

19-1610

Consolidated Case: 19-1618

United States Court of Appeals
FOR THE SECOND CIRCUIT

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
AND SIERRA CLUB,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,
NATIONAL FUEL GAS SUPPLY CORP. AND EMPIRE PIPELINE, INC.,
Intervenors.

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

**BRIEF OF GRAND RIVER DAM AUTHORITY, MERCED IRRIGATION DISTRICT,
NATIONAL HYDROPOWER ASSOCIATION, NORTHWEST HYDROELECTRIC
ASSOCIATION, PACIFIC GAS AND ELECTRIC COMPANY, 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**

Charles R. Sensiba
Troutman Sanders, LLP
401 9th Street, NW, Ste. 1000
Washington, DC 20004
Telephone: (202) 274-2850

Michael A. Swiger
Counsel of Record
Sharon L. White
Van Ness Feldman, LLP
1050 Thomas Jefferson Street, NW
Washington, DC 20007
Telephone: (202) 298-1800

May 4, 2020

(Of Counsel Listing on Inside Cover)

Andrea W. Wortzel
Troutman Sanders, LLP
1001 Haxall Point
Richmond, VA 23218
Telephone: (804) 697-1406

Angela J. Levin
Troutman Sanders, LLP
Three Embarcadero Center
Suite 800
San Francisco, CA 94111
Telephone: (415) 477-5787

CORPORATE DISCLOSURE STATEMENT

Grand River Dam Authority (“GRDA”) is a non-appropriated agency of the State of Oklahoma, created by the Oklahoma Legislature in 1935. GRDA has no parent company or stockholders.

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.

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.

Pacific Gas and Electric Company (“PG&E”) is a corporation organized under the laws of the State of California, with its principal executive offices in San Francisco, California. PG&E is an operating public utility engaged principally in the business of providing electricity and natural gas distribution and transmission services throughout most of Northern and Central California. PG&E Corporation is the holding company parent of PG&E and has a 10% or greater ownership

interest in PG&E. PG&E Corporation holds 100% of the issued and outstanding shares of PG&E common stock, which comprises approximately 96% of the total outstanding, voting stock of PG&E. Holders of PG&E's preferred stock hold approximately 4% of PG&E's total outstanding voting stock.

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.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vi

OVERVIEW OF *AMICI* 1

STATEMENT OF INTEREST 4

STATEMENT OF THE ISSUE PRESENTED 9

SUMMARY OF ARGUMENT 10

ARGUMENT 11

 I. The One-Year Statutory Period Is a Bright-Line Rule Without
 Exception Which Serves a Vital Regulatory Function. 11

 II. FERC’s Role in Determining Waiver Should Be Protected and
 Preserved. 15

 a. *Hoopa Valley* and Its Progeny Help Maintain Order and
 Certainty in Hydropower Licensing. 15

 b. Enforcing the One-Year Review Period for 401
 Certification Protects the Cooperative Federalism
 Construct Envisioned by the CWA. 19

CONCLUSION 21

CERTIFICATE OF COMPLIANCE 22

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

Page(s)

Cases

Alabama Rivers Alliance v. FERC,
325 F.3d 290 (D.C. Cir. 2003).....7

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

American Rivers, Inc. v. FERC,
129 F.3d 99 (2d Cir. 1997)6

Central Vermont Public Service Corp.,
113 FERC ¶ 61,167 (2005).....14

City of Tacoma v. FERC,
460 F.3d 53 (D.C. Cir. 2006).....7, 17, 18

Constitution Pipeline Co.,
169 FERC ¶ 61,199 (2019), *petition for review filed, N.Y. State
Dep’t of Env’tl. Conservation v. FERC*, No. 19-4338 (2d Cir. Dec.
30, 2019).....12

Constitution Pipeline Co., LLC,
168 FERC ¶ 61,129 (2019).....12

Exelon Generation Co., LLC v. Grumbles,
380 F. Supp. 3d 1 (D.D.C. 2019).....18

First Iowa Hydro-Electric Cooperative v. Federal Power Comm’n,
328 U.S. 152 (1946).....5

Hoopa Valley Tribe v. FERC,
913 F.3d 1099 (D.C. Cir.), *reh’g denied*, No. 14-1271, 2019 WL
3928669 (D.C. Cir. Apr. 26, 2019), *cert. denied sub nom.
California Trout v. Hoopa Valley Tribe*, 140 S. Ct. 650 (2019)*passim*

*Islander East Pipeline Co., LLC v. Connecticut Dep’t of
Environmental Protection*,
482 F.3d 79 (2d Cir. 2006)19

<i>Keating v. FERC</i> , 927 F.2d 616 (D.C. Cir. 1991).....	20
<i>McMahan Hydroelectric, LLC</i> , 168 FERC ¶ 61,185 (2019), <i>reh ’g & stay denied</i> , 171 FERC ¶ 61,046 (2020).....	16
<i>Millennium Pipeline Co., L.L.C. v. Seggos</i> , 860 F.3d 696 (D.C. Cir. 2017).....	7, 18
<i>Nat’l Fuel Gas Supply Corp.</i> , 164 FERC ¶ 61,084 (2018), <i>reh ’g denied</i> , 167 FERC ¶ 61,007 (2019).....	8
<i>Nevada Irrigation District</i> , 171 FERC ¶ 61,029 (2020).....	13, 17
<i>New York State Dep’t of Environmental Conservation v. FERC</i> , 884 F.3d 450 (2d Cir. 2018)	10, 11, 12
<i>Pacific Gas & Electric Co.</i> , 170 FERC ¶ 61,232 (2020).....	12, 17
<i>PacifiCorp</i> , 149 FERC ¶ 61,038 (2014).....	9
<i>Placer County Water Agency</i> , 169 FERC ¶ 61,046 (2019).....	12, 16
<i>PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology</i> , 511 U.S. 700 (1994).....	6, 19, 20
<i>S.D. Warren Co. v. Maine Board of Environmental Protection</i> , 547 U.S. 370 (2006).....	6
<i>Southern California Edison Co.</i> , 170 FERC ¶ 61,135 (2020).....	12, 16
Statutes and Regulations	
16 U.S.C. §§ 791-825r (2018)	5
16 U.S.C. § 797(e)	5, 6

16 U.S.C. § 803(a)	17
16 U.S.C. § 803(a)(1).....	6
16 U.S.C. § 808.....	5
16 U.S.C. § 817.....	5
18 C.F.R. § 4.34(b)(5) (2020).....	18
18 C.F.R. § 5.5(a).....	18
18 C.F.R. § 5.5(c).....	18
18 C.F.R. § 5.5(d)	18
18 C.F.R. § 5.23(b)	18
33 U.S.C. § 1341 (2018).....	6
33 U.S.C. § 1341(a)	6
33 U.S.C. § 1341(a)(1).....	7, 11, 19
33 U.S.C. § 1341(d)	19
40 C.F.R. § 1501.6 (2020)	17

Other Authorities

Environmental Protection Agency, Guidance for Federal Agencies, States and Authorized Tribes (June 7, 2019), <i>available at</i> https://www.epa.gov/sites/production/files/2019-06/documents/cwa_section_401_guidance.pdf	14
Federal Energy Regulatory Commission, Report to Congress on Hydroelectric Licensing Policies, Procedures, and Regulations; Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000 (May 2001), <i>available at</i> https://ferc.gov/legal/maj-ord-reg/land-docs/ortc_final.pdf	16

U.S. Department of Energy, Hydropower Vision: A New Chapter for America’s 1st Renewable Electricity Source (2016), *available at* http://energy.gov/sites/prod/files/2016/10/f33/Hydropower-Vision-10262016_0.pdf5

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 Apr. 28, 2020)4

OVERVIEW OF *AMICI*

Grand River Dam Authority (“GRDA”), Merced Irrigation District (“MID”), National Hydropower Association (“NHA”), Northwest Hydroelectric Association (“NWEHA”), Pacific Gas and Electric Company (“PG&E”), 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:

GRDA is a non-appropriated agency of the State of Oklahoma, created by the Oklahoma Legislature in 1935 to be a “conservation and reclamation district for the waters of the Grand River.” GRDA fulfills its statutory responsibilities under state law by operating the Pensacola Hydroelectric Project, Markham Ferry

¹ Pursuant to Local Rule 29.1, Hydroelectric *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.

Hydroelectric Project, and the Salina Pumped Storage Project, and by managing three lakes along the Grand River system.

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 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.²

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

² This brief represents the views of NHA as a whole. Although a member of NHA, the New York Power Authority takes no part in this brief.

Northwest region's waterpower as a clean, efficient energy source while protecting the fisheries and environmental quality that characterize the region.

PG&E is one of the largest combined natural gas and electric energy companies in the United States. It owns and operates one of the nation's largest investor-owned hydroelectric systems, which is located along 16 river basins that span more than 500 miles in California. PG&E is the owner and operator of 24 FERC-licensed hydroelectric projects. These projects include approximately 100 reservoirs, 65 powerhouses, and extensive appurtenant facilities, such as penstocks, canals, and transmission lines. PG&E's hydroelectric system has a combined generating capacity of nearly 3,900 megawatts ("MW") of clean power, which is enough power to meet the needs of nearly four million homes.

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/or 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 112 MW 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 on average.

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 and serious impacts on the nation's hydropower industry and supply of electric energy. Hydropower projects are an important source of electric power, accounting for approximately seven percent of national electric production each year and over one-third of the country's renewable energy.³ Hydropower resources serve as critical renewable electric resources that provide a multitude of grid benefits, including grid stability and reliability, and are the foundation upon which many

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> (last visited Apr. 28, 2020).

state renewable energy resource goals are built.⁴ Hydroelectric dams impound water in a reservoir or divert water out of the stream for release through turbines for the production of electricity. In addition to electricity production, the nation's 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. 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.⁵ 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,

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.

⁵ Federally operated hydropower projects, such as those operated by the Tennessee Valley Authority, U.S. Army Corps of Engineers, and the Bureau of Reclamation are not licensed by FERC.

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 a variety of environmental statutes, such as the National Environmental Policy Act (“NEPA”), the Fish and Wildlife Coordination Act, the Endangered Species Act, the Coastal Zone Management Act, the 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 the state’s water quality standards. If this certification is timely granted, FERC may issue the license, and is statutorily required to include any terms and 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 Env'tl. Prot., 547 U.S. 370, 374-75 (2006); *Ala. Rivers All. v. FERC*, 325 F.3d 290, 292 (D.C. Cir. 2003); 33 U.S.C. § 1341(a)(1). A developer of a new or expanded hydropower project that involves discharge of dredged or fill materials into navigable waters under Section 404 of the CWA also must obtain a Section 401 certification for that discharge.

For all federal licensing and permitting actions triggering Section 401 certification, including hydropower licensing and relicensing identified above, 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 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 and gas pipeline certificates. *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.) (holding that FERC was arbitrary and capricious for failing to find that the states had waived Section 401 authority), *reh'g denied*, No. 14-1271, 2019 WL 3928669 (D.C. Cir. Apr. 26, 2019), *cert. denied sub nom. Cal. Trout v. Hoopa Valley Tribe*, 140 S. Ct. 650 (2019); *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 section 401.”).

In these consolidated cases, the New York State Department of Environmental Conservation (“New York DEC”) and Sierra Club filed petitions for review challenging several FERC orders finding that New York DEC waived its authority under Section 401 to issue or deny a water quality certification for a natural gas pipeline project by failing to act within one year from the date it received the application. *Nat’l Fuel Gas Supply Corp.*, 164 FERC ¶ 61,084 (2018), *reh’g denied*, 167 FERC ¶ 61,007 (2019). FERC enforced the one-year period specified in Section 401 by holding that a state and an applicant may not agree to extend that one-year period by changing the date by which the application was deemed received by the state. Based on its conclusion that the Section 401 deadline cannot be altered by agreement, FERC held that because New York DEC failed to act within one year, it waived its authority to issue a water quality certification for the gas pipeline project.

FERC’s decision is correct and should be upheld. The plain language of CWA Section 401 requires a state to act on an application for water quality certification within one year from receipt of the application. As this Court has recognized, this is a bright-line rule with no exceptions. If this Court permits even a short extension of the statutory deadline through a written agreement, there is a

real risk of states using the threat of denial to pressure applicants into such agreements year after year thus 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).

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 Section 401 of the CWA requires a state to grant or deny an application for water quality certification within one year of the date it actually receives the application, and reasonably determined that New York DEC cannot lengthen the statutorily established maximum one-year period by agreeing with the applicant to deem the application received on a later date.

SUMMARY OF ARGUMENT

Hydropower *Amici*'s brief is limited to the sole issue of whether FERC appropriately determined that New York DEC waived the Section 401 certification for the pipeline project. FERC correctly enforced the bright-line, one-year rule codified in the CWA. The plain language of Section 401 provides no exceptions to the bright-line, one-year rule. If exceptions were allowed, the one-year rule established by Congress would be rendered meaningless. Moreover, the use of agreements to extend the one-year period, if authorized by this Court, would become the new procedural mechanism for states to avoid the statutory deadline in which to issue a decision on a 401 application. This would reverse the progress in extricating hydropower licensing proceedings from interminable delays that has been accomplished under the D.C. Circuit's *Hoopa Valley* decision and FERC's subsequent decisions implementing *Hoopa Valley*.

The *Hoopa Valley* precedent and this Court's bright-line one-year rule are critical to ensuring timely hydropower relicensings. *N.Y. State Dep't of Env'tl. Conservation v. FERC*, 884 F.3d 450, 452 (2d Cir. 2018) ("*New York DEC*"). A decision by this Court that undermines or narrows these prior decisions 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 intended by Congress under the plain language of Section 401.

Hydropower *Amici* urge the Court to uphold FERC's decision and find that an applicant and a state may not agree to modify the date of receipt of a request for water quality certification for purposes of extending the one-year deadline specified in Section 401.

ARGUMENT

I. The One-Year Statutory Period Is a Bright-Line Rule Without Exception Which Serves a Vital Regulatory Function.

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 a new license authorizing the continued operation of a hydroelectric project unless and until the state water quality certifying agency has either issued or waived a Section 401 certification. The certification is deemed waived if the state fails to act on a request for certification within a reasonable period of time, not to exceed one year. *Id.* This Court has held that the statutorily specified one-year period for a state's action begins upon receipt of the request for water quality certification. *New York DEC*, 884 F.3d at 455.

This Court, along with other reviewing courts and FERC have held that the one-year statutory deadline provided in Section 401 is a bright-line rule and that one year is 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); *Constitution Pipeline Co.*, 169 FERC ¶ 61,199 at P 20 (2019), *petition for review filed*, *N.Y. State Dep’t of Env’tl. Conservation v. FERC*, No. 19-4338 (2d Cir. Dec. 30, 2019). There are no exceptions to the bright-line, 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 and rejected the coordinated effort between an applicant and the certifying agency to engage in a “scheme” to extend the one-year prescribed timeframe. 913 F.3d at 1103, 1105. FERC has since found that even informal communications between the state certifying agency and water quality certification applicant can amount to an impermissible scheme, and that the parties may not extend the one-year deadline by the withdrawal and resubmittal of a 401 request. *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. The Commission has found that a “[S]tate’s reason for delay [is] immaterial” and does not excuse a failure to act within one year. *Placer County*, 169 FERC ¶ 61,046 at P 20; *Constitution Pipeline*

Co., LLC, 168 FERC ¶ 61,129 at P 37 (2019); *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, the length of delay, or whom it benefits—otherwise, these exceptions will swallow the statutorily imposed rule. While the facts of this case involve only a brief extension of the maximum time allowed under the statute, any Court-sanctioned exception would remove the regulatory certainty that is 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. As the D.C. Circuit has recognized, regulatory delays in FERC hydropower relicensing 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 Generating Inc. v. FERC*, 643 F.3d 963, 970 (D.C. Cir. 2011). Even for existing projects, delays in state Section 401 certification can—and often have—postponed the implementation of environmental and other public benefits that would come through settlement of environmental disputes and FERC’s issuance of the new license. *E.g., Hoopa*

Valley, 913 F.3d at 1105 (noting that “had FERC properly interpreted Section 401 and found waiver when it first manifested more than a decade ago” implementation of the settlement agreement “might very well be underway”).

For these reasons, the rather brief delay in this specific case is irrelevant. 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). The U.S. Environmental Protection Agency (“EPA”), the agency that administers the CWA and “ensures effective implementation of all CWA programs, including Section 401,” recently explained that “there is no tolling provision in Section 401” and that “the timeline does not pause or stop for any reason.....” EPA, Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes at 3 (June 7, 2019), *available at* https://www.epa.gov/sites/production/files/2019-06/documents/cwa_section_401_guidance.pdf. “By enacting Section 401, Congress clearly intended states and tribes to have an important role in federal permitting and licensing, but also clearly limited the timeline to act on a certification request to one year or less.” *Id.* at 2.

Hydropower *Amici* are concerned that if the Court sanctions the use of an agreement to extend the one-year period under Section 401 in this case, it will

render the statutory one-year deadline meaningless. Hydropower *Amici* fear that such a ruling would institutionalize a practice of pressuring applicants to consent to an extension of the period for review on threat of denial of water quality certification. Such practice was the norm in some states prior to *Hoopa Valley*, whereby certain states effectively compelled applicants to withdraw and resubmit their applications in an unlawful attempt to restart the one-year clock as the only alternative to denial. The result was chronic delay of hydropower relicensing proceedings for years. *See Hoopa Valley*, 913 F.3d at 1104. Experience dictates that the only way to avoid this circumstance is through the certainty of the bright-line rule established by Congress.

II. FERC's Role in Determining Waiver Should Be Protected and Preserved.

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

Most non-federal hydropower projects discharge into navigable waters or tributaries thereto; FERC's licensing and relicensing of these projects, therefore, require the applicant to seek a water quality certification from the state(s) under Section 401. Historically, the water quality certification process has been a chronic source of delay in hydropower relicensings. For example, in its Report to Congress on Hydroelectric Licensing Policies, Procedures, and Regulations in 2001, FERC identified the Section 401 process as a major source of delay in the

licensing process, stating 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.”⁶ 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*, the Commission 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; *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (2019), *reh’g & stay denied*, 171 FERC ¶ 61,046 (2020); *S. Cal. Edison Co.*, 170 FERC ¶ 61,135

⁶ 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://ferc.gov/legal/maj-ord-reg/land-docs/ortc_final.pdf.

at P 17; *Pac. Gas & Elec. Co.*, 170 FERC ¶ 61,232 at P 27; *Nev. Irrigation Dist.*, 171 FERC ¶ 61,029 at P 28. Without exception, in each case the Commission 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 will allow the Commission to finally complete the licensing process for these important, long-delayed renewable resources.⁷ The *Hoopa Valley* case 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 Hoopa Valley*, 913 F.3d at 1103; *City of Tacoma v. FERC*, 460 F.3d at 68. 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 federal statute, which includes the requirement that states must act on a water quality application within a maximum time of one year.

⁷ Recognizing and preserving FERC’s role in making waiver determinations will not result in a reduction in environmental protections. FERC-licensed infrastructure such as natural gas pipelines and 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). And, with respect to hydropower projects, FERC maintains statutory authority to impose water quality measures as warranted. *See* 16 U.S.C. § 803(a).

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.

Sierra Club argues that states need flexibility to “avoid forcing states to make snap judgments under arbitrarily short time frames” Sierra Club Br. at 16 (ECF No. 156). However, the plain language of Section 401 is clear: a state must act within one year. This time period is neither arbitrary nor prohibitively short. Rather, it is the time that was determined by Congress to be sufficient for a state to act on a 401 application. Moreover, the permitting process for large infrastructure projects involving discharges into navigable waters is typically lengthy and involved, providing states with notice, information and opportunity to participate beyond just the 401 certification process. This permitting process ensures that states will not be in the position of making snap judgments.⁸

⁸ For example, in the hydropower context, FERC revised its regulations in 2003 to require applicants to submit their Section 401 certification request with the state later in the FERC licensing process, allowing states more time to read and digest the FERC license application. 18 C.F.R. §§ 4.34(b)(5), 5.23(b) (2020). By the time an applicant submits a Section 401 certification request with the state, the state has already had years’ worth of notice that an applicant intends to seek a hydropower license. *Id.* § 5.5(a), (c)-(d). The state will already possess the applicant’s voluminous license application supported by environmental studies (and states have the opportunity to participate in the development of those environmental studies). Thus, the state should already be familiar with a project long before it receives a Section 401 request, and should be able to act on the request to certify a discharge within one year.

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.

b. 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 an exacting maximum time period for such regulation and requiring the federal licensing or permitting 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 700. This Court has held that Section 401 certification "is not a sovereign state right" and that the state "exercises only such authority as has been delegated by Congress." *Islander E. Pipeline Co., LLC v. Conn. Dep't of Env'tl.*

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 Clean Water Act 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 orderly and 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 and relicensing proceedings. This also serves the public interest, as protracted proceedings delay important 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 infrastructure projects.

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,

/s/ Michael A. Swiger

CHARLES R. SENSIBA
TROUTMAN SANDERS, LLP
401 9TH STREET, NW
SUITE 1000
WASHINGTON, DC 20004
(202) 274-2850
Charles.Sensiba@troutman.com

MICHAEL A. SWIGER
Counsel of Record
SHARON L. WHITE
VAN NESS FELDMAN, LLP
1050 THOMAS JEFFERSON STREET, NW
SEVENTH FLOOR
WASHINGTON, DC 20007
(202) 298-1800
mas@vnf.com
slw@vnf.com

ANDREA W. WORTZEL
TROUTMAN SANDERS, LLP
1001 HAXALL POINT
RICHMOND, VA 23219
(804) 697-1406
Andrea.Wortzel@troutman.com

ANGELA J. LEVIN
TROUTMAN SANDERS, LLP
THREE EMBARCADERO CENTER
SUITE 800
SAN FRANCISCO, CA 94111
(415) 477-5787
Angela.Levin@troutman.com

May 4, 2020

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) and Local Rule 32.1 because this brief contains 4,681 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
Michael A. Swiger

May 4, 2020

CERTIFICATE OF SERVICE

I, Michael A. Swiger, hereby certify that on May 4, 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 Second 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 4th day of May, 2020.

/s/ Michael A. Swiger
Michael A. Swiger
Van Ness Feldman, LLP
1050 Thomas Jefferson Street, NW
Seventh Floor
Washington, DC 20007
Telephone: (202) 298-1800