ORAL ARGUMENT NOT YET SCHEDULED

NO. 23-1075

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BROOKFIELD WHITE PINE HYDRO LLC,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

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

BRIEF OF WASHINGTON, CONNECTICUT, THE DISTRICT OF COLUMBIA, ILLINOIS, MARYLAND, MASSACHUSETTS, NEW YORK, OREGON, PENNSYLVANIA, AND VERMONT AS AMICI CURIAE IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), amici certify as follow:

A. Parties and Amici

Except for the following, all parties and intervenors appearing in this court are listed in the Brief of Petitioner Brookfield White Pine Hydro LLC: amici curiae Washington, Connecticut, the District of Columbia, Illinois, Maryland, Massachusetts, New York, Oregon, Pennsylvania, and Vermont.

B. Rulings Under Review

References to the rulings at issue appear in the Brief of Petitioner Brookfield White Pine Hydro LLC.

C. Related Cases

No other cases are pending regarding the subject of the rulings on review.

RESPECTFULLY SUBMITTED this 9th day of November 2023.

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I. INTERESTS OF AMICI

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, the States of Washington, Connecticut, Illinois, Maryland, Massachusetts, New York, Oregon, Pennsylvania, Vermont, and the District of Columbia (Amici States) submit this brief in support of Respondent, Federal Energy Regulatory Commission (FERC). Amici States request affirmance of FERC's Orders, which found that the State of Maine's Department of Environmental Protection (Maine DEP) did not waive its authority under section 401 of the Clean Water Act (CWA section 401), 33 U.S.C. § 1341, to issue a water quality certification for the Shawmut Hydroelectric Project along the lower Kennebec River in Maine.

Like Maine through Maine DEP, the Amici States exercise authority under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, to issue or deny water quality certifications for projects that require a federal license or permit and may result in a discharge into navigable waters. *See generally* 33 U.S.C. § 1341. For over fifty years, Amici States have implemented CWA section 401 in a manner that is consistent with and furthers the Clean Water Act, their state laws, and proprietary and statutory interests in water quality within their states.

This is illustrated in the economic viability analysis of the 2020 Rule performed by EPA. U.S. Envtl. Prot. Agency, *Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking* (Aug. 2019).[1] The analysis cited favorably to a 2019 survey of certifying states finding that states work hard to issue section 401 certifications in a timely manner and very rarely issue denials of certification. *Id*. at 6. "The average length of time for states to issue a certification decision once they receive a complete request is 132 days," with incomplete submissions by applicants as the most common reason listed for delay. *Id*. at 6, 19. Amici States have substantial interests in the lawful application of the state waiver provision of CWA section 401, such as Maine DEP's decision here.

II. ARGUMENT

Since at least 1948, Congress has repeatedly acted to preserve state sovereignty in matters related to water pollution within their borders. To those ends, section 401 of the Clean Water Act allows federal agencies such as FERC to proceed with licensing and permitting activities with the potential to impact state waters only after the affected state has either granted or denied the project

[1] Available at: https://www.epa.gov/sites/default/files/2019-08/documents/economic_analysis.pdf.

proponent's application for water quality certification or waived its authority to do so. Where a state denies certification, the proposed project cannot proceed. As this Court recently held, that state's denial can be with *or without* prejudice. *Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179, 1184 (D.C. Cir. 2022), *cert. denied*, 143 S. Ct. 1746 (2023).

Such a denial is at issue here, where Maine DEP denied without prejudice Brookfield White Pine Hydro LLC's (White Pine) application for water quality certification because White Pine did not submit information necessary for Maine to determine the activity's compliance with applicable water quality requirements. Rather than remedy the deficiencies in its application, White Pine attempted procedural "gamesmanship." *Id*. Relying on the now-replaced[2] 2020 section 401 Rule[3] that governed FERC's review of Maine DEP's state water

[2] The July 13, 2020 Rule has been replaced by the 2023 Rule, which will become effective November 27, 2023.

[3] The text of the relevant provision, 40 C.F.R. § 121.7(e), states:

> Any denial of certification shall be in writing and shall include:
> (1) For denial of certification for an individual license or permit,
> (i) The specific water quality requirements with which the discharge will not comply;
> (ii) A statement explaining why the discharge will not comply with the identified water quality requirements; and
> (iii) If the denial is due to insufficient information, the denial must describe the specific water quality data or information, if any, that would be needed to assure that the

quality certification denial, White Pine asserted that, despite taking clear and timely action on the certification request, Maine somehow waived its authority by failing to specify unsatisfied water quality requirements.

Contrary to White Pine's assertion, however, a state does not waive its CWA section 401 authority by failing to identify water quality impacts that it expressly determines *cannot* be identified because of an incomplete application for a state water quality certification request. Indeed, such an interpretation would provide an incentive for applicants to intentionally shorten their application materials and claim waiver when, as a result of such insufficient information, a state cannot identify water quality impacts of the proposed project—the very facts of this case. White Pine's interpretation of the 2020 Rule must be rejected to avoid such absurd results that are in direct contravention of the purposes of the Clean Water Act.

A. White Pine's Attempt to Eliminate State Authority Due to Alleged Procedural Errors Is Inconsistent with Section 401 and Congressional Intent

1. Congress has repeatedly expressed a clear intent that state authority over water quality not be lightly set aside

The Clean Water Act provides that:

> discharge from the proposed project will comply with water quality requirements.

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources.

33 U.S.C. § 1251(b).

These are not idle words. Congress's commitment to retain state sovereignty to protect water quality throughout the Clean Water Act has roots at least as far back as the 1948 Water Pollution Control Act, when Ohio Congressman John A. Elston stated during the congressional debate that "[t]here is not a single step that is taken under the pending bill that is not first authorized by some [s]tate agency, either by the public-health service of the [s]tate or some agency that may be designated by the [s]tate's public-health authority." 80 Cong. Rec. 8199 (1948) (June 17, 1948, House Floor Debate of the Water Pollution Control Act).[4]

Congress further codified this commitment to preserve state authority in the landmark water quality legislation of the 1970s by incorporating section 401 water quality certifications—states' guarantee that federal projects cannot

[4] Leaving no doubt, Section 5 of the Water Pollution Control Act also mandated that the Federal Works Administrator could only authorize funds for projects if a state's water pollution agency first approved the project's plan to comply with state water pollution control standards. Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948).

override local water quality concerns. *See, e.g.*, *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 711-12 (1994). This was done first in 1970 amendments through the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91, and again two years later when Congress revised the federal water quality protection framework through the Federal Water Pollution Control Act Amendments of 1972 (commonly known as the Clean Water Act or CWA). Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, *as amended* Pub. L. No. 95-217, 91 Stat. 1566 (1977). Indeed, EPA recently highlighted this fact in the newly published 401 Certification Rule (2023 Rule) where it recognized that "Congress granted states [water quality] certification authority in response to Federal agencies' failure to achieve Congress's previously stated goal of assuring that federally licensed or permitted activities comply with water quality standards." *Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 88 Fed. Reg. 66,558, 66,559 (Sept. 27, 2023).

State water quality certification authority is straightforward. Under what is now section 401 of the Clean Water Act, those applying for a federal license or permit to engage in activity that may result in a discharge into navigable waters must seek certification from the affected state that any such discharge

complies with applicable water quality requirements. *See* 33 U.S.C. § 1341(a)(1). Federal agencies may proceed with licensing and permitting such activities only after the certifying authority grants the application or waives its authority to do so. *Id*. Where a state denies the application for certification, "[n]o license or permit shall be granted." 33 U.S.C. § 1341(a)(1).[5]

Once made, federal agencies do not have authority to second-guess state water quality certification decisions. *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006). Indeed, a state's section 401 certification is a question of state law, with federal agencies "limited to awaiting, and then deferring to, the final decision of the state." *Id.*

Critically here, the Clean Water Act provides only a single avenue to unilaterally override state authority: certification may be constructively waived only where a state "fails or refuses to act on a request for certification" within a

[5] The legislative history confirms this plain language. The House Report on section 401 states that "[d]enial of certification by a State . . . results in a *complete prohibition* against the issuance of the Federal license or permit." H.R. Rep. No. 92-911, at 122, *reprod. in* 1 Legis. Hist. of the Water Pollution Control Act Amendments of 1972, at 809 (1973) (emphasis added). The Senate Report likewise provides that "[s]hould . . . an affirmative denial occur" by a State "no license or permit could be issued" by the federal agency "unless the State action was overturned in the appropriate courts of jurisdiction." S. Rep. No. 92-414, at 69 *reprod. in* 2 Legis. Hist. of the Water Pollution Control Act Amendments of 1972, at 1487 (1973) .

reasonable period of time. 33 U.S.C. § 1341(a)(1). The legislative history makes clear that Congress intended this provision—both in the 1970 Act and as carried forward into the Clean Water Act amendments—to guard only against "a situation where the [certifying state . . . simply sits on its hands and does nothing,"[6] thus killing a proposal via "sheer inactivity."[7]

Accordingly, a determination that weakens states' abilities to regulate water quality within their borders by greatly expanding constructive waiver of that authority is contrary to both the plain language and legislative intent of the Clean Water Act. To effectuate the plain statutory language and the congressional intent to preserve states' fundamental rights to protect water quality, section 401 and its implementing regulations must be construed in favor of non-waiver, preserving state authority. *See* 33 U.S.C. § 1341(a)(1).

2. White Pine's interpretation would create an unworkable procedural trap that neither Congress nor EPA intended

Congress's longstanding policy of preserving state authority over water quality—and the unequivocal codification of that policy in the Clean Water Act—coupled with EPA's effectuation of that policy judgment in its regulations

[6] 91 Cong. Rec. 9265 (Apr. 16, 1969) (House debate on H.R. 4148) (statement of Congressman Chester Holifield).

[7] H.R. Rep. No. 92-911, at 122 (1972).

makes clear that neither Congress in section 401 nor EPA in its regulations intended to create the procedural trap that White Pine attempts to use here. Such gamesmanship would gravely undermine the very state authority that the statute expressly preserved.

White Pine asserts that, under 40 C.F.R. § 121.7, Maine DEP was required to identify the specific water quality requirements that White Pine's hydroelectric project did not meet. Pet'r's Br. at 7-10. But, as Maine DEP made clear, the state agency could not make that determination because White Pine's application was devoid of the information necessary to do so. *Id.* at 9. And that makes sense: a certifying authority cannot analyze whether water quality standards are met if an applicant has not offered the certifying authority the information necessary to make a reasoned decision. In other words, a rule that would require states to detail what water quality standards are *not* met based on information *not* provided by the applicant would place states in the untenable position of either having to answer an unanswerable question or waive their section 401 authority. Such a strained and illogical reading of the regulatory text must be rejected. *United States v. Cook*, 594 F.3d 883, 891 (D.C. Cir. 2010) (a statutory outcome is "absurd" if it defies rationality due to rendering a statute nonsensical or superfluous).

Moreover, to read the procedural components of 40 C.F.R. § 121.7 as strictly as White Pine proposes is not only illogical but also inconsistent with EPA's intent. As EPA made clear in the text of the 2020 Rule: "[i]f the denial is due to insufficient information," then the denial must only describe the information needed to determine whether it would comply. 40 C.F.R. § 121.7(e)(1)(iii). As discussed above, that is the scenario at issue in this case. In contrast, and not at issue here, is the very different scenario where an applicant provides the certifying authority with all necessary information but finds that the proposed project will not satisfy water quality requirements. In such case, the 2020 Rule requires the state to specify those requirements and the ways they are not met. 40 C.F.R. § 121.7(e)(1)(i)-(ii). On the other hand, where, as here, "the denial is due to *insufficient information*," the denial must only describe the information needed to determine whether it would comply. 40 C.F.R. § 121.7(e)(1)(iii) (emphasis added). This Court should reject White Pine's attempt to apply the rule for the latter scenario onto the former, insufficient-information scenario both because it lacks textual support and defies reason.

Contrary to White Pine's claim, EPA's use of the conjunctive "and" within 40 C.F.R. § 121.7(e)(1) is not dispositive. While cannons of statutory construction typically construe "and" as conjunctive and "or" as disjunctive,

they are not to be interpreted as such where "context dictates otherwise." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Context speaks loudly here. The procedural requirements of subsections (i) and (ii) require the certifying authority to detail how water quality standards "will not" be met, but do not require an explanation as to why there wasn't sufficient information to make such a determination, because "if" that were the case, such a scenario is covered by subsection (iii). 40 C.F.R. § 121.7(e)(1)(i)-(iii). Reading this subsection as requiring a state to prove a negative—or forever *waive* section 401 authority—would be an absurd construction indeed. And, as explained above, such an interpretation would also be wholly inconsistent with Congress's intent. *Supra,* pp. 4-8.

EPA's preamble to the 2020 Rule does not counsel otherwise. The preamble discussion cited by White Pine (Pet'r's Br. at 30) addresses substantive denials, not denials for lack of information. 85 Fed. Reg. 42,267 (July 13, 2020). In fact, EPA has cautioned against an overly broad reading of the 2020 Rule's procedural requirements due to its concerns over "a state or tribe's certification or conditions being permanently waived as a result of nonsubstantive and easily fixed procedural concerns." 86 Fed. Reg. 29,543 ¶ 5 (June 2, 2021). This concern has since led EPA to completely abandon requiring "any additional direction or

process for denials." 88 Fed. Reg. at 66,608. In doing so, EPA noted that requiring regulatorily-defined elements is inconsistent with the plain language of section 401 and that "[t]he mere failure of a certifying authority to include [such elements]" does not comport with the kind of "'sheer inactivity' that Congress contemplated would result in a constructive waiver." 88 Fed. Reg. at 66,610.

This Court should concur with EPA's assessment. Maine DEP may, in fact, ultimately conclude that White Pine's project meets Maine's water quality requirements once it receives and reviews an application that includes all necessary information. Or Maine DEP may conclude that the project will meet Maine's water quality requirements so long as the project complies with certain conditions included in the certification once, again, it receives and reviews an application that includes all necessary information. But that is Maine DEP's decision alone to make, subject to review by Maine's state courts. *See generally FPL Energy Maine Hydro LLC v. Dep't of Envtl. Prot.*, 926 A.2d 1197, 1203-09 (Me. 2007) (reviewing Maine Board of Environmental Protection's denial of a water quality certification). A state's decision to deny certification based on the lack of specified information is a dispositive state water quality

determination that should not be construed as waiver. *Turlock Irrigation Dist.*, 36 F.4th at 1184. Neither Congress nor EPA intended otherwise.

B. This Court Should Follow Its Own and Other Courts' Pragmatic Approach to Questions of State Section 401 Authority

Consistent with Congress's express intent to preserve state authority over water quality, *supra,* pp. 4-8, multiple courts (including this Court) have appropriately hesitated to strip states of their section 401 certification authority based on technicalities or strained arguments related to the application process.

This Court recently turned aside an assertion that a state waives section 401 authority when it denies, without prejudice, a certification request due to additional time needed to complete environmental reviews. *Turlock Irrigation Dist.*, 36 F.4th at 1184. In doing so, this Court noted the significant danger for procedural "gamesmanship" that arises if denials without prejudice were not "acting" within the reasonable period of time. *Id*. Specifically, the Court agreed with FERC's conclusion that reading the waiver provisions broadly would leave states in the "untenable position" of either granting certification without proper information or waiving section 401 authority. *Id*. As noted above, White Pine's argument here—that Maine DEP waived its section 401 authority by failing to answer a question it expressly concluded it could not answer without additional

information—represents precisely the kind of procedural gamesmanship this Court rejected in *Turlock*. *See id*.

Other courts have similarly taken pragmatic approaches to section 401, refusing overly inflexible and impractical interpretations that minimize or undercut state authority. For example, in *California State Water Resources Control Board v. FERC*, 43 F.4th 920 (9th Cir. 2022), the Ninth Circuit rejected an overly broad interpretation of section 401's waiver provision to include an applicants' own withdrawal of its section 401 certification requests rather than having such requests denied because state environmental review was incomplete. Rejecting FERC's assertions of waiver, the court noted that constructive waver is a "dramatic consequence[]" that cannot be based on "thin evidence" of a state's refusal to discharge section 401 duties. *Cal. State Water Res. Control Bd.*, 43 F.4th at 936.

Additionally, in *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721 (4th Cir. 2009), the Fourth Circuit upheld a U.S. Army Corps' requirement to submit a valid (i.e., complete) application before the statutory one-year waiver period commences. This clarified that parties may not shortchange state section 401 review by triggering the one-year review period based on an applicant's

submission of an incomplete application. *AES Sparrows Point LNG,* 589 F.3d at 729.

The Fourth Circuit likewise rejected FERC's determination that North Carolina waived its section 401 authority where an applicant had unilaterally withdrawn its section 401 certification request to allow time for environmental studies and public participation processes to be completed. *North Carolina Dep't of Envtl. Quality v. FERC*, 3 F.4th 655 (4th Cir. 2021). In doing so, the court noted the limited scope of section 401 waiver and that, "while the purpose of § 401's [waiver provisions] was to prevent States from delaying federal projects by taking no action on certification requests, the purpose behind § 401 itself . . . is to assure that Federal licensing or permitting agencies cannot override State water quality requirements." *Id*. at 670 (internal quotations omitted).

These cases—and others—demonstrate that courts have appropriately recognized the practical realities that, as was the case here, impede a state's exercise of section 401 authority. Thus, so long as a state is not being derelict in its duties to work in good faith to make section 401 certification decisions, courts have appropriately declined to strip states of section 401 authority. This Court should decline to do so, too, based on the circumstances presented by this case.

III. CONCLUSION

For the foregoing reasons, this Court should affirm FERC's Orders.

RESPECTFULLY SUBMITTED this 9th day of November 2023.

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Dated at Seattle, Washington this 9th day of November 2023.

/s/*Alexandria K. Doolittle*
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SIGNATURE ATTESTATION

I attest that concurrence in the filing of this document has been obtained from each of the other signatories.

Dated: November 9, 2023

/s/*Alexandria K. Doolittle*
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CERTIFICATE OF SERVICE

I, Alexandria K. Doolittle, hereby certify that on November 9, 2023, I electronically filed the foregoing Brief of Washington, Connecticut, the District of Columbia, Illinois, Maryland, Massachusetts, New York, Oregon, Pennsylvania, and Vermont, as Amici Curiae in support of Respondent and Affirmance with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF System.

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 this 9th day of November 2023 at Seattle, Washington.

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