No. 22-616

In the Supreme Court of the United States

TURLOCK IRRIGATION DISTRICT AND
MODESTO IRRIGATION DISTRICT,
Petitioners,

v.

FEDERAL ENERGY REGULATORY
COMMISSION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF HYDROPOWER *AMICI* IN SUPPORT OF PETITIONERS

MICHAEL A. SWIGER
Counsel of Record
MICHAEL F. McBRIDE
VAN NESS FELDMAN LLP
1050 Thomas Jefferson Street, NW
Seventh Floor
Washington, DC 20007
(202) 298-1800
mas@vnf.com

Counsel for Amici Curiae

February 6, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes and Rules

Regulations

Agency Decisions

Other Authorities

INTEREST OF *AMICI CURIAE*

Kings River Conservation District ("KRCD"), Merced Irrigation District ("MID"), National Hydropower Association ("NHA"), Nevada Irrigation District ("NID"), Northwest Hydroelectric Association ("NWHA"), Northwest Public Power Association ("NWPPA"), Public Utility District No. 1 of Snohomish County, Washington ("Snohomish"), Rye Development ("Rye"), San Diego County Water Authority ("SDCWA"), South Feather Water and Power Agency ("SFWPA"), and Yuba County Water Agency d/b/a 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 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 involved in the Federal Energy Regulatory Commission ("FERC") licensing process and are subject to the requirement to obtain a state water quality certification. In particular:

---

[1] Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received notice of Hydropower *Amici*'s intention to file this *amici curiae* brief at least 10 days prior to the due date. Pursuant to Supreme Court Rule 37.6, Hydropower *Amici* offer the following additional statement: No counsel for any party authored the brief in whole or in part; no party or party's counsel contributed money intended to fund preparation or submission of this brief; and no person other than *amici* or their members made monetary contributions intended to fund preparation or submission of the brief.

KRCD is a California public agency created in 1951 by the Kings River Conservation Act. KRCD was formed to be the local agency responsible for the operations and maintenance of the U.S. Army Corps of Engineers flood control project downstream from Pine Flat Dam for safe passage of flood water in the Kings River channel. KRCD is the FERC licensee for the 165-megawatt Jeff L. Taylor Pine Flat Hydroelectric Project, the license for which expires in 2029.

MID is an irrigation district organized under California law. MID owns, operates, and maintains the New Exchequer, McSwain, and Merced Falls dams, reservoirs, and hydroelectric facilities in California, all of which are in the FERC relicensing process. Through its 105-megawatt-capacity hydroelectric projects, it supplies electric services to commercial, industrial, and residential customers in 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 U.S. 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 over 300 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 California law. NID owns and operates several hydropower projects, including the FERC-licensed, 80-megawatt Yuba-Bear Hydroelectric Project, which is in the relicensing process. NID's service area currently encompasses more than 287,000 acres in Nevada and Placer Counties. 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 approximately 130 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.

NWPPA is an electrical utility trade association formed in 1941, representing over 150 consumer-owned utilities in the western United States, Alaska, and Canada. NWPPA is dedicated to serving the interests of its members and their millions of public electric utility customers. The central mission of consumer-owned utilities is to serve their communities with reliable and low-cost power on a not-for-profit basis. NWPPA has continuously been an advocate for public power on behalf of its member utilities.

Snohomish is a Washington municipal corporation, 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 and has experienced rapid growth within its service territory in recent years. Snohomish owns and operates several FERC-licensed hydropower projects, including the 112-megawatt Henry M. 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.

Rye is a leading developer of new low-impact hydropower energy generation and energy storage in the United States. Among others, Rye leads the development of the proposed Kentucky River Lock and Dam No. 11 Hydroelectric Project (Kentucky), Overton Lock and Dam Project (Louisiana), Enid Lake Hydroelectric Project (Mississippi), Beverly Lock and Dam Water Power Project (Ohio), Swan Lake Project (Oregon), Allegheny Lock and Dam 2 Hydroelectric Project (Pennsylvania), Goldendale Project (Washington), and Morgantown Lock and Dam Hydroelectric Project (West Virginia).

SDCWA was established in 1944 pursuant to the County Water Authority Act, Cal. Water Code App., ch. 545, statutes of 1943, as amended, to provide wholesale water service to its 24 member agencies and approximately 3,000,000 residents located in the San Diego region. As part of its mission to provide safe, reliable, and affordable water supply, SDCWA has

invested significant resources to secure a reliable energy supply. Among other actions, SDCWA constructed and in 2012 began operating the 40-megawatt Lake Hodges Pumped Storage Facility, which connects two reservoirs owned by SDCWA and the City of San Diego and generates enough power to sustain 26,000 homes annually. Currently, SDCWA and the City hold a FERC preliminary permit to determine the feasibility of developing the San Vicente Energy Storage Facility Project, a proposed 500-megawatt closed-loop pumped storage facility with up to eight hours of storage capacity.

SFWPA is a California Irrigation District formed under California Water Code Division 11. SFWPA provides treated and raw water service to thousands of customers. SFWPA owns the 117-megawatt South Feather Power Project—consisting of eight dams, nine tunnels, 21 miles of canals and conduits, and four hydroelectric power plants—which is in the FERC relicensing process.

YWA is the public agency that the State of California created in 1959 for the explicit purpose of addressing Yuba County's water problems, after a devastating flood on the Feather River killed 40 people in 1955. YWA is the licensee and owner of the 362-megawatt Yuba River Development Project, which generates hydroelectricity that is used throughout Northern California, provides flood control for Yuba County's communities, and serves irrigation water needs within the County. YWA's water supplies serve the dual purpose of generating hydroelectricity and supporting the irrigation of about 100,000 acres of

farmland. YWA also is the licensee for the 12-megawatt Narrows Project. Both projects are undergoing FERC relicensing.

In this case, Petitioners Turlock Irrigation District and Modesto Irrigation District ("Districts") filed petitions for review challenging FERC orders denying the Districts' petition for declaratory order. FERC found that the California State Water Resources Control Board ("State Water Board") did not waive its authority under Section 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341. Section 401 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 certification from the state in which the discharge will originate that the discharge complies with state water quality standards. The state has one year to act on the request or its certification authority is waived. *See id.* § 1341(a). In this case, FERC found that the State Water Board's repeated, rote denials of the Districts' certification request "without prejudice" to refile the same request, without action on the merits of the request, did not constitute a failure to act. *Turlock Irrigation Dist.*, 174 FERC ¶ 61,042 (App. 40a-70a), *reh'g denied*, 174 FERC ¶ 62,175 (App. 38a-39a), *order on reh'g*, 175 FERC ¶ 61,144 (2021) (App. 11a-37a).[2] The U.S. Court of Appeals for the D.C. Circuit affirmed. *Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179 (D.C. Cir.) (App. 1a-10a), *reh'g en banc denied*, No. 21-1120 (D.C. Cir. Sept. 6, 2022). Hydropower *Amici* support the Districts' contention, consistent

[2] "App." refers to pages in the Appendix of the Petition.

with the dissenting opinion of FERC Commissioner Danly, that FERC should have found waiver under these circumstances and that the D.C. Circuit erred in affirming FERC's decision. *See* App. 30a (Danly, Comm'r, dissenting).

The Court's decision whether to grant certiorari in this case will have far-reaching impacts on the nation's hydropower industry and supply of electric energy. The unlawful state delay tactic at issue in this case has the potential to impede indefinitely the federal licensing and relicensing of hydroelectric projects and the public benefits they provide. Hydropower projects are an important source of electric power, accounting for approximately 7% of total national electric production each year. As the most mature, low-cost, and reliable renewable energy resource, hydropower alone accounts for over one-third of the country's renewable energy.[3] Beyond electric production, hydropower provides a multitude of benefits to the interstate electric grid, including grid stability and reliability to support the integration of energy from solar and wind facilities, and enables many states to achieve their renewable energy goals.[4] Hydropower is likely to increase in importance as the United States works to address climate change

---

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

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

impacts and reduce dependence on fossil fuels. The U.S. Department of Energy estimates that hydropower capacity in the United States has the potential to grow 50 percent from 101 gigawatts to nearly 150 gigawatts by 2050.[5] In addition to benefits to electric consumers, 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.

Regulatory delays generally, and the CWA Section 401 process in particular, in the permitting of hydropower projects are a major impediment to achieving these benefits and to decarbonizing the nation's energy supply. Almost all non-federally owned hydropower projects are subject to the comprehensive regulatory regime of the Federal Power Act ("FPA"). 16 U.S.C. §§ 791-825r. Under the FPA, FERC has exclusive authority to issue licenses authorizing the construction, operation, and maintenance of new and existing hydroelectric projects. *See id*. §§ 797(e), 808, 817. 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. FPC*, 328 U.S. 152, 180-81 (1946). The "long and colorful legislative history" of the FPA reflects "a vigorous determination of Congress to make progress with the development of the long idle water

---

[5] *Id*. at 3.

power resources of the nation" by creating "a complete scheme of national regulation." *Id.* at 171, 180.

In issuing licenses, FERC is required to consider a range of factors affecting the public interest in all aspects of the development of a waterway, including water quality, and to attach appropriate conditions to protect the environment. *See* 16 U.S.C. §§ 797(e), 803(a)(1), 803(j). Hydropower projects are also subject to the requirements of several 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 National Historic Preservation Act.

In addition, FERC-licensed hydropower projects are subject to Section 401 of the CWA which provides a limited delegation of authority to affected states to review anticipated discharges into navigable waters and impose conditions necessary to ensure they will comply with state water quality standards. Only after issuance of a Section 401 certification (or a state's waiver of its certification authority) may FERC issue the license. FERC is statutorily required to include any conditions contained in the certification in the federal license. *See PUD No. 1 of Jefferson Cnty. 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 Env't 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, 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); *see also* 115 Cong. Rec. 9,264 (1969) (statement of Rep. Edmondson explaining that the waiver provision was intended to "do away with dalliance or unreasonable delay and to require a 'yes' or 'no'" by states to a federally permitted project).

Hydropower *Amici* share Petitioners' interest in ensuring that states are not able to evade Section 401's one-year deadline to act on a certification request and thereby delay federal permitting of important energy projects. Hydropower *Amici* further agree with Petitioners that FERC's interpretation of Section 401, upheld by the D.C. Circuit in this case, would effectively gut the one-year statutory requirement by allowing a state repeatedly to issue *pro forma* letters labeling a certification request "denied without prejudice" while taking no action on the merits of the request.

SUMMARY OF ARGUMENT

The question presented—whether a state can avoid waiving its authority to act on a request for certification under Section 401, thus rendering Section 401's express one-year deadline meaningless, by issuing annual *pro forma* denials of certification "without prejudice" to the refiling of the same request—is an important federal question that this Court should resolve. In enacting Section 401, Congress established a bright-line, one-year rule for states to take final action on certification requests. *N.Y. State Dep't of Env't Conservation v. FERC*, 991 F.3d 439, 447-50 (2d Cir. 2021) ("*New York II*"); *N.Y. State Dep't of Env't Conservation v. FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018) ("*New York I*"). Here, by repeatedly issuing *pro forma* documents labeled "denials" in order to buy the state more time while failing to address the substance of the Districts' proposal, the State Water Board failed to take final action on the certification request by the one-year deadline. In these circumstances, denial without prejudice is not action on a certification request, but a transparent attempt to avoid taking final action as required by the statute.

Enforcing the bright-line, one-year rule is critical to ensuring timely federal permitting decisions, including licensing by FERC of hydropower projects. Allowing the practice of rote annual denials without prejudice to resubmission of the same request would have widespread negative ramifications for the hydropower industry, as well as other significant infrastructure projects requiring federal approvals.

Through simple inaction, states will effectively control the timing of federal permitting decisions and be able to exercise a "pocket veto" over new proposed projects, a result directly contrary to Congress' intent in Section 401. States also will be able to enact whatever state law processes they choose to implement their certification authority and subordinate Section 401's one-year rule to the time it takes to complete those processes. This Court's review is critical to effectuate Congress's purpose in enacting Section 401 and to restore order and certainty to the FERC hydropower licensing process.

ARGUMENT

I. The Court's Review Is Needed to Address the Important Federal Question of Whether Section 401's One-Year Limit Is Enforceable To Ensure Timely State Action On Federally Permitted Projects.

Under Section 401, state certification is deemed waived if the state "fails or refuses to act" on a request "within a reasonable period of time (which shall not exceed one year) after receipt of such request." 33 U.S.C. § 1341(a)(1). The one-year period for a state's action begins on its actual receipt of the request. *New York II*, 991 F.3d at 443; *New York I*, 884 F.3d at 455. The statutory deadline serves an essential purpose in federal licensing and permitting: "to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request." *Alcoa*, 643 F.3d at 972.

The U.S. Court of Appeals for the Second Circuit has 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. *New York II*, 991 F.3d at 449 (citation omitted); *New York I*, 884 F.3d at 455-56. The statute provides no exceptions to the one-year rule under Section 401.

The principle that one year is the "absolute maximum" for acting on a Section 401 certification request also applies with equal force to this case. If states could extend the one-year deadline for issuing a final decision on a certification request by a rote process of denying the request and instructing the applicant to resubmit the same request if it wants a Section 401 certification, the statutory deadline would be rendered meaningless. Hydropower *Amici* submit that one year means one year and that a rote denial with instruction to resubmit the same request does not constitute "act[ing]" on the request.

The need for this Court to resolve the important federal question of whether a state may evade Section 401's one-year deadline via procedural "work arounds" is highlighted by the petition for certiorari, filed today, asking this Court to review a decision of the U.S. Court of Appeals for the Ninth Circuit overturning FERC waiver orders. *Nevada Irrigation District, et al. v. FERC*, No. _____ (U.S. Feb. 6, 2023); *Cal. State Water Res. Control Bd. v. FERC*, 43 F.4th 920, 926, 930-32 (9th Cir. 2022) ("*State Water Board v. FERC*"). The Ninth Circuit's decision, like the D.C. Circuit's decision here, cannot be reconciled with Section 401's one-year limit.

For new proposed projects, the importance of a timely final, appealable certification decision cannot be overstated. FERC has established a policy of "two strikes and you're out" for original licenses. Under this policy, FERC will immediately dismiss an application for an original license after two certification denials *unless the applicant successfully appeals the initial denial*. *Moriah Hydro Corp.*, 173 FERC ¶ 62,132 at P 10 (2020); *Barrish & Sorenson Hydroelectric Corp.*, 69 FERC ¶ 61,206 (1994). The stated purpose of the policy is to make the site available to other applicants if the applicant is unable to obtain a Section 401 certification for its proposed project. *Barrish*, 69 FERC ¶ 61,206 at pp. 61,816-17; *N. Star Hydro Ltd.*, 58 FERC ¶ 61,266 at p. 61,844 (1992). FERC's policy does not distinguish between denials with prejudice and denials without prejudice. *Barrish*, 69 FERC ¶ 61,206; *see also Moriah*, 173 FERC ¶ 62,132 at P 4. Because FERC's license application process typically requires years of pre-filing consultation with resource agencies, Indian Tribes, and members of the public, and millions or tens of millions of dollars in environmental and engineering studies as well as costs for preparation of the application itself,[6] FERC's decision to dismiss a license application creates risk for years of investments and work.

Yet, if this Court allows FERC's orders here to stand, a state will be able to negate this substantial investment and "pocket veto" a new proposed project simply by sitting on its hands and issuing two

---

[6] *See* 18 C.F.R. §§ 4.38, 5.5-5.18.

consecutive denials without ever having to address the merits of the certification request. This is precisely the type of veto by inaction that Congress intended to prevent by imposing the one-year deadline in Section 401.

For projects seeking relicensing where the "two strikes" policy does not apply,[7] a state's rote "denial without prejudice" does not allow the federal permitting process to move forward. Instead, the federal process remains at a standstill through an indefinite number of rote denials unless and until the state decides to make a final merits decision. This outcome likewise directly contradicts Congressional intent in Section 401.

II. This Court's Review Is Needed To Clarify That State Law Processes Cannot Override the CWA One-Year Deadline.

Review by this Court is also needed because this case implicates a state's ability to override federal law through adoption of policies and procedures that make it impossible to comply with Section 401's one-year deadline. 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, a state cannot adopt policies and

---

[7] FERC's "two strikes" policy does not apply to relicensing of existing projects. *FPL Energy Me. Hydro LLC*, 108 FERC ¶ 61,261 at P 5 n.6 (2004) (citing *W. Penn Power Co.*, 74 FERC ¶ 61,287 at p. 61,913 n.14 (1996)).

procedures that will violate or override the CWA's one-year deadline, or purport to justify its failure to meet the one-year deadline based on state law requirements that cannot be met within that time frame. *Nev. Irrigation Dist.*, 171 FERC ¶ 61,029 at P 21, *reh'g denied*, 172 FERC ¶ 61,082 (2020), *vacated and remanded by State Water Board v. FERC*, 43 F.4th 920; *see also Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 754 (4th Cir. 2019) (recognizing that while states have broad discretion when developing criteria for their Section 401 certifications, the federal scheme imposes requirements on the state, including procedures for public notice); *New York v. United States*, 505 U.S. 144, 167 (1992) (noting "Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."). To do so would impermissibly result in the displacement of federal law by state regulation.

Instead, states can and must conform their permitting procedures such that they are able to act on Section 401 applications within one year, rather than issue repeated denials without prejudice. Yet, in this case, the State Water Board cited the fact that the California Environmental Quality Act ("CEQA") process was not complete as a basis for its denials without prejudice. Similarly, the Ninth Circuit's decision overturning FERC's waiver orders in *State Water Board v. FERC* relied heavily on the CEQA process and its requirements as justification for the State Water Board's failure to act on the certification requests by the one-year statutory deadline. *See* 43

F.4th at 925 (acknowledging California has set up a regime where it is generally "not feasible for a Section 401 certification to issue within one year"). And California is not the only state that subjects its certification decisions to compliance with a comprehensive state environmental review process. *See, e.g.*, Wash. Rev. Code, ch. 43.21c (2022); Wash. Admin. Code § 173-201A-010 et seq. (2022); Or. Rev. Stat., tit. 36a, ch. 468B (2022); Or. Admin. R. 340-048-0005 et seq. (2022); N.Y. Comp. Codes R. & Regs., tit. 6, § 608.9 (2022). Allowing states to avoid Section 401's one-year deadline by enacting laws that effectively prevent them from meeting the deadline is fundamentally inconsistent with the intent of Congress as reflected in the plain language of Section 401, and would turn the Supremacy Clause of the U.S. Constitution on its head. U.S. Const. art. VI, cl. 2.

III. This Court's Review Is Necessary To Restore Order and Certainty In Hydropower Licensing.

The problem of some states' circumvention of Section 401's one-year deadline is not new. It has long been a chronic source of delay in hydropower licensing. A former FERC Chairman, testifying in a 1997 Congressional oversight hearing to examine, in part, problems of delay in the FERC relicensing process, identified Section 401 certification as a significant constraint on FERC's ability to speed up the process, observing 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."[8] A few years later, FERC documented in a 2001 report to Congress addressing hydroelectric licensing issues that the "most common cause of long-delayed proceedings is untimely receipt of state water quality certification."[9]

The D.C. Circuit has observed 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*," concluding that "[b]y shelving water quality certifications, the states usurp FERC's control over whether and when a federal license will issue." *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir.), *cert. denied sub nom. Cal. Trout v. Hoopa Valley Tribe*, 140 S. Ct. 650 (2019) (mem.). The Congressional Research Service also found that "the most common cause of delayed hydropower licensing proceedings is untimely receipt of state water-quality certifications" under Section 401. Claudia Copeland, Cong. Research Service, *Clean Water Act Section 401: Background and Issues* 6 (July 2, 2015). The split federal-state approval process can result in "a series of sequential administrative and State court and Federal court appeals that [could] kill a project with a death by a thousand cuts just in terms of the time frames." *Id.* (quoting *Natural Gas Symposium*; Symposium Before the S. Comm. On Energy Natural Res., 109th

---

[8] S. Hrg. 105-381, 105th Cong. 55 (1997) (Prepared Statement of James J. Hoecker, FERC Chairman).

[9] FERC, Report on Hydroelectric Licensing Policies, Procedures, and Regulations Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000, at 5 (May 2001).

Cong. 41 (2005)). That is because delay can suspend the development of projects and jeopardize their funding.

Despite these complaints of FERC and others, by holding that repeated denials without prejudice to refile the same certification request comply with Section 401's one-year rule, FERC's orders here, if allowed to stand, would virtually ensure that the pattern of delay in hydroelectric licensings will continue. As the Petition points out (at 14-15), FERC's counsel conceded at oral argument that under FERC's statutory interpretation a state could delay acting on the merits of a request for certification for 100 years or more without running afoul of Section 401's one-year rule. This gives *carte blanche* to any state that wishes to do so to ignore Section 401's time limit on state action. And a number of states, for example, Maine, New York, Vermont, Massachusetts, and Washington are, in fact, utilizing the procedural device of denial without prejudice in an attempt to avoid having to act on certification requests within one year.

Any court-sanctioned exception to the bright-line rule requiring a state to act on a petition within a year would render the statutory deadline meaningless. That is why the Second Circuit affirmed FERC's waiver finding even where the state water quality agency sought an extension of only 36 days. *New York II*, 991 F.3d 439. Moreover, allowing rote denials without prejudice to qualify as an "act" under Section 401 would institutionalize a state practice of avoiding the one-year deadline, and result in state

veto by inaction of any new project proposal under FERC's "two strikes" policy. While FERC appears willing to throw up its hands, ceding control over its licensing process to the states, that outcome is unacceptable to the hydropower industry and contrary to both Congress's intent and the national interest in promoting important renewable energy projects.

Allowing FERC's orders to stand here would remove the regulatory certainty needed to maintain investment dollars and schedules associated with highly complex infrastructure projects. Hydropower projects 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. Delays and their associated costs can be fatal to unconstructed projects because the projects are not yet generating revenues to cover those costs. In the context of license reissuance for existing projects, such delays hamper the implementation of proposed environmental improvements and upgrades. 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*, 643 F.3d at 970.

FERC's orders threaten to bring new hydropower development in this country to a standstill at the time it is most needed to further national energy goals and climate-change policy, and to delay indefinitely the significant public benefits

achieved in license renewals for the existing fleet of FERC-licensed projects. It is imperative to the hydropower industry that the bright-line rule be preserved and held to apply in the current case.

CONCLUSION

For the reasons set forth above, Hydropower *Amici* respectfully request that the Court grant the Districts' petition for certiorari.

Respectfully submitted,

MICHAEL A. SWIGER
Counsel of Record
MICHAEL F. McBRIDE
VAN NESS FELDMAN LLP
1050 Thomas Jefferson Street, NW
Seventh Floor
Washington, DC 20007
(202) 298-1800
mas@vnf.com

Counsel for Hydropower Amici