No. 22-616

In the Supreme Court of the United States

TURLOCK IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

MATTHEW R. CHRISTIANSEN
General Counsel
ROBERT H. SOLOMON
Solicitor
JARED B. FISH
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Federal Energy Regulatory Commission (Commission) has authority to issue licenses for the construction, operation, and maintenance of hydroelectric projects on jurisdictional waters. See 16 U.S.C. 797(e). Under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, an applicant for a hydroelectric license from FERC is required to apply for a certification from the State in which the licensed project may result in a discharge into navigable waters. 33 U.S.C. 1341(a)(1). The Commission generally cannot issue a federal license unless and until the applicant obtains the requisite state water-quality certification. The Clean Water Act provides, however, that "[i]f 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, the certification requirements of this subsection shall be waived with respect to such Federal application." *Ibid.* The question presented is:

Whether the court of appeals correctly upheld the Commission's determination that the California State Water Quality Control Board "act[ed]" under 33 U.S.C. 1341(a)(1), and therefore did not waive its certification authority, when the Board denied petitioners' requests for water-quality certifications for two hydroelectric projects in California within one year of receiving them, without prejudice to resubmission, on the ground that the requests were incomplete as a matter of state law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

In the Supreme Court of the United States

No. 22-616

TURLOCK IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 36 F.4th 1179. The orders of the Federal Energy Regulatory Commission (Pet. App. 11a-37a, 40a-70a) are reported at 175 F.E.R.C. ¶ 61,144 and 174 F.E.R.C. ¶ 61,042, respectively.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2022. A petition for rehearing was denied on September 6, 2022 (Pet. App. 71a-72a). On November 29, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 4, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act, 16 U.S.C. 791a *et seq.*, provides the Federal Energy Regulatory Commission (FERC or Commission) with the authority to issue licenses for the construction, operation, and maintenance of non-federal hydroelectric projects on jurisdictional waters. 16 U.S.C. 797(e). The Commission may issue hydroelectric licenses for up to 50 years. 16 U.S.C. 808(e). In deciding whether to issue or reissue a license, the Commission is required to consider "the power and development purposes for which licenses are issued," and to "give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife * * * , the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. 797(e). If a new license is not granted prior to the expiration of an existing license, the Commission may issue to the licensee an annual license to operate the project from year to year, "under the terms and conditions of the existing license until * * * a new license is issued." 16 U.S.C. 808(a)(1); see 18 C.F.R. 16.18.

The Commission generally operates under a broad mandate to specify the conditions on which a license is granted. See 16 U.S.C. 803. In limited circumstances, however, the Commission can be required to include licensing terms established by other agencies. 16 U.S.C. 797(e), 811; see *Escondido Mut. Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). This case concerns one of those circumstances—specifically, mandatory water-quality measures that FERC can be required to include in a license as a result of the Clean Water Act, ch. 758, 86 Stat. 816 (33 U.S.C. 1251 *et seq.*).

Section 401 of the Clean Water Act provides that any applicant seeking a federal license for activities "which may result in any discharge into the navigable waters" must provide the federal licensing authority with a "certification from the State in which the discharge originates or will originate" that the discharge will comply with certain effluent limitations and water-quality requirements. 33 U.S.C. 1341(a)(1). Operating a dam to produce hydroelectricity may result in a "discharge" into navigable waters, *ibid.*, and FERC licensing or relicensing proceedings for such a project therefore trigger Section 401's water-quality certification process. See *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 373-374 (2006); see also *id.* at 377 (explaining that the term "'discharge'" bears its "plain meaning" in this context and therefore includes the release of water from a hydroelectric dam) (citation omitted).

A State may condition its certification under Section 401 "upon any limitations necessary to ensure compliance with state water quality standards or any other 'appropriate requirement of State law.'" *PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700, 713-714 (1994) (quoting 33 U.S.C. 1341(d)); see *id.* at 705 (explaining that the Clean Water Act permits States to "impose more stringent water quality controls" than federal law would otherwise prescribe). FERC, in turn, is required to incorporate any limitations or conditions specified in a State's water-quality certification into any license the Commission ultimately grants for the project at issue. 33 U.S.C. 1341(d). If the State denies the requested Section 401 certification, then "[n]o [federal] license or permit shall be granted." 33 U.S.C. 1341(a)(1).

By interposing the States in the process for granting federal licenses, Section 401 furthers the Clean Water Act's policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. 1251(b). At the same time, Section 401 is not designed to be a vehicle for States to "indefinitely delay[]" federal licensing proceedings. *Alcoa Power Generating Inc.* v. *FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). Congress therefore specified that the water-quality certification requirements set forth in Section 401(a) are deemed to be "waived" for a given federally licensed activity 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 [a] request" for certification. 33 U.S.C. 1341(a)(1); cf. 18 C.F.R. 4.34(b)(5)(iii) (FERC regulation treating the statutory maximum one-year period as the applicable deadline). If a State waives certification, FERC may proceed to act on a licensing application. See 33 U.S.C. 1341(a)(1) ("No license or permit shall be granted until the certification required by this section has been obtained *or has been waived*.") (emphasis added).

2. a. Petitioners are public water agencies that operate two hydroelectric facilities on the Tuolumne River in California. Pet. App. 3a; see Pet. iii. The Commission's predecessor agency granted a license to operate one of the facilities, the Don Pedro Project, in 1964—before the enactment of what is now Section 401 of the Clean Water Act. Pet. App. 41a; see *S.D. Warren Co.*, 547 U.S. at 374 (statutory history). That license expired in 2016. Pet. App. 3a. Since the 2016 expiration, the Commission has issued a series of one-year licenses for the continued operation of the Don Pedro Project under

the same terms and conditions as the expired 50-year license, thus maintaining the status quo. See *id.* at 41a & n.4. Petitioners' second facility, the La Grange Project, "has operated since the 1890s" without a federal license. *Id.* at 3a. In 2012, the Commission determined that the La Grange Project is subject to the licensing requirements of the Federal Power Act. *Ibid.*; see *Turlock Irrig. Dist.* v. *FERC*, 786 F.3d 18, 33 (D.C. Cir. 2015) (upholding the Commission's determination).

In 2017, petitioners filed with FERC an amended license application to operate the Don Pedro Project and an original license application to operate the La Grange Project. Pet. App. 3a. The Commission has not yet issued a decision on the merits of either application.

b. Petitioners' licensing applications triggered Section 401's requirement for state water-quality certifications for both projects. On January 26, 2018, petitioners submitted water-quality certification requests for the projects to the relevant California state agency, the California State Water Resources Control Board (State Board or Board). Pet. App. 3a; see *id.* at 97a-100a, 101a-104a (petitioners' requests). In their requests to the State Board, petitioners indicated that they would serve as the "Lead Agencies for the purpose of complying with the requirements of the California Environmental Quality Act." *Id.* at 99a, 103a.

The California Environmental Quality Act of 1970 (CEQA), Cal. Pub. Res. Code §§ 21000 *et seq.* (West 2016), is the state-law analogue to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Much like NEPA, CEQA "sets procedural requirements," including the preparation of an "Environmental Impact Report," to ensure that responsible officials take into account "'the environmental consequences of their

decisions before they are made.'" *City of Carmel-by-the-Sea* v. *United States Dep't of Transp.*, 123 F.3d 1142, 1163 (9th Cir. 1997) (quoting *Citizens of Goleta Valley* v. *Board of Supervisors*, 801 P.2d 1161, 1167 (Cal. 1990)). If CEQA requires the preparation of an environmental impact report for a project involving multiple public agencies, California law designates a "lead agency" that is responsible for preparing the report. Cal. Code Regs. tit. 14, § 15084(a) (Oct. 14, 2022); see *id.* §§ 15050(a), 15051.

On January 24, 2019—363 days after receiving petitioners' requests for certification—the State Board denied the requests without prejudice. Pet. App. 3a; see *id.* at 94a-96a. In denying the requests, the State Board observed that it may "deny certification without prejudice" to resubmission when a request "suffers from a procedural inadequacy." *Id.* at 95a. The Board further observed that petitioners, "as lead agencies for the Projects, ha[d] not begun the CEQA process," and that, under California law at the time, the Board could not "issue a certification" under Section 401 "[w]ithout completion of the CEQA process." *Ibid.*; see Cal. Code Regs. tit. 23, § 3856(f) (Sept. 30, 2022) ("[T]he certifying agency shall be provided with and have ample time to properly review a final copy of valid CEQA documentation before taking a certification action."). The Board noted that its denial on those grounds "carrie[d] with it no judgment on the technical merits of the activity." Pet. App. 95a.

On April 22, 2019, petitioners filed new requests for certification, which were "substantively unchanged." Pet. App. 3a-4a (citation omitted); see *id.* at 90a-91a, 92a-93a. The State Board again denied petitioners' requests without prejudice—this time, 364 days later. *Id.*

at 4a. "The Board gave the same explanation as it had before," regarding petitioners' failure to prepare (or even begin) an environmental impact report for either project under CEQA. *Ibid.*; see *id.* at 87a-89a.

On July 20, 2020, petitioners filed a third round of certification requests with the State Board for the same projects. Pet. App. 4a; see *id.* at 78a-82a. "In October of that year, while these requests were pending, [petitioners] filed a petition with FERC seeking a declaratory order that the California Board had waived section 401(a)(1)'s State certification requirement" by allegedly failing to act on petitioners' prior requests within Section 401's one-year time period. *Id.* at 4a. After filing their request for a declaratory order, petitioners informed the State Board that they were "withdrawing their [July 2020] certification applications." *Ibid.*

The State Board nonetheless proceeded with the Section 401 certification process and, in January 2021, "granted certification for both Projects." Pet. App. 4a-5a. Although petitioners "had still not completed the CEQA process," *id.* at 5a, California law had been amended in the interim to permit the State Board to grant a certification request "before completion of the [CEQA] environmental review," when the Board determines that "waiting until completion of that environmental review * * * poses a substantial risk of waiver of the state board's certification authority," Cal. Water Code § 13160(b)(2) (West Supp. 2022); see Pet. App. 5a.

The State Board's certifications include various conditions that petitioners are presently challenging in state court. Pet. App. 5a n.3. As explained above, when a State validly exercises its authority under Section 401 of the Clean Water Act to grant a water-quality certification subject to conditions or limitations, FERC is

required to incorporate those conditions or limitations into any federal license for the relevant project.

c. FERC denied petitioners' request for a declaratory order that the State Board had waived its Section 401 certification authority. Pet. App. 40a-70a. (At the time of the Commission's decision, the State Board had already issued draft certifications for the projects in response to petitioners' July 2020 certification requests, which petitioners had sought to withdraw. See *id.* at 46a & n.25.) The Commission explained that, under Section 401, a State waives its certification authority when it "fails or refuses to act on a request for certification" within one year of receiving the request. *Id.* at 54a (quoting 33 U.S.C. 1341(a)(1)). The Commission found that, in denying petitioners' first two rounds of requests without prejudice, the State Board had in fact "'acted' prior to the expiration of the one-year statutory deadline." *Id.* at 61a.

Petitioners contended that the State Board's denials should be disregarded as "invalid," and thus treated as failures or refusals to act, on the theory that the basis for the denials was "'non-substantive.'" Pet. App. 61a (citation omitted). The Commission rejected that contention. It explained that the substantive validity of the State Board's denials was a "question[] of State law" for the state courts to resolve, not the Commission. *Id.* at 64a (citation omitted). And with respect to the federal question of whether the State Board's denials without prejudice constituted "fail[ing] or refus[ing] to act" under Section 401, 33 U.S.C. 1341(a)(1), the Commission looked to the "plain language of the statute" and found that the State Board had "'acted' on [petitioners'] request[s]" when it denied them on CEQA grounds. Pet. App. 64a-65a.

The Commission also denied petitioners' request for rehearing, with Commissioner Danly dissenting. Pet. App. 11a-37a. As relevant here, the Commission again rejected petitioners' theory that a denial without prejudice should be deemed to constitute a failure or refusal to act, observing that petitioners "provide[d] no support for their claim that the plain language of section 401 requires a state certifying agency to address the technical merits of the request for water quality certification in order to satisfy the requirement that a state act on a request within one year." *Id.* at 19a.

3. The court of appeals denied a petition for review, thereby sustaining the Commission's orders. Pet. App. 1a-10a. The court "agree[d] with FERC that the [State] Board did not waive its certification authority under" Section 401 of the Clean Water Act when it denied petitioners' first two sets of requests without prejudice to resubmission. *Id.* at 6a. Like FERC, the court concluded that each time the State Board denied certification, "the Board 'acted' within the meaning of section 401(a)(1)." *Id.* at 7a (brackets omitted). The court also observed that, when the State Board ultimately granted certifications for both projects, "it 'acted' once more." *Ibid.* (brackets omitted).

Petitioners' contrary view rested largely on the D.C. Circuit's prior decision in *Hoopa Valley Tribe* v. *FERC*, 913 F.3d 1099, cert. denied, 140 S. Ct. 650 (2019). See Pet. C.A. Br. 4-6, 31-47. In that case, a FERC relicensing application for a network of hydroelectric dams had similarly triggered a requirement for the applicant to request water-quality certifications from California and Oregon. *Hoopa Valley Tribe*, 913 F.3d at 1101. The applicant proposed to relicense only some of the existing dams in the project and to decommission others; in the

course of negotiations about the proposed decommissioning, the applicant and the States "agreed to defer the one-year statutory limit for Section 401 approval by annually withdrawing-and-resubmitting the water quality certification requests." *Ibid.* A third party challenged that agreement in proceedings before FERC, arguing that the States had waived their Section 401 certification authority. *Id.* at 1102. The Commission found that the States had not waived their authority, *ibid.*, but the court of appeals disagreed. The court viewed the case as concerning "a written agreement with the reviewing states to delay water quality certification," and held that Section 401's statutory one-year period for acting on a certification request does not permit such a tolling arrangement. *Id.* at 1104.

Here, the court of appeals found petitioners' reliance on *Hoopa Valley Tribe* to be unavailing. Pet. App. 6a-10a. The court explained that *Hoopa Valley Tribe* had involved "a written agreement that obligated the state agencies, year after year, to *take no action at all* on the applicant's § 401 certification request," *id.* at 6a (citation omitted), whereas the State Board in this case repeatedly took action on the requests before it within the one-year deadline by denying them. The court also explained that petitioners' certification requests in this case "were not complete" and thus "were not ready for review" under state law when the Board denied them—again unlike the circumstances in *Hoopa Valley Tribe*, where the requests had been "'complete and ready for review for more than a decade.'" *Id.* at 8a (citation omitted).

Petitioners sought rehearing en banc, which the court of appeals denied without any noted dissent. Pet. App. 71a-72a.

ARGUMENT

Petitioners contend (Pet. 17-27) that the State Board waived its water-quality certification authority under Section 401 of the Clean Water Act by issuing what petitioners describe as pro forma letters denying petitioners' certification requests. That contention does not warrant further review. The court of appeals correctly upheld the Commission's determination that the State Board "act[ed]" within the applicable one-year deadline in 33 U.S.C. 1341(a)(1) when the Board denied petitioners' requests based on petitioners' failure to prepare an environmental report required under state law. The decision below does not conflict with any decision of this Court or of another court of appeals. This case would also be an unsuitable vehicle for addressing the circumstances under which a State should be held to have waived its Section 401 certification authority by denying a request without prejudice. After the denials that petitioners challenge here, the State Board in fact *granted* certifications for these projects. Accordingly, the petition for a writ of certiorari should be denied.

1. The decision below is correct. As the Commission and the court of appeals both recognized, the State Board "'acted' within the meaning of section 401(a)(1)" of the Clean Water Act when the State Board denied petitioners' certification requests. Pet. App. 7a (brackets omitted); see *id.* at 64a-65a (Commission's order).

a. Section 401 provides that, 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," then the water-quality certification requirements of Section 401(a) "shall be waived with respect to" the federal licensing or permit application that triggered the Section 401 certification

process. 33 U.S.C. 1341(a)(1). Section 401 "does not define 'failure to act' or 'refusal to act.'" Pet. App. 64a (quoting *Hoopa Valley Tribe* v. *FERC*, 913 F.3d 1099, 1104 (D.C. Cir.), cert. denied, 140 S. Ct. 650 (2019)). In the absence of any specialized definition, the Commission appropriately looked to the "plain language of the statute," *ibid.*, and determined that the State Board had acted by denying petitioners' requests.

Indeed, the State Board "act[ed]" under any reasonable understanding of that term when, within the one-year deadline specified in Section 401, the Board denied petitioners' then-pending certification requests. 33 U.S.C. 1341(a)(1); see Pet. App. 87a-89a, 94a-96a. Denying a request is one of the forms of acting that is expressly contemplated by the text of Section 401. See 33 U.S.C. 1341(a)(1) ("No license or permit shall be granted if certification has been *denied* by the State[.]") (emphasis added). The waiver provision in Section 401 contrasts such a denial with "fail[ing] * * * to act" or "refus[ing] to act." *Ibid.* If a State fails or refuses to act within a reasonable time not to exceed one year, it waives its certification authority; by contrast, if the State denies a pending request, then no federal license may issue for that project. See *ibid.*

In the proceedings below, petitioners nonetheless maintained that the State Board's denials should be treated as failures or refusals to act—thus triggering a waiver, see 33 U.S.C. 1341(a)(1)—because the basis for the denials was "non-substantive," in the sense that the denials did not reflect a judgment about the "technical merits" of petitioners' requests for certification. Pet. App. 62a. The Board's stated basis for the denials was petitioners' failure to complete the CEQA environmental-review process, which at the time prevented the Board

from granting certification. See *id.* at 88a (denial letter explaining that the State Board could "not issue a certification until the requirements for compliance with CEQA are met"); see also pp. 5-7, *supra*.[1]

As the Commission explained, however, the text of Section 401 does not distinguish between actions taken on the basis of "the technical merits of the request" and actions taken for failure to submit all of the environmental information required under state law. Pet. App. 19a (order denying rehearing). The statute establishes a "bright-line rule" under which a State must act on a pending request within one year of receiving it in order not to waive the State's certification authority. *New York State Dep't of Envtl. Conservation* v. *FERC*, 991 F.3d 439, 443, 450 (2d Cir. 2021) (*New York*). But the statute does not further distinguish among the many legitimate substantive or procedural reasons a State may have for denying a particular request.

To be sure, the D.C. Circuit has held that a State may not evade Section 401's one-year deadline by entering into an agreement with the requestor to withdraw and resubmit the same ripe application over and over again, thus effectively tolling the one-year deadline. *Hoopa Valley Tribe*, 913 F.3d at 1104. And following *Hoopa Valley Tribe*, the Commission has applied the same principle to informal agreements that likewise amounted to impermissible tolling, including several

---

[1] It is far from clear that a denial based on failure to complete the CEQA process should be regarded as non-substantive. The CEQA process includes an assessment of water-quality impacts—a point petitioners do not dispute. In denying certification in 2019, the Board stated that completing the CEQA review is relevant to "assur[ing] that an activity will comply with state and federal water quality standards." Pet. App. 95a.

cases involving the same State Board at issue here. See Pet. App. 56a-57a (describing instances in which the Commission has found waiver based on a withdraw-and-resubmit scheme even absent "an explicit agreement"). But this case involves no comparable allegation of collusion between the requestor and the State to circumvent the one-year deadline.

b. Petitioners' criticisms of the decision below lack merit and, in any event, fail to demonstrate any basis for further review by this Court. Petitioners principally contend (Pet. 17) that the decision below permits States to circumvent the one-year deadline by serially denying a request in "*pro forma* letters every 364 days, while directing the requester to resubmit the same request." See Pet. 17-19. But neither the Commission nor the court of appeals indicated that a State may engage in such a series of pretextual denials. The State Board in this case denied petitioners' requests based on petitioners' failure to submit certain environmental information required under state law at the time. And when California law was modified during the pendency of these proceedings to permit the State Board to grant certification before the CEQA process is complete, the Board promptly granted water-quality certifications for these projects. "[B]ased on [that] record," the Commission declined to find waiver here, without purporting to decide whether repeated denials that lack substance might in the future be found to be the equivalent of a withdraw-and-resubmit scheme, and thereby amount to a waiver. Pet. App. 65a.

Petitioners err in asserting (Pet. 10) that the State Board's ultimate issuance of the certifications "demonstrat[ed] that the Board never needed additional information." As just explained, although petitioners had

still failed to complete the CEQA process by that time, "California law had changed to allow the California Board to grant certification prior to the completion of that process." Pet. App. 5a; see Pet. 11 (acknowledging the statutory changes). Under California law as amended, the State Board can grant certification even in the absence of complete CEQA information when doing so is necessary to avoid the risk of waiving the State's certification authority under Section 401. Cal. Water Code § 13160(b)(2) (West Supp. 2022). And to the extent that petitioners contend that the State Board lacked a legitimate reason to deny their requests, petitioners' remedy lay with the state courts. See Pet. App. 64a (Commission's observation that "it is not the Commission's role to review the appropriateness of a state's decision to deny certification," and that review on that basis "falls squarely within the state court's purview").[2]

Petitioners also never explain why the State Board would have had any reason to seek to delay certification in this case. The projects at issue here are already operable and are not currently subject to water-quality licensing conditions imposed pursuant to Section 401. The La Grange project has never been licensed by FERC, and the Don Pedro Project is currently operating under one-year licenses from FERC that maintain the terms and conditions of an expired 50-year license that was granted before the enactment of Section 401.

---

[2] Petitioners contended below that they lacked an opportunity to seek state-court review of the State Board's first two sets of denials because those denials were "without prejudice" to resubmission and therefore, according to petitioners, did not constitute final agency action under state law. See Pet. App. 65a. The Commission found that petitioners had failed to substantiate that contention, see *ibid.*, and petitioners do not repeat it in this Court.

See pp. 4-5, *supra*. Under these circumstances, the State Board would seem to have a substantial incentive to grant certification in a timely manner and thus permit FERC to move forward with licensing proceedings that could culminate in licenses incorporating the water-quality conditions specified by the Board.

Petitioners' remaining arguments (Pet. 22-27) are also unavailing. Nothing about the decision below renders any language in Section 401 "inoperative or superfluous." Pet. 22 (quoting *Corley* v. *United States*, 556 U.S. 303, 314 (2009)). The one-year deadline continues to have real force and effect even if a State may "act" (and thus avoid waiver) by denying a request without prejudice to the applicant resubmitting another request in the future, as the State Board did here. 33 U.S.C. 1341(a)(1). To the extent that petitioners continue to maintain (*e.g.*, Pet. 23) that Section 401 should be interpreted to mean that a State must always adjudicate the technical merits of a pending water-quality certification request within one year, petitioners still fail to identify any textual basis for imposing such a requirement. Section 401 does not, by its plain terms, draw any distinctions among the valid grounds that a State may invoke in denying a certification request, and petitioners' arguments (Pet. 23-24) about purpose and legislative history do not support reading such unstated distinctions into the statute.[3]

---

[3] Petitioners repeatedly invoke (Pet. 1, 2, 3, 7, 20, 21, 24, 27) a floor statement in which a Member of Congress referred to preventing "dalliance or unreasonable delay" by certifying States. 115 Cong. Rec. 9264 (1969) (statement of Rep. Edmondson). That statement did not refer to the text of Section 401, but rather to an earlier proposal that would have permitted the federal licensing agency to determine the amount of time the state certifying agency would have

Petitioners are correct that the one-year deadline is designed to address concerns about "'unreasonable delay' by States." Pet. 27 (citation omitted). But the structure and purpose of the Clean Water Act as a whole make clear that Congress gave the States an important role in the process of granting a federal license or permit for activities covered by Section 401. The Act effectively gives States a limited "veto power": a federal license or permit cannot issue if the relevant State denies a water-quality certification. *Keating* v. *FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (citation omitted); see 33 U.S.C. 1341(a)(1); see also, *e.g.*, *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006) (explaining that "[s]tate certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution"); *Alcoa Power Generating Inc.* v. *FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011) (noting that Section 401 is one of the "primary mechanisms" through which States exercise their role under the Clean Water Act) (citation omitted). The role that the Act assigns to States in the water-quality certification process is inconsistent with petitioners' position here, which would call for FERC to superintend the state certification process—disregarding some denials and accepting others, based on criteria that petitioners never fully articulate.

Finally, petitioners err in relying (Pet. 2, 14-15, 17, 25) on a colloquy during oral argument before the D.C. Circuit, in which a member of that court posited a

---

had to act. See *ibid.* (quoting proposed text). As actually enacted, Section 401 expressly reflects a judgment by Congress that acting within one year is "reasonable." 33 U.S.C. 1341(a)(1) (referring to a "reasonable period of time (which shall not exceed one year)"). The State Board satisfied that deadline here.

hypothetical California law mandating the completion of a 100-year-long CEQA process as a prerequisite to granting water-quality certifications. The decision below would not commit the Commission or the court of appeals to any particular position on whether a State that deliberately manipulates its laws to ensure that Section 401 certifications cannot be granted within a reasonable time has waived its certification authority. As already explained (see pp. 14-15, *supra*), California has in fact moved in the opposite direction, authorizing the State Board to grant certifications in some circumstances even when the CEQA process is not complete.

2. Petitioners do not identify any substantial basis for further review. They do not contend that the decision below conflicts with a decision of this Court of any other court of appeals, and it does not. The Second Circuit has recently confirmed that a State "acts" within the meaning of Section 401 if it denies a certification request on the ground that the request "requires supplementation" with additional information, as the State Board did here. *New York*, 991 F.3d at 450 n.11 (citing *New York State Dep't of Envtl. Conservation* v. *FERC*, 884 F.3d 450, 456 (2d Cir. 2018)); accord Pet. App. 7a (citing both Second Circuit decisions with approval). The courts of appeals have also uniformly recognized, consistent with the text of Section 401 and common sense, that denying a request is a form of "act[ing]" on that request. 33 U.S.C. 1341(a)(1); see, *e.g.*, *California State Water Res. Control Bd.* v. *FERC*, 43 F.4th 920, 924-925 (9th Cir. 2022), petition for cert. pending, No. 22-743 (filed Feb. 6, 2023); *Millennium Pipeline Co.* v. *Seggos*, 860 F.3d 696, 698 (D.C. Cir. 2017).

Petitioners assert (Pet. 19) that the decision below nonetheless warrants further review on the theory that

it enables States to "nullify Section 401's federal one-year rule" and thereby frustrate important federal licensing proceedings. But that assertion merely reflects petitioners' own misreading of the D.C. Circuit's decision and the Commission's orders. Neither the court of appeals nor FERC held that a State may indefinitely delay federal licensing proceedings by issuing serial pro forma denial letters requiring repeated resubmissions of the same request as a way to circumvent the one-year deadline. FERC and the court also correctly rejected petitioners' effort (Pet. 21) to analogize this case to the D.C. Circuit's earlier decision in *Hoopa Valley Tribe*, which involved an explicit agreement between the applicant and the relevant state agencies to repeatedly withdraw and resubmit the same already-ripe request during settlement negotiations. See Pet. App. 7a-8a, 24a-28a, 60a. And even if petitioners had demonstrated any tension between this case and *Hoopa Valley Tribe*, such an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

3. This case would also be an unsuitable vehicle for further review in any event. Petitioners ask this Court to address a question concerning the hypothetical prospect of a State repeatedly issuing "*pro forma* letters every 364 days" to delay making a Section 401 certification decision "for as many years as a State wishes to delay." Pet. i. But those concerns are not implicated on the facts of this case. First, the State Board's denials did not rest on pro forma boilerplate but rather cited a case-specific reason—namely, petitioners' own failure to prepare the required CEQA information. Second, the State Board in fact *granted* water-quality certifications for

both projects after the changes to California law discussed above. See pp. 7-8, *supra*. Petitioners are presently challenging those certifications in state court. The effect of finding a waiver here would thus not be to terminate a State's indefinite delay, but rather to relieve petitioners of the water-quality licensing conditions that the State Board determined to be appropriate as an exercise of its authority under Section 401. Petitioners do not identify any sound basis for addressing their concerns about indefinite delay in a case in which the State Board has already acted.

In addition, further review is unwarranted at this time because the procedures for granting or denying certification under Section 401 are currently the subject of ongoing rulemaking proceedings. In 2020, the Environmental Protection Agency (EPA) promulgated a rule setting forth requirements for Section 401 certifications, including provisions to address waiver. See 85 Fed. Reg. 42,210, 42,286 (July 13, 2020). The 2020 rule is not directly at issue here. As the Commission explained, the denials in this case occurred before the effective date of the 2020 rule. Pet. App. 23a. Also, EPA has since announced a new rulemaking with regard to Section 401, 86 Fed. Reg. 29,541, 29,542 (June 2, 2021), and those rulemaking proceedings remain pending, see 87 Fed. Reg. 35,318, 35,377-35,381 (June 9, 2022) (notice of proposed new Section 401 rule).[4] Those ongoing

[4] The 2020 rule that contained provisions relevant to the issue in this case has been the subject of several challenges. When EPA announced its intent to engage in further rulemaking, it invited the district court in which one of those challenges had been brought to remand the 2020 rule to the agency without vacatur. The district court instead remanded *with* vacatur in an order that this Court later stayed pending further litigation. *Louisiana* v. *American*

proceedings counsel against further review here, in a case governed by the prior regulatory framework.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

MATTHEW R. CHRISTIANSEN
General Counsel
ROBERT H. SOLOMON
Solicitor
JARED B. FISH
Attorney
Federal Energy Regulatory Commission

MARCH 2023

Rivers, 142 S. Ct. 1347 (2022); see Gov't Mem. in Opp. at 6-12, *American Rivers*, *supra* (No. 21A539) (procedural history). The Ninth Circuit recently held that the district court erred in vacating the rule and reversed that aspect of the court's order. See *In re Clean Water Act Rulemaking*, No. 21-16958 (Feb. 21, 2023), slip op. 20, 30-31. The 2020 rule thus remains in force, although it does not apply here for the reasons explained above.