Case Nos. 20-1655 (L), 20-1671

In the United States Court of Appeals for the Fourth Circuit

NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY,
Petitioner,

and

PK VENTURES I LIMITED PARTNERSHIP,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF MERCED IRRIGATION DISTRICT, NATIONAL HYDROPOWER ASSOCIATION, NEVADA IRRIGATION DISTRICT, NORTHWEST HYDROELECTRIC ASSOCIATION, PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, SOUTH FEATHER WATER AND POWER AGENCY, AND YUBA WATER AGENCY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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CORPORATE DISCLOSURE STATEMENT

Merced Irrigation District ("MID") is an irrigation district organized under the laws of the State of California. MID has no parent company or stockholders.

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.

Nevada Irrigation District ("NID") is an irrigation district organized under the laws of the State of California. NID has no parent company or stockholders.

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.

Public Utility District No. 1 of Snohomish County, Washington ("Snohomish") is a municipal corporation and consumer-owned electric utility that owns and operates several hydropower projects in Washington State. Snohomish has no parent company or stockholders.

South Feather Water and Power Agency ("SFWPA") is a California Irrigation District formed to provide treated and raw water service to its thousands of customers. SFWPA has no parent company or stockholders.

Yuba Water Agency ("YWA") is a public agency created by the State of California to develop and promote the beneficial uses and regulation of the water resources of Yuba County. YWA has no parent company or stockholders.

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OVERVIEW OF *AMICI*

Merced Irrigation District ("MID"), National Hydropower Association ("NHA"), Nevada Irrigation District ("NID"), Northwest Hydroelectric Association ("NWHA"), Public Utility District No. 1 of Snohomish County, Washington ("Snohomish"), South Feather Water and Power Agency ("SFWPA"), and Yuba Water Agency ("YWA") (together, "Hydropower *Amici*") consist of electric utilities, water districts, and other hydropower project owners and operators from across the nation, as well as trade associations representing the range of regulatory activities affecting the hydropower industry nationwide, all of whom may be affected by the Court's decision in this case.[1] Several individual members of Hydropower *Amici* are currently in the Federal Energy Regulatory Commission ("FERC") licensing process. In particular:

MID is an irrigation district organized under the laws of the State of California. MID owns, operates, and maintains the New Exchequer, McSwain, and Merced Falls dams, reservoirs, and hydroelectric facilities in California. It supplies electric services to commercial, industrial, and residential customers in

[1] 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.

Eastern Merced County. It also provides affordable irrigation water for its approximately 2,200 local growers.

NHA is a non-profit national 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, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

NID is an irrigation district organized under the laws of the State of California. NID owns and operates several hydropower projects in California, including the Yuba-Bear Hydroelectric Project. NID's service area currently encompasses more than 287,000 acres in Nevada and Placer Counties and NID provides treated water to approximately 20,000 customer accounts and irrigation supply to roughly 5,500 accounts.

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.

Snohomish is a municipal corporation of the State of Washington, formed by a majority vote of the people in 1936 for the purpose of providing electric and water utility service. Snohomish is the second largest consumer-owned utility in Washington State and has experienced rapid growth within its service territory in recent years. Snohomish owns and operates several FERC-licensed hydropower projects in Washington State, including the Jackson Hydroelectric Project. Snohomish has recently developed two run-of-the-river hydroelectric projects which will generate enough clean energy annually to serve up to 10,000 homes.

SFWPA is a California Irrigation District formed and existing under Division 11 of the California Water Code. SFWPA provides treated and raw water service to its thousands of customers. SFWPA is also the licensee of the South Fork Hydroelectric Project, consisting of eight dams, nine tunnels, 21 miles of canals and conduits, and four hydroelectric power plants.

YWA is a public agency created by the State of California to develop and promote the beneficial uses and regulation of the water resources of Yuba County. YWA is the licensee and owner of the Yuba River Development Project and the Narrows Project, both located on the Yuba River.

STATEMENT OF INTEREST

The Court's decision in this case could have far-reaching impacts on the nation's hydropower industry and supply of electric energy. 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 renewable energy.[2] Hydropower resources provide a multitude of benefits, including grid stability and reliability, and enable many states to achieve their renewable energy goals.[3] 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 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

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[2] U.S. Energy Information Administration, Frequently Asked Questions, Electricity Generation by Source, https://www.eia.gov/tools/faqs/faq.php?id=427&t=3 (last visited Dec. 29, 2020).

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

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. 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, including 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 other environmental statutes, such as the National Environmental Policy Act ("NEPA"), Fish and Wildlife Coordination Act, Endangered Species Act, Coastal Zone Management Act, Federal Land Policy and Management Act, and the National Historic Preservation Act.

FERC-licensed hydropower projects are also subject to Section 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341 (2018). This provision requires an applicant for a federal license or permit to conduct an activity that may result in a discharge into navigable waters to request a water quality certification from the state in which the discharge will occur. *See id*. § 1341(a). This certification is intended to provide states with the opportunity to review the discharge and impose conditions necessary to ensure the discharge will comply with state water quality

standards. Importantly, a state's authority under Section 401 is not unbounded. States must exercise their authority in accordance with the terms of the CWA. Following state certification, FERC may issue the license, and is statutorily required to include any conditions contained in the certification in the license. *See PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 722 (1994); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 110 (2d Cir. 1997).

Licensees also must apply for a new Section 401 certification each time the hydropower project is relicensed and for certain license amendments. *See S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 374-75 (2006); *Ala. Rivers All. v. FERC*, 325 F.3d 290, 292 (D.C. Cir. 2003).

For all federal licensing and permitting actions triggering Section 401, including hydropower licensing and relicensing, the state has "a reasonable period of time (which shall not exceed one year) after receipt" of the certification request "to act" upon it. 33 U.S.C. § 1341(a)(1). Otherwise, the Section 401 requirement is waived. *Id.* 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). The issue of whether the one-year period has passed and a state has waived its certification authority under Section 401 is a federal question to be determined by the federal permitting agency,

namely FERC in the case of hydropower licenses. *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 700-01 (D.C. Cir. 2017); *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019) (faulting FERC for failing to make a waiver determination under Section 401); *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (FERC is required "at least to confirm that the state has facially satisfied the express requirements of [S]ection 401.").

In these consolidated cases, the North Carolina Department of Environmental Quality ("NCDEQ") and PK Ventures I Limited Partnership ("PK Ventures") filed petitions for review challenging FERC orders finding that NCDEQ waived its authority under Section 401 by failing to act within one year from the date it received the application. *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (2019), *reh'g denied*, 171 FERC ¶ 61,046 (2020). FERC's finding was based on its conclusion that a state and applicant may not engage in a coordinated withdrawal and refiling process to extend the one-year period under the CWA.

FERC's decision is correct and should be upheld. The plain language of Section 401 requires a state to act on an application for water quality certification within one year from receipt of the application. As several courts have recognized, this is a bright-line rule with no exceptions. If this Court permits a state to extend its review period under Section 401, there is a real risk of states indefinitely

delaying the federal permitting process. As recognized by the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit") in *Hoopa Valley*, these delays usurp FERC's control over the process and are not in the public interest. 913 F.3d at 1105. 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 such as the one at issue here, 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 the Court to deny the petitions for review and affirm FERC's decision.

STATEMENT OF THE ISSUE PRESENTED

Whether FERC reasonably determined that NCDEQ waived its CWA Section 401 certification authority when it coordinated with the applicant to cause a withdrawal and resubmission of the application, which was intended to restart or otherwise lengthen the statutorily established maximum one-year period.

SUMMARY OF ARGUMENT

Hydropower *Amici*'s brief is limited to the sole issue of whether FERC appropriately determined that NCDEQ waived its Section 401 authority. FERC correctly enforced the bright-line, one-year rule codified in Section 401. The CWA establishes a cooperative federalism framework for federal permitting actions, with Section 401 providing states and authorized tribes a robust role in the federal licensing process. *PUD No. 1*, 511 U.S. 700. However, that role is not unbounded; states must exercise their authority within the one-year deadline specified in Section 401. The record in this case demonstrates that NCDEQ participated in a coordinated scheme in an effort to inappropriately extend the deadline to rule on applicant's certification request. Contrary to NCDEQ's arguments, neither additional information requests nor state law public participation requirements enable a state to extend the one-year period. FERC appropriately determined, in accordance with Section 401 and *Hoopa Valley*, that NCDEQ waived its Section 401 authority.

Enforcing the rule is critical to ensuring timely hydropower licensings. *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018) ("*New York DEC*"). A contrary decision by this Court would have widespread ramifications on the hydropower industry, as well as other significant infrastructure

projects requiring federal approvals. By contrast, affirming FERC's orders below would protect the cooperative federalism process intended by Congress.

Hydropower *Amici* urge the Court to uphold FERC's decision and find that an applicant and state may not, through a coordinated withdraw and refile scheme, extend the one-year deadline required by Section 401.

ARGUMENT

I. NCDEQ Waived Its 401 Authority by Failing to Act Within One Year.

A. One Year Is the "Absolute Maximum" Time Period Afforded by Section 401 of the CWA.

Under Section 401 of the CWA, any applicant seeking a federal license for an activity that "may result in any discharge into the navigable waters" must first seek water quality certification from the state(s) in which the discharge originates. 33 U.S.C. § 1341(a)(1). FERC may not issue an original license authorizing the construction and operation of a hydroelectric project or a new license for an existing project unless and until the state has either issued or waived a Section 401 certification. The certification is deemed waived if the state fails to act on an application within a reasonable period of time, not to exceed one year. *Id*. The one-year period for a state's action begins upon its receipt of the request for water quality certification. *Id*.; *New York DEC*, 884 F.3d at 455.

The courts and FERC have held that the one-year statutory deadline provided in Section 401 is a bright-line rule, and the "absolute maximum" period

of time for state action. *Id*. at 455-56; *Hoopa Valley*, 913 F.3d at 1103-04; *S. Cal. Edison Co.*, 170 FERC ¶ 61,135 at P 30 (2020); *Pac. Gas & Elec. Co*., 170 FERC ¶ 61,232 at P 35 (2020); *Const. Pipeline Co*., *LLC*, 169 FERC ¶ 61,199 at P 20 (2019), *petition for review filed*, *N.Y. State Dep't of Envtl. Conservation v. FERC*, No. 19-4338 (2d Cir. Dec. 30, 2019). The statute provides no exceptions to the one-year rule under Section 401. In *Hoopa Valley*, the D.C. Circuit held that an applicant and a state may not extend the one-year deadline by agreement or by a coordinated effort between an applicant and the certifying agency to engage in a "scheme" of repeated withdrawal and refiling of the same 401 request to extend the one-year prescribed timeframe. 913 F.3d at 1103, 1105.

The *Hoopa Valley* ruling is not limited to its facts. *Const. Pipeline Co., LLC*, 168 FERC ¶ 61,129 at P 19. FERC has since correctly applied *Hoopa Valley* to find that even informal communications between the state and applicant for withdrawal and resubmittal of a 401 request can amount to an impermissible scheme to extend the one-year deadline. *See, e.g.*, *Placer Cty. Water Agency*, 169 FERC ¶ 61,046 at P 18 (2019); *S. Cal. Edison Co*., 170 FERC ¶ 61,135 at P 20; *Pac. Gas & Elec. Co*., 170 FERC ¶ 61,232 at P 27. FERC has rightly found that a "[S]tate's reason for delay [is] immaterial." *Placer County*, 169 FERC ¶ 61,046 at P 20; *Constitution Pipeline*, 168 FERC ¶ 61,129 at P 37; *Nev. Irrigation Dist*., 171 FERC ¶ 61,029 at P 28 (2020).

To preserve the bright-line, one-year rule, no exceptions can be permitted, regardless of the manner of the impermissible scheme, 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 needed to maintain 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 hydro power projects without the certainty and security of a multi-decade license." *Alcoa Power*, 643 F.3d at 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 [FERC] or the parties to extend the statutory deadline." *Cent. Vt. Pub. Serv. Corp.*, 113 FERC ¶ 61,167 at P 16 (2005); Clean Water Act Section 401 Certification Rule, 85

Fed. Reg. 42,210, 42,258 (July 13, 2020). Thus, a state's purported lack of sufficient information to act on a 401 application does not justify an exception.

B. NCDEQ Waived Its Section 401 Authority by Participating in a Coordinated Scheme to Extend the One-Year Deadline.

The record shows that NCDEQ participated in a coordinated scheme to extend the statutory one-year deadline in this case. Although nothing in the Environmental Protection Agency ("EPA") or FERC's rules would require a federal Environmental Assessment ("EA") to be completed before the 401 certification, and indeed much of the information in an EA is not relevant to water quality, shortly after receiving the applicant's first request for 401 certification in 2017, NCDEQ requested additional information. The request sought a water quality monitoring plan[4] and FERC's Draft EA for the project, and indicated that NCDEQ would put the application "on hold" until the information was provided. *McMahan Hydroelectric, LLC*, 171 FERC ¶ 61,046 at P 20. As the one-year deadline approached and it became clear that FERC's EA was not imminent, the applicant withdrew and resubmitted its application in February 2018. After another year elapsed, an NCDEQ employee reminded the applicant to withdraw and reapply again in February 2019, and the applicant complied. FERC found that

[4] NCDEQ could have included a requirement to develop the water quality monitoring plan post licensing or post issuance of the 401 certification instead of requiring the applicant to produce it in advance.

the withdrawal and resubmissions were not "unilateral action[s] by the applicant" and that the "[t]he record does not reflect evidence that [the applicant] displayed any desire for the state to delay action." *Id*. at PP 29, 37. Accordingly, FERC concluded that NCDEQ and the applicant had established a coordinated scheme that "delayed state action beyond the statute's prescribed one-year deadline and circumvented [FERC]'s "regulatory authority of whether and when to issue a federal license." *Id*. at P 34.

While the coordinated scheme in this case did not involve a written agreement, such formalities are not required to find that a state waived its 401 authority. NCDEQ and the applicant had a functional agreement that withdrawal and resubmission of the 401 application would take place. FERC has rightly held that a functional agreement to avoid the one-year deadline is a sufficient basis for a waiver determination. *See Yuba County Water Agency*, 171 FERC ¶ 61,139 at P 20 (2020); *Nevada Irrigation Dist*., 171 FERC ¶ 61,029 at P 23; *Pac. Gas & Elec. Co.*, 170 FERC ¶ 61,232 at P 27; *S. Cal. Edison*, 170 FERC ¶ 61,135 at P 23; *Placer Cty. Water Agency*, 167 FERC ¶ 61,056 at PP 17-18 (2019); *Constitution Pipeline*, 168 FERC ¶ 61,129 at PP 33-34. Where the state requests or directs the applicant to withdraw and resubmit "with the motivation to restart the one-year clock," there is a functional agreement that justifies a waiver determination. *Village of Morrisville*, 173 FERC ¶ 61,156 at P 21 (2020).

Importantly, the one-year deadline does not apply only to applications that a state deems "complete." "If the statute required 'complete' applications, states could blur this bright-line rule into a subjective standard, dictating that applications are 'complete' only when state agencies decide that they have all the information they need." *New York DEC*, 884 F.3d at 456. If such a practice was permissible under the statute, states could "theoretically request supplemental information indefinitely." *Id*. Therefore, NCDEQ had no authority to put the application on hold pending receipt of additional information, or to request that the applicant withdraw and resubmit.[5]

The applicant withdrew and refiled the same application without any material project modifications from year-to-year, an action that received express disapproval from the *Hoopa Valley* court. 913 F.3d at 1104. FERC has held that a state's reminder emails sent to an applicant just before the one-year deadline to elicit a withdrawal and resubmission results in a waiver of 401 authority. *S. Cal. Edison*, 170 FERC ¶ 61,135 at P 25; *Placer County*, 169 FERC ¶ 61,046 at P 17.

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[5] *But see AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 728 (4th Cir. 2009). In *AES Sparrows*, this Court found that Section 401 was ambiguous regarding when the one-year period commences. Accordingly, the court deferred to regulations developed by the U.S. Army Corps of Engineers, as well as the Corps' determination in that case, that the one-year period does not run until a complete application is received. That case is not relevant here, where FERC is the action agency and is relying on EPA regulations and the *Hoopa Valley* decision, both of which provide that the one-year period starts when the application is received, not when the application is complete. 85 Fed. Reg. at 42,243.

NCDEQ's own declaration attached to its rehearing request at FERC concedes that the applicant withdrew and refiled its application "presumably based on its understanding that NCDEQ could not issue a 401 certification prior to the expiration of the one-year statutory period." NCDEQ Brief at 50 (citing JA507-08) (ECF No. 22). Thus, coordination between the applicant and the agency is evident; by definition this was not a unilateral action on the part of the applicant.

Even absent this evidence of a coordinated scheme, prior to and upon receipt of the two withdrawals and resubmissions of the same 401 application, NCDEQ had the option of denying the certification within the one year it was afforded under the CWA. By accepting the resubmitted applications, NCDEQ participated in and encouraged the scheme to extend the one-year deadline. *See, e.g., S. Cal. Edison*, 170 FERC ¶ 61,135 at P 25; *Yuba County*, 171 FERC ¶ 61,139 at P 21.

C. State Law Processes Cannot Override the One-Year Deadline Established by the CWA.

The CWA provides states with the authority to condition water quality aspects of a federal license or permit within a specified time limit, not to exceed one year. The CWA "anticipates a partnership" between state and federal governments, "in which regulatory authority is shared." *Sierra Club v. ICG E., LLC*, 833 F. Supp. 2d 571, 574 n.1 (N.D. W.Va. 2011) (citing *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). However, the states' authority under Section 401 is not without limits. *PUD No. 1*, 511 U.S. at 712. A state cannot adopt

policies and procedures that will violate or override the CWA's one-year deadline. *Nev. Irrigation Dist.*, 171 FERC ¶ 61,029 at P 21; *Cf. Arkansas v. Oklahoma*, 503 U.S. at 110 (recognizing the "federal character" of state pollution standards in interstate pollution controversy); *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, the federal scheme imposes requirements on the State, including procedures for public notice); *New York v. United States*, 505 U.S. 144, 167 (1992) ("Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.").

For example, NCDEQ claims that FERC's EA "is critical to NCDEQ's review of federally licensed projects both because of the analysis of environmental impacts, including water quality impacts, that it contains and the fact that the [EA] process may result in substantive changes to the scope and configuration of a project." NCDEQ Brief at 12 n.3. Because the state deems FERC's EA critical to its review, it has essentially adopted a policy that a 401 application is not complete and the one-year period does not commence until it receives this document. This violates the plain language of Section 401, which requires a state to act on an application within one year "after receipt of such request." 33 U.S.C. § 1341(a)(1).

It is also inconsistent with the application process established by FERC, which mandates when an applicant must file for a 401 certification.

EPA, the agency that administers the CWA and "ensures effective implementation of all CWA programs, including Section 401," has determined that NEPA review is not a prerequisite to the state's evaluation of the 401 application. 85 Fed. Reg. at 42,272 n.62 ("certifying authorities do not need to delay action on a certification request until a NEPA review is complete. The environmental review required by NEPA has a broader scope than that required by [S]ection 401… Waiting for a NEPA process to conclude may result in waiver of the certification requirement for failure to act within a reasonable period of time."). The applicant's FERC license application, which is supported by environmental studies and includes a comprehensive environmental document that forms the basis for FERC's NEPA document, should provide more than enough technical and environmental information to allow the state's review to occur within one year. And in the case of license reissuance for existing hydropower projects, there is ample information regarding the operation of the project and its impacts to allow the review to occur without the EA. While FERC's NEPA document may ultimately recommend additional measures to mitigate potential impacts of the

proposed action, it will not "result in substantive changes to the scope and configuration of a project," as NCDEQ suggests.[6] NCDEQ Brief at 12 n.3.

Similarly, the time required to implement a state's public participation requirements does not excuse failure to act within one year. NCDEQ argues that FERC ignored the state's obligation "to comply with public participation requirements, which add additional time to NCDEQ's processing schedule." NCDEQ Brief at 33. FERC has held that a state's regulatory process that takes more than a year to complete does not excuse compliance with the CWA. *Nev. Irrigation Dist.*, 171 FERC ¶ 61,029 at P 28 (holding that a law requiring compliance with the state Environmental Quality Act in order to issue a 401 certification does not excuse compliance with the CWA). Moreover, in its final rule, EPA dismissed comments it received arguing that the "reasonable period of time" under the CWA does not account for state public notice procedures, finding that states have developed mechanisms over the years "to ensure that public

[6] In fact, NCDEQ's argument could be applied in the reverse. The conditions included in a state 401 certification could affect the analysis in FERC's EA. Applying NCDEQ's argument to the extreme, this could create a situation where both the EA and the state 401 certification are continually being revisited in light of changes and no decision would ever be made. Instead, Congress established a clear deadline for state action. FERC's application process similarly outlines a step-wise approach for applicants to obtain the necessary approvals from other state and federal agencies.

participation requirements are met within the reasonable period of time." 85 Fed. Reg. at 42,259.

A state's reason for delay in processing a 401 application is immaterial and does not excuse a failure to act within one year. *See, e.g. Placer County*, 169 FERC ¶ 61,046 at P 20; *Constitution Pipeline*, 168 FERC ¶ 61,129 at P 37; *Nev. Irrigation Dist*., 171 FERC ¶ 61,029 at P 28. While NCDEQ argues that it worked diligently to process the 401 application and perform its statutory obligations, NCDEQ Brief at 22, the standard under Section 401 requires a decision on an application within one year, not diligent processing of an application. *See* 33 U.S.C. § 1341(a)(1). The state's policy to place the application on hold pending receipt of FERC's NEPA document and its failure to timely implement public participation requirements contravenes the permitting process established by FERC and the requirements of the CWA. FERC correctly determined that NCDEQ waived its Section 401 authority.

D. DEQ's Policy Arguments Do Not Override CWA Requirement to Act Within One Year.

NCDEQ argues that FERC's reading of Section 401 would force a state to issue denials until it has a complete application on which to act, and thus creates "a regime of empty formalism that benefits no one." NCDEQ Brief at 34. In fact, the opposite is true. Enforcing the one-year requirement will encourage applicants to ensure that the information required is submitted, and states to articulate the

information needed as part of the 401 process. Issuing a denial also triggers other procedural options for the applicant. For example, a denial is a final action subject to appeal. A successful appeal by the applicant could expedite the certification process.

Compliance with the regulatory timeline established by the CWA provides consistency and certainty in the permitting process. *See* 85 Fed. Reg. at 42,221. The *Hoopa Valley* decision was critical to the hydropower industry because it invalidated the withdraw and resubmit scheme used by states to delay action on a Section 401 request and the overall FERC licensing process. In response to that decision, states have the ability to conform their permitting procedures such that they are able to act on 401 applications within one year, rather than issue repeated denials. *See, e.g.*, California Water Code § 13160 (Stats. 2020, Ch. 18, Sec. 9. (AB 92) effective June 29, 2020) (amending California law to lift the requirement to comply with the California Environmental Quality Act if necessary to prevent waiver of Section 401 authority).

NCDEQ argues that *Hoopa Valley* penalizes states and their citizens by allowing projects to move forward "without conditions to protect water quality" and that states have "lost the ability to protect their surface waters by imposing conditions through a 401 certification." NCDEQ Brief at 43-44. In fact, the opposite is true. State delays penalize citizens by preventing important renewable

energy projects from being implemented, and prevent the implementation of upgrades and environmental improvements at existing facilities. *Hoopa Valley* is not depriving states of the right to impose conditions protective of water quality; it simply requires them to do so within the one-year period specified in the CWA. *Hoopa Valley* only enforces the plain language of Section 401 that a state must act within one year. The one-year boundary on a state's authority has always been part of Section 401, yet some states have skirted the letter of the statute by employing impermissible procedural maneuvers.

In addition to CWA requirements, FERC-licensed hydropower projects are subject to extensive environmental reviews under NEPA, which assesses all environmental impacts, including water quality and project alternatives. States can participate in the NEPA process as a cooperating agency. 40 C.F.R. § 1501.6 (2020). FERC also maintains statutory authority to impose water quality measures on hydropower projects as warranted. *See* 16 U.S.C. § 803(a). In the event a state waives its Section 401 authority, FERC will consider any state water quality conditions as recommendations under section 10(a)(1) of the FPA. *Id.* § 803(a)(1). While these measures will ensure that a state's waters are protected even in the event of waiver, the state can guarantee its water quality conditions become mandatory requirements of a FERC license by acting on the 401 certification request within one year as provided under the CWA.

II. FERC's Role in Determining Waiver and the *Hoopa Valley* Precedent Should Be Protected and Preserved.

A. Enforcing the One-Year Review Period for 401 Certification Protects the Cooperative Federalism Construct Envisioned by the CWA.

Hydropower *Amici* urge this Court to preserve the Congressionally mandated balance of the CWA's cooperative federalism structure, which provides states with the authority to condition water quality aspects of a federal license or permit, while establishing a maximum time period for such regulation and requiring the federal agency to ensure that the state establishes and adheres to procedures consistent with Section 401. The purpose of the water quality certification is to ensure the "discharge will comply with the applicable provisions" of the CWA establishing effluent standards, standards of performance, prohibitions, pretreatment standards, and other requirements of approved state water quality programs, and where necessary, condition the water quality certification to include measures to assure compliance with these requirements. 33 U.S.C. § 1341(a)(1), (d).

However, the states' authority under Section 401 is not unbounded. *PUD No. 1*, 511 U.S. at 712. Section 401 certification "is not a sovereign state right" and a state "exercises only such authority as has been delegated by Congress." *Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 93 (2d Cir. 2006). Congress expressly established a maximum time period of up to one

year, as the absolute maximum, for states to act on requests for certification. *PUD No. 1*, 511 U.S. at 704 ("[T]he [CWA] establishes distinct roles for the Federal and State Governments."); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (Congress "plainly intended an integration of both state and federal authority."). This one-year period gives states ample opportunity to evaluate and condition federal permits, without derailing the timely issuance of permits.

This balance, recently reestablished in *Hoopa Valley*, increases certainty for all applicants, including hydropower licensing and relicensing applicants who operate within a process that too often takes a decade or more. The cooperative balance provides a much-needed efficiency in licensing proceedings. This also serves the public interest, as protracted proceedings delay important environmental upgrades to hydropower facilities and hamper the preservation and development of a reliable energy network. By upholding FERC's decision in this case, the Court would ensure nationwide consistency in the interpretation of Section 401 for all federally-permitted hydropower infrastructure projects.

B. *Hoopa Valley* and Its Progeny Help Maintain Order and Certainty in Hydropower Licensing.

The purpose of Section 401 is to provide states with the opportunity to add conditions – or veto projects – in order to protect state water quality. But the provision also seeks to ensure that the state review period is limited, so that it does not slow down the federal permitting process. As implementation of Section 401

has evolved, it has become a chronic source of delay in hydropower licensings. A former FERC Chairman has stated that "the [S]ection 401 certification process is often very time-consuming, despite the intent of the CWA that a State should act on a certification request in a year or less."[7] More recently, the D.C. Circuit has noted that "[in 2015], twenty-seven of the forty-three licensing applications before FERC were awaiting a state's water quality certification, and four of those had been pending for *more than a decade*." *Hoopa Valley*, 913 F.3d at 1104.

Regulatory certainty on CWA Section 401 was finally provided to the hydropower industry when the D.C. Circuit decided *Hoopa Valley*. In that case, the D.C. Circuit held that "[b]y shelving water quality certifications, the states usurp FERC's control over whether and when a federal license will issue." *Id.* It concluded that "if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters." *Id.*

Since *Hoopa Valley*, FERC has issued a number of waiver determinations for hydropower projects that were previously "held hostage" by the Section 401 process for up to 10 years. *See id.*; *Placer County*, 169 FERC ¶ 61,046 at P 18; *S.*

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[7] FERC Hydroelectric Relicensing Procedures: Hearing before the Subcomm. on Water and Power of the Comm. on Energy and Natural Resources, S. Hrg. 105-381, 105th Cong. 55 (1997) (Prepared Statement of James J. Hoecker, FERC Chairman).

Cal. Edison, 170 FERC ¶ 61,135 at P 17; *Pac. Gas & Elec. Co*., 170 FERC ¶ 61,232 at P 27; *Nev. Irrigation Dist*., 171 FERC ¶ 61,029 at P 28; *Merced Irrigation Dist.*, 171 FERC ¶ 61,240 (2020); *S. Feather Water & Power Agency*, 171 FERC ¶ 61,242 (2020). Without exception, in each case FERC has properly applied the statutory language's bright line "one year is one year" rule under *Hoopa Valley*.

Hydropower *Amici* strongly support FERC's role in determining and enforcing the one-year Section 401 review period for hydropower projects. FERC's waiver determinations allow it to finally complete the licensing process for these important, long-delayed renewable resources. *Hoopa Valley* restored Congressional intent and certainty in hydropower licensing and properly reinstated FERC's statutory role of ensuring appropriate and timely compliance by the states in discharging CWA Section 401. *See* 913 F.3d at 1103; *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006). These rulings confirm the necessity and propriety of FERC's precise action here, as Section 401's plain language confers on FERC the responsibility for determining whether a state has complied with the statute, which includes the requirement that states must act on an application within a maximum time of one year. *Exelon Generation Co., LLC v. Grumbles*, 380 F. Supp. 3d 1, 9-10 (D.D.C. 2019) (finding that the running of the one-year

period is a federal law issue); *Millennium Pipeline*, 860 F.3d at 698; *City of Tacoma*, 460 F.3d at 68.

While the delay in this case was not as extensive as in *Hoopa Valley*, any court-sanctioned exception to the bright-line rule would render the statutory one-year deadline meaningless. Moreover, it could institutionalize a state practice of pressuring applicants to extend the one-year deadline. It is imperative to the hydropower industry that the bright-line rule and the *Hoopa Valley* precedent be preserved, along with FERC's role in enforcing the rule.

III. There Are No Facts in This Case Justifying Overruling FERC.

Section 401 explicitly limits the state review period to one year. However, as recognized in EPA's Section 401 rule, there may be certain limited instances in a hydropower licensing in which an applicant may withdraw its 401 application voluntarily, such as when major modifications or cancellation of the project occurs. 85 Fed. Reg. at 42,247; *see also Village of Morrisville*, 173 FERC ¶ 61,156. In such cases, there are significant changes to a project that are being voluntarily undertaken by the applicant, which likely affect the project's water quality impact. In such cases, a new Section 401 application will include substantive differences from the prior application. Thus, a new Section 401 review period begins when a new 401 application is filed. That is not the case here, where NCDEQ placed its review on hold, and once the hold was lifted, directed the applicant to withdraw

and resubmit the same application. NCDEQ was seeking to extend its one-year review period not based on significant changes to the project, but to allow additional time for its review.

While there may be rare instances when a voluntary withdrawal occurs, allowing the Section 401 clock to restart upon filing of a new application, those facts are not present here. If the Court were to find those facts present here, the Court's decision should clearly articulate that its decision is based on the narrow factual grounds of this case. For the reasons stated in this brief, the Court should not disturb or otherwise limit the *Hoopa Valley* precedent, which is consistent with the plain language of CWA Section 401.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains 6,467 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point type.

/s/ Michael A. Swiger
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December 30, 2020

CERTIFICATE OF SERVICE

I, Michael A. Swiger, hereby certify that on December 30, 2020, I electronically filed the foregoing Brief of Hydropower *Amici Curiae* in support of Respondent Federal Energy Regulatory Commission with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF System. Pursuant to the Court's directive in light of the COVID-19 pandemic, I have not sent paper copies of the brief to the Clerk of the Court.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated at Washington, DC, this 30th day of December, 2020.

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