169 FERC ¶ 61,046
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Placer County Water Agency Project No. 2079-081

ORDER DENYING REHEARING

(Issued October 17, 2019)

1. On April 18, 2019, the Commission granted a petition for declaratory order filed by Placer County Water Agency.[1] The Commission determined that the California State Water Resources Control Board (California Board) had waived its authority under section 401(a)(1) of the Clean Water Act[2] to issue a water quality certification for the relicensing of the Middle Fork American River Hydroelectric Project (Middle Fork Project) No. 2079. The California Board and a coalition of conservation organizations filed requests for rehearing.

2. For the reasons discussed below, we deny the requests for rehearing.

I. Background

3. On February 23, 2011, Placer County Water Agency (Placer County) filed an application with the Commission for a new license for the Middle Fork Project. Placer County later filed an application with the California Board, which the Board received on July 18, 2011, requesting that the Board issue a water quality certification for the relicensed project pursuant to section 401 of the Clean Water Act.[3]

4. Section 401(a)(1) provides that an applicant for a federal license or permit to conduct activities that may result in a discharge into the navigable waters of the United States must provide the licensing or permitting agency a water quality certification from

[1] *Placer County Water Agency*, 167 FERC ¶ 61,056 (2019) (Declaratory Order).

[2] 33 U.S.C. § 1341(a)(1) (2018).

[3] *Id.*

the state in which the discharge originates.[4] 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," certification is waived.[5] 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.[6]

5. By letter to the California Board dated June 12, 2012, Placer County stated that it "hereby simultaneously withdraws its outstanding request for Water Quality Certification and refiles its request for Water Quality Certification . . . ."[7] Thereafter, Placer County submitted a similar letter to the California Board in June 2013 and a series of identical letters in 2014, 2015, 2016, 2017, and 2018.[8] The California Board actively participated in this process, on occasion directly requesting the withdrawal and refiling.[9]

6. On January 25, 2019, the D.C. Circuit decided *Hoopa Valley Tribe v. FERC*,[10] answering in the affirmative the question "whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant

[4] 33 U.S.C. § 1341(a)(1).

[5] *Id.* Further, the licensing or permitting agency may not grant a license or permit until certification has been granted or waived. Section 401(d) of the CWA provides that a certification and the conditions contained therein shall become a condition of any federal license that is issued. *Id*. § 1341(d). *See Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 106-112 (2d Cir. 1997).

[6] 33 U.S.C. § 1341(d). *See City of Tacoma, Washington v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

[7] *See* Placer County February 22, 2019 Petition for Declaratory Order, Attachment B at 1 (Petition for Declaratory Order) (reproducing letter from Andrew Fecko, Resource Planning Administrator for Placer County, to Thomas Howard, Executive Director of the California Board).

[8] Declaratory Order, 167 FERC ¶ 61,056 at P 6.

[9] *Id*. P 6 n.6.

[10] 913 F.3d 1099 (D.C. Cir. 2019) (*Hoopa Valley*).

repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year."[11]

7. On February 22, 2019, Placer County filed a petition for declaratory order. Citing *Hoopa Valley*, Placer County asked the Commission to declare that the California Board had waived its certification authority for the Middle Fork Project relicensing.

8. On April 17, 2019, the California Board issued a water quality certification for the project.[12]

9. On April 18, 2019, the Commission granted Placer County's Petition for Declaratory Order upon finding that the California Board and Placer County had worked to ensure that withdrawal and resubmission would take place each year[13] and that Placer County, under this ongoing agreement,[14] never actually filed a new request with the California Board and so never initiated a new one-year deadline for action.[15]

10. The Commission received timely requests for rehearing from the California Board and from a coalition of conservation groups: Foothills Water Network, American Rivers, American Whitewater, California Outdoors, California Sportfishing Protection Alliance, Friends of the River, Northern California Council Federation of Fly Fishers International, South Yuba River Citizens League, and Trout Unlimited (collectively, Foothills Water Network).

II. Discussion

11. As noted above, under section 401 of the Clean Water Act, if a state certifying agency "fails or refuses to act on a request for certification within a reasonable period of

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[11] *Id*. at 1103.

[12] California Board, *In the Matter of Water Quality Certification for the Placer County Water Agency Middle Fork American River Hydroelectric Project Federal Energy Regulatory Commission Project No. 2079*, State Clearinghouse Number 2012082046 (Apr. 17, 2019), https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/mfar2079/wqc.pdf.

[13] Declaratory Order, 167 FERC ¶ 61,056 at P 12.

[14] *Id*. P 16.

[15] *Id*. P 18.

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."[16]

A. Hoopa Valley Tribe v. FERC

12. *Hoopa Valley* involved a long-pending relicensing proceeding.[17] Negotiations among the state certifying agencies, the licensee, and other stakeholders yielded a settlement agreement that required, among other conditions, that the licensee withdraw and resubmit its section 401 applications to Oregon and California each year to avoid waiver during an interim period when the licensee was to satisfy agreed-upon environmental measures and funding obligations, to lead ultimately to the removal of several dams.[18] The "coordinated withdrawal-and-resubmission scheme" persisted for more than a decade.[19]

13. The court in *Hoopa Valley* explained that "[t]he temporal element imposed by the statute is 'within a reasonable period of time,' followed by the conditional parenthetical, '(which shall not exceed one year).' Thus, while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year."[20] The court did not "determine how different a request must be "to constitute a 'new request' such that it restarts the one-year clock."[21]

14. The court concluded that the licensee's annual submission of an identical letter withdrawing and resubmitting its certification request pursuant to an agreement with the states did not constitute a "new request" and did not restart the clock.[22] The court explained that "[s]uch an arrangement does not exploit a statutory loophole; it serves to

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[16] 33 U.S.C. § 1341(a)(1).

[17] *Hoopa Valley*, 913 F.3d at 1101.

[18] *Id*. at 1101-1102.

[19] *Id.* at 1104-1105.

[20] *Hoopa Valley*, 913 F.3d at 1103-04; *see also New York DEC v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018) (noting that section 401's "plain language . . . 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.'").

[21] *Hoopa Valley*, 913 F.3d at 1103-04.

[22] *Id*.

circumvent [FERC's] congressionally granted authority over the licensing, conditioning, and developing of a hydropower project."[23] The arrangement let "the states usurp FERC's control over whether and when a federal license will issue . . . [and] could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters."[24] The court concluded that the states' efforts pursuant to its agreement with the applicant constituted "failure to act" or "refusal to act" within the plain meaning of those phrases in section 401,[25] and therefore, the states had waived their section 401 authority with regard to the project.[26]

B. Rehearing Requests

15. On rehearing, the California Board and the Foothills Water Network contend that the California Board did not waive its authority under section 401, as interpreted and applied in *Hoopa Valley*, because the California Board did not enter into an agreement with Placer County to defer action on the requests for water quality certification[27] and because the California Board at no time failed or refused to act on a request beyond the statute's one-year deadline.[28] The California Board and the Foothills Water Network also assert, as a matter of fairness, that the Commission should not apply *Hoopa Valley* to find waiver in this case.[29]

16. The California Board first attempts to distinguish *Hoopa Valley* based on the form of the agreement, the parties' intentions, and the identity of the petitioner asserting waiver. As to the form of agreement, the California Board and Foothills Water Network assert that *Hoopa Valley* is applicable only in cases involving a formal, written agreement calling for withdrawal and resubmission, in order to indefinitely delay the water quality

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[23] *Hoopa Valley*, 913 F.3d at 1103-04.

[24] *Id.* at 1104.

[25] *Id*.

[26] *Id*. at 1105.

[27] California Board May 17, 2019 Request for Rehearing at 5-7; Foothills Water Network May 20, 2019 Request for Rehearing at 6-7.

[28] California Board Request for Rehearing at 3-5; Foothills Water Network Request for Rehearing at 5-6.

[29] California Board Request for Rehearing at 7-10; Foothills Water Network Request for Rehearing at 7-8.

certification to circumvent federal regulatory authority.[30] The California Board states that its communications with Placer County show no such agreement but rather that the California Board repeatedly notified Placer County that it should withdraw its request before the approaching one-year deadline if Placer County desired to avoid denial without prejudice.[31] The Foothills Water Network contends that section 401, on its face, does not prohibit an applicant from withdrawing its request before the one-year period expires.[32] The California Board explains that Placer County voluntarily withdrew and resubmitted its request for reasons unknown to the California Board. The California Board would have timely denied the request without prejudice, it says, if Placer County's withdrawal had not deprived the California Board of the opportunity until the final iteration.[33] The California Board asserts that Placer County should not be allowed to invoke *Hoopa Valley* to assert waiver.

17. We are not persuaded by the California Board's suggestion that it played no role in Placer County's choices. Although the record does not include a formal, written agreement, Placer County submitted evidence that the California Board's staff sent emails to Placer County in 2013, 2014, 2016, 2017, and 2018 about each upcoming one-year deadline for purposes of withdrawal and resubmission.[34] Only the 2014 email mentions denial without prejudice as the alternative.[35] The 2017 and 2018 email messages explicitly request withdrawal and resubmission.[36]

18. The record demonstrates that the California Board communicated about, expected, and, in at least two instances, requested Placer County's withdrawal and resubmission of

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[30] California Board Request for Rehearing at 3-4, 6 (quoting *Hoopa Valley*, 913 F.3d at 1100-01, 1104, 1105); Foothills Water Network May 20, 2019 Request for Rehearing at 6-7.

[31] California Board Request for Rehearing at 6.

[32] Foothills Water Network Request for Rehearing at 5.

[33] California Board Request for Rehearing at 2.

[34] Petition for Declaratory Order, Attachment A (reproducing email messages).

[35] *Id*., Attachment A (reproducing email from Michael Maher of the California Board to Ben Ransom (May 20, 2014)).

[36] *Id*., Attachment A (reproducing email from Meiling Roddam of the California Board to Ben Ransom (May 5, 2017), and email from Meiling Colombano of the California Board to Ben Ransom (May 10, 2018)).

its request. Given this history, we do not agree with the California Board's claim that it was ignorant of the reasons for Placer County's withdrawals and refilings.[37] In any case, the repeated withdrawal and refiling of the same application gave the California Board several years beyond section 401's one-year deadline to act. These actions amount to an ongoing agreement with Placer County that let the California Board usurp the Commission's control over whether and when a new license would issue for the Middle Fork Project.[38] The California Board's coordination with Placer County has prejudiced the Commission by delaying our licensing proceeding and undermining the Commission's regulation of the Middle Fork Project, in direct contravention of the Clean Water Act, as construed by the *Hoopa Valley* court.[39] Accordingly, we are not persuaded by the California Board's attempt to distinguish the withdrawals and resubmittals of Placer County's application from the facts of *Hoopa Valley.* We conclude that the California Board's actions and inactions regarding the withdrawals and resubmittals resulted in waiver, consistent with *Hoopa Valley*.[40]

19. Next, the California Board asserts that this case differs from *Hoopa Valley* because neither Placer County nor the California Board intended to defer review. The California Board states that Placer County's voluntary resubmissions from 2012 through 2018 show Placer County's intent that the California Board resume processing the request for certification for the project "as then currently reflected in the Commission's records."[41] The California Board attributes its unintentional delay largely to a drought emergency in 2012 through 2014 that required the California Board to assume "a

[37] The same is true of the California Board's contention that it would have denied the applications without prejudice had it not been denied the opportunity to do so. Aside from the fact that the California Board cites no evidence in support of its claim, the agency could have denied an application at any time during the year following its receipt and, particularly given that Placer County did not withdraw and refile its applications until almost the end of the various one-year periods, nothing in Placer County's actions can fairly be said to have deprived the California Board of the opportunity to act.

[38] *See Hoopa Valley*, 913 F.3d at 1104.

[39] *Id*.

[40] The Foothills Water Network's suggestion that nothing prevents an applicant from withdrawing a certification request is true, but irrelevant. It is the California Board's failure to timely act that caused waiver and there is no evidence, nor does the Foothills Water Network suggest, that Placer County prevented the California Board from taking an action it was otherwise prepared to take.

[41] California Board Request for Rehearing at 2.

multitude of drought-related actions that required significant workload with unusually short deadlines plus ongoing oversight."[42] The California Board further claims that it continuously worked toward a prompt decision, pointing out that the California Board "assiduously tracked" the one-year deadlines to avoid waiver[43] and the California Board sent semi-annual reports to the Commission providing target dates for a final decision, though the Board acknowledges that it failed to meet these targets.[44]

20. The California Board's representations regarding its limited resources between 2012 and 2014 do not explain the failure to act each year from 2015 through 2018.[45] Moreover, the one-year waiver period is a statutory deadline for which a failure to comply cannot be excused by a state's alleged lack of resources. Further the alleged differences in the California Board's and Placer County's intent from those of the parties in *Hoopa Valley* do not distinguish this proceeding from that case. In *Hoopa Valley*, the court's holding rested on its determination that the parties intended to delay state action beyond the statute's prescribed deadline of one year.[46] Similarly, here we find the California Board accepted, and indeed encouraged, Placer County's withdrawal and resubmission of its water quality certification request for more than seven years, to avoid acting on Placer County's application. The state's reason for delay and the fact that the delay here was for a shorter period than in *Hoopa Valley* are immaterial. The California Board's contention that it continuously worked toward a prompt decision does not remedy the state's failure to ultimately *act* within the one-year statutory deadline. The plain language of section 401 establishes a bright-line rule: the timeline for a state's action regarding a request for certification "shall not exceed one year" after "receipt of such request."[47]

21. The California Board further claims that the identity of the party asserting waiver was determinative in *Hoopa Valley*, claiming that, in *Hoopa Valley*, the Hoopa Valley Tribe was an excluded and injured third party asserting waiver, but here Placer County

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[42] California Board Request for Rehearing at 6 n.3.

[43] *Id*. at 1.

[44] *Id*. at 7; Foothills Water Network Request for Rehearing at 7.

[45] *See generally Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129, at P 34, n.80 (2019) (even where there are multiple withdrawals and resubmittals, there only needs to be a failure to act in one 12 month period to find waiver).

[46] *Hoopa Valley*, 913 F.3d at 1104.

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

participated in and benefitted from withdrawal and resubmission.[48] As the Commission explained in the Declaratory Order, nothing in the *Hoopa Valley* court's construction of the Clean Water Act rested on the identity of the litigants.[49] In any case, the California Board relies on the court's discussion of futility,[50] which is irrelevant here.

22. In addition, the California Board claims that the Commission should have found that Placer County's annual correspondence with the California Board constituted "new requests" that restarted the one-year clock.[51] In the Declaratory Order, the Commission determined that because Placer County and the California Board had only exchanged annual correspondence in which Placer County indicated that it was withdrawing and resubmitting its request, without actually doing so, "there would not appear to be a new filing with a new deadline."[52] On rehearing, the California Board contends that after the initial application in July 2011, the proposed relicensing of the Middle Fork Project materially changed over time through other separate processes, such as an evaluation of the project under the California Environmental Quality Act and the filing of mandatory conditions from other federal agencies, all completed in 2013.[53] Although the California Board did not require that Placer County file revised applications to reflect these changes, the California Board explains that this omission is consistent with the pre-*Hoopa Valley* understanding of withdrawal and resubmission. The California Board states that these

[48] California Board Request for Rehearing at 4 (claiming that neither Placer County nor the Commission were "prejudiced by any delay").

[49] Declaratory Order, 167 FERC ¶ 61,056 at P 14. *See also Nat'l Fuel Gas Supply Corp*., 167 FERC ¶ 61,007, at P 11 (2019) (explaining that an agreement between New York DEC and the applicant to extend review only five weeks beyond the one-year deadline violated the principle of *Hoopa Valley*, among other precedent).

[50] *Hoopa Valley*, 913 F.3d at 1105-06 (rejecting the argument that a finding of waiver would be futile because, as the Hoopa Valley Tribe was not a party to the agreement calling for withdrawal and resubmission of the section 401 request, the waiver finding provides the Tribe "an opportunity to rejoin the bargaining table").

[51] California Board Request for Rehearing at 5.

[52] Declaratory Order, 167 FERC ¶ 61,056 at P 18.

[53] California Board Request for Rehearing at 2, 5 (discussing evaluation of the project under the California Environmental Quality Act and the filing of mandatory conditions from other federal agencies, all which were completed in 2013).

changes to the project affected the California Board's consideration of Placer County's application and thus constituted new applications under *Hoopa Valley*.[54]

23. The *Hoopa Valley* court faulted the Commission for arbitrarily and capriciously concluding that, although the licensee's resubmissions "involved the same [p]roject, each resubmission was an independent request."[55] Here the record shows no additional information submitted for the California Board's consideration after 2013. Placer County's letter to the California Board dated June 7, 2013, noted that Placer County had completed its evaluation of the Middle Fork Project in May 2013 under the California Environmental Quality Act and had submitted a draft water quality certification to the California Board in March 2013 based on final mandatory conditions from the U.S. Forest Service and based on draft license conditions in Commission staff's Final Environmental Impact Statement for the project.[56] Even if, for the sake of argument, we were to treat Placer County's two-page letter dated June 4, 2014,[57] as a "new request" that triggered a new one-year period for review, the California Board did not act on that request for four years and ten months. Consistent with *Hoopa Valley*, Placer County's annual submissions of identical two-page letters in 2015, 2016, 2017, and 2018[58] did not constitute "new requests" and did not restart the clock.[59] The record shows that Placer County's water quality certification request had been complete and ready for review for at least four years and ten months after the 2014 letter.

24. We conclude, at a minimum, that the California Board's inaction pursuant to its functional agreement with Placer County beyond one year from the receipt of Placer County's letter dated June 4, 2014, constituted a failure or refusal to act within the plain meaning of section 401. As a result, the California Board waived its section 401 authority with regard to the relicensing of the Middle Fork American Project. Due to this

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[54] California Board Request for Rehearing at 5.

[55] *Hoopa Valley*, 913 F.3d at 1104.

[56] Placer County, Correspondence to California Board, Docket No. P-2079-000 (filed June 13, 2013).

[57] Placer County, Correspondence to California Board, Docket No. P-2079-000 (filed June 10, 2014).

[58] Placer County, Correspondence to California Board, Docket No. P-2079-000 (filed June 3, 2015, May 24, 2016, May 18, 2017, and May 21, 2018).

[59] *Hoopa Valley*, 913 F.3d at 1104.

waiver, the California Board's later grant of the water quality certification on April 17, 2019, had "no legal significance."[60]

25. Finally, the California Board objects to the Commission's Declaratory Order because past acts or omissions by the California Board and Placer County showed a justifiable reliance on the Commission's longstanding interpretation that section 401's one-year waiver period restarts upon the withdrawal and resubmission of an application, no matter how perfunctory or formulaic the process.[61] The California Board and the Foothills Water Network assert that a conclusion of waiver is prevented by principles of fairness: equitable tolling of the statutory deadline, unclean hands on the part of Placer County, and unreasonable delay by Placer County and the Commission to assert waiver.[62] Although we recognize that *Hoopa Valley* held that the Commission's past construction of section 401 was erroneous, we must resolve cases before us based on current law, and the *Hoopa Valley* court did not limit its ruling to prospective cases.[63] Given the court's ruling and our finding that Placer County and the California Board engaged in actions amounting to an agreement to circumvent the statutory deadline in section 401, resulting in waiver of the California Board's section 401 certification authority, we see no justification for not applying *Hoopa Valley* here. With respect to the allegation that Placer County lacks clean hands, we are acting in law, not in equity, here and we cannot fail to apply the law based on an allegation regarding equities. In any event, as discussed above, the record reflects that, with respect to the "coordinated withdrawal-and-

[60] *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 Envtl. Mgmt.*, 524 F.3d 1330, 1333 (D.C. Cir. 2008) (explaining that after waiver, states' preliminary decisions under section 401 "would be too late in coming and therefore null and void"). We note that, even where a certification is ineffective, our general policy, where time permits, is to review any certification conditions as recommendations under section 10(a) of the Federal Power Act.

[61] California Board Request for Rehearing at 7-10.

[62] *Id.*; Foothills Water Network Request for Rehearing at 7.

[63] On the contrary, the *Hoopa Valley* court denied petitions for rehearing that asked the court to equitably toll the section 401 deadline and to only apply the court's ruling prospectively. *Hoopa Valley Tribe v. FERC*, No. 14-1271 (Apr. 26, 2019) (denying petition for rehearing *en banc*).

resubmission scheme," the California Board's hands are in the same state as Placer County's.

The Commission orders:

The California Board and Foothills Water Network's requests for rehearing are denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.