ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 20-72432, 20-72452, 20-72782,
20-72800, 20-72958, 20-72973
(Consolidated)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, ET AL.,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For Review Of Agency Action By
The Federal Energy Regulatory Commission,

BRIEF OF NATIONAL HYDROPOWER ASSOCIATION AND NORTHWEST HYDROELECTRIC ASSOCIATION AS *AMICI CURIAE IN SUPPORT OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION*

CHARLES R. SENSIBA
Counsel of Record
MORGAN M. GERARD
TROUTMAN PEPPER HAMILTON
SANDERS LLP
401 9th Street, NW
Suite 1000
Washington, DC 20004
(202) 274-2850 (CS)
(202) 274-2897 (MG)
charles.sensiba@troutman.com
morgan.gerard@troutman.com

ANDREA W. WORTZEL
TROUTMAN PEPPER HAMILTON
SANDERS LLP
1001 Haxall Point
Richmond, VA 23218
(804) 697-1406
andrea.wortzel@troutman.com
Attorneys for the Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioners provide the following corporate disclosure statements:

1. National Hydropower Association ("NHA") is a non-profit trade association that represents and advocates on behalf of the hydropower industry. NHA has more than 240 members from all segments of the industry. NHA has no parent company or stockholders.

2. Northwest Hydroelectric Association ("NWHA") is a non-profit trade association that represents and advocates on behalf of the Northwest hydropower industry. NWHA has over 135 members from all segments of the industry. NWHA has no parent company or stockholders.

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GLOSSARY

***Alcoa Power*:**	*Alcoa Power Generating Inc. v. FERC,* 643 F.3d 963, 972 (D.C. Cir. 2011).
Applicants:	Nevada Irrigation District for the Yuba-Bear Hydroelectric Project (FERC Project No. 2266), Merced Irrigation District for the Merced River Project (FERC Project No. 2179) and Merced Falls Hydroelectric Project (FERC Project No. 2467), and Yuba County Water Agency for the Yuba River Hydroelectric Project (FERC Project No. 2246)
California Board:	California State Water Resources Control Board
CEQA:	California Environmental Quality Act, Cal. Pub. Res. Code § 21000 *et seq*.
Commission:	Federal Energy Regulatory Commission
CWA:	Clean Water Act, 33 U.S.C. §§ 1251–1387
D.C. Circuit:	United States Court of Appeals for the District of Columbia Circuit.
Environmental Petitioners:	The South Yuba River Citizens League, California Sportfishing Protection Alliance, Friends of the River, and Sierra Club and its Mother Lode and Tehipite Chapters
FPA:	Federal Power Act, 16 U.S.C. §§ 791-825r (2018)
FERC:	Federal Energy Regulatory Commission

FERC Orders:	*Merced Irrigation Dist.*, 171 FERC ¶ 61,240 (2020) *on reh'g*, 172 FERC ¶ 62,098 (2020); *Nev. Irrigation Dist.*, 171 FERC ¶ 61,029 (2020), *on reh'g*, 172 FERC ¶ 61,082 (2020); *Yuba Cnty. Water Agency*, 171 FERC ¶ 61,139 (2020), *on reh'g*, 172 FERC ¶ 61,080 (2020).
Fourth Circuit:	United States Court of Appeals for the Fourth Circuit
***Hoopa Valley*:**	*Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019).
Hydropower *Amici*:	NHA and NWHA
***McMahan*:**	*N.C. Dep't of Envtl. Quality v. FERC*, 3 F.4th 655, 770 n.5, 671 (4th Cir. 2021).
***New York II*:**	*N.Y. State Dep't of Env't Conservation v. FERC*, 991 F.3d 439 (2d Cir. 2021).
NHA:	National Hydropower Association
NWHA:	Northwest Hydroelectric Association
***PUD No. 1*:**	*PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994).

OVERVIEW OF *AMICI*

The National Hydropower Association ("NHA") and Northwest Hydroelectric Association ("NWHA") (together, "Hydropower *Amici*") are non-profit trade associations that consist of electric utilities, water districts, and other hydropower project owners and operators from across the nation, all of whom may be affected by this Court's decision in this case.[2] The Hydropower *Amici* engage with their membership on a wide range of regulatory activities affecting the hydropower industry nationwide, including obtaining Clean Water Act ("CWA") 401 certifications. 33 U.S.C. § 1341 (2018). Additionally, several individual members of Hydropower *Amici*'s associations are currently in the Federal Energy Regulatory Commission ("FERC" or "Commission") licensing process.

NHA is a national non-profit association dedicated exclusively to advancing the interests of the United States hydropower industry, including conventional, pumped storage, and new hydrokinetic technologies. NHA promotes the role of hydropower as a clean, renewable, and reliable energy source that advances national environmental and energy policy objectives. NHA's membership consists of more than 240 organizations, including public power utilities, investor-owned utilities,

[2] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Hydropower *Amici* state that no counsel for any party to this case authored this brief in whole or in part, and no person other than *amici* and their members made monetary contributions to the preparation and submission of this brief. The Parties have consented to the filing of this brief.

independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

NWHA is a non-profit trade association that represents and advocates on behalf of the Northwest hydroelectric industry. NWHA has over 135 members from all segments of the industry. NWHA is dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy source while protecting the fisheries and environmental quality that characterize the region.

STATEMENT OF INTEREST

This Court's decision could have far-reaching impacts on the nation's hydropower industry and supply of electric energy. Hydropower projects are subject to extensive permitting and regulatory review. It is vital to these projects that the permitting process, including the timeline for permit issuance, be well understood. Section 401 certification is an important component of the hydropower licensing process. This case will provide much-needed clarity about the Section 401 certification process, and the application of the one-year review period specified in the CWA.

Hydropower projects are an important source of renewable electric power, accounting for approximately seven percent of national electric production each year

and over one-third of the country's total renewable energy.[3] Hydropower resources provide a multitude of benefits, including grid stability and reliability, and enable many states to achieve their renewable energy resource goals.[4] Hydropower is likely to increase in importance as the United States works to address climate change impacts and reduce its dependency on fossil fuels. In addition to hydropower projects being renewable in and of themselves, certain hydro projects, such as hydro-pumped storage projects, directly support the deployment of energy generated by wind and solar projects that may generate power intermittently. In addition to electricity production, hydropower projects provide numerous other benefits to the communities where they are located, such as municipal and industrial water supply, navigation, flood control, irrigation, recreation, and fish and wildlife habitat.

Almost all non-federally owned hydropower projects are subject to the Federal Power Act's ("FPA") comprehensive regulatory regime. 16 U.S.C. §§ 791-825r (2018). Congress enacted the FPA (and its predecessor statute, the Federal Water Power Act of 1920) "to secure a comprehensive development of national resources." *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S.

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[3] U.S. Energy Information Administration, Hydropower explained, https://www.eia.gov/energyexplained/hydropower/ (last visited Nov. 27, 2021).

[4] U.S. Department of Energy, Hydropower Vision: A New Chapter for America's 1st Renewable Electricity Source, at 373 (2016), *available at* http://energy.gov/sites/prod/files/2016/10/f33/Hydropower-Vision-10262016_0.pdf.

152, 180-81 (1946). Under the FPA, FERC has exclusive authority to issue licenses authorizing the construction, operation, and maintenance of new and existing hydroelectric projects. *See* 16 U.S.C. §§ 797(e), 808, 817. In carrying out its statutory responsibilities, FERC is required to consider a range of factors affecting the public interest in the comprehensive development of a waterway and to impose appropriate conditions to protect the environment, including water quality. *See id.* §§ 797(e), 803(a)(1). In addition to the FPA, hydropower projects are subject to the requirements of a variety of environmental statutes, such as the National Environmental Policy Act, Fish and Wildlife Coordination Act, Endangered Species Act, Coastal Zone Management Act, Federal Land Policy and Management Act, and the National Historic Preservation Act. To meet all of its statutory requirements for a complete and robust environmental review, FERC has prescribed licensing and relicensing processes (which typically take more than three years to complete) that expressly afford multiple opportunities for states and other participants to submit studies, comment on the licensing proposal, and otherwise shape the regulatory outcomes for the project.

Crucially, FERC cannot issue a license for a hydropower project unless the state where a discharge occurs issues a water quality certification under Section 401 of the CWA or waives its authority to do so, 33 U.S.C. § 1341; *see PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 722 (1994) ("*PUD No. 1*");

Am. Rivers, Inc. v. FERC, 129 F.3d 99, 110 (2d Cir. 1997). This certification process is grounded in cooperative federalism. It ensures that states have a voice in federal permitting actions, while also protecting the integrity and timeliness of the federal permitting process.

The state's voice in the process is focused on discharges to navigable waters associated with the project subject to the federal permitting action. States can impose conditions in the FERC license necessary to ensure that the discharge will comply with the state's water quality standards. Under FERC's rules, a license applicant is not required to request Section 401 certification from the state until relatively late in the licensing process, after all FERC-approved studies have been completed and any deficiencies in the license application have been cured. 18 C.F.R. § 5.22. Thus, the states have the benefit of participating in the development of environmental studies and information and reviewing detailed project impact information when making their certification decisions.

The federal permitting process is protected through the establishment of a one-year time period in which the state must make its certification decision. While states often prescribe their own procedural requirements for applying for and obtaining the certification, those requirements must be completed within the one-year period. 33 U.S.C. § 1341(a)(1). The purpose of the waiver provision "is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water

quality certification under Section 401." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) ("*Alcoa Power*").

These consolidated cases involve questions regarding the application of the one-year review period, and whether states have the ability to extend the one-year period either by a scheme to withdraw-and-refile the request or by an extended state review process. It is important to the hydropower industry that the one-year maximum review period specified in the CWA be protected, and that these state mechanisms to extend the mandatory one-year review period not be allowed. Protecting the Section 401 one-year review period provides certainty and clarity to the hydropower licensing process, and prevents unnecessary and costly delays.

Enforcing the rule is critical to ensuring a timely hydropower licensing process. *See N.Y. State Dep't of Env't Conservation v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018). A contrary decision by this Court would have widespread ramifications on the hydropower industry, as well as other significant infrastructure projects requiring federal approvals.

STATEMENT OF THE ISSUE PRESENTED

1. Whether FERC reasonably determined that the California State Water Resources Control Board ("California Board") waived its CWA Section 401 certification authority by failing to approve or deny applicants' requests within the statutorily established maximum one-year period.

A. Whether, in making this determination, FERC correctly concluded that states cannot extend the statutory one-year period through a withdrawal-and-resubmission scheme.

B. Whether, in making this determination, FERC correctly concluded that a state cannot extend the statutory one-year period by imposing additional review requirements or procedural processes that cannot be completed within the one-year period.

SUMMARY OF THE ARGUMENT

Hydropower *Amici*'s brief is limited to the sole issue of whether FERC appropriately determined that the California Board waived the Section 401 certification for the hydroelectric projects. FERC's determinations were consistent with the plain language of CWA Section 401, which provides that a state has a period "not to exceed one year" to act on a pending certification request. 33 U.S.C. § 1341(a)(1). The purpose of this language, as reflected in the legislative history and described in case law, is to avoid having state review delay the federal permitting process. With respect to hydropower projects, state inaction on a Section 401 certification request has, in some cases, delayed the FERC licensing process by more than a decade. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) ("*Hoopa Valley*").

In these consolidated cases, the California Board filed petitions for review challenging six FERC orders affecting four hydroelectric projects, each finding that the California Board waived its authority under Section 401 by failing to act within one year from the date it received an application. *Merced Irrigation Dist.*, 171 FERC ¶ 61,240 (2020) *on reh'g*, 172 FERC ¶ 62,098 (2020); *Nev. Irrigation Dist.*, 171 FERC ¶ 61,029 (2020), *on reh'g*, 172 FERC ¶ 61,082 (2020); *Yuba Cnty. Water Agency*, 171 FERC ¶ 61,139 (2020), *on reh'g*, 172 FERC ¶ 61,080 (2020) (together, "FERC Orders").[5] The South Yuba River Citizens League, California Sportfishing Protection Alliance, Friends of the River, and Sierra Club and its Mother Lode and Tehipite Chapters ("Environmental Petitioners") also filed petitions with this Court to review the FERC Orders. FERC's findings were based on its conclusion that a state and applicant may not engage in a coordinated withdraw-and-refile process to extend the one-year period under the CWA.

FERC correctly enforced the bright-line, one-year rule codified in the CWA, consistent with the cooperative federalism framework established by Section 401. *PUD No. 1*, 511 U.S. 700, 722. Section 401 provides states an important role;

[5] The water quality certification applicants involved in the consolidated cases are: (1) Nevada Irrigation District for the Yuba-Bear Hydroelectric Project (FERC Project No. 2266); (2) Merced Irrigation District for the Merced River Project (FERC Project No. 2179) and Merced Falls Hydroelectric Project (FERC Project No. 2467); (3) and Yuba County Water Agency for the Yuba River Hydroelectric Project (FERC Project No. 2246) (together, "Applicants").

however, that role is not unbounded—states must exercise their authority within the one-year deadline specified in Section 401. The records in the consolidated cases demonstrate that, in each of the cases, the California Board participated in a coordinated scheme to unlawfully extend the one-year deadline to rule on the Applicants' certification requests.

As recognized by the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit") in *Hoopa Valley*, these delays usurp Congress's authority, undermine FERC's jurisdiction to regulate federal licensing of hydropower projects, and inhibit FERC's critical role in protecting the public interest in hydropower projects. 913 F.3d at 1104-05. Allowing the California Board's extensions through a withdraw-and-resubmit scheme or other extended state procedural review process would disrupt the federal permitting process, and would do so in a manner that evades judicial review by avoiding making a final decision. Such practices harm both project proponents and the public.

If this Court determines that the California Board can extend its review period under Section 401, there is a real risk of other states adopting similar practices that allow them to indefinitely delay the federal permitting process. This is a particular challenge in hydropower licensing. As FERC has recognized: "[T]here are relicensing proceedings that have been pending for many years awaiting water quality certification . . . . Of 43 pending license applications regarding which our

staff has completed its environmental analysis, 29 (67 percent) are awaiting water quality certification." *PacifiCorp*, 149 FERC ¶ 61,038 at P 13 & n.15 (2014). For new projects in an original licensing proceeding, these delays impact project financing and construction, and potentially delay service to customers. For existing projects, delays can also hinder the implementation of agreed-upon environmental improvements or upgrades sought by federal agencies or the public. Hydropower *Amici*, therefore, request this Court to deny the petitions for review and affirm FERC's decisions.

FERC's determinations are consistent with the plain language of CWA Section 401, and prevent states from devising methods to extend the one-year deadline specified therein. Contrary to Petitioners' claims, affirming the FERC Orders below would protect, rather than frustrate, the cooperative federalism process intended by Congress.

ARGUMENT

I. FERC Properly Concluded That the California Board Waived Its 401 Authority by Failing to Act Within One Year.

A. One Year Is the "Absolute Maximum" Time Period Provided by CWA Section 401 for States to Act on a 401 Certification Request.

Section 401 of the CWA provides that a state "waive[s]" its authority to issue a Section 401 certification "[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." 33 U.S.C. § 1341(a)(1). This language reflects Congress's goal with Section 401—"to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401." *Hoopa Valley*, 913 F.3d at 1101 (quoting *Alcoa Power*, 643 F.3d at 972) (brackets omitted). In reviewing the text of Section 401, the court in *Hoopa Valley* noted that "[t]he temporal element imposed by the statute is 'within a reasonable period of time,' followed by the conditional parenthetical, '(which shall not exceed one year).' Thus, . . . a full year is the absolute maximum. . . ." *Hoopa Valley*, 913 F.3d at 1103-04. Consistent with *Hoopa Valley*, the United States Court of Appeals for the Second Circuit in *N.Y. State Dep't of Env't Conservation v. FERC*, 991 F.3d 439 (2d Cir. 2021) ("*New York II*"), held that Section 401's text "outlines a bright-line rule," providing that a state waives the certification requirement if its action is not completed within one year. *Id.* at 447.

To preserve the bright-line, one-year rule, no exceptions can be permitted, regardless of the method, length of delay, or whom it benefits—otherwise, these exceptions will swallow the statutorily imposed rule. Any court-sanctioned exception would remove the regulatory certainty expressly established by Congress to preserve federal permitting programs. Such exceptions would also adversely impact an applicant's ability to maintain the investment dollars and schedules associated with highly complex infrastructure projects. Hydropower projects, for

example, often require numerous permits and reviews at the federal, state, and local levels—requiring precise planning and scheduling to keep a project on track for regulatory permitting, financing, and ultimate development. Moreover, in the case of license reissuance for existing projects, such delays hamper the implementation of agreed-upon environmental improvements and upgrades. As the D.C. Circuit has recognized, regulatory delays in FERC hydropower licensing create hardships in light of "congressional recognition that significant capital investments cannot be made in hydropower projects without the certainty and security of a multi-decade license." *Alcoa Power*, 643 F.3d 970. Congress established a maximum time period by statute; that statutory deadline serves an essential purpose in federal licensing and permitting. Section 401 simply "contains no provision authorizing either the Commission or the parties to extend the statutory deadline." *Cent. Vt. Pub. Serv. Corp.*, 113 FERC ¶ 61,167 at P 16 (2005).

For the first time on appeal and based on United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") *dicta*, *N.C. Dep't of Envtl. Quality v. FERC*, 3 F.4th 655, 670 n.5, 671 (4th Cir. 2021) ("*McMahan*"), the California Board and Environmental Petitioners now suggest that it is not a final decision on a Section 401 certification that is required within one year. *See, e.g.*, Cal. Br. 60-61; Env. Br. 27. Rather, they argue that the phrase "to act" implies that any step taken by a state to process a 401 certification request within a one-year period satisfies the requirement.

Cal. Br. 61 (opining that a state only waives when it is "deliberately or contractually idle").

While "failure to act" or "refusal to act" are not expressly defined in the statute, their meanings are plain when reviewed in the context of Section 401. *See Hoopa Valley*, 913 F.3d at 1104. 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, the certification requirements of this subsection shall be waived with respect to such federal application." 33 U.S.C. § 1341(a)(1). The next sentence in this provision reads, "No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence." *Id.* Thus, a state must issue or deny a request within the one-year period, or the opportunity to take such action is waived.

This language reflects Congressional intent to provide states with the opportunity to meaningfully participate in the federal permitting of projects with water discharges, and to ensure that state participation does not disrupt the federal permitting process. The interpretation suggested by the California Board and Environmental Petitioners would do the opposite. It would allow California to take an undefined amount of time to review and approve or deny Section 401 certification requests, so long as it is taking "meaningful action." This also leads to greater

uncertainty because FERC would have to continuously assess on a case-by-case basis whether a given state is taking action and then if those actions are meaningful—a metric for which there is absolutely no standard. This assessment would have to be conducted at least on a year-by-year basis if the certification had not been approved or denied, which provides no clarity to applicants and the public on the state's timeline. This makes no sense and would undermine the bright-line time period established by Congress. As the D.C. Circuit has explained, frustration of the federal permitting process "would occur if the State's inaction, *or incomplete action*, were to cause the federal agency to delay its licensing proceeding." *Alcoa Power*, 643 F.3d at 972 (emphasis added).

B. The California Board Waived Its Section 401 Authority by Orchestrating a Withdraw-and-Refile Scheme to Extend the One-Year Deadline

Hoopa Valley condemned a "scheme" where the state works with the requester to withdraw and resubmit an identical certification request before the expiration of the one-year statutory period in an effort to restart the one-year clock. 913 F.3d at 1103, 1105; *see also New York II*, 991 F.3d at 450 n.11. That is precisely what the California Board did here. As explained in *New York II*, Section 401's straightforward text does not permit state action to blur the bright-line rule it establishes. 991 F.3d at 448. Doing so would change the bright-line rule into a subjective standard. *Id.* at 448–50.

The record demonstrates that the California Board actively promoted and engaged in a scheme to extend the statutory one-year deadline multiple times: six times for the Yuba-Bear Hydroelectric Project (FERC Project No. 2266), four times for the Merced River Project (FERC Project No. 2179) and Merced Falls Hydroelectric Project (FERC Project No. 2467), and one time for Yuba River Hydroelectric Project (FERC Project No. 2246). The rationale behind a state's action to delay certification is irrelevant. The statute allows no extension beyond one year, whatever the motivation. Weighing motivations to discern if they are sufficiently meritorious results in the same sort of uncertainty and delay that CWA Section 401 explicitly prohibits. This Court should reject any appeal to justify the reason why action beyond the one-year limit is justified. The controlling statute refuses to justify it. Allowing such schemes to stand creates "a statutory loophole" in Section 401 that the states could "exploit" to "hold federal licensing hostage." *Hoopa Valley*, 913 F.3d at 1104.

The California Board and the Environmental Petitioners argue that the one-year clock restarts each time an application is submitted. In making this argument they attempt to differentiate the *Hoopa Valley* case, relying on *dicta* in the Fourth Circuit decision in the *McMahan* case stating that *Hoopa Valley* only applies to circumstances in which the parties enter into a "contractual agreement for agency idleness." *McMahan*, 3 F.4th at 669. However, the *McMahan* Court itself describes

this viewpoint as *dicta*, *see* 3 F.4th at 670,[6] and that *dicta* is wholly contrary to the core holding of *Hoopa Valley*. The D.C. Circuit in *Hoopa Valley* held that the state had waived the certification requirement after it failed to act within one year of the requester's *first* Section 401 certification request. *Hoopa Valley*, 913 F.3d at 1104-05. Moreover, not even the Fourth Circuit surmised that the clock restarts when, like here, the applicant withdraws and resubmits the same certification request, noting instead that "[t]he issue becomes a bit murkier in cases . . . involving the withdrawal and immediate resubmission of the same application." *Id.* at 668.

Finally, the first request in *Hoopa Valley* was filed years before the parties executed the contractual agreement. *Hoopa Valley*, 913 F.3d at 1104–05. The D.C. Circuit found that the Commission should have "found waiver when it first manifested," *id.* at 1105, which was one year after the requester "first filed its requests" in 2006, *id.* at 1104, and years before the parties entered into the contract in 2010, *id.* at 1101. Thus, the *Hoopa Valley* holding was not based on the contractual agreement, but rather on the coordinated withdrawal-and-resubmission process that took place before the written agreement was developed.

[6] *McMahan* held that there was not substantial evidence in the record to support FERC's determination that the North Carolina Department of Environmental Quality coordinated a withdraw-and-refile scheme. The Fourth Circuit specifically stated that it was leaving "the statutory-interpretation question for resolution in a case where the outcome depends on the precise meaning of the statute." 3 F.4th at 671.

The court emphasized that "a full year is the absolute maximum" period in which a state may act, and it cannot be extended by a withdraw-and-resubmit scheme. *Id.* at 1104. Otherwise, extended delays to the federal permitting process could occur.

C. State Law Processes Cannot Override the One-Year Time-Limit Established by CWA Section 401.

Just as a state cannot coordinate a withdraw-and-refile process that extends the statutory one-year period, states cannot impose procedural requirements that are inconsistent with the one-year period. States have an important role to play in reviewing the discharges associated with federally permitted projects, but they must exercise that role within the time period established by Congress in the CWA. Here, at the time of the FERC Orders, the California Board incorporated the withdraw-and-refile scheme into its regulations, recognizing that "the federal period for certification *will expire* before the certifying agency can receive and properly review the necessary environmental documentation." 23 C.C.R. § 3836(c) (emphasis added). The purpose of this provision was to allow time for an extended state environmental review under the California Environmental Quality Act ("CEQA"). *Id.*[7] However, a state cannot adopt policies and procedures that will violate or

[7] The California Legislature recently enacted legislation authorizing the California Board to issue certifications without CEQA documentation under certain circumstances. Cal. Water Code § 13160(b)(2). This legislation signals California's recognition that its prior practice of requiring completion of CEQA (with a process that includes withdrawals-and-resubmissions and denials without prejudice to

override the CWA's one-year deadline. *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 754 (4th Cir. 2019) (recognizing that while states have broad discretion when developing the criteria for their Section 401 certification, federal law imposes requirements on the state, including procedures for public notice); *New York v. United States*, 505 U.S. 144, 145 (1992) ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer states the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."); *Kurns v. R.R. Friction Prod. Corp.*, 565 U.S. 625, 630 (2012) (explaining that "state law is naturally preempted to the extent of any conflict with a federal statute").

In the proceedings below, the California Board claimed that state law prohibited it from issuing the certifications before the completion of the CEQA processes. But this does not protect the California Board from a finding of waiver. Rather, this confirms that California failed or refused to act within one year, and thus the Section 401 certification opportunity was waived.[8] Section 401 does not provide

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extend the CWA Section 401 one-year deadline) is not consistent with CWA Section 401.

[8] Moreover, and as noted above, the FERC licensing process is a multi-year endeavor, which gives states many opportunities to obtain all of the relevant water quality data that they could need to issue a decision on a certification request within one year, as Congress provided. *See supra* pp. 4-5. States have the

any exemption, exclusion, or tolling of the one-year statutory limit to allow other state or federal proceedings to be completed. Accordingly, FERC's determinations that the CEQA review period was not relevant to its determinations that the California Board waived the 401 certifications should be upheld. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *see, e.g., Nev. Irrigation Dist.*, 171 FERC ¶ 61,029, at P 28 (explaining that the CEQA delay is "immaterial").

II. The Petitioners' Policy Arguments Do Not Override the CWA Requirement to Act Within One Year.

A. CWA Section 401 Should Be Enforced Regardless of Any Actions (or Inaction) on the Part of the Applicants.

The California Board argues that the Applicants' participation in the withdraw-and-refile process somehow justifies the Board's failure to act on the certification requests within the one-year time period specified in CWA Section 401. Cal. Br. 77-79. In addition to the fact that an applicant's actions could not, as a matter of law, override a Congressionally established time period, this argument ignores the Board's role in orchestrating the withdraw-and-refile process to avoid having to act within the one-year statutory period. The records for each of the FERC Orders provide overwhelming support that the Applicants repeatedly withdrew and

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opportunity to participate at every step of this process, and there is no policy justification for allowing them to supplement that process by engaging in thinly veiled efforts to evade the CWA's one-year limitation, such as the scheme at issue in this case. *See infra* pp. 19-25.

resubmitted their requests as part of a process coordinated by California Board staff, and to avoid the threat of water quality certification denial. Thus, the Applicants' actions were not unilateral, but rather were done at the prompting of a state regulatory agency, and to avoid threatened consequences of failure to comply.

Expectations by state agencies, such as the California Board, have a powerful influence on entities that are highly regulated. There can be no serious question that the records in these cases demonstrate the expectation on the part of California Board staff that the Applicants would comply with the withdrawal-and-resubmission arrangement in an unlawful attempt to give the California Board more time to act on Applicants' water quality certification requests. Failure to comply with the California Board's scheme would result in serious consequences to the Applicants because, if the state does not grant certification, the federal agency cannot issue the license or permit, and if the state denies certification, the requestor's FERC license application may be put in peril.

The Board also suggests that the one-year period should be extended because of the Applicants' failure to timely pursue the CEQA review process. This is a red herring. Here again, an applicant's alleged delay, if any, in meeting certain application requirements cannot, as a matter of law, have the effect of overriding a statutorily established time-limit. Similarly, a state agency process that cannot be completed within the designated time period does not then supplant the timeline and

process established by federal law. States have the ability to impose procedural requirements on the Section 401 certification process, but only so long as those procedural requirements can be completed within one year. In other words, states cannot create a procedural process where applicants must either agree to a longer time period or face an automatic denial.

B. Denial Without Prejudice Is Not at Issue in This Case.

The California Board argues that FERC's approach to withdrawal-and-resubmission would force it "to prophylactically deny" certification to avoid waiver and that this "would serve no practical purpose." Cal. Br. 52-53. FERC responds that denial of certification "without prejudice" is a way for the state to avoid waiver, although it comes with a risk to the state of litigation if the applicant elects to appeal the denial. FERC Br. 62-65.

Hydropower *Amici* urge this Court not to address the issue of whether denial without prejudice is an "act" within the meaning of Section 401 that meets the one-year deadline, or whether the California Board could have denied Applicants' certification requests without prejudice in lieu of the withdraw-and-refile scheme. FERC's waiver determinations in these consolidated cases were based on the fact that the California Board did not act on the certification requests within the required one-year period, and that the coordinated withdrawal-and-resubmission of the same applications did not extend the review period. Because FERC's waiver

determinations were not based on denial without prejudice, it is not at issue in this case.

Even if denial without prejudice were an issue in this case, which it is not, given the facts of these consolidated cases, here it would have the same effect as the withdrawal-and-resubmission scheme. The California Board's regulations recognize that the CEQA review process will likely take longer than one year, and then offer two options for extending the time period to allow the CEQA review process to be completed: withdraw and resubmit, or receive a denial without prejudice. Thus, the purpose of the denial without prejudice under the California regulations was to allow additional time for the CEQA review to be completed. 23 C.C.R. § 3836(c). As outlined above, this is not permissible under CWA Section 401. States cannot abuse Section 401 by creating a process that cannot be completed within one year and then issue a denial without prejudice to extend the time period while the process is completed.

C. The Language of the Clean Water Act Controls the Outcome, Not FERC's Prior Policies.

The California Board argues that FERC's finding of waiver should be reversed because FERC's "new policy" regarding withdrawal and resubmittal, along with *Hoopa Valley*, should not be applied retroactively. Cal. Br. at 88. This argument ignores the fact that what is being applied here is the requirement of

Section 401 of the CWA. This provision predates the *Hoopa Valley* decision and FERC's policies (old and new). FERC appropriately found that the Section 401 certifications were waived because the California Board failed to take action on the applications within one year. The FERC waiver decisions were based squarely on the language of the CWA.

The fact that FERC's decision was consistent with the *Hoopa Valley* decision and current FERC policy does not mean that the legal requirements that apply to Section 401 certifications changed. Those requirements have always applied, and were appropriately implemented here.

III. FERC's Decision Is Consistent with CWA Section 401 and Promotes Certainty and Consistency in Hydropower Licensing.

An adherence to the text and purpose of CWA Section 401 allows project proponents to have regulatory certainty and for the stakeholders to effectively participate in the process. The California Board's extensions, whether through a coordinated withdrawal-and-resubmission scheme, denials without prejudice, or other methods, allow it to evade the processes of judicial review that harms both project proponents and shuts out the public. In fact, *Hoopa Valley* was a case brought by a third-party Tribe that, while a stakeholder to the FERC and California Board processes, was unable to halt the continuous withdrawal-and-resubmission scheme until it petitioned FERC for relief. Such an extreme bar for public

stakeholders to receive relief is certainly not the framework that was envisioned by Congress in drafting a clear time requirement into the statute. Until the D.C. Circuit's decision, a state's use of the variety of extension methods was generally able to evade scrutiny.

While the FERC regulations specifically describe a carefully timed and orchestrated process, in practice, the timing of the state water quality certification issuance essentially ignores the Section 401 one-year deadline. Uncertainties and delays in the water quality certification process have been identified as a long-standing and widespread problem. FERC, Report to Congress on Hydroelectric Licensing Policies, Procedures, and Regulations; Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000, at 16 (May 2001), *available at* https://www.ferc.gov/sites/default/files/2021-11/20010510-0721_00058e69-66e2-5005-8110-c31fafc91712.zip. Numerous federal reports discuss the extensive delays caused by state certification delays that are harmful to license applicants, the public, and potentially the environment. Some hydroelectric facilities operate pursuant to licenses issued by FERC in the 1950s and 1960s, before the enactment of bedrock environmental laws. Until FERC issues a new license, the terms of the old license continue to apply. Thus, state delay in the certification process delays the effectiveness of new license conditions that could mitigate hydroelectric project environmental impacts. Licensees are hesitant to voluntarily

make such improvements as the water quality certification, when issued, is incorporated into the FERC license and may deviate from the prospective licensee's investments.

CONCLUSION

For the reasons set forth above, Hydropower *Amici* respectfully request that this Court deny the petitions for review and affirm FERC's decision.

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Respectfully Submitted,

CHARLES R. SENSIBA
Counsel of Record
MORGAN M. GERARD
TROUTMAN PEPPER HAMILTON SANDERS LLP
401 9th Street, NW
Suite 1000
Washington, DC 20004
(202) 274-2850 (CS)
(202) 274-2897 (MG)
charles.sensiba@troutman.com
morgan.gerard@troutman.com

ANDREA W. WORTZEL
TROUTMAN PEPPER HAMILTON SANDERS LLP
1001 Haxall Point
Richmond, VA 23218
(804) 697-1406
andrea.wortzel@troutman.com
Attorneys for the Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation designated by the Court order dated July 30, 2021 because this brief contains 5,612 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32.1.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 14-point Times New Roman font.

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ANDREA W. WORTZEL
TROUTMAN PEPPER
HAMILTON SANDERS LLP
1001 Haxall Point
Richmond, VA 23218
(804) 697-1406
andrea.wortzel@troutman.com
Attorney for the Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2021, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: December 13, 2021

ANDREA W. WORTZEL
TROUTMAN PEPPER
HAMILTON SANDERS LLP
1001 Haxall Point
Richmond, VA 23218
(804) 697-1406
andrea.wortzel@troutman.com
Attorney for the Amici Curiae