

184 FERC ¶ 61,138
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

Pacific Gas and Electric Company	Project Nos.	2310-240
		14530-002
		14531-001

DECLARATORY ORDER ON WAIVER OF WATER QUALITY CERTIFICATION

(Issued September 5, 2023)

1. On April 2, 2021, Pacific Gas and Electric Company (PG&E) filed a petition for an order declaring that the California State Water Board (California Board) waived its authority under section 401(a)(1) of the Clean Water Act (CWA)¹ to issue a water quality certification for the proposed relicensing of the Upper Drum-Spaulding Hydroelectric Project No. 2310, Deer Creek Hydroelectric Project No. 14530, and Lower Drum Project No. 14531 (collectively, the Drum-Spaulding Project).² This order denies the petition.

I. Background

2. On June 24, 1963, the Federal Power Commission issued a 50-year license to PG&E to construct, operate, and maintain the 181.205-megawatt Drum-Spaulding

¹ 33 U.S.C. § 1341(a)(1).

² As described below, on November 18, 2021, the Commission issued an order approving the transfer of the Deer Creek Project facilities to Nevada Irrigation District (NID). *Pac. Gas & Elec. Co.*, 177 FERC ¶ 61,111 (2021). In its petition, PG&E states that, should the Commission act on the application to transfer the Deer Creek facilities and should the parties consummate the transaction while this petition is pending, PG&E and NID jointly request the Commission to substitute NID for PG&E with respect to the petition regarding the Deer Creek Project. PG&E and NID have not yet consummated the transaction. On April 10, 2023, PG&E and NID received an extension until November 18, 2023 to file the requisite documents. *Pac. Gas & Elec. Co.*, April 10, 2023 Order Granting Extension of Time to File Instrument of Conveyance and Signed Acceptance Sheet.

Project.³ The project, located on the Yuba, Bear, and North Fork American Rivers in Nevada County and Placer County, California, consists of the following ten developments: (1) Spaulding No. 3; (2) Spaulding Nos. 1 and 2; (3) Deer Creek; (4) Alta; (5) Drum Nos. 1 and 2; (6) Dutch Flat No. 1; (7) Halsey; (8) Wise; (9) Wise No. 2; and (10) Newcastle.

3. PG&E filed an application for a new license for the project on April 12, 2011. On February 27, 2012, PG&E requested water quality certification for the project, and the California Board received the application the next day.⁴ On February 6, 2013, PG&E withdrew and resubmitted an identical application for water quality certification. In its March 7, 2013, letter to PG&E acknowledging receipt of the application, the California Board confirmed that the application met the filing requirements set forth in the California Code of Regulations.⁵

4. To facilitate a transfer of the Deer Creek development to the Nevada Irrigation District (NID), PG&E amended its license application in 2012 and 2013 to separate the Drum-Spaulding Project into three distinct projects: (1) the Upper Drum-Spaulding Project No. 2310, composed of five developments from the existing project (the Spaulding No. 3, Spaulding Nos. 1 and 2, Alta, Drum Nos. 1 and 2, and Dutch Flat No. 1 developments); (2) a new project, the Lower Drum Project No. 14531, composed of four developments from the existing Drum-Spaulding Project (the Halsey, Wise, Wise No. 2, and Newcastle developments); and (3) a new project, the Deer Creek Project No. 14530, composed of the Deer Creek development.⁶ PG&E did not propose any changes in the operation of the facilities or the proposed measures set forth in its April 12, 2011 license application.⁷

³ *Pac. Gas & Elec. Co.*, 29 F.P.C. 1265 (1963). The license expired on April 30, 2013, and PG&E continues to operate the project under an annual license. Notice of Authorization for Continued Project Operation (May 13, 2013).

⁴ 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) (2022), PG&E filed a copy of the request with the Commission, including proof of the date of receipt of the request.

⁵ California Board March 7, 2013 Letter Confirming Receipt of Water Quality Certification Application (citing CAL. CODE REGS. tit. 23, § 3856).

⁶ In 2018, PG&E and NID entered into an Asset Sale and Purchase Agreement pursuant to which PG&E agreed to sell, and NID agreed to purchase the primary components of PG&E's Deer Creek Project.

⁷ See PG&E May 31, 2013 Amendment to Application for New Major License.

5. After the license amendment request, PG&E withdrew and submitted virtually identical applications to the California Board accounting for this change on January 29, 2014, January 22, 2015, January 15, 2016, January 6, 2017, and December 15, 2017.⁸ PG&E received acknowledgement letters from the California Board in response to each of the simultaneous withdrawal and refiling submissions.⁹

6. On December 12, 2018, the California Board denied without prejudice PG&E's water quality certification application as to all three projects.¹⁰ The Board's denial letter noted that the Commission had not completed consultation under the Endangered Species Act (ESA), that consultation is a critical element for the Board's review under the California Environmental Quality Act (CEQA), and that it could not issue certification prior to completion of the CEQA process.¹¹ PG&E refiled its certification application on December 20, 2018.

7. PG&E and NID filed an application with the Commission for a partial transfer of the license for the Drum-Spaulding Project on January 22, 2019, and, on August 29, 2019, PG&E withdrew its request for certification as to the Deer Creek Project.¹² The California Board denied without prejudice PG&E's application as to Upper Drum-Spaulding and Lower Drum Projects on December 20, 2019.¹³ The Board's denial letter again stated that the Commission had not completed ESA consultation and that the Board may not issue a certification until the requirements for compliance with CEQA are met.¹⁴

8. On February 4, 2020, PG&E resubmitted a certification application for the Upper Drum-Spaulding and Lower Drum Projects, and the California Board issued a water quality certification on February 3, 2021.¹⁵ PG&E has explained there is no pending

⁸ Petition at attach. A (PG&E's water quality certification applications).

⁹ Petition at attach. B (California Board's March 7, 2013; February 10, 2014; February 10, 2015; and February 11, 2016 Receipt Letters).

¹⁰ California Board December 12, 2018 Letter Denying Section 401 Water Quality Certification.

¹¹ *Id.*

¹² Petition at 7-8.

¹³ California Board December 20, 2019 Letter Denying Section 401 Water Quality Certification.

¹⁴ *Id.*

¹⁵ California Board February 3, 2021 Section 401 Water Quality Certification.

request for certification for the Deer Creek Project as NID cannot submit an application until the transfer of the Deer Creek Project is completed, and PG&E stated that it is not within its ratepayers' interest to continue "funding the Board's CEQA costs for a project for which the Board would not be a lead agency for purposes of conducting CEQA review."¹⁶

9. PG&E filed the pending Petition for a Declaratory Order on April 2, 2021. On April 9, 2021, the Commission issued public notice of the petition, establishing May 10, 2021, as the deadline for filing comments.¹⁷ NID, California Department of Fish and Wildlife (California DFW), the California Board, and the Foothills Water Network (Foothills)¹⁸ filed comments. NID supports the petition, while all other commenters oppose it. Commenters argue that: (1) waiver would be inconsistent with the CWA;¹⁹ (2) *Hoopa Valley Tribe v. FERC*²⁰ is not applicable;²¹ (3) *Hoopa Valley* cannot be applied retroactively;²² (4) PG&E has failed to exhaust its administrative remedies;²³ (5) the Commission should equitably toll the one-year deadline;²⁴ (6) PG&E has unclean hands;²⁵ (7) PG&E is venue shopping to gain a substantive advantage unrelated to delay in certification;²⁶ (8) the Commission should adopt the conditions

¹⁶ Petition at 8.

¹⁷ 86 Fed. Reg. 20,142 (Apr. 16, 2021).

¹⁸ Foothills' member organizations include Foothills Water Network, American Rivers, American Whitewater, California Outdoors, California Sportfishing Protection Alliance, Friends of the River, Gold Country Fly Fishers, Northern California Council of Fly Fishers International (formerly Northern California Council Federation of Fly Fishers), Save Auburn Ravine Salmon and Steelhead, Sierra Club and its Mother Lode Chapter, South Yuba River Citizens League, and Trout Unlimited.

¹⁹ California DFW's May 4, 2021 Comments at 2.

²⁰ 913 F.3d 1099 (D.C. Cir. 2019) (*Hoopa Valley*).

²¹ California Board's May 10, 2021 Comments at 9-11.

²² *Id.* at 17.

²³ *Id.* at 13-14.

²⁴ *Id.* at 15-16.

²⁵ *Id.* at 18-19,

²⁶ Foothills' May 10, 2021 Comments at 9.

in the California Board's certification;²⁷ and (9) waiver risks inadequate protection of fish and wildlife resources.²⁸

10. The Commission approved the transfer of the Deer Creek development to NID on November 18, 2021.²⁹ The order also approved non-capacity amendments of the licenses for the Drum-Spaulding Project and PG&E's Rollins Transmission Line Project No. 2784, and substituted NID for PG&E as the applicant in the pending application for a new license for the Deer Creek Project.

II. Discussion

11. Section 401(a)(1) of the CWA requires that an applicant for a federal license or permit to conduct activities that may result in a discharge into the navigable waters of the United States, such as the operation of the Drum-Spaulding Project, must provide the licensing or permitting agency a water quality certification from the state in which the discharge originates or evidence of waiver thereof.³⁰ 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.³¹ Further, the licensing or permitting agency may not grant a license or permit until certification has been granted or waived.³² For the reasons discussed below, we find that the California Board did not waive its authority under section 401.

A. Court and Commission Precedent

12. On January 25, 2019, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued *Hoopa Valley*, ruling 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

²⁷ *Id.* at 11.

²⁸ Foothills' May 10, 2021 Comments at 11; California DFW's May 4, 2021. Comments at 3-5.

²⁹ *Pac. Gas & Elec. Co.*, 177 FERC ¶ 61,111 (2021).

³⁰ 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, Wash. v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

³¹ 33 U.S.C. § 1341(a)(1).

³² *Id.*

over a period of time greater than one year.”³³ The court concluded that where a licensee each year sent a letter indicating withdrawal of its certification request and resubmission of the same,³⁴ “[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.”³⁵ In fact, “[b]y shelving water quality certification, 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.”³⁶

13. Following *Hoopa Valley*, the Commission found that the California Board waived its section 401 authority for several projects.³⁷ For example, in *Placer County Water Agency*,³⁸ the Commission found that the record demonstrated that the entities worked to ensure that the withdrawal and refiling happened each year,³⁹ 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.⁴⁰ The Commission concluded

³³ 913 F.3d at 1103.

³⁴ 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).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *E.g.*, *Nev. Irrigation Dist.*, 171 FERC ¶ 61,029, *on reh’g*, 172 FERC ¶ 61,082 (2020), *vacated sub nom. Cal. State Water Res. Control Bd. v. FERC*, 43 F.4th 920 (9th Cir. 2022) (*Cal. Water Board*); *Yuba Cty. Water Agency*, 171 FERC ¶ 61,139, *on reh’g*, 172 FERC ¶ 61,080 (2020), *vacated sub nom. Cal. Water Board*, 43 F.4th 920; *Merced Irrigation Dist.*, 171 FERC ¶ 61,240, *on reh’g*, 172 FERC 62,098 (2020) *vacated sub nom. Cal. Water Board*, 43 F.4th 920; *S. Feather Water & Power Agency*, 171 FERC ¶ 61,242 (2020); *Pac. Gas & Elec. Co.*, 172 FERC ¶ 61,064 (2020); *S. Cal. Edison Co.*, 170 FERC ¶ 61,135, *modified*, 172 FERC ¶ 61,066 (2020). ¶

³⁸ 167 FERC ¶ 61,056, (*Placer County Declaratory Order*) *reh’g denied*, 169 FERC ¶ 61,046 (2019) (*Placer County Rehearing Order*).

³⁹ *Placer County Declaratory Order*, 167 FERC ¶ 61,056 at P 12.

⁴⁰ *Placer County Rehearing Order*, 169 FERC ¶ 61,046 at P 17.

that these exchanges between the entities could amount to an ongoing agreement and that, coupled with the fact that Placer County never filed a new application, caused lengthy delay and amounted to the state waiving its certification authority.⁴¹

14. In other instances, the Commission did not find waiver. In *KEI (Maine) Power Management (III) LLC*,⁴² the Commission found on rehearing that the Maine Department of Environmental Protection did not waive its certification authority where the applicant withdrew and refiled its application to give itself time to negotiate fish passage measures with resource agencies. In *Village of Morrisville, Vermont*,⁴³ the Commission found that the Vermont Agency of Natural Resources did not waive its certification authority where the applicant twice withdrew and refiled its application to give itself time to review study reports, consider alternatives, and conduct a cost benefit analysis. In both cases, the Commission found insufficient evidence of the state certifying agency encouraging or supporting withdrawal and resubmittal, and that the record reflected the genesis of withdrawal and resubmittal to be on the applicant's desire to avoid receiving a certification with conditions to which it objected.⁴⁴

15. On March 23, 2021, the United States Court of Appeals for the Second Circuit (Second Circuit), in *N.Y. State Dep't of Env'tl. Conservation v. FERC (NYDEC)*,⁴⁵ held that the Commission properly found waiver in a case where the state agency and a natural gas pipeline company reached an agreement to alter the receipt date of the application to extend the one-year deadline by 36 days. As in *Hoopa Valley*, the Second Circuit concluded that the one-year time limit may not be extended by such an agreement between the certifying authority and an applicant, even if the applicant agrees.

16. On July 2, 2021, the United States Court of Appeals for the Fourth Circuit (Fourth Circuit), in *North Carolina Department of Environmental Quality v. FERC*,⁴⁶ rejected the Commission's finding that waiver occurred in a hydropower licensing proceeding. In the underlying order, the Commission found that the state agency coordinated with the

⁴¹ *Id.* PP 12, 18.

⁴² 171 FERC ¶ 62,043, *on reh'g*, 173 FERC ¶ 61,069 (2020).

⁴³ 173 FERC ¶ 61,156 (2020), *on reh'g*, 174 FERC ¶ 61,141 (2021), *appealed sub nom. Vill. Of Morrisville, Vermont v. FERC*, D.C. Cir. Nos. 21-1042, 21-1109.

⁴⁴ *See KEI Power*, 171 FERC ¶ 62,043 at PP 42-46; *Vill. of Morrisville*, 173 FERC ¶ 61,156 at PP 21-23.

⁴⁵ 991 F.3d 439 (2d Cir. 2021).

⁴⁶ 3 F.4th 655 (4th Cir. 2021) (*North Carolina DEQ*).

applicant to withdraw and resubmit its request over several years because the state agency needed additional information to process the request, including the final environmental assessment from the Commission.⁴⁷ The Fourth Circuit held that the Commission's findings were not supported by substantial evidence, and that the evidence illustrated that the applicant voluntarily sought to withdraw its application and that the state agency only directed the applicant as to how to withdraw and refile.⁴⁸

17. On June 17, 2022, the D.C. Circuit, in *Turlock Irrigation District v. FERC*,⁴⁹ affirmed the Commission's finding that no waiver occurred where the state denied without prejudice the certification request within one year because the applicant's request was incomplete and state-level reviews were ongoing.⁵⁰ The court agreed with the Commission and held that the state did not waive its certification authority because it "acted" within the meaning of section 401 by denying the request.⁵¹

18. On August 4, 2022, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit), in *California State Water Resources Control Board v. FERC*,⁵² held that the records for three proceedings lacked substantial evidence of a coordinated withdrawal-and-resubmittal scheme and vacated three declaratory orders issued by the Commission determining that the California Water Board had waived its certification authority for the Yuba-Bear, Yuba River, Merced River and Merced Falls Projects.⁵³ The court found that the state agency asking whether the applicant planned to withdraw and resubmit its request for certification was not an attempt by the state to evade section 401's one-year deadline, but rather was done to prepare to issue a denial accordingly.⁵⁴

⁴⁷ *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (2019), *reh'g denied*, 171 FERC ¶ 61,046 (2020).

⁴⁸ *North Carolina DEQ*, 3 F.4th at 671, 675.

⁴⁹ 36 F.4th 1179 (D.C. Cir. 2022) (*Turlock*), *cert denied*, 143 S. Ct. 1746 (2023).

⁵⁰ See *Turlock Irrigation Dist.*, 174 FERC ¶ 61,042, *reh'g denied*, 175 FERC ¶ 61,144 (2021).

⁵¹ *Turlock*, 36 F.4th at 1183.

⁵² *Cal. Water Board*, 43 F.4th 920.

⁵³ See *Nev. Irrigation Dist.*, 171 FERC ¶ 61,029, *on reh'g*, 172 FERC ¶ 61,082; *Yuba Cty. Water Agency*, 171 FERC ¶ 61,139, *on reh'g*, 172 FERC ¶ 61,080; *Merced Irrigation Dist.*, 171 FERC ¶ 61,240, *on reh'g*, 172 FERC ¶ 62,098.

⁵⁴ *Id.* at 932.

Therefore, the court vacated the orders in which the Commission concluded that waiver had occurred.

B. Application of Court and Commission Precedent to the Relicensing Proceeding for the Drum-Spauling Project

19. PG&E argues that *Hoopa Valley* supports a finding of waiver in this proceeding, claiming that the California Board used a tolling scheme to frustrate the Commission's ability to issue a timely license.⁵⁵ PG&E does not claim that it entered into a formal written agreement with the California Board as in *Hoopa Valley*; rather PG&E contends that it had a functional agreement with the California Board, evidenced by the Board's accepting the withdraw and resubmit process and through the acceptance of the deny without prejudice and resubmit process.⁵⁶ PG&E asserts that it submitted virtually identical applications each year and the Board never requested new supporting information.⁵⁷ Last, PG&E contends that its withdrawal of the Deer Creek Project facilities from its certification application and the Board's ultimate certification should have no effect on the waiver determination because waiver occurs automatically after the deadline set forth in section 401 has passed.⁵⁸

20. We disagree and find that the California Board did not waive its authority to issue certification for the project because the record lacks substantial evidence that the Board engaged in a coordinated withdrawal-and-resubmittal scheme with PG&E to circumvent the one-year deadline.

21. To determine whether the California Board waived its authority to issue certification for the project, the Commission must determine whether the state's actions constituted a failure or refusal to act under the meaning of section 401(a)(1) of the CWA. PG&E asserts that it "withdrew and resubmitted virtually identical requests for certification *six times*" and "[s]ection 401 requires a state certifying authority to act on a request for certification within one year, or else the state's authority is waived."⁵⁹ PG&E states that the California Board "has 'usurp[ed] FERC's control over whether and when a federal license will issue,' *Hoopa*,

⁵⁵ PG&E April 2, 2021 Petition for Declaratory Order at 10.

⁵⁶ *Id.*

⁵⁷ *Id.* at 11.

⁵⁸ *Id.* at 13.

⁵⁹ *Id.* at 11 (emphasis in original).

913 F.3d at 1104, and engaged in ‘regulatory abuse’ by attempting to extend the congressionally determined one-year deadline [*NYDEC*, 991 F.3d at 448].”⁶⁰

22. We disagree and find that the Board did not waive its section 401 certification authority. The record here, like in *Cal. Water Board*, is devoid of substantial evidence that the California Board sought to engineer an outcome circumventing the one-year deadline. In *Cal. Water Board*, the court observed that “‘it must take more than routine informational emails to show coordination’ because the states’ ‘rights and responsibilities to ensure compliance with their own water-quality standards are too important to be so easily stripped away.’”⁶¹ Yet in its petition, PG&E provides only the letters it sent to the California Board withdrawing and refiling its application and the letters in which the California Board acknowledged receipt.⁶² Therefore, as in *Cal. Water Board*, “the evidence shows only that the [California Board] acquiesced in [PG&E’s] own decisions to withdraw and submit [its] applications rather than have them denied.”⁶³ For these reasons, we find that the California Board did not waive its section 401 certification authority as a result of PG&E withdrawing and refiling its application.

23. PG&E also claims that the Board’s December 20, 2019 denial without prejudice is a functional agreement between PG&E and the California Board to circumvent section 401’s one-year deadline. However, as the D.C. Circuit found in *Turlock*, the California Board’s denial without prejudice of an application does not constitute a failure to act on the part of the state agency.⁶⁴ Therefore, waiver did not occur based on the December 20, 2019 denial.

24. PG&E refiled its certification application on February 4, 2020, as to the Upper Drum and Lower Drum Project, and the California Board acted on that application within the one-year deadline required by the Clean Water Act by issuing a water quality certification on February 3, 2021.

25. Based on the foregoing, we find that the California Board did not waive its authority under section 401(a)(1) of the CWA to issue a water quality certification for the Drum-

⁶⁰ *Id.*

⁶¹ *Cal. Water Board*, 43 F.4th at 936 (quoting *North Carolina DEQ*, 3 F.4th at 675).

⁶² PG&E April 2, 2021 Petition for Declaratory Order at Att. A & Att. B.

⁶³ *Cal. Water Board*, 43 F.4th at 932.

⁶⁴ *Turlock*, 36 F.4th at 1183.

Spaulding Project. In addition, we remind PG&E and NID that a water quality certification or evidence of waiver is required for relicensing of the Deer Creek Project.

The Commission orders:

PG&E's April 2, 2021 petition for declaratory order is denied.

By the Commission.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.