No. 22-616

In the Supreme Court of the United States

TURLOCK IRRIGATION DISTRICT, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

ROB BONTA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
ROBERT W. BYRNE
Senior Assistant Attorney General

JOSHUA PATASHNIK*
Deputy Solicitor General
ERIC M. KATZ
Supervising Deputy Attorney General
ADAM L. LEVITAN
Deputy Attorney General

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
600 West Broadway, Suite 1800
San Diego, CA 92101
(619) 738-9628
Josh.Patashnik@doj.ca.gov
**Counsel of Record*

March 8, 2023

QUESTION PRESENTED

Petitioners are local governmental agencies in California that own and operate two hydroelectric facilities, for which they submitted licensing applications to the Federal Energy Regulatory Commission. Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), required petitioners to obtain from the State of California a certification that their projects would comply with state environmental laws. Petitioners submitted certification requests to the California State Water Resources Control Board, but did not undertake the environmental review mandated by state law. The Board denied petitioners' certification requests, as California law required it to do, without prejudice to the filing of renewed requests. The question presented is:

Whether the Board "fail[ed] or refuse[d] to act on a request for certification," 33 U.S.C. § 1341(a)(1), thus waiving the State's certification authority, when it denied petitioners' certification requests within one year of submission.

TABLE OF CONTENTS

Page

Statement 1
A. Legal background 1
B. Procedural background 5
Argument 9
Conclusion 21

TABLE OF AUTHORITIES

Page

CASES

Alcoa Power Generating Inc. v. FERC
643 F.3d 963 (D.C. Cir. 2011) 3, 13, 14

Cal. State Water Res. Control Bd. v. FERC
43 F.4th 920 (9th Cir. 2022) 15, 17

City of Tacoma v. FERC
460 F.3d 53 (D.C. Cir. 2006) 2, 14

Del. Riverkeeper Network v. FERC
857 F.3d 388 (D.C. Cir. 2017) 1, 14

Hines v. Davidowitz
312 U.S. 52 (1941) 15

Hoopa Valley Tribe v. FERC
913 F.3d 1099 (D.C. Cir. 2019)
..... 3, 8, 11, 13, 14, 15, 16

Keating v. FERC
927 F.2d 616 (D.C. Cir. 1991) 14

N.C. Dep't of Env't Quality v. FERC
3 F.4th 655 (4th Cir. 2021) 10, 11, 15, 17

N.Y. State Dep't of Env't Conservation v. FERC
884 F.3d 450 (2d Cir. 2018)..... 10, 17

TABLE OF AUTHORITIES (continued)

Page

S.D. Warren Co. v. Maine Bd. of Env't Prot.
547 U.S. 370 (2006) 2, 14

Sierra Club v. County of Fresno
6 Cal. 5th 502 (2018) 4

STATUTES AND REGULATIONS

33 U.S.C.
§ 1251(a) 1
§ 1251(b) 1, 11
§ 1311 1
§ 1312 1
§ 1313 1
§ 1316 1
§ 1317 1
§ 1341 12
§ 1341(a)(1) 1, 2, 3, 8, 9, 10
§ 1341(d) 1, 2, 11
§ 1370 ..... 1, 14

42 U.S.C. § 4332(C) 4

18 C.F.R.
§ 5.23(b)(2) 3
§ 16.18(b) 2, 16

Cal. Code Civ. Proc. § 1094.5(b) 13

TABLE OF AUTHORITIES
(continued)

Page

Cal. Pub. Res. Code
§ 21000 4
§ 21002 5
§ 21002.1(b) 5
§ 21061 4
§ 21065 5
§ 21067 ..... 5, 19
§ 21069 5
§ 21080(c) 5
§ 21080(d) 4
§ 21081 5
§ 21100 ..... 4, 5, 19
§ 21151 ..... 5, 19

Cal. Water Code
§ 13160 3
§ 13160(b)(1) 3, 4
§ 13160(b)(2) 5, 12, 20
§ 13330(a) 4, 11, 13

2020 Cal. Stat. ch. 18, § 9 ..... 5, 12

Cal. Code Regs. tit. 14
§ 15002(a) 4
§ 15125(d) 4

Cal. Code Regs. tit. 23
§ 3830 3
§ 3837(b)(1) 4
§ 3837(b)(2) 4
§ 3856(f) 4, 5
§ 3859(a) 3, 4

TABLE OF AUTHORITIES
(continued)

Page

LEGISLATIVE MATERIALS

116 Cong. Rec. 8984 (1970) 2

H.R. Rep. 91-940 (1970) 3

OTHER AUTHORITIES

Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 Geo. L.J. 1507 (2012) 15

STATEMENT

A. Legal Background

1. Congress enacted the Clean Water Act in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The policy underlying the Act is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." *Id.* § 1251(b). "Except as expressly provided" in the statute, States retain the authority to "adopt or enforce" "any standard or limitation respecting discharges of pollutants" or "any requirement respecting control or abatement of pollution" that is more stringent than federal law requires. *Id.* § 1370. The Act thus reflects Congress's intent that States should serve as "the prime bulwark in the effort to abate water pollution." *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 393 (D.C. Cir. 2017).

Section 401 of the Act requires "[a]ny applicant for a Federal license or permit to conduct any activity" that "may result in any discharge into the navigable waters" to obtain "a certification from the State in which the discharge originates or will originate" that the activity "will comply with" applicable state and federal law. 33 U.S.C. § 1341(a)(1); *see id.* § 1341(d).[1]

---

[1] Section 401 specifies that the State has the authority to certify whether the "discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317" of Title 33 of the United States Code, 33 U.S.C. § 1341(a)(1), "and with any other appropriate requirement of State law," *id.* § 1341(d). The enumerated provisions include state and federal authority to establish and enforce water quality standards. *See id.* §§ 1311, 1312, 1313, 1316, 1317.

This certification process is "essential" to Congress's "scheme to preserve state authority" to address water pollution, and ensures that "'[n]o polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standards.'" *S.D. Warren Co. v. Maine Bd. of Env't Prot.*, 547 U.S. 370, 386 (2006) (quoting 116 Cong. Rec. 8984 (1970) (statement of Sen. Muskie)).

A State may respond to a request for certification by issuing a certification (along with any appropriate conditions to ensure that the project complies with state and federal law) or by denying the request. *See* 33 U.S.C. § 1341(a)(1); *S.D. Warren*, 547 U.S. at 380. If the State issues a certification, any conditions in the certification become conditions of the federal license or permit. 33 U.S.C. § 1341(d). If the State denies certification, "[n]o [federal] license or permit shall be granted." *Id.* § 1341(a)(1). If a relicensing application for a hydroelectric project is pending before the Federal Energy Regulatory Commission and the State denies certification without prejudice to the filing of a renewed certification request, FERC "will issue" an interim annual license allowing the project to continue to operate "under the terms and conditions of the existing license" while the relicensing application remains pending. 18 C.F.R. § 16.18(b).

States must "establish procedures for public notice in the case of all applications for certification" and, "to the extent [the State] deems appropriate, procedures for public hearings in connection with specific applications." 33 U.S.C. § 1341(a)(1). Section 401 does not otherwise specify what procedures States must follow in considering requests for certification, leaving that issue to the States. *See City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006).

If a 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," the certification requirements of Section 401 "shall be waived with respect to" the federal license or permit application. 33 U.S.C. § 1341(a)(1); *see also* 18 C.F.R. § 5.23(b)(2) (FERC regulation defining "a reasonable period of time" as one year). Congress enacted this waiver provision to prevent States from "indefinitely delaying a federal licensing proceeding" and "to ensure that 'sheer inactivity by the State . . . will not frustrate the Federal application.'" *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (quoting H.R. Rep. 91-940, at 56 (1970)). In *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), for example, the court of appeals concluded that state agencies waived their certification authority by entering into a written agreement to have a certification request that was "complete and ready for review" repeatedly withdrawn and resubmitted over "a lengthy period of time" in an effort to avoid the one-year time limit. *Id.* at 1105.

2. California vests its authority to issue or deny Section 401 certifications in the State Water Resources Control Board. Cal. Water Code § 13160. The Board's regulations establish procedures governing requests for certification. Cal. Code Regs. tit. 23, § 3830 *et seq*.

In considering a request, the Board must either issue an appropriately conditioned certification or deny certification. Cal. Code Regs. tit. 23, § 3859(a). The Board will issue a certification if there is reasonable assurance that an activity will comply with applicable Clean Water Act provisions and any other appropriate requirements of state law. Cal. Water Code

§ 13160(b)(1). The Board will deny a certification request when the activity will not comply with these requirements. Cal. Code Regs. tit. 23, § 3837(b)(1). When the application suffers from a procedural inadequacy, the Board may deny certification without prejudice to the applicant's filing a renewed application. *Id.* § 3837(b)(2). The Board must grant or deny a request for certification "before the federal period for certification expires." *Id.* § 3859(a). An applicant may challenge a certification decision by the Board by filing a petition for writ of mandate in California state court. Cal. Water Code § 13330(a).

California law requires that any proposed project at issue in a certification request be evaluated under the California Environmental Quality Act (CEQA), which is modeled on the National Environmental Policy Act (NEPA). Cal. Code Regs. tit. 23, § 3856(f); *see* Cal. Pub. Res. Code § 21000 *et seq.* Similar to NEPA, CEQA requires that whenever a project may have significant environmental effects, an environmental impact report must be prepared to address those effects, and to identify potential alternatives that would avoid or reduce the effects and feasible mitigation measures. *See* Cal. Pub. Res. Code §§ 21061, 21080(d), 21100; *compare* 42 U.S.C. § 4332(C). The CEQA analysis includes evaluation of impacts to water quality. *See, e.g.*, Cal. Code Regs. tit. 14, § 15125(d). In enacting CEQA, the California Legislature sought to "foster informed public participation and to enable [governmental] decision makers to consider the environmental factors necessary to make a reasoned decision." *Sierra Club v. County of Fresno*, 6 Cal. 5th 502, 516 (2018); *see* Cal. Code Regs. tit. 14, § 15002(a).

CEQA applies to projects undertaken by state and local agencies and to projects undertaken by private

parties for which a discretionary government-issued permit or approval is required. Cal. Pub. Res. Code § 21065. Where a project is undertaken by a public agency but a permit or approval from a separate public agency is required, as in this case, the agency undertaking the project is generally designated the "lead agency" for CEQA purposes and the permitting agency is designated as a "responsible agency." *See id.* §§ 21067, 21069. The lead agency is responsible for preparing the environmental impact report. *Id.* §§ 21100, 21151(a). CEQA also imposes certain substantive requirements—for example, the lead agency must adopt feasible mitigation measures before approving a project. *Id.* §§ 21002, 21002.1(b).

California law generally prohibits the Board from issuing a Section 401 certification until the lead agency has prepared and submitted an environmental impact report, *see* Cal. Pub. Res. Code § 21081; Cal. Code Regs. tit. 23, § 3856(f), or determined that no such report is required because the project would have no significant environmental effects, *see* Cal. Pub. Res. Code § 21080(c). In 2020, however, the California Legislature created an exception to that rule, allowing the Board to issue a certification before CEQA review is completed if the Board "determines that waiting until completion of [the CEQA process] poses a substantial risk of waiver of the state board's certification authority" under Section 401 or other federal water quality laws. Cal. Water Code § 13160(b)(2). That exception took effect in June 2020. *See* 2020 Cal. Stat. ch. 18, § 9.

B. Procedural Background

1. Petitioners are local governmental agencies in California that jointly own and operate the two hydroelectric facilities at issue here, the Don Pedro Project

and the La Grange Project, both of which are located on the Tuolumne River in central California. Pet. App. 3a. In 2014, petitioners filed with the Federal Energy Regulatory Commission a relicensing application for the Don Pedro Project, whose prior 50-year license expired in 2016. *Id.* at 41a. In 2017, petitioners filed an amended relicensing application for that project and an application for an original license for the La Grange Project. *Id.* at 41a-42a & n.3. (The La Grange Project is much smaller than the Don Pedro Project and petitioners operated it for many years without a FERC license, but FERC determined in 2012 that a license was required. *Id.* at 3a, 41a-42a.)

On January 26, 2018, petitioners filed Section 401 certification requests for both projects with the Board. Pet. App. 3a; *see id.* at 97a-104a. On January 24, 2019, the "Board denied the requests 'without prejudice,'" on the grounds that petitioners, "as lead agencies for the Projects, ha[d] not begun the CEQA process" required for certification and that FERC had not yet completed its own NEPA analysis. *Id.* at 3a; *see id.* at 94a-96a.[2] On April 22, 2019, petitioners submitted "substantively unchanged" certification requests, which the Board denied without prejudice on April 20, 2020. *Id.* at 3a-4a & n.2; *see id.* at 83a-93a. The Board cited the same rationales it had given in denying petitioners' first set of requests; it also noted that, based on the information before the Board at the time, it appeared

[2] "Without prejudice" in this context means only that petitioners "could apply again" for certification and any new application would be considered on its own merits; the Board's denial of petitioners' prior application would "not have preclusive effect." Pet. App. 8a n.7.

that "the proposed activity does not comply with applicable water quality standards and other appropriate requirements." *Id.* at 85a; *see id.* at 84a-85a, 88a-89a.

In July 2020, petitioners again submitted certification requests for the two projects. Pet. App. 4a; *see id.* at 78a-82a. While those requests were pending, in October 2020, petitioners filed a petition with FERC seeking a declaratory order that the Board had waived its certification authority with respect to both projects. *Id.* at 4a. A month later, petitioners withdrew their certification requests. *Id.* Despite that withdrawal, in January 2021, the Board invoked the new statute authorizing it to issue a certification before CEQA review is completed, *see supra* p. 5, and issued a certification for the two projects with a number of conditions designed to ensure compliance with state and federal water quality laws. *Id.* at 4a-5a. Petitioners object to those conditions. *Id.* at 5a.[3] Petitioners' licensing applications for both projects remain bending before FERC, and petitioners continue to operate the projects while FERC processes those applications. Pet. App. 41a-42a; *see supra* p. 2.

2. In January 2021, FERC denied petitioners' request for an order declaring that the Board had waived its Section 401 certification authority. Pet. App. 69a; *see id.* at 40a-70a. Petitioners filed a request for rehearing, which FERC also denied. *Id.* at 29a; *see id.* at 11a-29a (majority opinion); *id.* at 30a-37a (dissent). FERC explained that "the Board 'acted' prior to the expiration of the one-year statutory deadline by deny-

[3] Petitioners have challenged the Board's certification in California state court. Pet. App. 5a n.3; *Turlock Irr. Dist. v. State Water Res. Control Bd.*, No. CV63819 (Cal. Super. Ct., Tuolumne County, filed May 11, 2021). That litigation remains pending.

ing without prejudice the Districts' request for certification." *Id.* at 61a. Petitioners identified "no support" for their apparent theory that Section 401 requires state certifying agencies to "address the technical merits" of a certification request within one year to avoid waiver. *Id.* at 19a.

3. Petitioners filed a petition for review, which the D.C. Circuit denied in a unanimous opinion authored by Judge Randolph. Pet. App. 1a-10a. The court agreed with FERC that the Board "'acted' within the meaning of section 401(a)(1)" when it denied petitioners' certification requests. *Id.* at 7a (alteration omitted). The court contrasted that action with the facts of *Hoopa Valley*, where "the state agencies and the license applicant entered into a written agreement that obligated the state agencies, year after year, to *take no action at all*" on the certification request. *Id.* at 6a. And whereas the *Hoopa Valley* decision "stressed that the applicant's 'water quality certification request ha[d] been complete and ready for review for more than a decade,'" petitioners' requests here "were not complete and they were not ready for review, which is why the California Board denied them." *Id.* at 8a.

The court of appeals rejected petitioners' argument that upholding FERC's ruling could allow state certifying agencies to "extend the time for decision indefinitely by denying one certification request after another without prejudice." Pet. App. 8a-9a. The court endorsed FERC's conclusion that while "repeated denials without prejudice, particularly those that do not rest on any substantive conclusions" might be viewed as "the equivalent of the withdrawal-and-resubmittal scheme" in *Hoopa Valley*, the Board's actions "in this case . . . satisfied the statutory mandate

for action." *Id.* at 9a. Moreover, petitioners' own theory "could lead to 'gamesmanship'" under which "[a]pplicants could file certification requests lacking sufficient documentation," presenting state agencies with the "Hobson's choice of either granting certification without necessary information or waiving" their certification authority. *Id.* at 10a (alterations omitted).

ARGUMENT

Petitioners seek review of a question of statutory interpretation: whether the Board's denial without prejudice of their requests for certification constituted "act[ing] on [the] request[s]" under Section 401(a)(1) of the Clean Water Act. 33 U.S.C. § 1341(a)(1). The D.C. Circuit and FERC held that the Board did "act," and rejected petitioners' waiver argument on that basis. That straightforward construction is consistent with the text of Section 401, its underlying purpose, and precedent from other appellate courts.

In this Court, petitioners do not allege any conflict of authority and they fail to offer any plausible interpretation of the statutory text that would support their position. Instead, they focus on policy rationales. But those policy arguments are unpersuasive, and petitioners' suggestion that the Board improperly sought to delay its resolution of their certification requests is unfounded. As Judge Randolph explained below, the Board denied petitioners' requests because the "requests were not complete and they were not ready for review." Pet. App. 8a. Indeed, petitioners had not even begun the environmental review process required of them under state law. To find a waiver under these circumstances would reward petitioners with a windfall that would be at odds with the purpose and design of the Clean Water Act. There is no need for further review.

1. The court of appeals correctly held that the Board did not waive its certification authority in the circumstances of this case. The "plain language" of Section 401 "requires that a State 'act' on a certification request within one year" to avoid waiver. Pet. App. 6a; *see* 33 U.S.C. § 1341(a)(1) (waiver occurs when a State "fails or refuses to act on a request for certification"). "The action contemplated in section 401(a)(1) is action by the State agency." Pet. App. 7a. Here, when the "Board denied certification, the Board 'acted' within the meaning of section 401(a)(1)." *Id.* The court of appeals' holding is consistent with FERC's own understanding of Section 401, and with the views of the other circuits that have addressed this issue—which have uniformly recognized that a state certifying agency "'act[s]' on [a] request under the language of Section 401" when it "den[ies] the application without prejudice." *N.Y. State Dep't of Env't Conservation v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018); *see also N.C. Dep't of Env't Quality v. FERC*, 3 F.4th 655, 669-671 (4th Cir. 2021).

Petitioners fail to articulate any plausible alternative interpretation of Section 401's waiver provision. FERC understood petitioners to be arguing that a State's denial must "address the technical merits of the request" in order to avoid waiver. Pet. App. 19a; *see id.* at 6a. But petitioners disavow that interpretation, Pet. 26—and sensibly so, given the lack of any basis in the statutory text. Rather than advancing a different interpretation, however, petitioners merely assert that a "*pro forma* letter[]" denying a request for certification without prejudice is "not an 'act' under Section 401." Pet. 23. That assertion is equally lacking in textual support, and petitioners never explain

what *would* suffice to avoid waiver in their view (except to say cryptically that it must be "an actual 'yes' or 'no,'" *id.* at 24).

Moreover, as the court below explained, the circumstances here are materially different from those in *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019). Pet. App. 7a; *see* Pet. 21. In that case, the D.C. Circuit found waiver where "'the state agencies and the license applicant entered into a written agreement that obligated the state agencies, year after year, to *take no action at all* on the applicant's § 401 certification request.'" Pet. App. 6a (quoting *N.C. Dep't of Env't Quality*, 3 F.4th at 669); *see Hoopa Valley*, 913 F.3d at 1101-1105. In this case, by contrast, the Board acted within the one-year period by denying petitioners' requests without prejudice. Pet. App. 8a. Those denials "had the legal effect under section 401 of precluding FERC from issuing licenses to [petitioners] during the period preceding the Board's grant of certifications." *Id.* (citing 33 U.S.C. § 1341(d)). They also gave rise to a right to judicial review in state court. Cal. Water Code § 13330(a); *see supra* p. 4.[4]

The court of appeals' holding is not only consistent with text and precedent, it aligns with the broader purpose of the Clean Water Act. Congress sought to "preserve[] and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," 33 U.S.C. § 1251(b), including by requiring those who seek a federal license or permit to obtain a

[4] Before FERC, petitioners argued that the denials in this case were not subject to judicial review in state court because they were not "final agency actions" under state law. Pet. App. 21a. FERC rejected that argument, *id.*, and petitioners abandoned it in the court of appeals and do not advance it here.

state certification that the project will comply with applicable state and federal law, *see id.* § 1341; *supra* pp. 1-2. Here, petitioners sought certifications but "had not even begun" the CEQA review process that California law requires. Pet App. 7a n.5. That process informs the Board's decision regarding whether and on what terms to issue a Section 401 certification, because the environmental impact report required by CEQA contains the scientific and technical information necessary to determine whether the proposed project complies with state environmental laws. As a consequence of petitioners' failure to engage in the CEQA process, the Board had no statutory authority to issue a certification at the time of the relevant denials.[5] It should not have surprised petitioners that the Board denied requests that plainly failed to satisfy that basic state law requirement. And it would undermine the purpose of the Act to reward that failure with a finding of waiver.

2. Petitioners principally contend that their understanding of Section 401 is supported by a variety of policy rationales. Pet. 1-3, 17-27. Of course, bare policy arguments are not generally a sound basis for certiorari. And the particular rationales advanced by petitioners here do not withstand closer scrutiny.

a. Petitioners first assert that the decision below would "render Section 401's one-year rule meaningless." Pet. 17; *see id.* at 22-26. That is hardly so. The meaning of Section 401 as construed by the D.C. Circuit is the same meaning conveyed by the statutory

[5] The amended statute later invoked by the Board when it issued its certification, *see* Pet. App. 4a-5a, did not become effective until June 2020, months after the Board's final denials without prejudice here. Cal. Water Code § 13160(b)(2); 2020 Cal. Stat. ch. 18, § 9.

text: a State waives its certification authority by failing to take any action before the one-year deadline. Pet. App. 6a-7a. What is more, under *Hoopa Valley*, a State may waive its certification authority by agreeing with a project applicant to enter a "coordinated withdrawal-and-resubmission scheme" over multiple years to avoid taking action on a complete, ready-for-review certification request. 913 F.3d at 1105.

Petitioners argue that the decision below would allow States to "delay acting on Section 401 certification requests for as many years as the State desires" by "deny[ing] the requests every 364 days." Pet. 18. They overlook the fact that a denial is an action that the State must be prepared to justify in court. A "State's decision on a request for Section 401 certification is generally reviewable . . . in State court." *Alcoa*, 643 F.3d at 971. In California, for example, the applicant may seek judicial review of the Board's denial of a certification request via a petition for a writ of mandate. Cal. Water Code § 13330(a). If the Board received a complete, properly documented certification request for a project that would comply with applicable state and federal water quality standards, state administrative law principles would appear to preclude the Board from denying that request merely on the ground that it would like more time. *See* Cal. Code Civ. Proc. § 1094.5(b).[6]

Petitioners complain that state court review would focus primarily on whether the state agency's denial of a Section 401 certification request is "lawful under

[6] As FERC noted, moreover, "[i]t may be that the courts [would] find repeated denials without prejudice, and particularly those that do not rest on any substantive conclusions, to be the equivalent of the [*Hoopa Valley*] withdrawal-and-resubmittal scheme" for purposes of Section 401. Pet. App. 65a.

state law." Pet. 17; *see id.* at 18. But that is exactly what Congress intended when it enacted the Clean Water Act. Section 401 provides States "with 'the power to block, for environmental reasons, local water projects that might otherwise win federal approval.'" *Del. Riverkeeper*, 857 F.3d at 394 (quoting *Alcoa*, 643 F.3d at 963). That remains so even if the state standards at issue are "stricter than federal ones." *S.D. Warren*, 547 U.S. at 386 (citing 33 U.S.C. § 1370). Whether a state agency has properly exercised its Section 401 certification authority thus "generally turns on questions of state law," although both state courts and FERC may evaluate whether a state agency's actions "compl[y] with the terms of section 401." *City of Tacoma*, 460 F.3d at 67; *see also, e.g.*, *Keating v. FERC*, 927 F.2d 616, 622-625 (D.C. Cir. 1991).

b. Petitioners next speculate that the D.C. Circuit's interpretation of Section 401 "would allow a State to pass a statute that requires an environmental impact assessment that will take 100 years to do," with the state certifying agency denying certification without prejudice "every 363 days." Pet. 25 (alterations and internal quotation marks omitted). Of course, no State has enacted such a bizarre law, and there is no basis for believing that any State would do so. The States are focused on carrying out their broad and unquestioned authority to enact substantive water quality laws and to determine under Section 401 whether proposed projects would comply with those laws.

If such a law ever did emerge, it might very well be deemed an equivalent of the *Hoopa Valley* withdrawal-and-resubmittal scheme. *Cf.* Pet. App. 65a. It could also be vulnerable to a preemption challenge on the ground that it is an "obstacle to the . . . purposes

and objectives" of Section 401's one-year waiver provision. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). But petitioners' hypothetical bears no resemblance to the facts of *this* case—in which petitioners failed to comply with a longstanding environmental review statute, which provides the Board with the information it needs to make a reasoned certification decision, and is similar to NEPA and many other state laws. *See generally* Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 Geo. L.J. 1507, 1520 & n.73 (2012) (describing dozens of state environmental review statutes).

c. Petitioners also contend that review is warranted because "[s]ome States have proven all too eager to abuse the Section 401 certification process to delay federal projects." Pet. 20-21. Petitioners fail to substantiate that allegation. The only specific example they cite is *Hoopa Valley*. *Id.* at 21. As multiple courts of appeals have recognized, however, *Hoopa Valley* is an outlier, not an accurate representation of how the Section 401 process typically works. It involved "a fairly egregious set of facts," in which the parties signed a contract that "obligated the state agencies, year after year, to *take no action at all*" on the certification request. *N.C. Dep't of Env't Quality*, 3 F.4th at 669; *see also* Pet. App. 6a-8a; *Cal. State Water Res. Control Bd. v. FERC*, 43 F.4th 920, 930-931 (9th Cir. 2022).[7] The parties arrived at that unusual approach for an idiosyncratic reason—to facilitate ongoing, complex negotiations between the project applicant, two States, Indian Tribes, and a variety of other

[7] A petition for a writ of certiorari seeking this Court's review of the Ninth Circuit's decision is currently pending. *See Nev. Irr. Dist. v. Cal. State Water Res. Control Bd.*, No. 22-743.

interested stakeholders regarding the decommissioning of outdated hydroelectric facilities that could not be modernized in a cost-effective way. *Hoopa Valley*, 913 F.3d at 1101. That single example is hardly emblematic of a systemic problem.

Nor do States typically have any incentive to delay FERC relicensing proceedings. While a relicensing application is pending before FERC, the project at issue will generally receive an interim annual license that incorporates the terms of the prior license (as occurred in this case with respect to the Don Pedro Project). *See supra* pp. 2, 7; 18 C.F.R. § 16.18(b). As the court below noted, those license terms are often outdated and fail to incorporate modern water-quality conditions that the State seeks to add through its Section 401 certifications—conditions that cannot take effect until FERC issues the new license. Pet. App. 7a-8a n.6. Here, for example, because FERC issued the prior license for the Don Pedro Project before the enactment of the Clean Water Act, *see* Pet. App. 41a, that license contains no state water quality conditions. States therefore have an interest in ensuring that the certification and relicensing process is both thorough and prompt.

Petitioners note that, as of January 2019, "27 of the 43 then-pending 'licensing applications before FERC were awaiting a state's water quality certification, and four of those had been pending for more than a decade.'" Pet. 21 (quoting *Hoopa Valley*, 913 F.3d at 1104) (emphasis omitted). That statistic is badly outdated, at least with respect to California: The Board has issued Section 401 certifications for all 26 relicense or

original license applications pending before FERC in which a certification has been requested.[8]

Petitioners' suggestion that States are improperly delaying FERC licensing proceedings is misguided in other respects as well. In many cases, including this one, the licensee's initial certification request is incomplete, lacking the information the state agency needs to determine whether the project complies with state law.[9] Moreover, the Section 401 certification process is hardly the only reason why FERC licensing proceedings are often protracted. As petitioners have

---

[8] These applications are: Big Creek Nos. 2A, 8, and Eastwood (FERC Project No. 67); Big Creek No. 3 (FERC Project No. 120); Portal (FERC Project No. 2174); Big Creek Nos. 1 and 2 (FERC Project No. 2175); Mammoth Pool (FERC Project No. 2085); Vermilion Valley (FERC Project No. 2086); Upper North Fork Feather River (FERC Project No. 2105); Kilarc-Cow Creek (FERC Project No. 606); McCloud-Pit (FERC Project No. 2106); Yuba-Bear (FERC Project No. 2266); Upper Drum-Spaulding (FERC Project No. 2310); Lower Drum-Spaulding (FERC Project No. 14531); Merced River (FERC Project No. 2179); Merced Falls (FERC Project No. 2467); Yuba River (FERC Project No. 2246); Don Pedro (FERC Project No. 2299); La Grange (FERC Project No. 14581); South Feather (FERC Project No. 2088); Lassen Lodge (FERC Project No. 12496); Camp Far West (FERC Project No. 2997); South State Water Project (FERC Project No. 2426); DeSabla-Centerville (FERC Project No. 803); Phoenix (FERC Project No. 1061); Devil Canyon (FERC Project No. 14797); Kaweah (FERC Project No. 298); Oroville Facilities (FERC Project No. 2100).

[9] *See, e.g.*, Pet. App. 8a (noting that petitioners' applications were "not complete" and "not ready for review" because the project applicant had not prepared environmental review required by CEQA); *Cal. State Water Res. Control Bd.*, 43 F.4th at 927 (same); *N.C. Dep't of Env't Quality*, 3 F.4th at 662 (certification request lacked required water quality monitoring plan and environmental assessment); *N.Y. State Dep't of Env't Conservation*, 884 F.3d at 453 (similar).

acknowledged, "the FERC licensing process is a multiyear endeavor," in part because FERC's own NEPA process frequently "take[s] far more than one year." Petrs' C.A. Br. (Oct. 8, 2021), pp. 54, 56. Here, for example, petitioners' licensing applications still remain pending before FERC—more than two years after the Board ultimately issued a Section 401 certification in January 2021. *Supra* p. 7.

d. For all of their discussion of policy concerns, petitioners offer no meaningful response to the concern raised by the D.C. Circuit. As the court of appeals recognized, accepting petitioners' theory would invite "gamesmanship," by creating an incentive for applicants to "file certification requests lacking sufficient documentation." Pet. App. 10a. That would leave the state certifying agency in the "untenable position" of having to address the technical merits of a certification request without adequate information. *Id.* And where the agency opts to deny that request without prejudice, as here, it would allow parties like petitioners—who failed even to *begin* the required state environmental review—to nonetheless obtain a finding that the agency waived its certification authority.

3. Petitioners argue that this case "is an ideal vehicle" for construing Section 401's waiver provision because "the facts of this case . . . illustrate[] the danger of FERC's approach." Pet. 28; *see id.* at 28-30. In particular, they contend that "given CEQA's many, time-consuming requirements," California has "by statute mandated a more-than-one-year timeline" for the Board to "'act' on a certification request." *Id.* at 28-29. That argument is unfounded. As public agencies seeking the Board's approval for their projects, petitioners acknowledged that they were the "lead agencies" un-

der CEQA—so they were in control of the CEQA process and timeline. Pet. App. 99a; *see* Cal. Pub. Res. Code § 21067. Had petitioners conducted their CEQA analysis *before* submitting their certification requests to the Board, the Board could have completed its certification process within a year. Petitioners submitted their relicensing application to FERC for the Don Pedro Project in 2014, Pet. App. 41a, and a 2012 FERC order required petitioners to submit a license application for the La Grange Project, *id.* at 42a. That timeline should have allowed petitioners to complete the CEQA review process before they submitted their first set of certification requests to the Board in 2018.

Petitioners also take issue with the court of appeals' conclusion that their certification requests failed to include the documentation needed for CEQA review. Pet. 29-30; *see* Pet. App. 5a, 8a. That failure is manifest in the record. Petitioners are the "lead agencies" here, *supra* p. 5, which means that petitioners—not the Board—were responsible for preparing the required environmental impact report to evaluate the effects of the project and consider alternatives and feasible mitigation measures. Cal. Pub. Res. Code §§ 21100, 21151(a). As the court of appeals recognized, however, petitioners "had not even begun" the CEQA process when they submitted their certification requests. Pet. App. 7a n.5; *see id.* at 14a, 84a, 88a, 95a. Petitioners' only response is that their certification requests included the "information that the [Board] needed" to determine whether the project would comply with state water quality laws, Pet. 29, because they attached a DVD with a copy of the information they had sent FERC to facilitate its own environmental review, *see* Pet. App. 99a-100a. But that did not relieve petitioners of their obligations as lead agencies to prepare the environmental impact report required

by state law, which is necessary for the Board to properly assess the projects and evaluate whether a certification is warranted.

Finally, petitioners suggest that the Board's ultimate decision to issue a Section 401 certification (with appropriate environmental conditions) indicates that the earlier denials without prejudice "were just an attempt to buy itself more time." Pet. 30. That is wrong. The earlier denials occurred because petitioners' "requests were not complete," Pet. App. 8a, and the Board lacked authority at that time to issue any certification in response to such a request, *see supra* p. 5. The certification came after the Legislature granted the Board authority to take such action, *see* Cal. Water Code § 13160(b)(2), and after petitioners sought from FERC a declaration that the Board had waived its certification authority, *see* Pet. App. 4a-5a. The fact that the Board was eventually compelled to compensate for petitioners' incomplete requests by issuing a certification based on the best information available at the time hardly suggests that the Board's earlier denials were made in bad faith or for the purpose of delay.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROB BONTA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
ROBERT W. BYRNE
Senior Assistant Attorney General
JOSHUA PATASHNIK
Deputy Solicitor General
ERIC M. KATZ
Supervising Deputy Attorney General
ADAM L. LEVITAN
Deputy Attorney General

March 8, 2023