw and resubmit its application before the deadline each year. The Board further claims the delays in the completion of the final CEQA document, Forest Service FPA section 4(e) consultation, and NMFS ESA consultations caused the delay in issuing the water quality certification, and South Feather failed to exhaust all state administrative remedies. California Fish and Wildlife further claims that finding waiver is inappropriate because the water quality certification was issued before the decision in *Hoopa Valley* was issued, and South Feather financially benefitted from the delay caused by its voluntary withdrawal and resubmittal and should not be rewarded for doing so.

**1. A Formal Agreement Not Necessary to Find Waiver**

21. The California Board contends that *Hoopa Valley* is distinguishable from this case because the Board and South Feather did not enter into a written agreement regarding the withdrawal and resubmittal scheme.<sup>51</sup> As we have previously held, an explicit written agreement to withdraw and refile is not necessary to support a finding of waiver.<sup>52</sup>

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<sup>49</sup> *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 28; *Yuba County*, 171 FERC ¶ 61,139 at P 25.

<sup>50</sup> *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 29; *Yuba County*, 171 FERC ¶ 61,139 at P 27.

<sup>51</sup> California Board’s Comments at 2.

<sup>52</sup> 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;

22. The facts in this proceeding are similar to those in *Placer County, Southern California Edison, Pacific Gas and Electric, Nevada Irrigation District, and Yuba County*, in that South Feather's withdrawal and refile of its application was in response to the Board's request that it do so. Here, the Board informed South Feather, on February 3, 2014, about one month in advance of the one-year deadline that:

Since the water quality certification for the South Feather Power Project is not issued, please ask South Feather Water & Power Agency to send us a water quality certification application withdrawal and resubmittal letter for the Project before March 1st. The last one sent is attached for reference.”<sup>53</sup>

Additionally, on January 29, 2015, the Board again reminded South Feather that the deadline for withdrawal and resubmittal was approaching, stating “you know the drill.”<sup>54</sup>

23. This coordination between the Board and South Feather alone is sufficient evidence that the California Board sought the withdrawal and resubmittal of the South Feather application to circumvent the one-year statutory deadline for the state agency to act. Here, as in *Placer County, Southern California Edison, Pacific Gas and Electric, Nevada Irrigation District, and Yuba County*, where the record indicates that South Feather's water quality certification request has been complete and ready for review for a decade, 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.<sup>55</sup>

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*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).

<sup>53</sup> Request for Waiver at Appendix A, 000154.

<sup>54</sup> *Id.* at Appendix A, 000153.

<sup>55</sup> *Placer County*, 169 FERC ¶ 61,046 at P 18 (finding waiver because no new Section 401 application was actually refiled because the parties only exchanged correspondence indicating that they would refile without actually doing so); *Southern California Edison*, 170 FERC ¶ 61,135 at P 25 (finding waiver where the Board sent annual reminder emails in advance of the one-year deadline); *Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 27 (finding waiver where the applicant withdrew and refiled its application eight times via letter without ever submitting new information); *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 23 (finding waiver where the Board commented on the EIS that the applicant would likely withdraw and refile its certification application); *Yuba County*, 171 FERC ¶ 61,139 at P 20 (finding waiver where the

## 2. South Feather Did Not Act Unilaterally; the California Board Was Complicit

24. The California Board and California Fish and Wildlife claim that South Feather voluntarily withdrew and resubmitted its water quality certification application to avoid the Board's "otherwise necessary denial of certification for project relicensing,"<sup>56</sup> implying that South Feather acted unilaterally. The Board further claims that the Commission's "broad interpretation" of section 401—that "a state or other proper certifying authority fails or refuses to act any time the *applicant* withdraws its certification request and resubmits a certification request 'for the purpose of avoiding section 401's one-year time limit'"<sup>57</sup>—requires "a state or other certifying authority to divine the applicant's intent or purpose in withdrawing or submitting a request for certification, and to either approve or deny a request for certification even if the applicant has already withdrawn it."<sup>58</sup>

25. We have rejected similar arguments in prior proceedings. In *Yuba County*, we rejected the Board's argument that the certification applicant voluntarily withdrew and resubmitted its application where Board staff directed the applicant to withdraw and resubmit its application in advance of the one-year deadline.<sup>59</sup> Similar facts are present here. In 2014 and 2015, the Board reminded South Feather to withdraw and resubmit its certification about one month before the annual deadline,<sup>60</sup> evidence that the Board expected and encouraged South Feather to withdraw and resubmit its certification in order to avoid the one-year deadline for acting.<sup>61</sup>

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California Board emailed the applicant a reminder to withdraw and refile its certification application ahead of the one-year deadline).

<sup>56</sup> California Board's Comments at 3.

<sup>57</sup> *Id.*

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

<sup>59</sup> *Yuba County*, 171 FERC ¶ 61,139 at PP 21-22.

<sup>60</sup> Request for Waiver at Appendix A, 000153-54.

<sup>61</sup> *See Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 27 (finding that the California Board expected that PG&E would withdraw and refile its application based on the Board's 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" to support the Commission's waiver determination).

26. Even absent evidence of annual reminders, we have found evidence of a withdrawal-and-resubmittal scheme.<sup>62</sup> 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.<sup>63</sup> While we relied on the Board's annual reminder emails sent to the licensee just before the one-year deadline requesting withdrawal and resubmission of the application to reach our decision,<sup>64</sup> 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.<sup>65</sup>

27. Here, too, we find, based on the ten years of the applicant withdrawing and resubmitting its application 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*,<sup>66</sup> here too we find that the California Board's actions, whether implied or explicit, constituted a failure to act within the one-year deadline of section 401.

28. The California Board also states that South Feather withdrew and resubmitted its application annually because it knew its application would be denied "due to the

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<sup>62</sup> See, e.g., *Southern California Edison*, 170 FERC ¶ 61,135 at P 25.

<sup>63</sup> *Id.* 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).

<sup>64</sup> *Southern California Edison*, 170 FERC ¶ 61,135 at P 25.

<sup>65</sup> *Id.*

<sup>66</sup> *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*, 171 FERC ¶ 61,139 at P 20.

procedural inadequacies of [its] successive certification applications over continuous years.”<sup>67</sup> We disagree. In its letter acknowledging receipt of South Feather’s initial water quality certification application in 2008, the California Board stated that the application met “the application filing requirements.”<sup>68</sup> Over the ten years South Feather withdrew and resubmitted its water quality certification application, it did not provide any new information; rather South Feather repeatedly stated: “The Project has not changed, so the March 26, 2008, FERC application, which the [California Board] has on file, contains all information required for a complete application for a water quality certificate.”<sup>69</sup> The California Board never disputed this claim, nor did it request any further information from South Feather.<sup>70</sup>

29. Further, the California Board asserts that, because South Feather withdrew and refiled its application in advance of the one-year deadline, that it cannot be “reasonably accused of failing or refusing to act on an application when the applicant itself has already expressly withdrawn the application to avoid and obviate the state’s denial.”<sup>71</sup> As we explained in *Pacific Gas and Electric*, the court in *Hoopa Valley* faulted the Commission for concluding that, once an application is withdrawn, the refiling restarts the one-year period.<sup>72</sup> “Despite previous Commission orders concluding that once an

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<sup>67</sup> California Board’s Comments at 3.

<sup>68</sup> Request for Waiver at Appendix A, 0008 (Board’s June 10, 2008 Acknowledgment Letter); *see also* California Board’s November 30, 2018 Water Quality Certification at 8 (noting that “[o]n June 10, 2008, State Water Board staff provided notice of receipt of a complete application for the Project to the applicable parties pursuant to California Code of Regulations, title 23, section 3835, subdivision (c).”).

<sup>69</sup> *See, e.g.*, Request for Waiver at Appendix A, 00012 (South Feather’s May 5, 2009 Withdrawal/Resubmittal Letter) and 00039 (South Feather’s March 1, 2013 Withdrawal/Resubmittal Letter).

<sup>70</sup> The California Board states in its comments that “[b]oth before and after [South Feather’s] adoption of the [final CEQA document], its staff and consultants worked with [California Board] staff in providing records and information and in developing reasonable and effective water quality certification conditions,” but does not provide evidence to support this claim. California Board’s Comments at 5. Regardless, it is immaterial whether the applicant assisted the Board in its development of certification conditions. The Board acknowledged South Feather’s application was complete as early as June 10, 2008 when it confirmed receipt of the initial application.

<sup>71</sup> *Id.* at 4.

<sup>72</sup> *Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 29.

application is withdrawn, the refileing 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>73</sup> And, even if the California Board could not act on an application once it was withdrawn and refiled, the Board fails to explain why it was unable to act on South Feather's application every year in the months prior to the withdrawal and resubmittal, typically filed less than one month before the annual deadline.<sup>74</sup>

### 3. Reason for Delay is Immaterial

30. The California Board states that it did not fail to act on South Feather's request for certification, but rather that it was working "extensively over the years and months leading up to the [Board's] issuance of the final water quality certification in 2018."<sup>75</sup> The California Board states that it worked collaboratively with South Feather and several state and federal agencies to resolve "a number of issues and concerns regarding the Project's effects on water quality, beneficial uses of water, and related requirements of state law."<sup>76</sup> The California Board cites several environmental documents and consultations completed from 2009 to 2016 that it claims were necessary for the development of water quality certification conditions, including: South Feather's final CEQA document, South Feather's ESA consultation with NMFS, and the Forest Service's development of FPA section 4(e) conditions for the project.<sup>77</sup>

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<sup>73</sup> *Id.* (quoting *Hoopa Valley*, 913 F.3d at 1104).

<sup>74</sup> *See, e.g.*, Request for Waiver at Appendix A, 00011 (2009 withdrawal/resubmittal filed nine days prior to the one-year deadline), 00021 (2010 withdrawal/resubmittal filed approximately one month prior to the one-year deadline), 00063 (2016 withdrawal/resubmittal filed seven days prior to the one-year deadline).

<sup>75</sup> California Board's Comments at 5.

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

<sup>77</sup> California Board's Comments at 6-7. The Forest Service and FWS both noted that South Feather, the California Board and stakeholder agencies have been engaged in ongoing and collaborative meetings. FWS's Comments at 1-2; Forest Service's Comments at 2-3.

31. We are unpersuaded by these arguments. As we have explained in prior proceedings, the “state’s reason for delay [is] immaterial.”<sup>78</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>79</sup> In *Nevada Irrigation District*, we rejected a similar argument that the Commission should not find waiver because the applicant was also the lead agency for CEQA and controlled the timing for CEQA compliance, therefore causing the delay in issuing the water quality certification.<sup>80</sup> We explained that “[t]he 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.”<sup>81</sup> We also held in *Nevada Irrigation District* that, due to *Hoopa Valley*’s bright-line rule, delays in ESA consultation do not excuse the California Board from its one-year deadline to act on the applicant’s request for water quality certification.<sup>82</sup> The same logic applies to the consultation with the Forest Service under FPA section 4(e). We note that, to the extent the California Board does not have sufficient information to issue a water quality certification, as it claims here, it has a

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<sup>78</sup> *Placer County*, 169 FERC ¶ 61,046 at P 20; see also *Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 35, *Constitution*, 168 FERC ¶ 61,129 at P 37.

<sup>79</sup> See e.g., *New York DEC v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018); see also *Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 35.

<sup>80</sup> *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 28; see also *Yuba County*, 171 FERC ¶ 61,139 at P 25.

<sup>81</sup> *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 28; see also *Yuba County*, 171 FERC ¶ 61,139 at P 25.

<sup>82</sup> *Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 29; see also *Yuba County*, 171 FERC ¶ 61,139 at P 27.

remedy—it can deny certification.<sup>83</sup> It cannot, however, subvert section 401’s one-year deadline.<sup>84</sup>

#### 4. Pursuing State Remedies Not Required

32. The California Board argues that the Commission should not find waiver because South Feather failed to exhaust state administrative remedies to pursue reconsideration of or challenge the conditions in the issued water quality certification.<sup>85</sup> 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.<sup>86</sup>

#### 5. Hoopa Valley Applies Retroactively

33. California Fish and Wildlife opposes finding waiver here because the water quality certification was ultimately issued before the decision in *Hoopa Valley*.<sup>87</sup> In

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<sup>83</sup> 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).

<sup>84</sup> 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).

<sup>85</sup> California Board’s Comments at 8-9.

<sup>86</sup> See *Pacific Gas and Electric*, 170 FERC ¶ 61,232 at P 43; see also *Millennium Pipeline Co., LLC v. Seggos*, 860 F.3d 696, 700-701 (D.C. Cir. 2017); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (“[T]he question before us focuses on FERC’s authority to decide whether the state’s purported revocation of its prior [section 401 water quality] certification satisfied the terms of section 401(a)(3) [of the CWA]. We have no doubt that the question posed is a matter of federal law, and that it is one for FERC to decide in the first instance.”)

<sup>87</sup> California Fish and Wildlife’s Comments at 1-2.



*Southern California Edison*, we held that the legal principles articulated in *Hoopa Valley* apply to waiver determination for water quality certifications issued prior to the *Hoopa Valley* decision.<sup>88</sup> We explained that “legal rules announced in judicial decision-making typically have retroactive effect and ‘[r]etroactivity is the norm in agency adjudications[,]’... ‘no less than judicial adjudications.’”<sup>89</sup> For these same reasons, we see no justification for not applying *Hoopa Valley* here.

**6. Benefit to Applicant from Withdrawal and Resubmittal is Immaterial**

34. California Fish and Wildlife opposes finding waiver here because South Feather financially benefitted from withdrawing and resubmitting its certification application annually by delaying issuance of a new project license that would require costly protective measures.<sup>90</sup> California Fish and Wildlife states that, at minimum, South Feather has saved an estimated \$2.5 million annually by delaying implementation of final FPA section 4(e) conditions outlined in the Final Environmental Impact Statement.<sup>91</sup>

35. As we have explained, the plain language of section 401 establishes a bright-line rule with respect to 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>92</sup> Therefore, whether South Feather benefitted from the withdrawal-resubmittal scheme is immaterial to whether the California Board waived its certification authority.

**C. Incorporation of Water Quality Certification Terms**

36. The California Board, California Fish and Wildlife, Forest Service, and FWS all contend that, regardless of the Commission’s waiver determination, we should

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<sup>88</sup> 170 FERC ¶ 61,135 at P 34-36. *See also Pacific Gas & Electric*, 170 FERC ¶ 61,232 at P 37).

<sup>89</sup> *Id.* at P 35 (quoting *Constitution Pipeline Co., LLC*, 169 FERC ¶ 61,199, at P 31). The D.C. Circuit itself declined to revisit *Hoopa Valley* to consider whether the decision should only be applied prospectively. *Constitution*, 168 FERC ¶ 61,129 at P 19, n.37.

<sup>90</sup> California Fish and Wildlife’s Comments at 3.

<sup>91</sup> California Fish and Wildlife’s Comments at 3.

<sup>92</sup> *Southern California Edison*, 170 FERC ¶ 61,135 at P 30 (quoting *New York DEC v. FERC*, 884 F.3d at 455).

incorporate the conditions in the California Board's November 30, 2018 Water Quality Certification into the project's final license order. South Feather argues the opposite.

37. As we have long held, 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 with the Commission's discretion.<sup>93</sup>

Accordingly, we will consider all of the November 30, 2018 certification conditions as recommendations under FPA section 10(a)(1)<sup>94</sup> in the relicensing proceeding.

The Commission orders:

(A) South Feather Water and Power Agency's December 12, 2019 request for the Commission to find waiver is granted. The Commission determines that the California State Water Control Board waived its water quality certification authority under section 401 of the Clean Water Act with respect to the relicensing of the South Feather Power Project No. 2088.

(B) South Feather's April 10, 2020 Response to Comments is rejected, as described in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>93</sup> See *Central Vermont Public Service Corp.*, 113 FERC ¶ 61,167, at P 20 (2005).

<sup>94</sup> 16 U.S.C. § 803(a)(1) (2018).