

171 FERC ¶ 61,240
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Merced Irrigation District

Project Nos. 2179-043
2467-020

ORDER ON WAIVER OF WATER QUALITY CERTIFICATION

(Issued June 18, 2020)

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

I. Background

2. On April 18, 1964, the Commission issued Merced an original 50-year license for the operation and maintenance of the Merced River Project, located on the Merced River on the border of Merced and Mariposa Counties.² The license expired on February 28, 2014, and Merced continues to operate the project under an annual license.

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

¹ 33 U.S.C. § 1341(a)(1) (2018).

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

³ *Pacific Gas & Electric Co.*, 42 FPC 237 (1969). Pacific Gas and Electric was the original licensee for the Merced Falls Project. The license was transferred to Merced

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

5. Section 401(a)(1) of the CWA requires that an applicant for a federal license or permit to conduct activities that may result in a discharge into the navigable waters of the United States must provide the licensing or permitting agency a water quality certification from the state in which the discharge originates or evidence of waiver thereof.⁵ If the state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request," then certification is waived.⁶ Further, the licensing or permitting agency may not grant a license or permit until certification has been granted or waived.⁷

effective March 3, 2017, making Merced the applicant for the new license. *Pacific Gas and Electric Co.*, 152 FERC ¶ 62,015 (2015) (order approving transfer).

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

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

⁶ 33 U.S.C. § 1341(a)(1).

⁷ *Id.*

6. The California Board received PG&E's and Merced's water quality certification requests on May 20, 2014,⁸ and May 21, 2014,⁹ respectively.¹⁰ The Board's June 6, 2014 acknowledgment letters for each project were substantively identical and stated that the "... letter initiates a one-year time deadline from the date it was received for the [California Board] to act on the request for [water quality certification][]" and "... serves as a formal request for certification of the Project."¹¹ The Board did not suggest the application was incomplete.¹²

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

8. On April 21, 2015, the California Board emailed Merced requesting that Merced "withdraw [] and simultaneously resubmit" its water quality certification prior to May 13, 2015, for the Merced River Project.¹⁴ On May 14, 2015, Merced withdrew and

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

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

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

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

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

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

¹⁴ Merced Request at Attachment 21 (Board's April 21, 2015 email to Merced). The Board's email also invited Merced to contact the Board staff "[i]f you have any

resubmitted its certification application for the Merced River Project with a two-page letter.¹⁵ Merced's withdrawal and resubmittal letter stated: "by copy of this letter, Merced ID formally submits a new application The Project has not changed, so the April 23, 2014 FERC application, which the [Board] has on file, contains all information required for a complete application for a water quality certificate."¹⁶

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

10. On May 29, 2015, the California Board filed comments on the Commission's draft EIS. The Board asked that the Commission remove from the final EIS the statement that the water quality certifications for the projects were due on May 20, 2015, stating that

questions regarding this request or this process" There is no similar email in the record regarding the Merced Falls Project.

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

¹⁶ *Id.*

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

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

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

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

“[a] certified CEQA document is required prior to acting on a WQC application. State Water Board staff does not anticipate . . . [a] certified CEQA document prior to FERC’s release of the final EIS.”²¹

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

12. On May 4, 2016, PG&E again withdrew and resubmitted its water quality certification for the Merced Falls Project,²² as did Merced on May 9, 2016.²³ Thereafter, Merced, now as licensee for both the Merced Falls and Merced River Projects, withdrew and resubmitted certification applications for the projects two additional times: on May 1, 2017²⁴ and April 24, 2018.²⁵ Each letter was substantively identical to the 2015 withdrawal and resubmittal letters. Further, Merced, in each of its letters, stated that the “project has not changed” and that the FERC application that the Board had on file contained all information required for a complete application for certification. Similar to its responses to the previous withdrawal and resubmittal letters, the California Board sent letters acknowledging the withdrawal and resubmittal requests.²⁶ The Board’s acknowledgment letters each contained the same paragraph regarding compliance with CEQA, stating that “[i]f the information necessary for compliance with CEQA is not

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

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

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

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

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

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

provided to the [] Board, staff may recommend denial of certification without prejudice.”²⁷

13. On January 25, 2019, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an opinion in *Hoopa Valley Tribe v. FERC*,²⁸ ruling that, where a state and an applicant agree to repeatedly withdraw and refile the same water quality certification request, the state has waived certification.

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

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

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

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

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

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

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

II. Discussion

17. The “waiver” provision in section 401(a)(1) of the CWA is at issue here. As noted above, under section 401 of the CWA, if a state certifying agency “fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of [section 401] shall be waived with respect to such federal application.”³¹

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

A. Hoopa Valley and Commission Precedent

19. In *Hoopa Valley*, the D.C. Circuit found that “a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year.”³² The court concluded that where a licensee each year sent a letter indicating withdrawal of its certification request and resubmission of the same,³³ “[s]uch an arrangement does not exploit a statutory loophole; it serves to circumvent [FERC’s] congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.”³⁴ In fact, “[b]y shelving water quality certifications, the states usurp FERC’s control over whether and when a federal license will issue. Thus, if allowed, the withdrawal-and-resubmission scheme could be used to

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

³¹ 33 U.S.C. § 1341(a)(1).

³² 913 F.3d at 1103.

³³ In *Hoopa Valley*, the court noted that before each calendar year passed, the applicant sent a “letter indicating withdrawal of its water quality certification request and resubmission of the very same . . . in the same one-page letter” *Id.* at 1104 (emphasis in original).

³⁴ *Id.*

indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters."³⁵

20. Following *Hoopa Valley*, the Commission found that the California Board waived its section 401 authority in *Placer County Water Agency*.³⁶ In *Placer County*, the Commission held that a formal agreement between a licensee and a state was not necessary to support a finding of waiver; rather, the exchanges between the entities could amount to an ongoing agreement.³⁷ The Commission found that the record showed that the entities worked to ensure that the withdrawal and refiling happened each year,³⁸ given that the licensee submitted evidence that the California Board sent it emails about each upcoming one-year deadline for the purpose of eliciting a withdrawal and resubmission.³⁹ Based on this functional agreement and the fact that Placer County never filed a new application, the Commission concluded that the process caused lengthy delay and found that the state waived its certification authority.⁴⁰

21. Similarly, in *Southern California Edison*,⁴¹ the Commission found that the California Board waived its section 401 authority with respect to the relicensing of six projects that comprise the Big Creek hydroelectric system. There, the Commission rejected the Board's argument that *Hoopa Valley* was not applicable. While there was no explicit agreement between the applicant and the Board, the Commission found that the record showed the Board directly participated in the withdrawal and resubmittal scheme. The Board staff sent emails in some years ahead of the upcoming one-year deadline that explicitly requested withdrawal and resubmittal.⁴² In addition, the Board, commenting on the draft EIS, stated that "[i]f the one year federal period for certification is insufficient

³⁵ *Id.*

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

³⁷ *Placer County*, 167 FERC ¶ 61,056 at P 16; *see also McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185, at PP 33-38 (2019); *see also Pacific Gas and Electric Co.*, 170 FERC ¶ 61,232, at P 27 (2020) (*Pacific Gas and Electric*); *Southern California Edison Co.*, 170 FERC ¶ 61,135, at P 23 (2020) (*Southern California Edison*).

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

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

⁴⁰ *Id.* PP 12, 18.

⁴¹ 170 FERC ¶ 61,135 (2020).

⁴² *Id.* P 25.

for the [] Board to act, staff will recommend that [Southern California Edison] withdraw and resubmit their request for [water quality certification] for the six Big Creek Projects.”⁴³ The Commission found this evidence sufficiently demonstrated the state’s coordination with the licensee and supported a waiver finding.⁴⁴

22. Thereafter, in *Pacific Gas and Electric*, the Commission found that the California Board waived its section 401 authority with respect to the surrender of the Kilarc-Cow Creek Hydroelectric Project No. 606, again stating that an explicit agreement between the applicant and the Board was not necessary to find waiver.⁴⁵ We found that the record showed that the Board expected the applicant to withdraw and refile its certification application and the applicant cooperated.⁴⁶ In its comments on the EIS, the Board indicated that the “usual process” involved the applicant voluntarily withdrawing and refiling its application.⁴⁷ Moreover, the Commission found unavailing the Board’s assertion that it could not issue a water quality certification until the CEQA process was complete, which often takes more than one year, and determined that the general principle from *Hoopa Valley* still applied.⁴⁸ The Commission found, as it had previously, that a “state’s reason for delay [is] immaterial.”⁴⁹

23. Most recently, in *Nevada Irrigation District*⁵⁰ and *Yuba County Water Agency*,⁵¹ we again found that the Board waived its authority to issue a water quality certification where the applicant withdrew and resubmitted its application numerous times, even when an explicit agreement was not in place. The Commission found unpersuasive the arguments that Nevada Irrigation District and Yuba County Water Agency, as the

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

⁴⁴ *Id.* P 25.

⁴⁵ 170 FERC ¶ 61,232 at P 27 (2020).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* PP 31-33.

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

⁵⁰ 171 FERC ¶ 61,029 (2020).

⁵¹ 171 FERC ¶ 61,139 (2020).

respective lead agencies for CEQA, controlled the timing for the CEQA analysis, and reiterated that “state’s reason for delay [is] immaterial.”⁵²

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

24. The California Board and Conservation Groups claim that the Board did not waive its authority under section 401, as interpreted and applied in *Hoopa Valley*.⁵³ They claim: (i) there was no formal agreement for Merced to withdraw and resubmit its applications; (ii) Merced acted voluntarily and unilaterally in doing so each year before the deadline and that an applicant’s decision to withdraw its request for certification before expiration of the certification period eliminates any need to approve or deny the withdrawn request; (iii) that unlike *Hoopa Valley*, Merced is not a dependent third party seeking waiver; (iv) Merced’s failure to prepare and submit CEQA documents caused delay and precluded the Board’s issuance of certifications; and (v) that the Board’s issuance of certifications even if taking longer than one year would not delay the Commission’s licensing proceeding.⁵⁴

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

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

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

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

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

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

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

26. As we have stated previously, an explicit written agreement to withdraw and resubmit is not necessary.⁵⁷ The facts in this proceeding are similar to those in *Pacific Gas and Electric*, in that there is sufficient evidence to determine that the Board expected Merced to withdraw and resubmit its application and Merced did so. This expectation is underlined in the April 21, 2015 email from the Board to Merced, which stated: “Merced Irrigation District’s application for water quality certification for the Merced River Hydroelectric Project, FERC Project No. 2179 expires on May 21, 2015. Please withdraw the [application] and simultaneously resubmit an application for water quality certification prior to May 13, 2015.”⁵⁸

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

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

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

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

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

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

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

28. The Board alleges that Merced presumably withdrew its requests voluntarily to avoid the Board denying its application.⁶³ We rejected a similar argument in prior proceedings. In *Southern California Edison*, we found that the California Board had waived its water quality certification authority based on the fact that in the eight years of the applicant effectuating a withdrawal and resubmittal of its application with a single page letter, the applicant never filed a new application or any new supporting information.⁶⁴ In reaching this decision, we also relied on record evidence that showed the Board's direct participation in the withdrawal and resubmittal scheme, namely annual reminder emails sent to the licensee just before the one-year deadline, requesting withdrawal and resubmission of the application.⁶⁵ We further concluded that:

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

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

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

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

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

⁶⁶ *Id.*

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

30. The Board argues that “[c]onsistent with logic and Commission precedent, . . . an applicant’s decision to withdraw its request for certification before expiration of the certification period eliminates any need to approve or deny the withdrawn request.”⁶⁸ We disagree. In *Hoopa Valley*, the court faulted the Commission for concluding that although the many resubmissions from the hydroelectric license applicant “involved the same [p]roject, each resubmission was an independent request, subject to a new period of review.”⁶⁹ Despite previous Commission orders concluding that once an application is withdrawn, the refiling restarts the one-year period, the court explained that a state’s obligation “to act on a request for certification” within one year applies to a specific request and “cannot be reasonably interpreted to mean that the period of review for one request affects that of any other request.”⁷⁰

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

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

32. The California Board and Conservation Groups’ argument that, because Merced is the lead agency⁷⁴ for CEQA and controls the timing for CEQA compliance, Merced

⁶⁸ California Board June 27, 2019 Response at 3.

⁶⁹ 913 F.3d at 1104.

⁷⁰ *Id.*

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

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

⁷³ *Id.*

⁷⁴ While Merced has always been the lead agency for the Merced River Project, the California Board was the lead agency for compliance with CEQA for the Merced

should not benefit from its own inaction in failing to bring the water quality certification process to completion is unpersuasive.⁷⁵ The Board states that as a responsible agency it cannot make use of environmental documentation or approve a project until the lead agency completes its responsibilities under the CEQA.⁷⁶ We find that the California Board's contention that Merced alone is responsible for the delay in issuance of a water quality certification ignores the Board's own role in the process. The state's reliance on a regulatory process (i.e., CEQA) over which it has potentially limited control over timing and that often takes more than one year to complete does not excuse compliance with the CWA. Moreover, as we have explained, the "state's reason for delay [is] immaterial."⁷⁷ "The plain language of [s]ection 401 outlines a bright-line rule regarding the beginning of review: the timeline for a state's action regarding a request for certification 'shall not exceed one year' after 'receipt of such request.'"⁷⁸ Accordingly, a state may not extend the one-year deadline to act even if a state process may, in practice, often take more than a year to complete.⁷⁹ We note that to the extent a state lacks sufficient information to act

Falls Project from May 2014 through February 2017, at which time the license was transferred from PG&E to Merced. Merced Request at 4.

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

⁷⁶ California Board June 27, 2019 Response at 3.

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

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

⁷⁹ *See, e.g., Nevada Irrigation District*, 171 FERC ¶ 61,029 at P 27 (referencing the California Board's comment that the water quality certification could not be issued until the Board's CEQA process was complete and the applicant would likely need to withdraw and resubmit its certification application).

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

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

33. The Board and Conservation Groups argue that finding waiver here would serve no purpose, because the Commission cannot issue a license until ESA consultation is complete.⁸² Regardless of whether a water quality certification decision is the sole factor delaying a licensing proceeding, the general principle from *Hoopa Valley* still applies: where an applicant withdraws and resubmits a request for water quality certification to avoid section 401's one-year time limit, and the state does not act within one year of the receipt of an application, the state has failed or refused to act under section 401 and thus waived its section 401 authority.⁸³ Here, we find that the California Board failed to act within the one-year period on PG&E's May 20 and Merced's May 21, 2014 applications, respectively, hereby waiving its certification authority.⁸⁴

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

⁸¹ *See Hoopa Valley*, 913 F.3d at 1104-1105 ("Congress intended Section 401 to curb a *state's* 'dalliance or unreasonable delay' This Court has repeatedly recognized that the waiver provision was created 'to prevent a State from indefinitely delaying a federal licensing processing.'" (emphasis in original) (citation omitted).

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

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

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

The Commission orders:

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

conditioned its approval on the applicant securing a required federal Clean Air Act air quality permit from the state).

Document Content(s)

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