ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21-1120, 21-1121

TURLOCK IRRIGATION DISTRICT AND
MODESTO IRRIGATION DISTRICT,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

AMERICAN WHITEWATER, ET AL.,

Intervenors for Respondent.

ON PETITIONS FOR REVIEW OF ORDERS BY THE
FEDERAL ENDERGY REGULATORY COMMISSION

BRIEF OF AMICI CURIAE OF THE STATES OF WASHINGTON, COLORADO, CONNECTICUT, THE DISTRICT OF COLUMBIA, ILLINOIS, MAINE, MARYLAND, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, VERMONT, AND THE COMMONWEALTHS OF MASSACHUSETTS, PENNSYLVANIA, AND VIRGINIA IN SUPPORT OF RESPONDENT

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I. INTEREST OF AMICI CURIAE

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, the States of Washington, Colorado, Connecticut, the District of Columbia, Illinois, Maine, Maryland, Minnesota, New Jersey, New York, New Mexico, North Carolina, Oregon, Vermont, and the Commonwealths of Massachusetts, Pennsylvania, and Virginia submit this brief in support of Respondent Federal Energy Regulatory Commission ("Commission") to defend its orders denying Petitioners' request to declare that the California State Water Resources Control Board ("Board") waived its authority under Section 401(a)(1) of the Clean Water Act to issue water quality certifications for two hydroelectric projects along the Tuolumne River.

Like California through the Board, the Amici States exercise authority under Section 401 of the Clean Water Act, 33 U.S.C. §§ 1251–1387, to issue or deny water quality certifications for projects that may result in a discharge and require a federal license or permit. *See generally* 33 U.S.C. § 1341. Amici States implement Section 401 in a manner that is consistent with the Clean Water Act, their state laws, and proprietary and statutory interests in water quality within their states. Accordingly, Amici States have substantial interests in the proper

application of the state waiver provision of Section 401 as presented in this petition for the Court's review.

II. INTRODUCTION AND ARGUMENT SUMMARY

Hydropower licensing and relicensing proceedings are among the most complex situations in which states are tasked with ensuring compliance with state water quality laws pursuant to Section 401 of the Clean Water Act. While hydro projects can represent a key element of the nation's energy infrastructure and serve as an important means of reducing greenhouse gas emissions, they can also come with significant environmental costs. Even with mitigation, dams can have devastating impacts on water quality, including habitat loss, increased sedimentation, temperature changes, and a host of other water-related harms. Because federal law largely prevents states from otherwise regulating hydropower facilities, Section 401 represents states' principal chance to avoid or at least mitigate these harms. These licenses are often valid for up to 50 years, meaning that water quality certifications provide states with a singular opportunity to address water quality impacts from these facilities.

Evaluating the water quality impacts of hydro projects can be a time consuming and difficult task. As Hydropower Amici point out, conducting required environmental reviews of large hydro projects can take years and

millions of dollars to complete. Hydro Amici Br. at 29. The results of this review, however, are not just relevant to the federal agency. Information gleaned during environmental review is crucial to a state's understanding of whether the project will comply with state water quality laws and to the development of conditions necessary to ensure that compliance.

As a result, states (and courts) have long struggled with a mismatch between the timing of federal environmental review and the one-year timeframe for Section 401 certification for hydro projects. State certifying authorities cannot evaluate the water quality impacts of complex projects in a vacuum or craft mitigation conditions out of thin air. Without the benefit of key environmental studies (that are being developed by an applicant, but are not yet available), certifying authorities cannot certify projects will comply with state water quality requirements and, under current judicial and administrative precedent, *must* deny those requests if the applicant does not withdraw them, as happened here.

The Clean Water Act does not require otherwise. A plain language reading of the Clean Water Act establishes that California's decision in this case denying the certification request without prejudice was not a "fail[ure] or refus[al]" to act within a reasonable period not to exceed one year. California indeed *did* act by

denying certification. There is thus no basis for holding that this agency action was, as Petitioners contend, inaction that should result in a waiver.

This conclusion is bolstered by the legislative history of Section 401, which confirms that Congress' intent in adopting the one-year timeframe for Section 401 certifications was related solely to avoiding deliberate inaction to stymie federally licensed projects. That concern is absent where, as here, the certification denial constituted an action that could be challenged in state court, was made well in advance of the Commission completing its licensing proceeding, and was based not on deliberate idleness or a desire to delay the project, but on the practical reality that critical data necessary to evaluate the request was forthcoming but not yet available.

Nor does this Court's decision in *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099 (D.C. Cir. 2019) (*Hoopa Valley)* require reversal. In *Hoopa Valley*, this Court did not address the situation presented here. Rather, and under what has been described as fairly egregious facts, the *Hoopa Valley* decision held only that "deliberate, contractual idleness" in delaying a hydro licensing proceeding via a coordinated withdrawal and resubmittal of a Section 401 certification request circumvented Congress's intent that the process not be used as a means to stonewall federal licenses. *See N.C. Dep't of Env't.*

Quality v. Fed. Energy Regul. Comm'n, 3 F.4th 655, 669 (4th Cir. 2021) (stating *Hoopa Valley* flows from a "fairly egregious set of facts."). In so holding, this Court did not attempt to further define what constituted a failure or refusal to act on the part of a certifying authority or to adopt a bright-line rule for this standard. Nor has any court. After *Hoopa Valley* was decided, both the Commission and the circuit courts have been reluctant to apply a harsh interpretation of Section 401's one-year timeline absent a showing that a state seeks to use its Section 401 authority as a means of project delay. Moreover, the case has no application here where the state denied certification within one year.

There is no indication that California's denials in this case represent any attempt to delay Petitioners' projects. Rather, the denials were an appropriate response to the lack of information available on the proposals' water quality impacts. The denials thus constituted action by the state within the one-year timeframe that caused no delay to the projects' ultimate approvals. To hold otherwise would contradict the plain language of the Clean Water Act and undermine both cooperative federalism and congressional intent. We urge the Court to affirm the Commission's orders.

III. ARGUMENT

A. The Plain Language and Legislative History of the Clean Water Act Support the Commission's Conclusion That California Did Not Waive Its Section 401 Authority.

1. Congress' concern in adopting Section 401's waiver provision was a narrow one.

The Clean Water Act sets forth a policy "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). Key to this preservation of authority, Section 401 requires that applicants for a federal license or permit for an activity that may result in a discharge into navigable waters also obtain state certification that any such discharge complies with the Clean Water Act and appropriate requirements of state law. *See id.* § 1341(a)(1); *see also City of Fredericksburg, Va. v. Fed. Energy Regul. Comm'n*, 876 F.2d 1109, 1112 (4th Cir. 1989) (holding the Commission's license for a hydroelectric dam project was invalid because the applicant failed to obtain Section 401 certification).

The policy behind Section 401 is clear and central to the "cooperative federalism" framework set out in the Clean Water Act. Through the certification process, Congress sought to ensure that the federal government could not use its

licensing and permitting authority to "override State water quality standards."[1] Thus, Section 401 evinces Congress's intent "that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval." *Keating v. Fed. Energy Regul. Comm'n*, 927 F.2d 616, 622 (D.C. Cir. 1991). Subject to state-court review of the substance of a certification decision, Section 401 imposes no explicit restrictions on a state's authority to condition or deny certification. *See Alcoa Power Generating Inc. v. Fed. Energy Regul. Comm'n*, 643 F.3d 963, 791 (D.C. Cir. 2011) (decision to deny a certification request reviewable in state court); 33 U.S.C. § 1341.

In contrast to the expansive authority reserved to states under Section 401, the circumstances under which the federal government can determine that a state has waived certification authority is extremely limited. A state waives its authority to issue, condition, or deny a Section 401 certification *only* if the state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request." 33 U.S.C. § 1341(a)(1).

[1] S. Rep. 92-313, at 69 *reprod. in* 2 Legis. Hist. of the Water Pollution Control Act Amendments of 1972, at 1487 (1973) HR (Legislative History Vol. 2).

The legislative history of Section 401 is critical to understanding the limited scope of this waiver language and, contrary to Petitioners' assertions, does not support a finding of waiver in this case. The current Section 401 was included as Section 21(b) in a 1970 amendment to the Federal Water Pollution Control Act.[2] As originally drafted, state water quality certifications were not confined to a particular timeframe.[3] In the reconciliation process, Congress added the waiver provision in response to concerns that a state could permanently block federally approved projects altogether by simply refusing to take *any* action on an application for water quality certification.[4] Thus, by inserting a timeline and waiver provision, Congress intended only to "guard against a situation where the [certifying state] . . . simply sits on its hands and does nothing."[5] When the Clean Water Act was reorganized and amended in 1972, Congress carried this language forward essentially unaltered into what is now Section 401.[6] When it did so, Congress' purpose (as noted in the House Report) remained focused on guarding only against "sheer inactivity" by the

[2] *See* Pub. L. No. 91-224, 84 Stat. 91, 108 (1970).
[3] H.R. Rep. No. 91-127, at 42–43 (1969).
[4] 91 Cong. Rec. 9264–65 (Apr. 16, 1969) (House debate on H.R. 4148).
[5] *Id*. at 9265 (statement of Congressman Chester Holifield).
[6] Pub. L. No. 92-500, 86 Stat. 816, 877–78 (1972).

states.[7] Indeed, both the House and Senate Reports on Section 401 noted that a State's *denial* of a Section 401 request—for whatever reason—would result in a "complete prohibition against issuance of the Federal license or permit" unless challenged and overturned in the courts of that State.[8]

This singular goal has served as a benchmark and limiting factor for the interpretation of the Section 401 waiver provision. Both the Commission and the courts have been appropriately reluctant to declare waiver—even when Section 401 certifications extend well beyond the one-year timeframe—where there was no showing that the certifying authority engaged in a scheme to purposefully delay the Section 401 timeline. *See, e.g., N.C. Dep't of Envt'l. Quality v. Fed. Energy Regulatory Comm'n*, 3 F.4th 655 (4th Cir. 2021) (NCDEQ) (holding that North Carolina did not waive Section 401 authority when it provided information to an applicant regarding how to withdraw and resubmit its request for certification while environmental reviews and monitoring plans were finalized); *KEI (Maine) Power Management (III) LLC*, 171 FERC ¶ 62,043 (delegated order), *modified*, 173 FERC ¶ 61240 (2020) (declining to declare waiver where an applicant independently withdrew and refiled a certification

[7] H.R. Rep. No. 92-911, at 122 (1972), *reproduced in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 809 (1973).
[8] *Id.*; *accord* S. Rep. 92-414, at 69, *reprod. in* 2 Legis. Hist. at 1487 (1973).

request in order to negotiate environmental conditions); *Village of Morrisville v. Vermont*, 173 FERC ¶ 61,156 (2020) (declining to declare waiver).

As discussed below, actually taking action on a Section 401 certification request, as was done here, places California's denials well outside of the plain meaning of "fails or refuses to act" and cannot possibly be seen as inactivity on California's part. Thus, Congress' concern over states' refusal to act—which was limited to preventing states from doing nothing on a certification request—is absent in this case.

2. The denials in this case constitute "action" within Section 401's one-year timeframe.

Within the limited scope and purpose of Section 401's waiver provision, California's denial of the certification requests here was not a failure or refusal to act. Because the Clean Water Act does not expressly define what constitutes a failure or refusal to act on a Section 401 certification request, the plain meaning of these words at the time of enactment should govern. *See Fed. Communications Comm'n v. AT&T Inc.*, 562 U.S. 397, 403 (2011). In this context, to "act" simply means "to do something." *Webster's Dictionary, Third Edition*. To "refuse" is "to show or express a positive unwillingness to do or comply." *Webster's Third*. And, to "fail" is to "neglect to do something." *Webster's Third*. Thus, under a plain reading, the reference to "fails or refuses

to act" under Section 401 means an unwillingness or neglect to take action on a certification request. In other words, and fully in line with Congress's stated intent, this standard requires "sheer inactivity."[9]

There was no such sheer inactivity here. To the contrary, California indeed *did* "do something" within the required one-year timeframe by denying certification. Section 401 provides for a waiver only when a state "fails or refuses to act." Here, California did act and therefore did not waive its certification authority.

While the fact that California took action is sufficient to resolve this case, there also is no indication in the record that California was simply seeking to stymie the projects at issue. There is no evidence suggesting that California at any point in the process either ignored or refused to process Petitioners' 401 certification requests. Nor is there any evidence to suggest engagement in a scheme—coordinated or otherwise—to indefinitely delay the processing of Petitioners' requests.

To the contrary, after receiving Petitioners' applications, California took active and significant steps to move certification forward. California

[9] H.R. Rep. No. 92-911, at 122 (1972), *reproduced in* Legislative History Vol. 1, at 809. *See* 91 Cong. Rec. 9264–65 (Apr. 16, 1969) (House debate on H.R. 4148).

immediately acknowledged receipt of the requests and identified a deadline for certification action. Initial Ord. at 5–6, JA __. California also provided detailed comments to Petitioners and issued preliminary certification terms and conditions shortly thereafter. Initial Ord. at 6 & n.8, JA __. Correspondence with Petitioners also clearly communicated the process and general requisites for obtaining certification, including informing Petitioners that California law requires compliance with the California Environmental Quality Act—with Petitioners themselves serving as the lead agency for state environmental review—before a certification determination can be made. Initial Ord. at 6 & n.12, JA __. California also clearly communicated that it needed to review the environmental analysis (for which Petitioners were *solely* responsible for executing as the lead agency) before a Section 401 certification could be issued and that, if the document was unavailable before the certification deadline ran, the application would be denied. Initial Ord. at 6–7, JA __.

Because Petitioners had not yet supplied the environmental analysis, or even started the state environmental review process it was required to complete, California acted on the request by denying them without prejudice two days before the certification deadline. *Id.* As fully informed and sophisticated public entities, and with the fate of their certification requests resting firmly in their

own hands, Petitioners cannot legitimately claim surprise at the denials or that the denials represent a dilatory action on *California's* part.

B. This Court's Decision in *Hoopa Valley* Does Not Require Waiver

Both Petitioners and Hydropower Amici assert that this Court's decision in *Hoopa Valley* compels a reversal of the Commission's denial of Petitioners' request for waiver. District Br. at 27, Hydro Amici Br. at 15. They are mistaken. This case presents a much different set of circumstances from those in *Hoopa Valley*.

Hoopa Valley involved the relicensing and decommissioning of a series of dams along the Klamath River in California and Oregon. See *Hoopa Valley*, 913 F.3d at 1101–02. The project proponent filed its application with the Commission in 2004 and first sought Section 401 certifications from California and Oregon in 2006. Four years later, the states entered into a settlement agreement with the project proponent and other interested parties that preconditioned decommissioning on a number of future events—including securing federal funds. To accommodate the undefined and extended timeline of these events, the settlement agreement included a specific term requiring that the project proponent "shall withdraw and re-file its applications for Section 401 certifications as necessary to avoid the certifications being deemed waived under

the [Clean Water Act] during the Interim Period." *See Hoopa Valley*, 913 F.3d at 1102. The Hoopa Valley Tribe, which was not a party to the settlement, petitioned in 2012 for a declaration that Oregon and California had waived their Section 401 authority.

Upon review, this Court agreed with the Tribe and held that California and Oregon waived their Section 401 certification authority for the project by engaging in a contractual "scheme" to delay the licensing proceeding by artificially extending the Section 401 certification timeline via a "coordinated" agreement. *Id.* at 1105. The Court specifically highlighted that its decision was narrow and based on the specific circumstances presented by the Hoopa Valley record, including the fact that all milestones for relicensing other than state certification had been "complete and ready for review for more than a decade." *Id.* at 1104–05. The Court did not attempt to define what constituted a state refusing or failing to act for purposes of Section 401's waiver provision (other than to confirm that the contractual agreement at issue was such a failure or refusal) and specifically declined to opine on the propriety of other potential circumstances. *Id.* at 1104.

This case bears little resemblance to the contractually mandated inactivity in *Hoopa Valley*. Critically, and as set out above, California did indeed act within

the one-year timeframe by denying Petitioners' certifications due to lack of information necessary to determine that the projects would comply with state water quality standards. As both California and the Commission have pointed out, that decision was subject to challenge in state court, adding heft to the fact that the denials should be considered as final actions for purposes of Section 401 waiver. Initial Order PP at 19, 32, JA__; FERC Br. at 30–31. *Keating*, 927 F.2d at 622. Moreover, the denials were not part of any effort or desire, coordinated or otherwise, to delay the Petitioners' projects. As the Commission again affirmed on rehearing, "there is no record evidence showing that the [California] Board communicated about, expected, requested, or encouraged the Districts to withdraw and resubmit their applications for the purpose of avoiding waiver, or that the Districts ever withdrew and resubmitted their applications as a result of any such exchanges…." Rehearing Order PP at 10–11, JA__.

Finally, and unlike *Hoopa Valley*, California's denials here did not cause *any* delay to the licensing of Petitioners' projects because, at the time the denials were made, the Commission's process was ongoing and far from over. In fact, California has issued the 401 certifications Petitioners sought. FERC elibrary no. 20210119-5032; JA___-___. Delay is solely on Petitioners, who would be well on their way to completing the licensing proceeding had they not withdrawn their

applications and initiated multiple rounds of litigation based on their meritless waiver arguments.

C. The Clean Water Act Does Not Prohibit—and In Fact May Require—Denial of a 401 Certification Request When a State Lacks Sufficient Information to Evaluate Water Quality Impacts

Large energy projects, such as hydropower dams and natural gas pipelines, are complex feats of engineering with potentially enormous water quality impacts. Since licenses authorize operation for up to 50 years, these impacts can last for decades, and this case is a prime example. FERC Br. at 4. For states to make informed and reasoned Section 401 certification decisions, they must be able to undertake an assessment of project water quality impacts and mitigation proposals, particularly for such projects that are otherwise largely regulated by federal law. *See generally, e.g.*, *California v. Fed. Energy Regul. Comm'n*, 495 U.S. 490, 506 (1990) (discussing preemption under the Federal Power Act).

If the necessary environmental information is not available at the end of the one-year timeframe, under current judicial and administrative precedent, the proper course where a state cannot certify that the project will comply with state water quality requirements is to *deny* certification if the applicant does not withdraw the request. Because Congress placed no sideboards on states'

authorities to deny, such denials can be without prejudice, thereby allowing the applicant to ask the state to reconsider at a later date. To find otherwise would leave states in the untenable position of having to decide between denying *with* prejudice (thereby halting the federal license for good), issuing an approval based on an incomplete record (thereby opening it up to legal challenge), or forcing applicants to conduct an environmental review that is duplicative, rushed, and performed on a piecemeal basis. Thus, and for the reasons laid out below, Petitioners attempt to cut off this practical and permissible option should be rejected.

1. Denial—with or without prejudice—is a proper action states may be required to take if forced to make Section 401 decisions without necessary environmental data.

As the Commission has noted, the "practical reality of large [energy infrastructure] projects . . . is that they take considerable time and effort to develop," and therefore are inherently difficult to review since "[t]he natural consequence is some aspects of the project . . . may remain in early stages of planning even as other portions of the project become a reality." *Crown Landing, LLC*, 117 FERC ¶ 61,209, at 28 (November 17, 2006). This is especially apparent in the Section 401 context where project proponents often apply for state certification well before the environmental review process or water quality

analysis for their project is complete. Under the Commission's Integrated Licensing Process, the absolute latest that a project applicant can file a Section 401 application is 60 days after the Commission issues a notice that the application is ready for environmental analysis. 18 C.F.R. § 5.23(b)(1).

The environmental analysis alone—which could include the project's impact on water temperature; flow for habitat, aesthetics, and recreation; water chemistry (including pH), dissolved oxygen, turbidity, and gas supersaturation; and impacts to existing and designated uses of the water body—can take several years to complete depending on type of project and its complexity.[10] For example, the technical studies necessary to evaluate dam impacts often require assessment of a full year-long water cycle.

States often rely on federal environmental analyses to inform Section 401 decisions, as "NEPA documents frequently include valuable and objective scientific analyses pertaining to water quality standards, especially information on hydropower project effects on uses designated by the water quality standards." *See Water Quality Certifications for Existing Hydropower Dams*,

[10] *See, e.g.,* CEQ Environmental Impact Timeline Study 2010-2018 Pg 1-2 ("… across all Federal agencies, the average EIS completion time was 4.5 years…varying widely in technical complexity and other factors that influence the length and timing.").

Wash. State Dep't of Ecology Publ'n. No. 04-10-022, March 2005, https://fortress.wa.gov/ecy/publications/SummaryPages/0410022.html, at 16 (Water Quality Certifications for Existing Hydropower Dams). Doing so avoids duplication, and saves time and resources since the environmental reviews can themselves result in changes to the project that are relevant to the certification decision.

States have no control over when an applicant submits a certification request, and no control over when the Commission initiates its environmental review. But once a certification request is submitted, it is the state that determines whether the project will meet the state's water quality standards.[11] *See NCDEQ v. FERC*, 3 F.4th 655, 670 (4th Cir. 2021) ("The CWA reflects a carefully prescribed allocation of authority between federal and state agencies that preserves "'*the primary responsibilities and rights of States* to prevent,

[11] Indeed, certifying authorities *must* determine whether sufficient information has been provided to assure compliance with water quality laws. *See* 40 CFR § 121.2(a)(2) (requiring in certifications by state certifying agencies that such agencies include "[a] statement that the certifying agency has either (i) examined the application made by the applicant to the licensing or permitting agency * * * and bases its certification upon an evaluation of the information contained in such application which is relevant to water quality considerations, or (ii) examined other information furnished by the applicant sufficient to permit the certifying agency to make the statement [that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards]").

reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'") (emphasis added and internal quotation omitted).

Therefore, California's actions here represent a logical and permissible response to the need to receive critical environmental review information before making a water quality determination. States are required by their own Administrative Procedure Acts to make reasoned and supported decisions. In the context of environmental permitting, those decisions must be based on rigorous scientific data. If forced to either grant or deny Section 401 requests before necessary environmental studies have been completed, states *must* deny certification requests—as California did here—if in the absence of those studies, they cannot certify that the project will comply with state water quality requirements.

Under these circumstances, to find otherwise would leave states in an untenable position: either deny *with* prejudice (thereby halting the federal license for good) or be forced to approve based on an incomplete record. Such an approval could not be fully informed and would potentially include inadequate or unnecessary conditions. Such conditions would not only be vulnerable to legal challenge, but would also carry significant long-term risks to state water quality.

As noted above, equally untenable would be any effort to avoid this dilemma by forcing applicants to conduct a piecemeal, duplicate, and rushed environmental review before the same evaluation is completed for compliance with federal law.

In short, denials without prejudice are the only course of action states can take if forced to grant or deny Section 401 requests without the data necessary to properly evaluate water quality impacts.

2. Allowing Denial without Prejudice of Section 401 Applications Is Necessary to Preserve State Authority under Section 401.

Finally, denial without prejudice may be the only option remaining to states seeking to properly execute their Section 401 obligations by assuring that they can rely on federal environmental review to inform their more granular analysis of impacts to state water quality. This is so because, historically, states could simply wait for the completion of federal environmental review before making certification decisions. *See, e.g., AES Sparrows Point, LLC v. Wilson*, 589 F.3d 721, 728-729 (4th Cir. 2009) (states one-year period for review of section 401 request commenced upon release of draft environmental review). Project operators, however, have repeatedly challenged any action by states to make sure environmental review was complete before acting on a certification request and have convinced at least some courts to take a hard line on Section 401's timeline.

For example, and as Petitioners point out, the Second Circuit has held that the one-year time period begins to run upon receipt of the Section 401 application, even if the state deems the application incomplete. *N.Y. State Dep't of Envt'l Conservation v. Fed. Energy Regul. Comm'n*, 884 F.3d 450, 455–56 (2d Cir. 2018). Thereafter, the Second Circuit rejected a state's agreement with a project operator to deem an application as having been received just 36 days after it was actually received in order to give the state a short period of additional time to complete the required notice-and-comment process, and thereby avoid affirmatively denying the request outright.[12] *N.Y. State Dep't of Envt'l Conservation v. Fed. Energy Regul. Comm'n*, 991 F.3d 439, 447–48 (2d. Cir. 2021).

Now, against the headwind of logic and any rational understanding of the word "act," Petitioners seek to cut off what could be the one remaining option for states seeking to make their decisions with the benefit of federal environmental review: deny certification. But, as explained above in detail, a

[12] That said, this Court's decision in *Hoopa Valley* did not ban the practice of withdraw and resubmit completely and leaves open the extent to which a state might rely on a withdrawal and resubmission arrangement that was not as egregious as the arrangement in that case. The Fourth Circuit recently upheld withdraw and resubmit as fully compatible with Section 401's one-year timeline in the absence of evidence that the certifying authority was seeking to delay a proponent's project. *N.C. Dep't of Env't. Quality v. Fed. Energy Regul. Comm'n*, 3 F.4th 655 (4th Cir. 2021)

denial of that kind, as FERC correctly recognizes here, is a unilateral action that does not constitute a failure or refusal to act resulting in a waiver. FERC Br. at 41. FERC is not alone in this determination. Indeed, even the Second Circuit has endorsed the fact that states can (and should) simply deny Section 401 certification requests without prejudice rather than take other actions to extend the decision window. *N.Y. State Dep't of Envt'l Conservation v. Fed. Energy Regul. Comm'n*, 991 F.3d at 450 n.11. This Court should reach the same conclusion and hold that acting on a certification request by denying it does not justify waiving the critical authority over water quality Congress sought to reserve to the states by adopting Section 401.

IV. CONCLUSION

For the reasons set out above, this Court should affirm FERC's waiver order. California acted within the timeframe set out in Section 401 by denying Petitioners' requests for Section 401 certification. Unlike the contractual idleness presented in *Hoopa Valley*, there is no indication that California's denials were driven by a desire to delay the projects or create an end-run around Section 401's one-year limit. Instead, the denials represent a logical response—and the *only* option available—when states are forced by project proponents and

the courts to undertake environmental impacts evaluations of highly complex projects without the benefit of key data necessary to analyze those impacts.

RESPECTFULLY SUBMITTED this 15th day of December, 2021.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because this brief contains 5,048 words, excluding the parts of the brief exempted by Rule 32(f).

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.

DATED this 15th day of December, 2021.

/s/ Kelly T. Wood
Kelly T. Wood

SIGNATURE ATTESTATION

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

Dated: December 15, 2021

/s/ Kelly T. Wood
Kelly T. Wood

CERTIFICATE OF SERVICE

I, Kelly T. Wood, hereby certify that on December 15, 2021, I electronically filed the foregoing Brief of States' Amici Curiae in support of Respondents FERC 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 15th day of December, 2021 at Olympia, WA.

/s/ Kelly T. Wood
Kelly T. Wood