No. ______

In the Supreme Court of the United States

TURLOCK IRRIGATION DISTRICT *and*
MODESTO IRRIGATION DISTRICT, PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et. al.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State can avoid "waiv[ing]" its one-year "period of time" in which "to act" on a "request for certification" under Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1)—thus rendering Section 401's one-year rule meaningless—by declaring in *pro forma* letters every 364 days that the request is "denied" and must be resubmitted if the applicant ever wants to obtain a Section 401 certification, and then repeating this every 364 days for as many years as a State wishes to delay.

PARTIES TO THE PROCEEDINGS

Turlock Irrigation District and Modesto Irrigation District are the Petitioners here and were the Petitioners below.

The Federal Energy Regulatory Commission is the Respondent here and was the Respondent below.

The California State Water Resources Control Board, the Tuolumne River Trust, American Whitewater, the California Sportfishing Protection Alliance, the Friends of the River, and the Sierra Club and its Mother Lode Chapter are also Respondents here and were Intervenors for Respondent the Federal Energy Regulatory Commission below.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6, Petitioners provide the following corporate disclosure statements:

Petitioner Turlock Irrigation District is a governmental water agency formed under the laws of the State of California. Therefore, a corporate disclosure statement is not required.

Petitioner Modesto Irrigation District is a governmental water agency formed under the laws of the State of California. Therefore, a corporate disclosure statement is not required.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Turlock Irrigation District & Modesto Irrigation District*, "Declaratory Order On Waiver Of Water Quality Certification," 174 FERC ¶ 61,042 (Jan. 19, 2021);
- *Turlock Irrigation District & Modesto Irrigation District*, "Notice Of Denial Of Rehearing By Operation Of Law And Providing For Further Consideration," 174 FERC ¶ 62,175 (Mar. 22, 2021);
- *Turlock Irrigation District & Modesto Irrigation District*, "Order Addressing Arguments Raised On Rehearing," 175 FERC ¶ 61,144 (May 21, 2021);
- *Turlock Irrigation Dist. v. FERC*, No.21-1120 (D.C. Cir. June 17, 2022);
- *Turlock Irrigation Dist. v. FERC*, No.21-1120, Dkt.1962263, 2022 WL 4086378 (D.C. Cir. Sept. 6, 2022) (per curiam).

The following cases are the only proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii): *Turlock Irrigation District & Modesto Irrigation District v. State Water Resources Control Board & Eileen Sobeck*, No.CV63819 (Cal. Super. Ct. for Tuolumne Cnty.,

filed May 11, 2021), and *City and County of San Francisco v. State Water Resources Control Board & Eileen Sobeck*, No. CV63828 (Cal. Super. Ct. for Tuolumne Cnty., filed May 14, 2021).

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PETITION FOR WRIT OF CERTIORARI

Section 401 of the Clean Water Act prohibits the Federal Energy Regulatory Commission ("FERC") from issuing a license or relicense for a federal hydropower or interstate natural gas project until the State in which any discharge from the project originates issues a "certification" that the project complies with the State's water-quality standards. 33 U.S.C. § 1341(a)(1). Section 401 places a critical one-year time limit on this state power: a State waives its authority by "fail[ing] or refus[ing] to act on a request for certification" within "one year." *Id.* Through this time limit, Congress prohibited States from delaying these federally licensed or permitted projects through "dalliance or unreasonable delay." 115 Cong. Rec. 9264 (Apr. 16, 1969).

FERC—the body charged with overseeing States' compliance with Section 401 for federal hydropower and interstate natural gas pipeline projects throughout the Nation—has now rendered this one-year limit a meaningless formality, such that any State can now delay these federal projects nationwide, for as many years or decades as the State pleases (or, indeed, forever). In particular, in the orders below, FERC provided that States can issue *pro forma* letters to applicants every 364 days purporting to deny Section 401 certification requests and telling the applicants that they must resubmit their requests—thereby restarting the one-year clock, over and over again—if the applicant ever wants to

obtain a Section 401 certification. As FERC conceded below, under its now-binding approach, any State can delay a federal project through such a scheme for "100 years," so long as this scheme complies with state law. But that is just another way of saying that Section 401's federal rule is now utterly meaningless under FERC's approach, given that every State can now choose at its own option to delay a federal project through "dalliance or unreasonable delay," 115 Cong. Rec. 9264, for as many years as it wants—or, indeed, kill any federal hydropower or interstate natural gas project with endless 364-days-at-a-time delays—with the requestor having no recourse under federal law.

This Court should grant this Petition and review FERC's decision, now affirmed by the D.C. Circuit, to render Section 401's one-year rule meaningless for hydropower and interstate natural gas projects nationwide. FERC's orders below allow States to delay these activities *indefinitely*, achieving the very "dalliance or unreasonable delay" that Congress designed Section 401's one-year rule to avoid. *Id.* Such delays would be disastrous for our Nation's economy, given the vital roles that hydropower and natural gas play in energy production and consumption across the country. Further, FERC's orders are plainly incorrect. A State labeling a request "denied" every 364 days, while directing the requester to resubmit the same request for as many years as the State desires, is not an "act" under Section 401. Otherwise, Section 401's one-year deadline would be a meaningless formality, contrary

to "one of the most basic interpretive canons" that no statutory language should be interpreted as "inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (citations omitted; brackets omitted).

This case is an ideal vehicle for addressing this Question Presented. FERC's orders provide that any document that a State labels a "denial" is an "act" under Section 401, and thus, under *SEC v. Chenery Corporation*, 318 U.S. 80, 87 (1943), this conclusion is the only grounds upon which those orders may be reviewed. And while the egregiousness of Respondent the California State Water Resources Control Board's ("Board") actions are not relevant under *Chenery*, it is worth noting that this case presents exactly the type of "dalliance or unreasonable delay," 115 Cong. Rec. 9264, that Congress enacted Section 401's one-year rule to stop. The Board denied Petitioners' first certification requests 363 days after submission, directed resubmittal, and then denied Petitioners' resubmitted, substantively identical requests after 364 days. Those repeated denials did not engage in any way with the merits of Petitioners' voluminous environmental-review evidence that supported their certification requests, nor did the State need any additional evidence to issue its certifications, as the Board definitively showed by subsequently issuing those certifications *sua sponte*, without receiving any new information from Petitioners.

This Court should grant the Petition.

DECISIONS BELOW

The D.C. Circuit's opinion below upholding the orders of FERC is reported at *Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179 (D.C. Cir. 2022), and it is reproduced at Appendix A to the Petition, Pet.App.1a–10a. The D.C. Circuit's order denying rehearing en banc is unreported, but it is available at 2022 WL 4086378, and is reproduced at Appendix E to the Petition, Pet.App.71a–72a. The orders of FERC are reported at 175 FERC ¶ 61,144; 174 FERC ¶ 62,175; and 174 FERC ¶ 61,042, and they are reproduced at Appendices B–D to the Petition, Pet.App.11a–70a.

JURISDICTION

The D.C. Circuit entered its judgment on June 17, 2022, Pet.App.1a, and denied Petitioners' timely petition for rehearing en banc on September 6, 2022, Pet.App.71a. On November 29, 2022, the Chief Justice extended the time within which to file this Petition to and including January 4, 2023, and this Petition is filed by that deadline. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portion of Section 401 of the Clean Water Act, 33 U.S.C. § 1341, is reproduced at Appendix F to the Petition, Pet.App.73a.

STATEMENT

A. Legal Background

Congress enacted the Federal Power Act, 16 U.S.C. § 791a, *et seq.*, as "a complete scheme of national regulation" for "the water resources of the Nation," *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152, 180 (1946); *see also California v. FERC*, 495 U.S. 490, 497–98 (1990). This Act represents Congress' exercise of "comprehensive control over those uses of the Nation's water resources in which the Federal Government ha[s] a legitimate interest," including for "hydroelectric power." *Fed. Power Comm'n v. Union Elec. Co.*, 381 U.S. 90, 98 (1965). FERC, in turn, has the exclusive authority to issue licenses "for the purpose of constructing, operating, and maintaining" hydropower projects on navigable waters or on federal lands. 16 U.S.C. §§ 797(e), 808(a), 817(1); *S.D. Warren Co. v. Me. Bd. of Env't Prot.*, 547 U.S. 370, 373 (2006); Pet.App.2a. Thus, in order to operate a hydropower project lawfully on such waters or lands, the Federal Power Act requires the project owner to apply to FERC for a license and then a relicense at the end of each license's term. *See* 16 U.S.C. §§ 799, 808(e). This FERC licensing or relicensing requirement applies to "about half of all hydroelectric power in the United States." *See* Pet.App.2a n.1.

Obtaining a hydropower license or relicense from FERC is a multi-step, multiyear process that affords

numerous opportunities for impacted States to participate. *See* 18 C.F.R. § 5.6–.25. The applicant must prepare a pre-application document that identifies existing technical and scientific information relating to the project, including its effects on water quality. *See id.* § 5.6. From this, FERC determines under the National Environmental Policy Act ("NEPA") what issues the applicant must address in an environmental study plan, also allowing States to comment and request specific environmental studies. *See id.* §§ 5.8–.13. Then, FERC issues that study plan for the applicant to complete, *see id.* § 5.13(c); *accord id.* § 5.15—affording an additional comment period for the States, *see id.* § 5.14—after which the applicant prepares and submits a draft license application and then a final license application, *see id.* §§ 5.15, .17–.19. Thereafter, FERC issues a draft environmental impact study under NEPA, accepts additional comments from the States, and finally publishes a final environmental impact study for the project. *See id.* §§ 5.22–.23, .25.

The license and relicense requirement at issue here is Section 401 of the Clean Water Act. 33 U.S.C. § 1341. Under Section 401, FERC may not grant a hydropower license or relicense unless the applicant obtains a "certification" from the State in which any "discharge" from the project "originates" that the project will comply with federal water-quality standards, unless the State waives its statutory right. *Id.* § 1341(a)(1); *S.D. Warren*, 547 U.S. at 373–74; Pet.App.2a. Section 401's waiver component, in turn,

provides that a State "waive[s]" its certification authority "[i]f 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) (emphasis added). When a State waives its certification authority under this one-year rule, FERC may then proceed to consider the applicant's hydropower license application without a state certification, although even after such a waiver, FERC must still give consideration to the State's water-quality recommendations. *See id.*; *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 700 (D.C. Cir. 2017). Section 401's one-year rule thus time-limits the State's power to delay federal licensing through the certification process. This is crucial because while Congress allowed for state participation in the federal licensing process through Section 401 certification, Congress foreclosed States' "dalliance or unreasonable delay" of that process. 115 Cong. Rec. 9264.

FERC also has the statutory responsibility to issue certificates of public convenience and necessity for interstate natural gas pipelines under Section 7 of the Natural Gas Act. *See* 15 U.S.C. § 717, *et seq*. Section 401's State certification requirement and the attendant no-more-than-one-year waiver rule apply to those certificates as well. *See* 33 U.S.C. § 1341.

B. Factual And Procedural Background

1. This case arises out of Petitioners' licensing and relicensing applications with FERC for two hydropower projects located in California. Pet.App.2a–4a. Among other licensing and relicensing steps required of Petitioners, Petitioners sought to obtain water-quality certifications from the Board under Section 401. Pet.App.2a–4a. As explained immediately below, Petitioners submitted substantively identical certification requests to the Board over a more-than-two-year period, at the Board's repeated direction, which requests the Board denied every 363 or 364 days after submission, while directing Petitioners to resubmit the same requests.

Petitioners submitted their initial certification requests to the Board on January 26, 2018, supported by voluminous environmental-review documents that Petitioners had compiled as part of the licensing process described above. Pet.App.42a–43a, 97a–104a. The Board confirmed these requests met "the application filing requirements set forth in [the California Code of Regulations]." Pet.App.42a–43a, JA1632–33.[1] The Board then purported to deny the requests 363 days later in a short *pro forma* letter, Pet.App.43a–44a, 94a–96a. This *pro forma* letter contained "no judgment on the technical merits" of

[1] Citations of "JA__" are of the parties' Joint Appendix filed with the D.C. Circuit below. D.C. Cir. No.21-1120, Dkt.1934418.

Petitioners' projects or engagement with Petitioners' supporting environmental-review evidence at all, but rather just pointed vaguely to the processes under NEPA and the California Environmental Quality Act ("CEQA"), which processes were as-yet-unfinished. Pet.App.95a–96a. This short letter concluded by stating that "to maintain an active certification application, [Petitioners] will need to request certification for the [p]rojects." Pet.App.95a.

Petitioners then resubmitted substantively identical certification requests to the Board on April 22, 2019, in the form of brief renewal letters, supported by the very same environmental-review evidence from Petitioners' prior submissions. Pet.App.44a–45a, 90a–93a. The Board again confirmed that these requests met "the application filing requirements specified in [the California Code of Regulations]." JA1635–37, 1638–40. Then, the Board purported to deny these requests via *pro forma* letters 364 days later. Pet.App.45a, 83a–89a. Here again, the Board's letters referenced generally the as-yet-unfinished NEPA and CEQA processes as the reason for the denial and then "encourage[d] [Petitioners] to submit a new request for certification." Pet.App.84a–85a, 88a.[2]

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[2] These *pro forma* letters also stated that, "at this time, the proposed activity does not comply with applicable water quality standards and other appropriate requirements." Pet.App.85a,

Finally, on July 20, 2020, Petitioners resubmitted for a third time with the Board their substantively identical requests for certification, again in the form of request-renewal letters supported by the very same environmental-review evidence. Pet.App.45a–46a, 78a–82a. And again, as with the first two sets of submissions, the Board certified that these requests were "complete." JA1641–43, 1644–46. Petitioners thereafter withdrew these certification requests from the Board and began the agency proceedings before FERC. Pet.App.4a–5a.

After Petitioners withdrew their substantively identical requests from the Board, the Board purported to issue *sua sponte* Section 401 certifications for Petitioners' projects on December 1, 2020—although the CEQA process had not yet concluded and, indeed, the Board had gained no information at all from any such process. Pet.App.4a–5a, 46a & n.25; JA1780–888, JA1890–998. Put another way, the Board issued Section 401 certifications without receiving *any* new supporting evidence from Petitioners in any respect, demonstrating that the Board never needed additional information in order to act on Petitioners' certification requests. *See* Pet.App.46a; *accord* Pet.App.4a–5a. The Board claimed that it could issue

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89a. But the letters did not contain any "elaboration" on which standard or requirement the projects had purportedly not met, Pet.App.45a, or on how the projects had not met those unnamed standards or requirements.

those certifications, despite the lack of completion of the CEQA process, due to a "June 2020 amendment to the California Water Code" authorizing it "to issue certifications before completion of CEQA review, where waiting until completion of CEQA review presents a substantial risk of waiver of certification." Pet.App.46a & n.25 (citation omitted); Cal. Water Code § 13160(b)(2) (2020). The Board's *sua sponte* certifications were voluminous, comprising over 100 pages, demonstrating that the Board had been working on these certifications for more than a year and had denied Petitioners' requests simply to buy itself more time. *See* JA1780–888, JA1890–998. These certifications imposed numerous burdensome conditions on Petitioners' projects; "some forty-five" conditions in total. Pet.App.5a.

2. In the FERC proceedings below, Petitioners sought a declaration from FERC that the Board had waived the State's Section 401 certification authority by denying Petitioners' requests every 363 or 364 days and then requiring Petitioners to resubmit without actually needing any additional information. *See* Pet.App.5a–6a, 40a–41a, 54a–55a. FERC denied Petitioners' claims of waiver in a declaratory order, Pet.App.38a, and then reaffirmed that denial in an order on Petitioners' request for rehearing, Pet.App.11a—orders that are FERC precedent, applicable nationwide, *see* 16 U.S.C. §§ 797(e), 817(1); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *accord County of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999).

In holding that the Board "did not waive its authority under section 401," FERC's declaratory order concluded that any time that a State labels a request "denied" within the one-year deadline, it has "act[ed]" on that request and avoided waiver, full stop. Pet.App.55a, 58a–60a. So here, in FERC's view, "by denying [Petitioners'] applications without prejudice" with its *pro forma* letters, the Board "acted on" those requests within the meaning of Section 401, without any further inquiry. Pet.App.45a, 60a. FERC admitted that "[i]t may be that the courts will find repeated denials without prejudice, and particularly those that do not rest on any substantive conclusions," do trigger waiver, but it said that FERC itself would not do so. Pet.App.65a. FERC reaffirmed its interpretation of Section 401 in its order on rehearing. *See* Pet.App.17a–23a.

Commissioner Danly dissented from FERC's order on rehearing, explaining that States have historically engaged in two schemes to evade Section 401's one-year deadline when they want to have "[m]ore [t]ime" to consider a request than the one-year limit affords. Pet.App.33a–34a (Danly, Comm'r, dissenting) (citations omitted). The first is the "withdrawal-and-resubmission scheme" condemned by *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), where States would coordinate with requesters so that the requesters would withdraw and resubmit their requests just before the one-year deadline. Pet.App.31a (Danly, Comm'r, dissenting) (discussing *Hoopa Valley*, 913 F.3d at

1104). The second is the scheme at issue here, Pet.App.33a–34a (Danly, Comm'r, dissenting), where a State will "deny[ ] the application" either with or "without prejudice" while inviting the requester to resubmit the same application year after year, *see* Pet.App.21a–22a. The second scheme at issue here achieves the same dilatory result as the first scheme and thus triggered waiver under Section 401. Pet.App.33a–34a (Danly, Comm'r., dissenting). "Like the withdrawal-resubmission scheme found impermissible in *Hoopa Valley*, the Board in this case twice denied [Petitioners'] application in what appears to be an attempt to override the statute's one-year deadline thereby affording itself additional time to act." Pet.App.31a–32a (Danly, Comm'r., dissenting). That is, the Board "received [Petitioners' first] application," "acknowledged receipt," "found [that it] met the filing requirements," "identified the one-year deadline," and then "did not request additional information." Pet.App.31a–32a (Danly, Comm'r., dissenting). Nevertheless, "just two days before the one-year deadline, the Board denied the application without prejudice." Pet.App.31a–32a (Danly, Comm'r., dissenting). And then "the Board did it all again" after receiving Petitioners' "substantively unchanged" second certification requests, denying those 364 days after receipt. Pet.App.32a–33a (Danly, Comm'r., dissenting). Commissioner Danly also observed that the "timing" of the Board's "ultimate approval" of Petitioners' requests "bears note," coming only "*after* [Petitioners] filed their petition for finding waiver [with FERC] and

had withdrawn their third request." Pet.App.32a–33a (Danly, Comm'r., dissenting).

3. Petitioners petitioned the D.C. Circuit for review of FERC's orders, and the D.C. Circuit entirely affirmed FERC's orders in a written opinion issued after oral argument.

In a revealing exchange at oral argument, FERC's counsel conceded that the orders' interpretation of Section 401 rendered the statutory one-year rule meaningless for any State that wanted that result:

> JUDGE WALKER: Let me ask one more hypothetical, imagine that . . . California passes a statute that says we require an environmental impact assessment that will take us 100 years to do. And because of this one-year, [Section] 401 deadline, we're instructing the [Board] every 363 days, to deny and require the petitioner to refile for 100 years . . . . [Y]ou think that that scheme would be legal?
>
> FERC: I don't know that it would contradict Section 401, because Section 401 doesn't go [there]. But, however, I certainly think that would probably prompt Congress to amend its law to say, look, we—

> JUDGE WALKER: I'm sure Congress will be right on that with FERC at the top of their agenda.
>
> FERC: Well, regardless of the practicalities, I mean, this is, again, this is a . . . certification power that Congress has given and it can condition it, or it can take it away. And here, Congress decided to leave it at . . . if you deny certification, then FERC's responsibility is to consider whether it was within the—

Oral Argument Audio at 29:45–31:15 (Apr. 11, 2021).[3] Thus, under FERC's interpretation of Section 401, a State can delay acting on a request for certification *for a century* (or more), without running afoul of Section 401's one-year rule, so long as the scheme complies with the State's own laws and is implemented with *pro forma* letters issued every 364 days. *Id.*

Remarkably, and notwithstanding FERC's concession that its interpretation renders Section 401's one-year rule meaningless, the D.C. Circuit affirmed FERC's orders below. Pet.App.6a–7a. The D.C. Circuit held that FERC was correct to conclude that "[e]ach time the California Board denied

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[3] Available at https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?OpenView&count=100&SKey=202204 (see link for No.21-1120) (all websites last visited Jan. 3, 2023).

certification, the Board 'act[ed]' within the meaning of section 401(a)(1)"—with no further inquiry either required or allowed. Pet.App.7a (second brackets in original). In other words, the D.C. Circuit approved FERC's conclusion that *every time* a State issues a document labeled a "denial" of a certification request, the State has taken an "act" under Section 401, and thus evaded waiver under the one-year rule. *See* Pet.App.7a–8a. In reaching this decision, the D.C. Circuit rejected Petitioners' core argument that this bright-line interpretation allows "State agencies [to] extend the time for decision *indefinitely* by denying one certification request after another without prejudice, thus nullifying section 401's one-year limit." Pet.App.8a–9a (emphasis added). The D.C. Circuit asserted that an "opposing slope"—namely, that Petitioners' interpretation of Section 401 leads to "gamesmanship"—presents "just as bad (or even worse) consequences," without even acknowledging Petitioners' arguments rebutting these concerns. *See generally* Pet.App.9a–10a. Finally, the D.C. Circuit explained in a short footnote that a State's need to "comply[ ] with State law . . . may" serve as a sort of backstop, limiting when a State could engage in a scheme like the Board's here. Pet.App.9a n.8

The D.C. Circuit denied Petitioners' petition for rehearing en banc. Pet.App.71a–72a.

REASONS FOR GRANTING THE PETITION

I. Whether Section 401's One-Year Rule Is A Meaningless Formality Is An Important Question Of Federal Law That This Court Should Resolve

A. FERC's orders below, now affirmed by the D.C. Circuit, render Section 401's one-year rule meaningless for all federal hydropower and interstate natural gas projects nationwide. *See* Pet.App.18a–22a, 54a–65a; *see also* Pet.App.6a–7a; *infra* Part II.B. This is because, under FERC's orders, a State wishing to delay acting on any certification request associated with any federally licensed or permitted activity need only "deny[ ]" that request in *pro forma* letters every 364 days, while directing the requester to resubmit the same request if it wants any chance to move forward with its project. *See* Pet.App.58a–60a. As FERC admitted below, its position means that a State may repeat that scheme "every 363 days . . . for 100 years," so long as that is lawful under *state* law. Oral Argument Audio, *supra*, at 29:45–31:15. Nothing about FERC's interpretation of Section 401 depends upon, for example, the requester's failure to supply any relevant water-quality-related information. *See* Pet.App.58a–60a, 65a; *accord* Pet.App.6a–7a.

FERC's interpretation of Section 401 makes Section 401's one-year waiver rule a dead letter. All that a State must do to evade Section 401's one-year rule completely, for as long as the State desires, is to

issue *pro forma* letters labeling a request "denied" every 364 days, while telling the requester to resubmit the exact same request, over and over again, if it ever hopes to obtain the mandatory Section 401 certification. *See supra* pp.8–10. Thus, as long as the relevant state bureaucrat possesses a calendar and authority to act under state law, Section 401's one-year waiver rule would never operate against the State, no matter how many years the State wishes to delay action. *Contra Corley*, 556 U.S. at 314.

FERC's gutting of Section 401's one-year rule now applies to all federal hydropower and interstate natural gas projects across the country under FERC's authority, given FERC's nationwide jurisdiction, *see* 16 U.S.C. §§ 797(e), 817(1); 15 U.S.C. § 717(b), and the Administrative Procedure Act's requirement that FERC apply its precedent consistently to all future cases, *see Fox Television Stations*, 556 U.S. at 515; *accord Shalala*, 192 F.3d at 1022. So, under the current state of the law and absent this Court's intervention and reversal, any State may rely on these FERC decisions to delay acting on Section 401 certification requests for as many years as the State desires—or, indeed, forever, if it wants to kill the project completely—without ever triggering waiver. All a State needs to do is deny the requests every 364 days and require the requester to resubmit. Further, every Section 401 requester must comply with that state scheme if it ever hopes to obtain a license, given that FERC may not issue a license to the requester

until the requirements of Section 401 are either satisfied or waived. § 1341(a)(1).

B. Whether the States may nullify Section 401's federal one-year rule in the trivially easy-to-replicate manner that FERC has now authorized nationwide is an important question calling out for this Court's immediate review. Under the Supremacy Clause, "[the] Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land," U.S. Const. art. VI, cl. 2, notwithstanding the laws or actions of any State to the contrary, *see Arizona v. United States*, 567 U.S. 387, 399 (2012). Yet, FERC has empowered the States to nullify Section 401's one-year waiver rule for hydropower projects generating "about half of all hydroelectric power in the United States," *see* Pet.App.2a n.1, as well as for all interstate natural gas projects, *see supra* pp.7–8. Whether States may do this in the face of federal law is a "question" of "significance," as this Court regularly recognizes in cases dealing with federal-state conflict. *See, e.g.*, *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019); *Arizona*, 567 U.S. at 394 ("important questions concerning the interaction of state and federal power"); *Wyeth v. Levine*, 555 U.S. 555, 563 (2009).

Rendering Section 401's one-year deadline meaningless for all federal hydropower and interstate natural gas pipeline projects is deeply significant, warranting this Court's review. Section 401's one-

year deadline serves an important purpose by stopping a State's "dalliance or unreasonable delay" of the federal licensing process, 115 Cong. Rec. 9264—including a State pocket-vetoing pending licenses by labeling Section 401 certification requests "denied" every 364 days, while directing resubmission of those same requests year after year. Federal hydropower projects are vital to our Nation's long-term, clean-energy market since, in 2021, hydropower accounted for 19% of the Nation's renewable-energy consumption, *see* U.S. Energy Info. Admin., *U.S. Energy Facts Explained* (June 10, 2022),[4] for 31.5% of our utility-scale renewable energy generation, and for 6.3% of our utility-scale total electricity generation, *see* U.S. Energy Info. Admin., *Hydropower Explained* (Mar. 16, 2022).[5] And natural gas is likewise important to our Nation's energy requirements, as it comprised 32% the country's total energy consumption in 2021. U.S. Energy Info. Admin., *U.S. Energy Facts Explained*, *supra*. So, given the significant roles of hydropower and natural gas in meeting our Nation's energy needs, allowing States to delay federal hydropower or interstate natural gas projects indefinitely would be disastrous.

Some States have proven all too eager to abuse the Section 401 certification process to delay federal

[4] Available at https://www.eia.gov/energyexplained/us-energy-facts/.

[5] Available at https://www.eia.gov/energyexplained/hydropower/.

projects and will take advantage of the scheme that FERC blessed in this case with relish, as these States' prior conduct illustrates. In *Hoopa Valley*, the D.C. Circuit rejected certain States' so-called "withdrawal-and-resubmission scheme" under Section 401, where these States would coordinate with certification requesters to withdraw their requests just before the one-year deadline and then have the requestors resubmit the very same requests immediately, buying the States more time to "act." Pet.App.31a (Danly, Comm'r, dissenting) (discussing *Hoopa Valley*, 913 F.3d at 1104). In the course of concluding that this scheme triggered waiver under Section 401, *Hoopa Valley* explained that "it is now commonplace for states to use Section 401 to hold federal licensing hostage" far beyond Section 401's "one-year maximum." *Hoopa Valley*, 913 F.3d at 1104. For example, at the time of *Hoopa Valley*, 27 of the 43 then-pending "licensing applications before FERC were awaiting a state's water quality certification, and four of those had been pending for *more than a decade*." *Id.* Now, based on FERC's orders below, any State wishing to evade Section 401's one-year deadline may do so unilaterally for as many years as it wants to delay—or, indeed, forever—obtaining the very same "dalliance or unreasonable delay" observed in *Hoopa Valley*. *Id.* (quoting 115 Cong. Rec. 9264).

II. FERC's Ruling That States Can Render Section 401's One-Year Rule Meaningless By Issuing *Pro Forma* Letters Purporting To Deny The Requests Every 364 Days And Then Requiring Resubmittal Is Wrong

A. This Court interprets statutes according to their text, understanding that text in light of the statutory structure and context, as well as the statutory purpose. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021); *Pereira v. Sessions*, 138 S. Ct. 2105, 2110–11 (2018); *see Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1792 (2022). "[O]ne of the most basic interpretative canons" is "that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley*, 556 U.S. at 314 (citations omitted; brackets omitted); *see Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 825 (2018). So where Congress provides "words of limitation" in a statute, the Court will not interpret those limiting words to be a "mere sham" that will "never run [their] course," *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995), or to be "practically devoid of significance," *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004).

B. Applying these statutory-interpretation principles to Section 401's waiver provision, issuing *pro forma* denial letters to requesters every 364 days and telling the requester that it must resubmit the request if the requester ever hopes to obtain

certification, is not an "act" under Section 401 that avoids waiver of the State's authority. § 1341(a)(1).

A State's scheme purporting to deny a request every 364 days in *pro forma* letters and then requiring resubmittal is not an "act" under Section 401. Section 401 provides that a State has "one year" to "act" on a certification request, with the State's "fail[ure] or refus[al]" to "act" within that year resulting in the waiver of the requirement to obtain a certification from the State. § 1341(a)(1). Therefore, a State has a maximum of "one year" to "act" on a request for certification, otherwise it has "waived" its certification authority. *Id.* When a State implements a scheme to delay its decision on a certification by issuing *pro forma* documents purporting to deny the request every 364 days, and then making clear that the requestor must resubmit the request if it ever wants to obtain the necessary Section 401 certification, that is not an "act" under Section 401, but a scheme to avoid taking any "act."

The manifest purpose of Section 401 supports this statutory reading, further demonstrating that a State's unilateral scheme to avoid Section 401's one-year rule by issuing *pro forma* denial letters every 364 days and then requiring resubmittal is not an "act" under Section 401. By requiring States to "act" on a request within "one year," or else waive their authority, Congress designed Section 401 to empower States to participate in the federal-licensing process without allowing them to derail or unduly delay the

process. *See* § 1341(a)(1). So, while Section 401 affords States the "authority . . . to act to deny a permit," S. Rep. No. 92-414, at 69 (1971), it does not permit a State's "dalliance or unreasonable delay" of the federal-permitting process, 115 Cong. Rec. 9264. If a State is to exercise its Section 401 authority, it must give an actual "'yes' or 'no'" within the one-year deadline. 115 Cong. Rec. 9264. And if a State is to deny a request for certification, it must issue "an affirmative denial" before that one-year period elapses. S. Rep. No. 92-414, at 69; *see generally S.D. Warren*, 547 U.S. at 380. Thus, Section 401 requires the State to "act *in one way or the other* within the prescribed time," with anything else "constitut[ing] a waiver of the certification required as to that State." 115 Cong. Rec. 9264 (emphasis added).

FERC's contrary interpretation of "act" under Section 401 would impermissibly render Section 401's one-year limitation either "inoperative" and "void," or "insignificant," *Corley*, 556 U.S. at 314, or "practically devoid of significance," *Leocal*, 543 U.S. at 12. If a State "act[s]" under Section 401 whenever it issues a *pro forma* document labeled a "denial" every 364 days, and then tells the applicant that it must resubmit if it ever wants a Section 401 certification—regardless of the circumstances at issue—that would mean that Section 401's one-year rule would "never run its course," *N.Y. State Conf.*, 514 U.S. at 655, or would be "practically devoid of significance," *Leocal*, 543 U.S. at 12. Congress does not draft statutory "limitation[s]"

like this to be a "mere sham" in that way. *N.Y. State Conf.*, 514 U.S. at 655.

Tellingly, FERC conceded before the D.C. Circuit that, under FERC's orders below, any State could delay a decision on a certification request for as long as it wants by simply enshrining that scheme in state law. As FERC admitted, its interpretation of Section 401 would allow a State to "pass[ ] a statute" that "require[s] an environmental impact assessment that will take [ ] 100 years to do" and that further "instruct[s] the [Board] every 363 days, to deny and require the petitioner to refile for 100 years," with no trigger of waiver. Oral Argument Audio, *supra*, at 29:45–31:15. Thus, under FERC's orders, any State may completely evade Section 401's one-year rule for as long as it desires, which shows that FERC's interpretation of Section 401 impermissibly renders the one-year rule completely "insignificant." *Corley*, 556 U.S. at 314; *see also N.Y. State Conf.*, 514 U.S. at 655; *Leocal*, 543 U.S. at 12.

Notably, neither FERC nor the D.C. Circuit offered any meaningful response to Petitioners' core argument that FERC's interpretation makes Section 401's one-year rule utterly meaningless for any State that does not want to be limited by Section 401's federal limit. FERC defaulted entirely on this point, saying that while courts may ultimately find waiver under certain circumstance, FERC would not do so. Pet.App.65a. For its part, the D.C. Circuit's only response came in a short footnote, where it asserted

that whether the one-year limit would have any meaning under FERC's reading "may depend on whether the State agency, in issuing denials, is complying with State law, which in turn may depend on the State agency's reasons for denying the applications." Pet.App.9a n.8; *accord* Pet.App.22a. But that gives the game away. Section 401's one-year rule is a *federal* limit on a *State's* ability to delay federally licensed projects. If the only limit on the State's delay is to be found in state law—as the D.C. Circuit concluded in the just-discussed footnote—that is not a federal limit at all. A State that wants more than a year to act on a Section 401 certification can just change its state law to authorize such delay, and there would be nothing that any federal court could do about that under FERC's orders.

The D.C. Circuit also speculated that Petitioners' interpretation of Section 401 could lead to "gamesmanship" by requesters, who could strategically submit "certification requests lacking sufficient documentation," with the D.C. Circuit repeating FERC's utterly false assertion that Petitioners had argued that a State's certification decision must be "'on the merits'" to ever be an "act" under Section 401. Pet.App.9a–10a (quoting FERC's brief verbatim, with no citation whatsoever to any submission by Petitioners taking this position). But the issue in this petition for review challenging FERC's orders is whether *FERC's* categorical interpretation of Section 401 is correct. *See Chenery Corp.*, 318 U.S. at 87. Should this Court grant review

and then require the D.C. Circuit to set aside FERC's orders as contrary to Section 401, *see* 5 U.S.C. § 706(2), FERC could choose to take into account the D.C. Circuit's "gamesmanship" concerns on remand, to the extent that FERC were to conclude that the "gamesmanship" worry that the D.C. Circuit raised had any relevance to the situation here.

In any event, nothing about Petitioners' actual interpretation of Section 401 below leads to "gamesmanship" in any case. Petitioners explained below that, under their interpretation of Section 401, a State "act[s]" on a certification request under Section 401 when it denies that request in a situation where, for example, the requestor fails to supply the State with requisite supporting water quality-related information, which information will already have been developed during the lengthy, pre-certification-request-submission FERC licensing process. D.C. Cir. Dkt.1936399 at 18–19 (citation omitted); D.C. Cir. Dkt.1936398 at 46–47; *see supra* p.6. If a requestor fails to submit that readily available information, the State can (and presumably would) deny that certification request within the one-year limit, at which point the applicant would simply resubmit its application with that water-quality information now properly attached. That statutorily-permissible sequence would result in no possible "gamesmanship" by requestors, Pet.App.10a, while not opening the door to "dalliance or unreasonable delay" by States, 115 Cong. Rec. 9264.

III. This Case Is An Ideal Vehicle For Resolving The Question Presented

This case is an ideal vehicle for resolving the Question Presented. FERC rested its orders below solely upon its interpretation of Section 401, *see* Pet.App.18a–22a, 54a–65a, and thus this is the only ground upon which the federal courts may review FERC's orders under *Chenery*, 318 U.S. at 87. So while FERC's supporting parties attempted to raise before the D.C. Circuit certain (meritless) fact-specific arguments to defend the Board's actions in issuing its *pro forma* letters, those arguments are irrelevant under *Chenery*, given that FERC did not rely upon them when issuing its agency decisions.

In any event, considering the facts of this case only further illustrates the danger of FERC's approach to the Section 401's one-year rule. California law at the relevant time required Petitioners first to complete the CEQA process in order to obtain certification, Cal. Code Regs. tit. 23, § 3856(f), while directing the Board to issue without-prejudice denials to Petitioners until they completed that CEQA process, *id.* § 3837(b)(2). But given CEQA's many, time-consuming requirements, *see, e.g.*, Cal. Water Boards, *Revised [CEQA] Initial Study And Environmental Checklist* at 8–42 (Nov. 9, 2016),[6]

[6] Available at https://www.waterboards.ca.gov/rwqcb9/board_info/agendas/2016/Nov/item9c/Item_9_SD5_Revised_CEQA_Initial_Study_and_Environmental_Checklist.pdf.

complicated projects like those at issue here take far more than one year to complete the CEQA process. So, under the then-extant state law, California already effectively provided that projects like Petitioners' would take more than a year to evaluate for purposes of the issuance of Section 401 certifications, despite Section 401's one-year deadline. In other words, California had by statute mandated a more-than-one-year timeline for it to "act" on a certification request, just as FERC conceded at oral argument below its reading of Section 401 permits. *See* Oral Argument Audio, *supra*, at 29:45–31:15.

And this is not a case where the requester failed to submit to the State information that the State needed to decide whether the project would comply with its water-quality standards under Section 401. As explained above, Petitioners supported each of their substantively identical certification requests to the Board with the *exact same* environmental evidence, never supplementing that voluminous evidence with the Board in any way. *Supra* pp.8–12. Although the Board's *pro forma* denial letters claimed that it could not review these requests until Petitioners had completed the requirements under NEPA and CEQA, *supra* pp.8–10, the Board subsequently issued lengthy certifications to Petitioners without receiving *any* additional water-quality information whatsoever—including under the NEPA and CEQA processes that its *pro forma* letters had repeatedly invoked, *supra* pp.10–11. This showed in the most conclusive terms imaginable that

the Board's stated reasons for its *pro forma* denials were just an attempt to buy itself more time, precisely the kind of "dalliance or unreasonable delay" that Section 401's one-year rule stops. 115 Cong. Rec. 9264.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JUNE 17, 2022

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 11, 2022 Decided June 17, 2022

No. 21-1120

TURLOCK IRRIGATION DISTRICT AND
MODESTO IRRIGATION DISTRICT,

Petitioners,

v.

FEDERAL ENERGY REGULATORY
COMMISSION,

Respondents,

AMERICAN WHITEWATER, *et al.*,

Intervenors.

Consolidated with 20-1121

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Before: Wilkins and Walker, *Circuit Judges*, and Randolph, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* Randolph.

Randolph, *Senior Circuit Judge*: An applicant for a federal license to operate a hydroelectric facility must seek a State certification that the facility's discharges will comply with the water quality standards specified in federal law. 33 U.S.C. § 1341(a)(1). The State may grant the applicant's request outright, or it may grant the request subject to conditions relating to water quality, or it may deny the request, or it may fail to act. If the State agency denies certification, no federal license, or at least no federal long-term license, may issue. *See id.* § 1341(d).

This case presents questions about the directive in section 401 of the Clean Water Act that if "the State . . . fails or refuses to act on a request for certification" within one year from receiving the request, the State "shall" be deemed to have waived its authority to grant or deny water quality certification. *Id.* § 1341(a)(1).

The Federal Energy Regulatory Commission decides whether to license private, municipal and State hydroelectric projects subject to federal jurisdiction. *See* 16 U.S.C. §§ 797(e), 817(1).[1] This case arose from a combined licensing and relicensing proceeding for two hydroelectric facilities in California. The administrative record is as follows.

---

1. FERC has licensing authority over only non-federal hydroelectric projects. Federally-owned hydroelectric projects, which generate about half of all hydroelectric power in the United States, "are managed primarily by the U.S. Department of the Interior's Bureau of Reclamation [] and the U.S. Army Corps of Engineers . . .." Kelsi Bracmort et al., Cong. Rsch. Serv., R42579, Hydropower: Federal and Nonfederal Investment 2, 6 (2015).

Both of the hydroelectric facilities — the Don Pedro Project and the La Grange Project — are on the Tuolumne River in central California. The Turlock and Modesto Irrigation Districts own the facilities. FERC's predecessor agency granted a fifty-year license to operate the Don Pedro Project. The license expired in 2016. The other, quite smaller project — La Grange — has operated since the 1890's but in 2012 FERC decided that La Grange was subject to federal licensing authority. We upheld FERC's decision in *Turlock Irrigation District v. FERC*, 786 F.3d 18, 415 U.S. App. D.C. 175 (D.C. Cir. 2015).

In 2017, the Districts filed with FERC a new license application for the La Grange Project and an amended relicensing application for the Don Pedro Project.

On January 26, 2018, the Districts filed certification requests for both projects with the California State Water Resources Control Board. On January 24, 2019 — 363 days later — the California Board denied the requests "without prejudice." The California Board gave two reasons. The first: "FERC has not yet completed its National Environmental Policy Act (NEPA) environmental analysis for the Projects." J.A. 820. The second: "the Districts, as lead agencies for the Projects, have not begun the CEQA [California Environmental Quality Act] process. Without completion of the CEQA process, the State Water Board cannot issue a certification." *Id.* The Board added that its denial was not a "judgment on the technical merits." *Id.*

On April 22, 2019, the Districts sent the Board "substantively unchanged" certification requests for the

Projects. *Turlock Irrigation Dist. & Modesto Irrigation Dist.*, 174 FERC ¶ 61,042, at P. 8 (2021) ("*Declaratory Order*"). On April 20, 2020 — 364 days later — the Board again denied the requests "without prejudice." The Board gave the same explanation as it had before.[2]

The Districts sent a third certification request for both projects to the California Board in July 2020. In October of that year, while these requests were pending, the Districts filed a petition with FERC seeking a declaratory order that the California Board had waived section 401(a)(1)'s State certification requirement. One month later, the Districts informed the California Board that they were withdrawing their certification applications. Despite the Districts' withdrawal of these requests, in January 2021 the California Board granted certification

2. The California Board's full reasoning was the following:

> The Districts are the lead agencies for the Project for purposes of CEQA compliance, but they have not begun the CEQA process. As a responsible agency, the State Water Board relies on the environmental document prepared by the lead agency, but makes its own determination as to whether and with what conditions to grant the certification, taking into consideration the information provided in the lead agency's document. (Pub. Resources Code, §§ 21080.1, subd. (a), 21002.1, subd. (d).) The State Water Board may not issue a certification until the requirements for compliance with CEQA are met. Additionally, the Federal Energy Regulatory Commission has not yet completed its National Environmental Policy Act environmental process for the Project.

J.A. 1159.

for both Projects.[3] Although the Districts had still not completed the CEQA process for the Projects, California law had changed to allow the California Board to grant certification prior to the completion of that process. *Declaratory Order*, at P. 11 & n.25; *see* Cal. Water Code § 13160(b)(2) (2020).

The Districts object to the conditions — some forty-five — that the California Board imposed in granting their requests for certification. If the California Board did not waive its certification authority under section 401(a)(1), those conditions would be mandatory. *See* 33 U.S.C. § 1341(d). On the other hand, if the California Board had waived its section 401(a)(1) authority, the conditions would become only "recommendations" for FERC to consider in developing the terms and conditions of the Districts' federal licenses under Federal Power Act § 10(a), 16 U.S.C. § 803(a). Fed. Energy Regul. Comm'n, Off. of Energy Projects, Div. of Hydropower Licensing, Preparing Environmental Documents: Guidelines for Applicants, Contractors, and Staff 10 (2008).

FERC denied the Districts' petition for a declaratory order. *Declaratory Order*, at PP. 1, 20-35. The Districts petitioned for rehearing which FERC denied. *Turlock Irrigation Dist. & Modesto Irrigation Dist.*, 175 FERC

3. The Districts are challenging the Board's action in California State court. *See* Petitioners Br. iii; California Board Intervenor Br. 19; *Turlock Irrigation Dist. v. State Water Res. Control Bd.*, No. CV63819 (Cal. Super. Ct., Tuolumne County, filed May 11, 2021).

¶ 61,144, at PP. 11-21 (2021) (“*Rehearing Order*”).[4] FERC reasoned that the California Board, “by denying the applications without prejudice, indeed acted on [] them . . ..” *Declaratory Order*, at P. 28. FERC relied on section 401’s “plain language,” which requires that a State “act” on a certification request within one year. *Id.* at P. 33; *Rehearing Order*, at P. 11. FERC distinguished the California Board’s denials without prejudice from *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 439 U.S. App. D.C. 304 (D.C. Cir. 2019), which FERC said involved “a coordinated withdrawal and resubmittal scheme” that allowed the State agencies to not act and still avoid waiver. *Rehearing Order*, at PP. 16. Because section 401 requires only action within a year to avoid waiver, FERC also rejected the Districts’ argument that the California Board’s denials were “invalid” as a matter of federal law because they were “on non-substantive grounds” and not “on the technical merits of the certification requests.” *Declaratory Order*, at PP. 30-32; *see Rehearing Order*, at P. 11.

We agree with FERC that the California Board did not waive its certification authority under section 401(a)(1) and that FERC’s ruling is not contrary to *Hoopa Valley*. The Fourth Circuit accurately described *Hoopa Valley* as a case in which “the state agencies and the license applicant entered into a written agreement that obligated the state agencies, year after year, to *take no action at all* on the applicant’s § 401 certification request.” *N.C. Dep’t of Env’t Quality v. FERC*, 3 F.4th 655, 669 (4th Cir. 2021).

4. Commissioner James P. Danly dissented from the denial of rehearing.

Those circumstances are not present in this case. Each time the California Board denied certification, the Board "act[ed]" within the meaning of section 401(a)(1). *See N.Y. State Dep't of Env't Conservation v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018); *N.Y. State Dep't of Env't Conservation v. FERC*, 991 F.3d 439, 450 n.11 (2d Cir. 2021). And when the Board granted the third application subject to conditions, it "act[ed]" once more. Contrast this with *Hoopa Valley*. The action contemplated in section 401(a)(1) is action by the State agency. Yet the response of the State agencies to the certification requests in *Hoopa Valley* was not action, but inaction.[5] By agreement, the applicant filed and then withdrew its certification request before the one-year period expired, a ritual repeated for more than ten years. *Hoopa Valley*, 913 F.3d at 1101-02, 1104.[6] There was no

5. That was also the situation in *Placer County Water Agency*, 167 FERC ¶ 61,056 (2019), *on reh'g*, 169 FERC ¶ 61,046 (2019), as FERC pointed out in its *Declaratory Order*, at P. 24, and in its *Rehearing Order*, at P. 18, in this case. In *Placer County*, e-mails showed that the state agency "elicit[ed] a withdrawal and resubmission" of the certification application shortly before the one-year deadline. *Declaratory Order*, at P. 24.

And "inaction" also described how FERC dealt with a different deadline in a different statute. *See Allegheny Def. Project v. FERC*, 964 F.3d 1, 13, 448 U.S. App. D.C. 1 (D.C. Cir. 2020) (en banc). There, FERC granted rehearing solely "for the purpose of affording additional time to consider the merits of a rehearing request." *Rehearing Order*, at P. 11. The denials in this case occurred for a different reason, namely that the California Board lacked information that it needed to grant certification. This included the completion of the CEQA process, which the Districts had not even begun.

6. The evidence in *Hoopa Valley* tended to show that the applicant did not want an immediate license that would have

such agreement between the Districts and the California Board. The court's opinion in *Hoopa Valley* stressed that the applicant's "water quality certification request has been complete and ready for review for more than a decade." *Id.* at 1105. Here, the Districts' requests were not complete and they were not ready for review, which is why the California Board denied them. The Board's denials were "without prejudice,"[7] but those rulings still had the legal effect under section 401 of precluding FERC from issuing licenses to the Districts during the period preceding the Board's grant of the certifications. *See* 33 U.S.C. § 1341(d).

The Districts' answer to these points is that if we uphold FERC's ruling, State agencies could extend the

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required decommissioning some of the project's dams in line with current federal environmental standards. *See PacifiCorp*, 147 FERC ¶ 61,216, at PP. 3-5, 11 n.11, 17 (2014). The applicant may have been using this delay tactic in the hope of obtaining federal funding before being required to decommission the dams. *See id.* at PP. 5, 12-13 & n.13. And the applicant had an incentive to delay: while awaiting relicensing, FERC must issue annual licenses that allow for the continued operation of hydroelectric projects under the terms of the existing, expired license. *See* 16 U.S.C. § 808(a)(1). The applicant's expired license was issued in 1954 and presumably included far fewer environmental conditions than are required under current federal law. *PacifiCorp*, at P. 11 & n.11.

7. In context, the words "without prejudice" signified that the Districts could apply again, and that the Board's decision did not have preclusive effect. This would have been evident from the Board's reasoning even without the quoted words, which is doubtless why the Districts' counsel stated at oral argument that "nothing" in their case depended on "the words without prejudice." Oral Arg. 7:22-23.

time for decision indefinitely by denying one certification request after another without prejudice, thus nullifying section 401's one-year limit. The Districts' argument takes the familiar form of the slippery slope. But as with any slippery slope argument, its power to persuade is a function of the plausibility of its predictions.

In response to the Districts' argument in the administrative proceedings FERC stated: "It may be that the courts will find repeated denials without prejudice, particularly those that do not rest on any substantive conclusions, to be the equivalent of the withdrawal-and-resubmittal scheme." *Declaratory Order*, at P. 33.[8] FERC continued: "Given, however, that the state in this case appears to have satisfied the statutory mandate for action, we are not prepared to conclude based on the record before us that the state has waived its section 401 authority." *Id.*

It is also important to recognize that slippery slope arguments often can be turned against themselves. Potentially, for each slippery slope there is an opposing slope. "As in all arguments from consequences, drawing attention to the [supposed] bad outcomes of one course of action is not enough; one has to show that the alternative courses of action don't have just as bad (or even worse) consequences themselves." David Enoch, *Once You Start Using Slippery Slope Arguments, You're on a Very Slippery Slope*, 21 Oxford J. Legal Stud. 629, 636 (2001).

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8. Whether the Districts' hypothetical is plausible may depend on whether the State agency, in issuing denials, is complying with State law, which in turn may depend on the State agency's reasons for denying the applications.

Counsel for FERC put the opposing slope this way. What the Districts propose could lead to "gamesmanship." Respondent Br. 35. Applicants could file certification requests lacking sufficient documentation. "That would leave the State in an untenable position." *Id.* Given the Districts' contention "that a within-one-year denial must be 'on the merits' to avoid waiver . . . the State would be stuck with the Hobson's choice of either granting certification [without necessary information] or waiving its power to" decide. *Id.*

In deciding not to adopt the Districts' proposed interpretation of section 401(a)(1) FERC thus made what can only be regarded as a quite rational judgment. The Districts' remaining arguments do not merit discussion and have been denied for the reasons given by FERC.

The petitions for judicial review are denied.

APPENDIX B — ORDER OF THE UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION, FILED MAY 21, 2021

175 FERC ¶ 61,144
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Project Nos. 2299-087, 14581-004

Turlock Irrigation District
Modesto Irrigation District

Before Commissioners: Richard Glick, Chairman; Neil Chatterjee, James P. Danly, Allison Clements, and Mark C. Christie.

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(May 21, 2021)

1. On February 18, 2021, Turlock Irrigation District and Modesto Irrigation District (collectively, the Districts) filed a request for rehearing of the Commission's January 19, 2021 Declaratory Order on Waiver of Water Quality Certification,[1] which denied the Districts' petition requesting the Commission to declare that the California State Water Resources Control Board (California Board or Board) waived its authority under section 401(a)(1)

1. *Turlock Irrigation Dist.*, 174 FERC ¶ 61,042 (2021) (Declaratory Order).

of the Clean Water Act (CWA)[2] to issue water quality certification for relicensing the Don Pedro Project No. 2299 and licensing the La Grange Project No. 14581.

2. Pursuant to *Allegheny Defense Project v. FERC*,[3] the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the Federal Power Act,[4] we are modifying the discussion in the Declaratory Order and continue to reach the same result in this proceeding, as discussed below.[5]

I. Background

3. The Districts are co-licensees for the 168-megawatt Don Pedro Project No. 2299.[6] On April 28, 2014, the Districts filed an application for a new license to continue

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2. 33 U.S.C. § 1341(a)(1).

3. 964 F.3d 1, 448 U.S. App. D.C. 1 (D.C. Cir. 2020) (en banc) (*Allegheny*).

4. 16 U.S.C. § 825*l*(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

5. *Allegheny*, 964 F.3d at 16-17. The Commission is not changing the outcome of the Declaratory Order. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57, 420 U.S. App. D.C. 400 (D.C. Cir. 2015).

6. *Turlock Irrigation Dist.*, 31 FPC 510 (1964), *aff'd sub nom. Cal. v. FPC*, 345 F.2d 917 (9th Cir. 1965).

to operate and maintain the Don Pedro Project. On October 11, 2017, the Districts filed an application for an original license to continue to operate and maintain the unlicensed 4.7-megawatt La Grange Project.[7]

4. Under section 401(a)(1) of the CWA, any applicant seeking a federal license for an activity that "may result in any discharge into the navigable waters," such as a Commission-issued hydroelectric license, must first seek water quality certification from the state or states in which a discharge may occur.[8] However, certification requirements shall be waived 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."[9]

5. On January 26, 2018, the Districts filed applications for water quality certification for the projects with the California Board, which the Board received on the same day: the Board recognized January 26, 2019, as the one-year deadline to act on the requests.[10] On January 24, 2019, the Board denied the Districts' applications

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7. *Turlock Irrigation Dist.*, 141 FERC ¶ 62,211 (2012), *reh'g denied*, 151 FERC ¶ 61,240 (2015), *aff'd, Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 415 U.S. App. D.C. 175 (D.C. Cir. 2015) (establishing that the unlicensed La Grange Project was required to be licensed).

8. 33 U.S.C. § 1341(a)(1).

9. *Id.*

10. *See* Districts Petition for Declaratory Order at attachment B (filed October 2, 2020) (the Board's February 15, 2018 Receipt Letter accepting the applications) (Petition).

without prejudice, noting that the Commission had not completed its review under the National Environmental Policy Act, that the Districts had not begun the California Environmental Quality Act (CEQA) process, and that the Board could not issue certification prior to completion of the CEQA process.[11] The Board further explained that denial without prejudice was not a judgment on the technical merits of the Districts' applications, and that the Districts would need to re-request certification in order to maintain an active certification application.[12] On April 22, 2019, the Districts submitted to the Board what they described as "substantively unchanged" requests for certification for the projects, which the Board again denied without prejudice on April 20, 2020.[13] On July 20, 2020, the Districts refiled their request and stated that the third request was identical to the first and second requests for certification.[14] On October 2, 2020, the Districts jointly filed a petition asking that the Commission declare that the Board waived its authority to issue certification for the projects, and subsequently withdrew their July 20, 2020 requests for certification on November 19, 2020.[15] On January 15, 2021, the California Board issued water quality certifications for the projects.[16]

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11. Petition at attachment C (the Board's January 24, 2019 Denial).

12. *Id.*

13. *Id.*

14. Declaratory Order, 174 FERC ¶ 61,042 at ¶ 10.

15. *Id.* ¶¶ 10-11.

16. *See* Board Filing Notifying the Commission of the January 15, 2021 Water Quality Certificate Issuance Project Nos. 2299 and 14581(filed January 19, 2021).

6. In the Declaratory Order, the Commission found that the California Board, by denying the applications without prejudice, satisfied CWA section 401's requirement that a state certifying agency act on an application within one year.[17] The Commission further reasoned that because the Board acted on the Districts' applications, neither the D.C. Circuit Court of Appeals' opinion in *Hoopa Valley Tribe v. FERC*,[18] nor subsequent Commission opinions applying *Hoopa Valley*, compelled a waiver finding here.[19] In addition, the Commission determined that the validity of the California Board's decision to deny certification is a question for California state court, and that the Districts had not shown that these denials were unreviewable in state court.[20]

II. Procedural Issues

7. On January 29, 2021, two weeks after the California Board issued final water quality certification, California Sportfishing Protection Alliance, Tuolumne River Trust, Trout Unlimited, American Whitewater, Merced River Conservation Committee, Friends of the River, Golden West Women Flyfishers and Central Sierra Environmental Resource Center (collectively, Conservation Groups) filed a motion requesting the Commission direct the Districts

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17. Declaratory Order, 174 FERC ¶ 61,042 at ¶¶ 28, 33.

18. 913 F.3d 1099, 439 U.S. App. D.C. 304 (D.C. Cir. 2019) (*Hoopa Valley*).

19. Declaratory Order, 174 FERC ¶ 61,042 at ¶¶ 28, 33.

20. *Id.* ¶¶ 32, 34.

to resubmit their requests for water quality certification with the Board.[21] On February 12, 2021, the Board filed an answer to Conservation Groups' motion, stating that as it had issued final certification for the Don Pedro and La Grange projects Conservation Groups' motion was moot, and that questions regarding the validity of the Board's action are matters of state, not federal, law and are therefore not within the Commission's purview.[22]

8. We deny Conservation Groups' motion. Given that the California Board has issued certification for the Don Pedro and La Grange projects (which Conservation Groups fail to reference in their request), and that we have declined to find the Board waived its authority to issue certification, we agree with the Board that Conservation Groups' request is now moot. As we stated in the Declaratory Order, questions regarding the validity of the Board's actions here -- be they denials without prejudice, or issuance of certification after an application has been withdrawn -- are "squarely within the state court's purview."[23]

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21. *See* Conservation Groups Motion for Directive, Project Nos. 2299-082 and 14581-002 (Filed January 29, 2021).

22. *See* Board Motion to Intervene and Answer Project Nos. 2299-082 and 14581-002 at 11-16 (filed February 12, 2021).

23. Declaratory Order, 174 FERC ¶ 61,042 at ¶ 32.

III. Discussion

A. The California Board Acted on the Districts' Application

9. On rehearing, the Districts assert that "the key error in the Commission's analysis" in the Declaratory Order was finding that "by denying the applications without prejudice, [the California Board] indeed acted on them."[24] The Districts contend that denying an application without prejudice does not constitute acting on the application for the purposes of section 401 and that therefore not only is the holding in *Hoopa Valley* applicable to this proceeding, but *Hoopa Valley* also compels a finding of waiver in this instance.[25] The Districts aver that the Board, by issuing denials without prejudice that did not address the technical merits of the Districts' applications, and are not reviewable in state court, clearly did not "act" on the Districts' applications in the manner Congress intended when drafting section 401.[26] Rather, the Districts argue that the Board never intended to grant or deny certification and only sought to evade section 401's one-year deadline.[27] The Districts further assert that the legislative history of section 401 "confirms definitively" that denial without prejudice does not constitute an act

24. *See* Districts Rehearing Request at 11 (citing Declaratory Order, 174 FERC ¶ 61,042 at ¶ 28).

25. *See* Districts Rehearing Request at 10-19.

26. *Id.*

27. *Id.*

"sufficient ... to avoid waiver," as Congress' goal in adding the waiver provision to section 401 was to prevent "sheer inactivity" by the state.[28]

10. The Districts argue that here, denial without prejudice is equivalent to withdrawal and resubmittal because under California regulations "denial without prejudice is not a decision on the merits" and therefore cannot constitute a denial under federal law.[29] In support, the Districts note that California regulations provide that where "the federal period for certification will expire before" the certifying agency can review the application, the agency may either deny the application without prejudice, or direct the applicant to withdraw the application.[30] The Districts further contend that that the Board's denials without prejudice are akin to the Commission's previous practice of issuing tolling orders, deemed invalid in *Allegheny*,[31] as the goal in each instance was simply to "delay the process."[32]

11. The Districts' arguments are not compelling. As the Commission explained in the Declaratory Order, the court in *Hoopa Valley* found that "section 401 does not define

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28. *Id.* at 13-14.

29. *Id.* at 12.

30. *Id.* (citing Cal. Code Regs. tit. 23 § 3831(h) (2020)).

31. 964 F.3d 1, 448 U.S. App. D.C. 1.

32. *See* Districts Rehearing Request at 13.

'failure to act' or 'refusal to act.'"[33] The Districts argue that because denial without prejudice "is not a decision on the merits" it therefore "cannot be a 'denial' as a matter of federal law."[34] But aside from these assertions, the Districts provide no support for their claim that the plain language of section 401 requires a state certifying agency to address the technical merits of the request for water quality certification in order to satisfy the requirement that a state act on a request within one year. Further, in proceedings prior to *Hoopa Valley*, the Board referenced denial without prejudice as a potential consequence if applications were not withdrawn and resubmitted.[35] That the Board appears to have historically regarded denial without prejudice as a definite agency action, as opposed to withdrawal and resubmittal by the applicant, casts doubt on the Districts' argument that the Board, and California regulations, treat denial without prejudice and withdrawal

33. Declaratory Order, 174 FERC ¶ 61,042 at ¶ 33 (citing *Hoopa Valley*, 913 F.3d at 1104). Further, the Commission explained that it is "reluctant to read meaning into the statute that Congress intended the terms 'failure to act' or 'refusal to act' to encompass a state's denial of certification without prejudice, especially as our interpretation of the CWA is entitled to no deference." *Id.*

34. *See* Districts Rehearing Request at 12.

35. *See, e.g., S. Cal. Edison Co.*, 172 FERC ¶ 61,066, at ¶ 25 (2020) (where the Board "mention[ed] denial without prejudice as a possibility if [the applicant] failed to provide supplemental information in a timely manner"); *see also Placer Cnty. Water Agency*, 167 FERC ¶ 61,056, at ¶ 6 n.6 (*Placer County*), *reh'g denied* 169 FERC ¶ 61,046 (2019) (featuring emailed exchanges from 2014 wherein the Board requested the applicant withdraw and resubmit its application "[t]o prevent denial of your request without prejudice").

and resubmittal as one and the same.[36] Regarding the Districts' arguments that the Board's denials are the same as the tolling orders,[37] the court in *Allegheny* stated that tolling orders involved *grants* of rehearing explicitly for the purpose of affording additional time to consider the merits of the rehearing request.[38] Such a scenario is entirely inapposite to this proceeding, which involves a state certifying agency's denial of a request for water quality certification.[39]

12. The Districts, repeating arguments made in their Petition,[40] allege that the California Board's denials without prejudice do not constitute acting on an application

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36. *See* Districts Rehearing Request at 12-13. In addition, in response to the Districts' arguments relying on California regulations, the Commission notes that the California Code of Regulations does not appear to treat withdrawal and resubmittal and denial without prejudice as one and the same. The California Code of Regulations defines denial without prejudice as a "form of denial" resulting from an "inability to grant certification for procedural rather than substantive reasons." *See* Cal. Code Regs. tit. 23 § 3837(b)(2) (2020). While the California Code of Regulations suggests withdrawal and resubmittal as an alternative to denial without prejudice, they refer to denial without prejudice as a denial. *See* Cal. Code Regs. tit. 23 §§ 3831, 3835 (2020).

37. *Id.* at 13.

38. *Allegheny*, 964 F.3d at 13-14.

39. Declaratory Order, 174 FERC ¶ 61,042 at ¶¶ 6-9 (explaining the California Board's rationale for denying the Districts' requests).

40. *Compare* Districts Rehearing Request at 18-19 *with* Petition at 29-30.

under section 401 because they are not reviewable in state court, asserting that "[u]nder California law, because the denials were without prejudice, they are not considered final agency actions."[41] However, as we found in the Declaratory Order, the Districts have not demonstrated that they have "attempted and been thwarted in an attempt to seek review" of the Board's denials.[42] On rehearing, the Districts rely on the same trio of California state court cases cited in the Petition, which the Districts allege demonstrate that in California, denials without prejudice are not considered final agency action and are therefore unreviewable.[43] Having already examined these cases, the Commission remains unconvinced that "the state court cases cited by the Districts persuasively establish that the Districts' ability to challenge the Board's denial of the Districts' requests for certification is foreclosed."[44] The Districts have not provided evidence which persuades the Commission that an attempt by the Districts to seek state court review of the denials would

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41. Districts Rehearing Request at 18.

42. Declaratory Order, 174 FERC ¶ 61,042 at ¶ 34. The Commission notes that on February 16, 2021, the Districts filed a "Petition for Reconsideration and Request for Stay" of their water quality certificates with the Board. *See* Districts, Filing, Project Nos. 2299 and 14581 (February 24, 2021).

43. *Compare* Districts Rehearing Request at 18, n.74, *with* Petition at 29, n.97 (citing *SJCBC, LLC v. Horwedel*, 201 Cal. App. 4th 339, 135 Cal. Rptr. 3d 85, 92 (Ct. App. 2011); *McHugh v. Cnty of Santa Cruz*, 33 Cal. App. 3d 533, 109 Cal. Rptr. 149, 153 (Ct. App. 1973); *Bleeck v. State Board of Optometry*, 18 Cal. App. 3d 415, 95 Cal. Rptr. 860, 871 (Ct. App. 1971)).

44. Declaratory Order, 174 FERC ¶ 61,042 at ¶ 34.

fail solely because the denials were without prejudice. Without successfully establishing that the Board's denials without prejudice are not reviewable in state court, it remains unseen whether such denials render section 401's one-year deadline "superfluous" or otherwise violate section 401.[45] Regarding the Districts' legislative history arguments, nothing in the legislative history suggests that a conclusive action such as denial (with or without prejudice) is equivalent to the concern regarding "sheer inactivity" identified in the legislative history.

13. The Districts further aver that their petition only asked the Commission to find that the Board failed to act under section 401 as a matter of federal law, and clarify that they do not wish for the Commission "to opine on state law" regarding the validity of the Board's denials.[46] Whether the Board acted under federal law pursuant to CWA section 401 is the precise question answered by the Commission in the Declaratory Order,[47] as the Commission found that "the appropriateness of a state's decision to deny certification" is "squarely within the state court's purview."[48] Accordingly, there is no disagreement over this issue.[49]

45. *See* Districts Rehearing Request at 13-17.

46. *Id.* at 22-23.

47. Declaratory Order, 174 FERC ¶ 61,042 at ¶ 28.

48. *Id.* at ¶ 32.

49. The Commission notes that it proffers no opinion as to whether the Board's denials are valid under California Code of Regulations or California law, and only references the California Code of Regulations in response to the Districts' arguments.

14. The Districts, for the first time on rehearing, assert that the California Board's denials without prejudice would be insufficient under the Environmental Protection Agency's Clean Water Act Section 401 Certification Rule.[50] The Environmental Protection Agency published its Final Rule in the *Federal Register* on July 13, 2020, and the rule became effective on September 11, 2020.[51] As the Board's denials were all issued prior to the Final Rule's effective date, application of the Final Rule to the Board's actions in this proceeding would violate the Administrative Procedure Act's general rule against retroactivity.[52] Moreover, the Districts had ample opportunity to present this argument in the their October 2, 2020 Petition, and offer no explanation for why they failed to do so. The Commission looks with disfavor on parties raising issues for the first time on rehearing that could have been raised earlier, in part because other parties are not permitted to respond to requests for rehearing.[53] Therefore, we will not address the Districts' argument on this issue.

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50. *See* Districts Rehearing Request at 17-18 (arguing that the Board's denials were insufficient under the Final Rule, as they did not describe the specific information missing from the Districts' requests) (citing 85 Fed. Reg. 42,210 (July 13, 2020) (Final Rule)).

51. Final Rule, 85 Fed. Reg. 42,210.

52. *See, e.g.*, 5 U.S.C. § 551(4) (defining a rule as an agency statement with "future effect").

53. *See, e.g., S. Shore Energy, LLC*, 168 FERC ¶ 61,118, at ¶ 12 & n.39 (2019) (citing *Calpine Oneta Power v. Am. Elec. Power Serv. Corp.*, 114 FERC ¶ 61,030, at ¶ 7 (2006) ("The Commission looks with disfavor on parties raising new issues on rehearing. Such behavior is disruptive to the administrative process because it has the effect

B. No Coordinated Scheme to Evade Section 401's One-Year Deadline

15. The Districts argue that the Commission "erred in inferring there was no coordinated scheme" to extend section 401's one-year deadline, and assert that in doing so the Commission "arbitrarily and capriciously holds the Districts to a higher standard than applicants in past proceedings, without explanation."[54] The Districts contend the California Board engaged in such coordination by twice accepting as complete "substantively unchanged applications" only to later deny the applications as deficient, while "invit[ing] the Districts to submit a new application."[55] In addition, the Districts assert that it was arbitrary and capricious for the Commission to consider the fact that the Board issued its first denial without prejudice prior to the D.C. Circuit's issuing its opinion in *Hoopa Valley*.[56]

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of moving the target for parties seeking a final administrative decision.")); *cf.* 18 C.F.R. § 385.713(c)(3) ("[a]ny request for rehearing must ... [s]et forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order."); 18 C.F.R. § 385.713(d)(1) ("The Commission will not permit answers to requests for rehearing.").

54. *See* Districts Rehearing Request at 19.

55. *Id.* at 20.

56. *Id.* at 21.

16. As an initial matter, as we found in the Declaratory Order[57] and reiterate here,[58] because the California Board acted on the Districts' requests for certification within one year of receipt, the holding in *Hoopa Valley* does not control here; accordingly, the Commission need not assess whether a coordinated withdrawal and resubmittal scheme took place. Regardless, were the Commission to consider the Districts' argument that there was a coordinated scheme in this proceeding akin to that present in *Hoopa Valley* and subsequent Commission proceedings, the Districts' arguments would still fail, as discussed below.

17. *Hoopa Valley* involved a proceeding where the California Board entered into a formal, written agreement with an applicant for water quality certification that required the applicant to annually withdraw and resubmit its application for certification, for the purpose of avoiding section 401's one-year deadline.[59] In evaluating those circumstances, the court in *Hoopa Valley* held that indeed "a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws and resubmits its request for water quality certification over a period of time greater than one year."[60]

57. Declaratory Order, 174 FERC ¶ 61,042 at ¶ 28.

58. *See supra* ¶¶ 9-11.

59. *Hoopa Valley*, 913 F.3d at 1101-03.

60. *Id.* at 1103.

18. In *Placer County*, an applicant repeatedly withdrew and refiled its request for water quality certification over several years, often after the California Board emailed the applicant and directly requested the applicant withdraw its application in order to avoid section 401's one-year deadline.[61] In finding that the Board's actions constituted waiver, the Commission determined that *Hoopa Valley* does not require a formal agreement between a licensee and a state certifying agency, but that exchanges between entities could amount to an ongoing agreement.[62] Although the parties in *Placer County* did not enter into a formal, written agreement as in *Hoopa Valley*, the Commission determined that the state and the licensee had formed a functional agreement by working together to ensure that withdrawal and resubmission would take place each year, thus delaying a certification decision by over six years.[63]

19. Citing several Commission orders,[64] the Districts contend that the Commission has previously held that accepting an applicant's withdrawal and resubmittal letters "is enough to show coordination" and that we have "*also* found a coordinated scheme" where the certifying agency "communicated about, requested, and expected"

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61. 167 FERC ¶ 61,056 at ¶ 6.

62. *Placer Cnty. Water Agency*, 169 FERC ¶ 61,046 at ¶¶ 16, 18.

63. *Id.*

64. *See* Districts Rehearing Request at 20 (citing *S. Cal. Edison Co.*, 170 FERC ¶ 61,135, at ¶ 25 (2020) *(S. Cal. Edison); Pac. Gas & Elec. Co.*, 172 FERC ¶ 61,065, at ¶¶ 21-22 (2020); *S. Feather Water & Power Agency*, 171 FERC ¶ 61,242, at ¶¶ 22-23 (2020); *Merced Irrigation Dist.*, 171 FERC ¶ 61,240, at ¶ 22 (2020)).

an applicant's withdrawal and resubmittal.[65] The Districts assert that, in this case, the California Board has engaged in a coordinated scheme by accepting "substantively unchanged applications" as complete after having denied the applications without prejudice and then inviting, or once encouraging, the Districts to reapply.[66]

20. As the Commission has found previously, mere acceptance of an application that has been withdrawn and resubmitted is insufficient to find waiver where it cannot be shown that the withdrawal and resubmittal is made "at the behest of the state certifying agency to delay a certification decision."[67] In this proceeding, there is no record evidence showing that the Board communicated about, expected, requested, or encouraged[68] 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

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65. *See id.* (quoting *S. Cal. Edison*, 170 FERC ¶ 61,135 at ¶ 25 (internal quotations omitted, emphasis added).

66. *See* Districts Rehearing Request at 20.

67. *See, e.g., Vill. of Morrisville, Vt.*, 173 FERC ¶ 61,156, at ¶ 21 (2020); *KEI (Maine) Power Management (III) LLC*, 173 FERC ¶ 61,069, at ¶¶ 42-46 (2020).

68. The Commission notes that the Board's sole instance of encouragement was limited the Board's April 20, 2020 denial without prejudice where the Board stated that the Districts may submit a new request for certification, with no reference to the Districts withdrawing and resubmitting their application, or the waiver provision of section 401. *See* Petition at attachment C (the Board's April 20, 2020 denial letter).

of any such exchanges; therefore, we continue to find that no coordinated scheme took place.[69] As this proceeding features none of the circumstances that were present in prior instances in which the Commission has found waiver post-*Hoopa Valley*, there is no basis for finding that the Commission has held the Districts "to a higher standard than past applicants in prior proceedings."[70]

21. Finally, the Districts assert that the Commission's consideration of the fact that the California Board denied their application without prejudice, instead of directing them to withdraw and resubmit, prior to the issuance of the opinion in *Hoopa Valley* is "arbitrary and capricious because it is irrelevant" and contend that "[i]t does not matter when the Board tried to stop the clock; it matters only that it tried to do so."[71] To the contrary, we continue to find that the Board denial of the Districts' application without prejudice, instead of instructing the Districts to withdraw and resubmit their applications, prior to the *Hoopa Valley* holding that such coordinated schemes result in waiver, is relevant to and supports the Commission's finding that the Board did not seek to engage in a coordinated scheme in this proceeding. Indeed, at the time of denial, the court had not yet ruled that coordinated withdrawal and resubmittal schemes resulted in waiver.

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69. There is no record evidence and the dissent does not cite to any record evidence to infer that the Board intended to override section 401's waiver provision. *See* Dissent at ¶ 3.

70. *See* Districts Rehearing Request at 19.

71. *See id.* at 20-21.

The Commission orders:

(A) In response to the Districts' request for rehearing, the Declaratory Order is hereby modified and the result sustained, as discussed in the body of this order.

(B) Conservation Groups' Motion for Directive is denied.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.

(SEAL)

Debbie-Anne A. Reese,
Deputy Secretary

DANLY, Commissioner, *dissenting*:

1. I dissent from today's order on rehearing reaffirming the Commission's finding that the California State Water Resources Control Board (Board) did not waive its ability to issue a water quality certification to Turlock Irrigation District and Modesto Irrigation District (Districts). Although I initially voted for not finding waiver,[1] after considering the material raised in the request for rehearing and reviewing the filings in the proceeding, it is now my view that our prior finding—reaffirmed here—contravenes section 401 of the Clean Water Act (CWA).

2. CWA section 401 delegates to states the authority to issue water quality certifications for the construction or operation of facilities that may discharge into navigable waters within their jurisdiction.[2] While broad, that delegation is not limitless. Congress required states to "establish procedures for public notice in the case of all applications" and permitted states to establish "procedures for public hearings in connection with specific

1. *See Turlock Irrigation Dist.*, 174 FERC ¶ 61,042 (2021) (Declaratory Order). To the extent that the Commission signaled in *Merced Irrigation District* that denial without prejudice for the purpose of extending the one-year deadline is considered an "act" under CWA section 401, I voted for that order in error. *See Merced Irrigation Dist.*, 171 FERC ¶ 61,240, at ¶ 32 (2020) ("We note that to the extent a state lacks sufficient information to act on a certification request, it has a remedy: it can deny certification. Delay beyond the statutory deadline, however, is not an option.").

2. *See* 33 U.S.C. § 1341(a)(1).

applications."[3] Then, in order to "curb a state's 'dalliance or unreasonable delay,'"[4] Congress provided that if a 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, the certification requirements of this subsection shall be waived with respect to such Federal application."[5] In *Hoopa Valley Tribe v. FERC* (*Hoopa Valley*), the court found that "[w]hile the statute does not define 'failure to act' or 'refusal to act,' the states' efforts . . . constitute such failure and refusal within the plain meaning of these phrases" because "the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings."[6]

3. Like the withdrawal-resubmission scheme found impermissible in *Hoopa Valley*, the Board in this case twice denied the Districts' application in what appears to be an attempt to override the statute's one-year deadline thereby affording itself additional time to act. The Board received the application, acknowledged receipt, found the Districts' application met the filing requirements set forth in the California Code of Regulations, and identified the

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3. *Id.*

4. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104, 439 U.S. App. D.C. 304 (D.C. Cir. 2019) (citing 115 Cong. Rec. 9264 (1969)) (emphasis omitted).

5. 33 U.S.C. § 1341(a)(1).

6. *Hoopa Valley*, 913 F.3d at 1104.

one-year deadline for certification.[7] The Board did not request additional information. And just two days before the one-year deadline, the Board denied the application without prejudice stating that environmental review under the National Environmental Policy Act and the California Environmental Quality Act (CEQA) had not been completed and the Board therefore could not issue its certification.[8] The Board also explained that the Districts would need to request certification "[i]n order to maintain an active certification application."[9]

4. Then, after the Districts filed their application "substantively unchanged,"[10] the Board did it all again, denying the application just two days before the deadline but this time adding, "without elaboration, that 'the proposed activity does not comply with applicable water quality standards and other appropriate requirements.'"[11]

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7. Declaratory Order, 174 FERC ¶ 61,042 at ¶ 5.

8. *See id.* ¶ 6; *see also Merced Irrigation Dist.*, 171 FERC ¶ 61,240 at ¶ 22 ("Moreover, the Commission found unavailing the Board's assertion that it could not issue a water quality certification until the CEQA process was complete, which often takes more than one year, and determined that the general principle from *Hoopa Valley* still applied.") (citing *Pac. Gas & Elec. Co.*, 170 FERC ¶ 61,232, at ¶¶ 31-33 (2020)).

9. Districts Petition at attachment C (Board January 24, 2019 Denial Letter).

10. Declaratory Order, 174 FERC ¶ 61,042 at ¶ 8 (citation omitted).

11. *Id.* ¶ 9 (quoting District Petition at attachment C (Board April 20, 2020 Denial Letters)).

Despite finding that the proposed activity did not comply with applicable standards, the Board issued a water quality certification for the Districts' third request, which was "identical to the first and second requests for certification."[12] The timing of the ultimate approval also bears note: it occurred *after* the Districts filed their petition for finding waiver and had withdrawn their third request.

5. Whether the Board explicitly suggests withdrawal and resubmission, or styles its suggestion as a denial without prejudice, removing the applicant's complicity, the result is the same: the Board's denial without prejudice in this case "usurp[s] FERC's control over whether and when a federal license will issue"[13] and is intended to override the waiver provision "created 'to prevent a State from indefinitely delaying a federal licensing proceeding.'"[14] Indeed, the U.S. Environmental Protection Agency (EPA) has stated in guidance, under the heading, "*When More*

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12. *Id.* ¶ 10.

13. *Hoopa Valley*, 913 F.3d at 1104.

14. *Id.* at 1104-05 (citing *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972-73, 395 U.S. App. D.C. 425 (D.C. Cir. 2011); *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 701-02, 429 U.S. App. D.C. 403 (D.C. Cir. 2017)); *see also N.Y. State Dep't of Env't Conservation v. FERC*, 991 F.3d 439, 449 (2d Cir. 2021) ("Section 401 was intended to curb conduct by certifying states that upsets the regulatory balance set by Congress.") (citation omitted); *id.* at 450 ("[W]e are bound by what we believe to be Congress' intention expressed in the text of Section 401 and reinforced in its legislative history to reduce flexibility in favor of protecting the overall federal licensing regime.").

Time is Needed," that "states have tended to take two approaches": (1) suggesting the applicant withdraw and resubmit its application and (2) denying the application without prejudice.[15] EPA explicitly declined to endorse either approach as consistent with CWA section 401.[16]

6. The Commission does not dispute that denials without prejudice could be used to override the waiver provision.[17] Rather, the Commission argues that the

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15. U.S. Environmental Protection Agency, Office of Wetlands, Oceans and Watersheds, *Clean Water Act Section 401: A Water Quality Protection Tool for States and Tribes*, 13 (2010), https://eelp.law.harvard.edu/2021/01/section-401-of-the-cleanwater-act-from-trump-to-biden/ (linking to *Clean Water Act Section 401: A Water Quality Protection Tool for States and Tribes* under the term "interim guidance") (2010 Guidance) (emphasis added). The 2010 Guidance was rescinded and replaced in 2019 with an updated guidance, which recommended, "the state or tribe not delay action on a certification request until a NEPA review is complete unless the request is submitted at or near the conclusion of the NEPA process." U.S. Environmental Protection Agency, *Clean Water Act Section 401 Guidance for Federal Agencies, States, and Authorized Tribes*, 5 (2019), https://www.epa.gov/sites/production/files/2019-06/documents/cwa_section_401_guidance.pdf (2019 Guidance). The 2019 Guidance is no longer in effect. *See* U.S. Environmental Protection Agency, *CWA Section 401 Certification*, https://www.epa.gov/cwa-401/clean-water-act-section-401-guidance-federal-agencies-states-and-authorized-tribes.

16. 2010 Guidance at 13 n.70 ("This handbook does not endorse either of the two approaches, but emphasizes the need for coordination regarding necessary information early in the certification process in order to avoid denial or withdrawal due to data gaps.").

17. *See* Declaratory Order, 174 FERC ¶ 61,042 at 33.

Board's denial without prejudice in this case constituted an "act" because "section 401 does not define 'failure to act' or 'refusal to act'"[18] and the Commission is "reluctant" to interpret such phrases as encompassing a denial without prejudice when its interpretation is entitled to no deference.[19] This argument is essentially the same as that made by the Commission, and that the *Hoopa Valley* court rejected, in support of the withdrawal-and-resubmission scheme constituting an "act": "The Act therefore speaks solely to *state action or inaction*, rather than the repeated withdrawal and refiling of applications."[20] This argument is no more compelling because the state treats withdrawal-resubmission and denial without prejudice differently.[21] Those may be different labels but both are used to achieve the same result. The rights of the Districts to potentially appeal (so long as they have exhausted all administrative remedies) the denial in state court does not cure the fact that the denial without prejudice is a procedural device used to override the one-year deadline.[22]

7. I cannot fault my colleagues for their reluctance to reduce a state's flexibility to issue water quality

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18. *Turlock Irrigation Dist.*, 175 FERC ¶ 61,144, at ¶ 11 (2021) (quoting Declaratory Order, 174 FERC ¶ 61,042 at ¶ 33).

19. Declaratory Order, 174 FERC ¶ 61,042 at ¶ 33.

20. *PacifiCorp*, 149 FERC ¶ 61,038, at ¶ 20 (2014), *vacated and remanded sub nom. Hoopa Valley*, 913 F.3d 1099, 439 U.S. App. D.C. 304 (emphasis in original).

21. *See Turlock Irrigation Dist.*, 175 FERC ¶ 61,144 at ¶ 11.

22. *See id.*

certifications. Indeed, my inclination in such cases is always to allow the state instrumentality to act as it sees fit under the statutory scheme enacted by Congress and let aggrieved parties seek redress in state court. The federal courts, however, have spoken. They have stated that procedural schemes that work an extension of the one-year deadline constitute failures or refusals to act. And, in fact, here the state heeded the court's guidance and revised their procedures in order to comply with the reinvigorated one-year deadline.[23] The Board's repeated denials without prejudice are essentially the same as the scheme in *Hoopa Valley*. The court has instructed us as to our duty and I see no reason to wait for the issue to reach the courts before finding waiver as the Commission suggests, my respect for the states' independence notwithstanding.[24]

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23. *See* Board January 19, 2021 Water Quality Certification at 18 ("On June 29, 2020, Governor Newsome signed into law amendments to the Water Code that provide the State Water Board with the authority to issue certifications before completion of CEQA review, where waiting until completion of CEQA review presents a substantial risk of wavier of certification authority.").

24. *See* Declaratory Order, 174 FERC ¶ 61,042 at ¶ 33 ("It may be that the courts will find repeated denials without prejudice, and particularly those that do not rest on any substantive conclusions, to be the equivalent of the withdrawal-and-resubmittal scheme."). The Board has denied without prejudice water quality certifications in eight other proceedings: (1) Yuba-Bear Hydroelectric Project No. 2266 (Accession No. 20190205-0043), (2) Merced River Hydroelectric Project No. 2179 (Accession No. 20190429-0020), (3) Merced Falls Hydroelectric Project No. 2467 (Accession No. 20190429-0020), (4) Yuba River Project No. 2246 (Accession No. 20190822-5016), (5) Deer Creek Project No. 14530 (Accession No. 20181217-0025), (6) Upper

For these reasons, I respectfully dissent.

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James P. Danly
Commissioner

North Fork Feather River Hydroelectric Project No. 2105 (Accession No. 20190228-0019), (7) Don Pedro Hydroelectric Project No. 2299 (Accession No. 20190206-0011), and (8) La Grange Hydroelectric Project No. 14581 (Accession No. 20190206-0011).

APPENDIX C — NOTICE OF DENIAL OF REHEARING OF THE UNITED STATES OF AMERICA FEDERAL ENERGY REGULATORY COMMISSION, FILED MARCH 22, 2021

174 FERC ¶ 62,175

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Turlock Irrigation District Project Nos. 2299-087
Modesto Irrigation District 14581-004

NOTICE OF DENIAL OF REHEARING BY OPERATION OF LAW AND PROVIDING FOR FURTHER CONSIDERATION

(March 22, 2021)

Rehearing has been timely requested of the Commission's order issued on January 19, 2021, in this proceeding. *Turlock Irrigation District.*, 174 FERC ¶ 61,042 (2021). In the absence of Commission action on the request for rehearing within 30 days from the date the request was filed, the request for rehearing (and any timely requests for rehearing filed subsequently)[1] may be deemed denied. 16 U.S.C. § 825*l*(a); 18 C.F.R. § 385.713 (2020); *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

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1. *See San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs. Into Mkts. Operated by Cal. Indep. Sys. Operator & Cal. Power Exch.*, 95 FERC ¶ 61,173 (2001).

As provided in 16 U.S.C. § 825*l*(a), the rehearing request of the above-cited order filed in this proceeding will be addressed in a future order to be issued consistent with the requirements of such section. As also provided in 16 U.S.C. § 825*l*(a), the Commission may modify or set aside its above-cited order, in whole or in part, in such manner as it shall deem proper. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing request will be entertained.

Kimberly D. Bose,
Secretary.

APPENDIX D — ORDER OF THE UNITED STATES OF AMERICA FEDERAL ENERGY REGULATORY COMMISSION, DATED JANUARY 19, 2021

174 FERC ¶ 61,042
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;
Neil Chatterjee, Richard Glick,
Allison Clements, and
Mark C. Christie

Turlock Irrigation District	Project Nos. 2299-082,
Modesto Irrigation District	14581-002

DECLARATORY ORDER ON WAIVER OF WATER QUALITY CERTIFICATION

(Issued January 19, 2021)

1. On October 2, 2020, Turlock Irrigation District and Modesto Irrigation District (the Districts), licensees for the Don Pedro Hydroelectric Project No. 2299 (Don Pedro Project) and applicants for the unlicensed La Grange Hydroelectric Project No. 14581 (La Grange Project), jointly filed a petition for declaratory order. The Districts request that the Commission declare that the California State Water Resources Control Board (California Board or Board) waived its authority under section 401(a)(1)

of the Clean Water Act (CWA)[1] to issue water quality certifications for relicensing the Don Pedro Project and for licensing the La Grange Project. This order denies the petition.

I. Background

2. The 168-megawatt Don Pedro Project is located on the Tuolumne River in Tuolumne County, California. The Commission's predecessor, the Federal Power Commission, issued a 50-year original license for the Don Pedro Project on March 10, 1964.[2] The Districts filed a timely application for a new license to continue to operate and maintain the Don Pedro Project on April 28, 2014.[3] The license expired on April 30, 2016, and the Districts continue to operate the Don Pedro Project under an annual license.[4]

3. The 4.7-megawatt La Grange Project is located on the Tuolumne River in Stanislaus and Tuolumne

1. 33 U.S.C. § 1341(a)(1).

2. *Turlock Irrigation Dist.*, 31 FPC 510 (1964), *aff'd sub nom. California v. FPC*, 345 F.2d 917 (9th Cir. 1965). The license authorized construction of a new dam and reservoir that submerged existing, unlicensed project facilities constructed in 1923. The license was effective as of the first day of the month in which the Districts accepted it, which did not occur until May 1965 after judicial review.

3. The Districts filed an amended license application for the Don Pedro Project on October 11, 2017.

4. Notice of Authorization for Continued Project Operation (May 5, 2016).

Counties, California, immediately downstream of the Don Pedro Project. On December 19, 2012, Commission staff issued an order finding that the existing, unlicensed La Grange Project requires licensing because it is located on a navigable river and occupies federal land.[5] On October 11, 2017, the Districts filed an application for an original license to continue to operate and maintain the La Grange Project.

4. Pursuant to public notices issued by the Commission, the deadline for filing motions to intervene in the Don Pedro Project relicense proceeding and the La Grange Project license proceeding was January 29, 2018.[6]

5. The Districts requested water quality certification for each project on January 26, 2018, and the California Board received the requests the same day.[7] On January

5. *Turlock Irrigation Dist.*, 141 FERC ¶ 62,211 (2012), *reh'g denied*, 151 FERC ¶ 61,240 (2015), *aff'd, Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 415 U.S. App. D.C. 175 (D.C. Cir. 2015).

6. *See* November 30, 2017 Notices of Application Accepted for Filing issued for Project Nos. 2299-082 and 14581-002. A second intervention period followed Commission staff's issuance of the draft Environmental Impact Statement (EIS). *See* February 11, 2019 Notice of Availability of the Draft EIS for the Don Pedro and La Grange Projects (setting April 12, 2019, as the deadline for filing comments on the draft EIS); 18 C.F.R. § 380.10(a) (2020) (deeming timely any motion to intervene filed on the basis of, and within the comment period for, a draft EIS).

7. As required by section 5.23(b)(1)(ii) of the Commission's regulations, 18 C.F.R. § 5.23(b)(1)(ii) (2020), the Districts filed a copy of the requests with the Commission, including proof of the date of receipt of the request.

29, 2018, the Board provided preliminary certification conditions for the projects.[8] Thereafter, in a February 15, 2018 letter to the Districts acknowledging receipt of the certification applications, the Board stated that the Districts' applications met the application filing requirements set forth in the California Code of Regulations (California Code),[9] and identified January 26, 2019, as the one-year deadline for certification action.[10]

6. On January 24, 2019, the California Board denied without prejudice the Districts' applications.[11] The Board's denial letter stated that the Commission had not completed its review under the National Environmental Policy Act (NEPA), that the Districts had not started the California Environmental Quality Act (CEQA) process, and that the Board could not issue certification prior to completion of the CEQA process.[12] Explaining that "denial without

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8. The California Board provided comments and preliminary terms and conditions for the Don Pedro and La Grange Projects in response to the Commission's November 30, 2017 Notice of Ready for Environmental Analysis.

9. Districts' October 2, 2020 Petition for Declaratory Order at attachment B (California Board's February 15, 2018 Receipt Letter) (citing Cal. Code Regs., tit. 23, § 3856) (Petition).

10. *Id.*

11. Petition at attachment C (California Board's January 24, 2019 Denial Letter).

12. *Id.* The Board has explained that, at the time of the January 2019 certification denial, it "could not determine compliance with water quality standards and issue water quality certification until environmental documentation had been prepared evaluating the

prejudice carries with it no judgment on the technical merits of the activity," the Board notified the Districts of the need to re-request certification in order to maintain active certification applications for the projects.[13]

7. On January 25, 2019, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an opinion in *Hoopa Valley Tribe v. FERC*,[14] ruling that, where a state and an applicant agree to repeatedly withdraw and refile the same water quality certification request, the state has waived its certification authority.

8. On April 22, 2019, the Districts submitted to the California Board their second requests for water quality certification for the Don Pedro and La Grange Projects. The Districts noted that, aside from an updated procedural background, their letters requesting certification were "substantively unchanged" from their initial requests.[15] In its May 21, 2019 letters to the Districts acknowledging receipt of the applications, the Board again stated that

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potential environmental impacts of the proposed project and any feasible mitigation measures." California Board's October 29, 2020 Motion to Intervene and Comments on Petition at 20 (California Board's October 29 Comments).

13. *See id.*

14. 913 F.3d 1099, 439 U.S. App. D.C. 304 (D.C. Cir. 2019) (*Hoopa Valley*) (rejecting a coordinated withdrawal-and-resubmission scheme between the applicant and the state certifying agency).

15. Petition at 8.

the applications met the application filing requirements,[16] and identified April 22, 2020, as the one-year deadline for certification action.[17]

9. On April 20, 2020, the California Board denied without prejudice the Districts' second certification requests.[18] The Board noted that it "may not issue a certification until the requirements for compliance with CEQA are met," and that the Commission had not yet completed its NEPA process. Further, the Boards' letters stated, without elaboration, that "the proposed activity does not comply with applicable water quality standards and other appropriate requirements."[19] In its denial letter for each project, the Board "encourage[d] the Districts to submit a new request for certification."[20]

10. On July 20, 2020, the Districts submitted to the California Board their third requests for water quality certification for the Don Pedro and La Grange Projects. Again, the Districts stated that, aside from updating the procedural background, their third requests were identical to the first and second requests for certification.[21] In its

16. *Id.* at attachment B (California Board's May 21, 2019 Receipt Letters) (citing Cal. Code Regs., tit. 23, § 3856).

17. *Id.*

18. *Id.* at attachment C (California Board's April 20, 2020 Denial Letters).

19. *Id.*

20. *Id.*

21. *Id.* at 10.

August 18, 2020 letters to the Districts acknowledging receipt of the applications, the Board again notified the Districts that the applications met the application filing requirements,[22] and identified July 20, 2021, as the one-year deadline for certification action.[23]

11. On October 2, 2020, the Districts filed the instant petition. They subsequently withdrew their third requests for certification, on November 19, 2020.[24] On December 1, 2020, the California Board filed draft certifications for the projects.[25]

II. Procedural Issues

12. On November 6, 2020, the Commission issued public notice of the Districts' petition, establishing

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22. *Id.* at attachment B (California Board's August 18, 2020 Receipt Letters) (citing Cal. Code Regs., tit. 23, § 3856).

23. *Id.*

24. Districts' November 20, 2020 Copy of Withdrawal of Requests for Water Quality Certification.

25. California Board's December 1, 2020 Copy of Draft Water Quality Certification for the Don Pedro and La Grange Projects. Notwithstanding that the Districts had not initiated the CEQA process as of the date of the draft certification (i.e., November 30, 2020), the California Board explained that, pursuant to a June 2020 amendment to the California Water Code, the Board is now authorized to issue certifications before completion of CEQA review, "where waiting until completion of CEQA review presents a substantial risk of waiver of certification." *Id.* (citing Cal. Water Code § 13160(b)(2) (2020)); *see also* Petition, Attachment F (providing copy of Cal. Water Code § 13160 and Assembly Bill No. 92).

December 7, 2020, as the deadline for filing interventions and comments on the petition.[26] Before the Commission issued that notice, the California Board filed comments and a motion to intervene on October 29, 2020.[27] California Sportfishing Protection Alliance, Tuolumne River Trust, Trout Unlimited, American Whitewater, Merced River Conservation Committee, Friends of the River, Golden West Women Flyfishers and Central Sierra Environmental Resource Center (collectively, Conservation Groups) filed initial comments on November 2, 2020. On November 13, 2020, the Districts filed an answer in opposition to the California Board's motion to intervene. On November 30, 2020, the Districts filed an answer to the California Board's and Conservation Groups' comments. On December 7, 2020, Sierra Club filed comments and a motion to intervene, and the Conservation Groups filed supplemental comments. All commenters oppose the petition.

13. In support of its motion to intervene, the California Board first points to the Commission's recent practice of publicly noticing the filing of a petition for declaratory order regarding waiver of water quality certification under section 401.[28] Those notices of petitions, the Board states,

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26. 85 Fed. Reg. 72,646 (Nov. 13, 2020).

27. The California Board subsequently filed a second request to intervene, which included, "out of an abundance of caution," a request to incorporate by reference its October 29, 2020 motion to intervene and comments, which preceded the Commission's public notice of the Districts' petition. California Board's December 4, 2020 Notice of Intervention, Motion to Intervene, and Comments at 2-3.

28. California Board's October 29 Comments at 10.

have provided an opportunity for entities to file notices of intervention, motions to intervene, or protests and the Commission has accepted as timely any interventions filed during the time period established by the notice. Therefore, the Board asserts, its intervention should be considered timely. Second, the California Board states that its intervention should be granted to allow the Board to "exercise its statutorily recognized duties with respect to Section 401 water quality certification" and in light of its "statutory responsibilities to protect the quality of waters of the state in the public interest."[29] Third, because its actions are the target of the Districts' petition, the Board states that denying intervention would be unfair, as no other party can adequately represent the Board's interest in preserving its authority under section 401 of the CWA.[30] Fourth, the Board asserts that it had good cause for not intervening earlier in the license proceedings for the Don Pedro and La Grange Projects because it had no reason to believe its authority to deny or condition certification would be jeopardized and because it could not foresee the ramifications of the yet-to-be-issued *Hoopa Valley* opinion. Good cause is further established, the California Board asserts, because it had no reason to anticipate that its denials of certification would be reviewed in a forum other than state court and because the Board has been an active participant in the license proceedings.[31] The Board urges the Commission to "unconditionally confirm,

29. *Id.* at 11.

30. *Id.* at 12.

31. *Id.* at 13-14 (noting its January 29, 2018 filing of general comments and preliminary terms and conditions in response to the Commission's November 30, 2017 Notice of Application).

recognize, or grant party and intervenor status" to it in this proceeding, and asserts that limiting the scope of its participation as intervenor would be inconsistent with the Commission's regulations and the Commission's practice addressing similar petitions.[32]

14. The Districts filed an answer opposing the California Board's motion to intervene.[33] They urge the Commission to deny the Board's late motion to intervene in the license proceedings for the Don Pedro and La Grange Projects. First, the Districts argue that by failing to intervene after having two previous opportunities to do so, the Board slept on its rights and should not be allowed to intervene now.[34] Second, the Districts deem the Board's argument that it could not have foreseen the *Hoopa Valley* result as unavailing because, as the Districts note, issues concerning certification conditions and waiver arise with relative frequency in Commission license proceedings.[35] Third, the Districts claim that allowing the Board to

32. *Id.* at 14.

33. Districts' November 13, 2020 Answer in Opposition to Late Motion to Intervene.

34. *Id.* at 2-3. The Board had the opportunity to timely intervene on two prior occasions: after the Commission accepted the Districts' license applications for the projects and after Commission staff issued the draft EIS. *See* November 30, 2017 Notices of Application Accepted for Filing issued for Project Nos. 2299-082 and 14581-002 (establishing January 29, 2018, as the deadline for filing motions to intervene) and 18 C.F.R. § 380.10(a) (deeming timely any motion to intervene filed on the basis of, and within the comment period for, a draft EIS).

35. *Id.* at 3-4.

intervene in the licensing proceedings would prejudice the Districts and cause undue burden, because the Districts have relied on the fact that the Board, given its current lack of party status, would be unable to seek rehearing of any license that the Commission may issue for the Don Pedro or La Grange Projects.[36] However, the Districts state that they do not oppose the Board's intervention in a separately sub-docketed proceeding for the Districts' petition for declaratory order seeking waiver of water quality certification.[37]

15. The Secretary's public notice explained that because the Districts' petition is part of the licensing proceedings for the Don Pedro and La Grange Projects, any person who intervened in either proceeding is already a party to the licensing proceeding.[38] The notice further explained that, generally, the filing of a petition for a declaratory order involving an issue arising from the licensing proceeding, such as waiver of certification, does not trigger a new opportunity to intervene.[39] Accordingly, the notice directed any person seeking to become a party at this stage in the license proceedings to file a motion to intervene out-of-time, pursuant to Rule 214(b)(3) and (d) of the Commission's Rules of Practice and Procedure, that provides justification by reference to the factors set forth in Rule 214(d).[40]

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36. *Id.* at 4.

37. *Id.* at 1, 5.

38. Secretary's November 6, 2020 Notice of Petition for Declaratory Order at n.1.

39. *Id.*

40. 18 C.F.R. § 385.214(b)(3) and (d) (2020).

16. The California Board and Sierra Club, the only entities that filed motions to intervene in the petition proceeding (both of which were timely and neither of which was opposed), became parties in that proceeding by operation of the Commission's rules of practice and procedure.[41] However, as the notice made clear, any entity seeking to also intervene in the licensing proceedings would have to justify late intervention in accordance with our regulations.[42]

17. After considering the Rule 214(d) factors, we find that neither the California Board nor the Sierra Club has demonstrated good cause for intervening late in the licensing proceedings. As both entities were aware, water quality issues generally, and water quality certification in specific, are matters that arise in all licensing proceedings. Nonetheless, neither entity elected to timely intervene.

18. The California Board asserts that good cause exists for its failure to intervene in the licensing proceedings because it had no reason to believe its certification authority would be jeopardized nor could it anticipate the implications of the *Hoopa Valley* opinion. We disagree. The Board's actions do not amount to good cause, but rather, constitute sleeping on its rights.[43] In any

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41. *See id.* § 385.214(c).

42. *See Idaho Power Co.*, 171 FERC ¶ 61,238, at ¶¶ 11-14 (2020).

43. Participants in Commission proceedings may not sit back and wait to see how issues might be resolved before deciding whether to intervene to protect their interests. *See Cal. Trout v. FERC*, 572 F.3d 1003, 1022 (9th Cir. 2009) (*Cal. Trout*); *Idaho Power Co.*, 171 FERC ¶ 61,238 at ¶ 17 n.27, (citing *Cal. Trout*, 572 F.3d at 1022 ("[T]

case, to the extent that the Board's interest in preserving its statutory authority to issue water quality certification for the Don Pedro and La Grange Projects is a compelling interest not adequately represented by any other party to the license proceedings,[44] that interest is completely protected by the Board's status as a party to the limited proceeding on the petition.[45] In addition, granting late intervention in the underlying licensing proceedings could disrupt the proceeding and cause prejudice to, or additional burdens on, existing parties.

19. The same is true of Sierra Club, which in any case lacks the statutory concerns expressed by the Board.

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he Commission has steadfastly and consistently held that a person who has actual or constructive notice that his interests might be adversely affected by a proceeding, but who fails to intervene in a timely manner, lacks good cause under Rule 214."); *Bradwood Landing, LLC*, 126 FERC ¶ 61,035, at ¶¶ 11, 16 (2009) (denying late intervention to movant who claimed that scientific studies made it more aware of its interests in the proceeding); *Cent. Neb. Pub. Power & Irrigation Dist.*, 125 FERC ¶ 61,192, at ¶ 12 (2008) ("The Commission expects parties to intervene in a timely manner based on the *reasonably foreseeable issues* arising from the applicant's filings and the Commission's notice of proceedings." (emphasis added)); *Broadwater Energy, LLC*, 124 FERC ¶ 61,225, at ¶ 13 (2008) ("Those entities with interests they intend to protect are not entitled to wait until the outcome of a proceeding and then file a motion to intervene once they discover the outcome conflicts with their interests.")).

44. *See* 18 C.F.R. § 385.214(d)(1)(iii).

45. We recently clarified that the Commission may, but need not, establish separate sub-dockets for petitions filed in licensing proceedings. *Idaho Power Co.*, 171 FERC ¶ 61,238 at ¶ 13. As a result, our decision is not influenced by the fact that separate subdockets are not used in this case.

Although Sierra Club argues that it did not anticipate the Districts' "novel decision" to file a petition seeking waiver on the basis of the Board twice denying the Districts' requests for certification,[46] as was true of the Board, Sierra Club was aware that issues regarding water quality, including any related to certification, would arise in the licensing proceedings and has not explained it failure to timely intervene to address those matters. Moreover, Sierra Club's limited interest in this proceeding[47] —opposition to the Districts' petition seeking waiver of certification—is adequately represented by its timely intervention in the proceeding on the petition.

III. Discussion

20. Section 401(a)(1) of the CWA requires that an applicant for a federal license or permit to conduct activities that may result in a discharge into the navigable waters of the United States, such as the Districts' operation of the Don Pedro and the La Grange Projects, must provide the licensing or permitting agency a water quality certification from the state in which the discharge originates or evidence of waiver thereof.[48] If the state

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46. *See* Sierra Club's December 7, 2020 Comments and Motion to Intervene at 8, 9 (Sierra Club Comments).

47. Sierra Club Comments at 3 ("The outcome of these CWA Section 401 agency implementation matters is clearly a significant program concern of the Sierra Club") and 7 ("Our major interest here is the Commission's national implementation of its water quality certification legal responsibilities").

48. 33 U.S.C. § 1341(a)(1). Section 401(d) of the CWA provides that a certification and the conditions contained therein shall become

"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," then certification is waived.[49] Further, the licensing or permitting agency may not grant a license or permit until certification has been granted or waived.[50]

21. The Districts contend that, by twice denying certification without prejudice and encouraging application resubmittal, the California Board relied on a tactic that is not only indistinguishable from the withdrawal-and-resubmission scheme rejected by the *Hoopa Valley* court, but also inconsistent with section 401(a) of the CWA. The California Board argues that we should not find waiver because: (1) *Hoopa Valley* is not applicable; (2) treating the Board's denial of certification as waiver would be inconsistent with the plain language of the CWA; (3) the Districts failed to exhaust their administrative and judicial remedies; and (4) the Districts' unclean hands preclude equitable relief.[51] The Conservation Groups and Sierra Club also argue that *Hoopa Valley* is inapplicable.[52]

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a condition of any federal license that is issued. *Id.* § 1341(d). *See City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 373 U.S. App. D.C. 117 (D.C. Cir. 2006) (*Tacoma*).

49. 33 U.S.C. § 1341(a)(1).

50. *Id.*

51. *See* California Board's October 29 Comments.

52. Conservation Groups' November 2, 2020 Comments at 16-22; Sierra Club Comments at 6.

22. For the reasons discussed below, we find that the California Board did not waive its authority under section 401.

A. *Hoopa Valley* and Commission Precedent

23. In *Hoopa Valley*, the D.C. Circuit found that "a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year."[53] The court concluded that where a licensee each year sent a letter indicating withdrawal of its certification request and resubmission of the same,[54] "[s]uch an arrangement does not exploit a statutory loophole; it serves to circumvent [FERC's] congressionally granted authority over the licensing, conditioning, and developing of a hydropower project."[55] In fact, "[b]y shelving water quality certifications, the states usurp FERC's control over whether and when a federal license will issue. Thus, 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."[56]

53. 913 F.3d at 1103.

54. In *Hoopa Valley*, the court noted that before each calendar year passed, the applicant sent a "letter indicating withdrawal of its water quality certification request and resubmission of the very same . . . *in the same one-page letter* . . . ." *Id.* at 1104 (emphasis in original).

55. *Id.*

56. *Id.*

24. Following *Hoopa Valley*, the Commission found in a series of orders that the California Board waived its section 401 authority. In the first case, *Placer County Water Agency*,[57] the Commission found that the record showed that the entities worked to ensure that the withdrawal and refiling happened each year,[58] given that the licensee submitted evidence that the state sent it emails about each upcoming one-year deadline for the purpose of eliciting a withdrawal and resubmission.[59] We concluded that these exchanges between the entities could amount to an ongoing agreement and that, coupled with the fact that Placer County never filed a new application, caused lengthy delay and amounted to the state waiving its certification authority.[60] Thereafter, in *Southern California Edison Co.*,[61] *Pacific Gas & Electric Co.*,[62] *Nevada Irrigation*

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57. 167 FERC ¶ 61,056, *reh'g denied*, 169 FERC ¶ 61,046 (2019) (*Placer County*).

58. *Placer County*, 167 FERC ¶ 61,056 at ¶ 12.

59. *Placer County*, 169 FERC ¶ 61,046 at ¶ 17.

60. *Id.* ¶¶ 12, 18.

61. 170 FERC ¶ 61,135, *modified*, 172 FERC ¶ 61,066 (2020) (*S. Cal. Edison*) (finding that the California Board waived its section 401 authority for relicensing six projects that comprise the Big Creek hydroelectric system where the Board staff sent annual emails to the licensee noting the upcoming one-year deadline and explicitly requested withdrawal and resubmittal over multiple years).

62. 170 FERC ¶ 61,232, *modified*, 172 FERC ¶ 61,065 (2020) (*Pacific Gas & Elec.*) (finding waiver where the record showed the California Board expected the applicant to withdraw and refile its certification application and the applicant cooperated by simultaneously withdrawing and refiling the same water quality certification application for nine years).

District,[63] *Yuba County Water Agency*,[64] *South Feather Water & Power Agency*,[65] *Merced Irrigation District*,[66] and *Pacific Gas & Electric*,[67] the Commission again found that the California Board waived its authority to issue a water quality certification where the applicant withdrew and refiled its application numerous times, even when an explicit agreement was not in place. The Commission found unpersuasive the arguments that the licensee, as the respective lead agency for CEQA, controlled the timing for the CEQA analysis, and reiterated that the "state's reason for delay is immaterial."[68] Further, the Commission reaffirmed that section 401 of the CWA is clear, and that failure to act within the oneyear time limit is dispositive, regardless of whether the timing of the water quality certification, even if it extends beyond one year, would not disrupt the relicensing proceeding.[69]

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63. 171 FERC ¶ 61,029 (2020), *modified*, 172 FERC ¶ 61,082 (2020).

64. 171 FERC ¶ 61,139, *reh'g denied*, 172 FERC ¶ 61,080 (2020) (*Yuba County*).

65. 171 FERC ¶ 61,242 (2020) (*South Feather*).

66. 171 FERC ¶ 61,240 (2020).

67. 172 FERC ¶ 61,064 (2020).

68. *Nevada Irrigation Dist.*, 171 FERC ¶ 61,029 at ¶ 28; *Yuba County*, 171 FERC ¶ 61,139 at ¶ 25; *Merced Irrigation District.*, 171 FERC ¶ 61,240 at ¶ 32; *South Feather*, 171 FERC ¶ 61,242 at ¶ 31.

69. *See Nevada Irrigation Dist.*, 171 FERC ¶ 61,029 at ¶ 29; *Yuba County*, 171 FERC ¶ 61,139 at ¶ 27; *Merced Irrigation Dist.*, 171 FERC ¶ 61,240 at ¶ 32; *South Feather*, 171 FERC ¶ 61,242 at ¶ 31.

25. In other instances, the Commission has not found waiver. In *KEI* (Maine) Power Management (III) LLC,[70] the Commission found on rehearing that the Maine Department of Environmental Protection did not waive its certification authority where the applicant withdrew and refiled its application to give itself time to negotiate fish passage measures with resource agencies. Most recently, in *Village of Morrisville, Vermont*,[71] the Commission found that the Vermont Agency of Natural Resources did not waive its certification authority where the applicant twice withdrew and refiled its application to give itself time to review study reports, consider alternatives, and conduct a cost benefit analysis. In both cases, the Commission found insufficient evidence of the state certifying agency encouraging or supporting withdrawal and resubmittal, and that the record reflected the genesis of withdrawal and resubmittal to be on the applicant's desire to avoid receiving a certification with conditions to which it objected.[72]

B. Application of *Hoopa Valley* and Commission Precedent to the Licensing Proceedings for the Don Pedro and La Grange Projects

26. The Districts argue that the California Board's letters denying certification without prejudice are a

70. 171 FERC ¶ 62,043 (delegated order), *modified*, 173 FERC ¶ 61,069 (2020) (*KEI Power*).

71. 173 FERC ¶ 61,156 (2020) (*Vill. of Morrisville*).

72. *See KEI Power*, 171 FERC ¶ 62,043 at ¶¶ 42-46; *Vill. of Morrisville*, 173 FERC ¶ 61,156 at ¶¶ 21-23.

tolling mechanism that is "indistinguishable from" and the "functional equivalent" of the withdraw-and-resubmit arrangement that the D.C. Circuit rejected in *Hoopa Valley*.[73] Specifically, the Districts argue that the California Board's actions are impermissible under *Hoopa Valley* because: (1) the Board's letters, by denying certification without prejudice and encouraging application resubmittal, amount to a coordinated scheme for the purposes of extending the CWA's statutory deadline; (2) the Districts have continued to re-submit the same request for certification following the Board's denials; (3) the Board's letters denying certification without prejudice frustrate the same policy concerns articulated by the court in *Hoopa Valley*; and (4) the Board's regulations treat withdrawal-and-resubmittal and denial without prejudice letters as interchangeable tolling mechanisms.[74]

27. The California Board responds that the limited holding of *Hoopa Valley* is not applicable in these circumstances because: (1) there is no withdrawal-and-resubmittal; (2) there is no formal agreement between the Board and the Districts explicitly requiring abeyance of the Board's review of the Districts' requests for certification; and (3) there is no "coordinated . . . scheme" to indefinitely delay or otherwise halt the Board's processing of the Districts' requests for certification.[75]

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73. Petition at 11, 14.

74. *Id.* at 14-23.

75. California Board's October 29 Comments at 16.

28. Due to the fact the Board, by denying the applications without prejudice, indeed acted on the them, as opposed to the serial withdrawal-and-resubmittal of certification requests in a number of the cases discussed above, we agree with the California Board that the holding of *Hoopa Valley* is not dispositive here. That the Districts' first requests for certification were denied without prejudice, one day before the court issued its opinion in *Hoopa Valley*, rather than the Districts withdrawing and resubmitting their application, refutes the argument that the Board engaged in a coordinated scheme to evade the waiver period. Unlike the cases where the Commission found that the state certifying agency had waived its authority under section 401, here, there is no record evidence that the Districts and the California Board engaged in actions amounting to an agreement, formal or functional, to circumvent section 401's statutory deadline. Accordingly, *Hoopa Valley* and the subsequent Commission orders in which we found waiver where applicants engaged in serial withdrawal and resubmittal of their applications do not dictate a finding of waiver in this case.

C. Validity of the California Board's Denials under Section 401(a) of the Clean Water Act

29. Section 401(a)(1) of the CWA, in relevant part, states:

> If the State, interstate agency, or Administrator, as the case may be, 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, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.[76]

With regard to the state certifying agency's role, the *Hoopa Valley* court put it succinctly: "Section 401 requires state action within a reasonable period of time, not to exceed one year."[77] Here, on both occasions, the Board "acted" prior to the expiration of the one-year statutory deadline by denying without prejudice the Districts' requests for certification. No party disputes this. Rather, the Districts urge the Commission to find that the Board's letters denying certification without prejudice are invalid actions under section 401(a) of the CWA.[78] The Districts argue that "a non-substantive action, even if styled as a 'denial,' cannot constitute a valid 'action on a request for certification'" under section 401(a) because it would effectively nullify the statute's waiver provision.[79]

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76. 33 U.S.C. § 1341(a)(1).

77. *Hoopa Valley*, 913 F.3d at 1104.

78. *See* Petition at 24-32.

79. *Id.* at 24.

Accordingly, the Districts urge the Commission to find that the Board has waived its authority to issue certifications for the licensing of the Don Pedro and La Grange Projects.

30. The Districts also contend that the Commission is obligated to determine whether the Board's denial of certification is valid as a matter of federal law.[80] Following the Districts' logic, if the Board's denials of certification on non-substantive grounds, rather than on the technical merits of the certification requests, are invalid actions under federal law, then the Commission must conclude that the Board has waived its certification authority.[81]

31. The California Board contests the Districts' characterization of the Commission's obligations, asserting that there is no reason for the Commission to distinguish between a denial based on inadequate information (i.e., a non-substantive denial) and a denial based on the technical merits of a certification request.[82] Contrary to the Districts' position, the Board contends that the validity of a state's decision to grant or deny certification is grounded in state law, rather than by reference to federal law.[83] Moreover, the Board distinguishes the cases proffered

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80. *Id.* at 24-26 (citing *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 395 U.S. App. D.C. 425 (D.C. Cir. 2011) (*Alcoa*); *Tacoma*, 460 F.3d 53, 373 U.S. App. D.C. 117; *Keating v. FERC*, 927 F.2d 616, 288 U.S. App. D.C. 344 (D.C. Cir. 1991) (*Keating*)).

81. *See* Petition at 26.

82. *See* California Board's October 29 Comments at 24-25.

83. *Id.* at 25 (citing *Keating*, 927 F.2d at 622).

by the Districts as instances where the court found that the Commission was required to review state-issued certifications to ensure compliance with the requirements of section 401.[84] Responding to the Districts' claim that a state certifying agency's denial of certification is limited to "substantive denials of certification on the merits," the Board argues that the Districts attempt "to insert language and intent into Section 401 that does not exist" and notes that "Section 401 contains no such limitation."[85]

32. We agree with the California Board that the validity of its action—denial of certification pursuant to state water quality standards—is a question that turns on state law.[86] The cases cited by the Districts do not convince us that the Commission's review is warranted, or appropriate, when a state denies certification. As the California Board points out, the cases cited by the Districts concern the validity of certifications issued by the state; none address the validity of a state's denial of certification.[87] As the D.C. Circuit explained, a state's

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84. *Id.* at 25-26.

85. *Id.* at 26.

86. *See Tacoma*, 460 F.3d at 67 ("[T]he decision whether to issue a section 401 certification generally turns on questions of state law. FERC's role is limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state's power to block the project would be meaningless." (citing *Keating*, 927 F.2d at 622)).

87. *See Alcoa*, 643 F.3d at 968 (whether state-issued certification that was not effective until the applicant satisfied a bond requirement therein complied with the requirements of section 401); *Tacoma*, 460 F.3d at 68 (whether state-issued certification facially satisfied

decision to grant or deny a request for section 401 water quality certification is "generally reviewable only in State court, because the breadth of State authority under [s]ection 401 results in most challenges to a certification decision implicating only questions of State law."[88] A state-issued certification "is reviewable in federal court, however, at least to the extent Section 401 itself imposes requirements that a State must satisfy in order for a certification to be a 'certification required by this section.'"[89] Because section 401 contains no explicit requirements restricting a state's authority to deny certification, we conclude that it is not the Commission's role to review the appropriateness of a state's decision to deny certification. This review falls squarely within the state court's purview. Whether the mere statement that the Districts' proposals violate state water quality standards, without more, is sufficient justification for denying certification is a matter for a state court to determine.

33. Moreover, as the *Hoopa Valley* court observed, section 401 does not define "failure to act" or "refusal to act."[90] Based on the plain language of the statute, we find that on both occasions the California Board, in denying certification, "acted" on the Districts' request within one

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section 401(a)(1)'s public notice requirements); *Keating*, 927 F.2d at 624-25 (whether subsequent revocation of state-issued certification satisfied the terms of section 401(a)(3)).

88. *Alcoa*, 643 F.3d at 971 (citing *Tacoma*, 460 F.3d at 67).

89. *Id.* (citing 33 U.S.C. § 1341(a)(1)).

90. *Hoopa Valley*, 913 F.3d at 1104.

year. We are reluctant to read meaning into the statute that Congress intended the terms "failure to act" or "refusal to act" to encompass a state's denial of certification without prejudice, especially as our interpretation of the CWA is entitled to no deference.[91] It may be that the courts will find repeated denials without prejudice, and particularly those that do not rest on any substantive conclusions, to be the equivalent of the withdrawal-and-resubmittal scheme. Given, however, that the state in this case appears to have satisfied the statutory mandate for action, we are not prepared to conclude based on the record before us that the state has waived its section 401 authority.

34. We are sympathetic to the Districts' argument that they are left without any state-level recourse following the Board's issuance of letters denying certification without prejudice, because the letters do not constitute final administrative actions and are thus non-reviewable in California state courts.[92] However, it is not clear from the record before us that the Districts have attempted and been thwarted in an attempt to seek review of the Boards' letters. Nor do the state court cases cited by the Districts persuasively establish that the Districts' ability to challenge the Board's denial of the Districts' requests for certification is foreclosed.[93]

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91. *Id.* at 1102 ("[B]ecause FERC is not the agency charged with administering the CWA, the [c]ourt owes no deference to its interpretation of Section 401 or its conclusion regarding the states' waiver.") (citing *Alcoa*, 643 F.3d at 972).

92. *See* Petition at 28-30.

93. *See* Petition at 29 n.97 (citing *SJCBC, LLC v. Horwedel*,

36. For the reasons discussed above, we find that the California Board did not waive its authority under the CWA to issue certifications for the Don Pedro and La Grange licensing proceedings.[94]

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201 Cal. App. 4th 339, 135 Cal. Rptr. 3d 85 (Cal. Ct. App. 2011) (medical marijuana dispensary operators not required to exhaust administrative remedies due to inability to initiate administrative review procedure following nuisance abatement orders); *McHugh v. Cnty. of Santa Cruz*, 33 Cal. App. 3d 533, 109 Cal. Rptr. 149 (Cal. Ct. App. 1973) (taxpayer failed to exhaust administrative remedies in appealing real property taxes for several assessment years); *Bleeck v. State Board of* Optometry, 18 Cal. App. 3d 415, 95 Cal. Rptr. 860 (Cal. Ct. App. 1971) (optometrist failed to exhaust administrative remedies in seeking to transfer several branch office licenses because applications were still pending before state optometry board)); *see also* Districts' November 30 Answer at 8, n.30 (citing *Cal. Water Impact Network v. Newhall Cty. Water Dist.*, 161 Cal. App. 4th 1464, 75 Cal. Rptr. 3d 393, 411 (Cal. Ct. App. 2008) (adequacy of water supply assessment not subject to direct judicial review and could only be reviewed as part of challenge to CEQA-required environmental impact report following city approval of development project)). To the contrary, the California Board states that "[t]here is no basis for concluding that denial without prejudice is not a final agency action subject to exhaustion of administrative remedies and judicial action." California Board's October 29 Comments at 26.

94. Because we find that the California Board did not waive certification, we need not address its remaining arguments regarding the Districts' failure to exhaust administrative remedies and unclean hands, which we have rejected in previous proceedings. *See, e.g., Yuba County*, 171 FERC ¶ 61,139 at ¶ 28 (finding that the applicant need not exhaust all administrative remedies prior to seeking waiver determination from the Commission); *Pacific Gas & Electric*, 170 FERC ¶ 61,232 at ¶ 43 (same); *S. Cal. Edison*, 172 FERC ¶ 61,066 at ¶ 33 (same); *see also Yuba County*, 171 FERC ¶ 61,139 at 25 (finding unpersuasive the argument that applicant benefitted from its own

D. Request for Dismissal of Licensing Applications

36. The Conservation Groups assert that the Districts' licensing applications for the Don Pedro and La Grange Projects should be dismissed.[95] Citing *Swift River Co.*[96] and *Creamer and Noble Energy, Inc.*,[97] the Conservation Groups state that Commission precedent mandates dismissal in situations, such as here, where the state has denied certification and no timely appeal of the denial or an active certification request is pending 90 days after the state's denial of certification.[98]

37. It is the Commission's policy that, if a license applicant informs the Commission within 90 days from the date of a denial of water quality certification that it has filed a timely appeal of the denial or a new request for certification, the Commission keeps the license application on file until the applicant has exhausted its remedies on administrative and judicial appeal, so long as the applicant continues to demonstrate, through periodic status reports,

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inaction); *Nevada Irrigation Dist.*, 171 FERC ¶ 61,029 at ¶ 28 (same); *S. Cal. Edison*, 172 FERC ¶ 61,066 at ¶ 36 (noting that, with respect to the "coordinated withdrawal-and-resubmittal scheme," the California Board's hands are in the same state as the applicant's).

95. Conservation Groups' December 7, 2020 Supplemental Comments at 5, 13.

96. 41 FERC ¶ 61,146 (1987).

97. 93 FERC ¶ 61,044 (2000).

98. *See* Conservation Groups' December 7, 2020 Supplemental Comments at 5.

due diligence in pursuing these remedies. However, if the second certification request is denied, the Commission will dismiss the license application, unless the appeal of the first denial is pending.[99] This policy was developed in the context of applications for original license, under the rationale that, "[a]t some point, the public interest in freeing up potential sites for hydroelectric development or for other purposes will outweigh the private interest in maintaining the application on file while repeated requests for certification are pursued."[100]

38. As the Commission explained in *West Penn Power Co.*,[101] this rationale does not apply with respect to a relicense application, which involves an existing project that continues to operate under annual license or Administrative Procedure Act authority[102] pending relicensing. In addition, if a relicense application for a major project is dismissed after the FPA section 15(c) statutory deadline for such applications,[103] it cannot be refiled.[104] For this reason, the Commission has given relicense applications greater flexibility than original license applications with respect to circumstances that

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99. *See City of Harrisburg, Pa.*, 45 FERC ¶ 61,053 (1988).

100. *North Star Hydro Ltd.*, 58 FERC ¶ 61,266, at 61,844 (1992).

101. 74 FERC ¶ 61,287, at 61,913 n.14 (1996) (*West Penn*).

102. 5 U.S.C. § 558(c).

103. *See* 16 U.S.C. § 808(c)(1).

104. *See* 18 C.F.R. § 16.9(b)(4) (2020).

can cause an application to be dismissed.[105] In light of the special considerations attending relicense applications, Commission staff does not dismiss such applications after two certification denials. We find that the special considerations due relicense applications are similarly compelling in the context of an original license application for an existing, unlicensed project that requires licensing, such as the La Grange Project. Dismissal of such a license application would in effect shut down an existing, operational project. Moreover, allowing greater latitude to original license applications for existing, unlicensed projects that require licensing does not implicate the same site banking concerns that the new project dismissal policy was intended to curtail. Accordingly, we are not dismissing the licensing applications for the Don Pedro or La Grange Projects at this time.

The Commission orders:

(A) Turlock Irrigation District and Modesto Irrigation District's October 2, 2020 petition for declaratory order is denied.

(B) The California State Water Resources Control Board's motion to intervene out-of-time in the licensing proceedings is denied. The California Board's participation as an intervenor is limited to only those issues raised in Turlock Irrigation District and Modesto Irrigation District's October 2, 2020 petition for declaratory order.

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105. *See West Penn*, 74 FERC at 61,913 n.14; *see also* 18 C.F.R. § 16.9(b)(2), (3) (corrections of application deficiencies; amendments to applications).

(C) Sierra Club's motion to intervene out-of-time in the licensing proceedings is denied. Sierra Club's participation as an intervenor is limited to only those issues raised in Turlock Irrigation District and Modesto Irrigation District's October 2, 2020 petition for declaratory order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED SEPTEMBER 6, 2022

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-1120
September Term, 2022
FERC-174FERC61042, FERC-174FERC62175

Consolidated with 21-1121

TURLOCK IRRIGATION DISTRICT AND MODESTO IRRIGATION DISTRICT,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

AMERICAN WHITEWATER, *et al.*,

Intervenors.

Filed On: September 6, 2022

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker and Childs*, Circuit Judges; and Randolph, Senior Circuit Judge

ORDER

Upon consideration of petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

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* Circuit Judge Childs did not participate in this matter.

APPENDIX F — RELEVANT STATUTORY PROVISIONS

33 U.S.C. § 1341 – Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If

the State, interstate agency, or Administrator, as the case may be, 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, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such

hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D)

applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall

remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

* * *

APPENDIX G — REQUEST FOR SECTION 401 CERTIFICATION FOR DON PEDRO PROJECT, DATED JULY 20, 2020

July 20, 2020
Eileen Sobeck, Executive Director
California State Water Resources Control Board
1001 "I" Street, 14th Floor
Sacramento, CA 95814

Re: Don Pedro Hydroelectric Project, FERC Project No. 2299 Third Request for Water Quality Certification

Dear Director Sobeck:

On January 26 2018, Turlock Irrigation District and Modesto Irrigation District (collectively, the "Districts") filed with the State Water Resources Control Board ("SWRCB") an original request for water quality certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, in support of the Districts' October 11, 2017 application before the Federal Energy Regulatory Commission ("FERC") for a new license for the Don Pedro Hydroelectric Project No. 2299 ("Don Pedro Project") (*see* Attachment A). The request for certification was filed in accordance with Title 23, Division 3, Chapter 28, Article 4, Sections 3855 and 3856 of the California Code of Regulations. The SWRCB acknowledged receipt of the Districts' request for certification on February 15, 2018 (*see* Attachment A). On January 24, 2019, the SWRCB issued a letter notifying the Districts' that the request for water quality certification for the Don Pedro Project was denied without prejudice (*see* Attachment A).

On April 22, 2019, the Districts filed with the SWRCB a second request for water quality certification in support of the Districts' October 11, 2017 application for license (*see* Attachment B). On May 21, 2019, the SWRCB acknowledged receipt of the Districts' second request for certification (*see* Attachment B). In a letter dated April 20, 2020, the SWRCB issued a second letter notifying the Districts' that the request for water quality certification for the Don Pedro Project was denied without prejudice (*see* Attachment B).

In order to ensure the Districts' October 11, 2017 license application remains in good standing before FERC, the Districts are filing a third request for water quality certification for the Don Pedro Project in support of the Districts' October 11, 2017 license application. If you have any questions regarding this request, please contact the undersigned. Please note that Mr. Cooke should be used as the contact for Turlock Irrigation District for all future correspondence.

Respectfully submitted,

/s/
Michael I. Cooke
Turlock Irrigation District
P.O. Box 949
Turlock, CA 95381
(209) 648-6819
micooke@tid.org

/s/
John B. Davids
Modesto Irrigation District
P.O. Box 4060
Modesto, CA 95352
(209) 526-7564
john.davids@mid.org

Enclosures
cc: Chase Hildeburn, SWRCB

APPENDIX H — REQUEST FOR SECTION 401 CERTIFICATION FOR LA GRANGE PROJECT, DATED JULY 20, 2020

July 20, 2020

DELIVERED VIA EMAIL; DATE STAMP REQUESTED

Eileen Sobeck, Executive Director
California State Water Resources Control Board
1001 "I" Street, 14th Floor
Sacramento, CA 95814

Re: La Grange Hydroelectric Project, FERC Project No. 14581 Third Request for Water Quality Certification

Dear Director Sobeck:

On January 26 2018, Turlock Irrigation District and Modesto Irrigation District (collectively, the "Districts") filed with the State Water Resources Control Board ("SWRCB") an original request for water quality certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, in support of the Districts' October 11, 2017 application before the Federal Energy Regulatory Commission ("FERC") for an original license for the La Grange Hydroelectric Project No. 14581 ("La Grange Project") (*see* Attachment A). The request for water quality certification was filed in accordance with Title 23, Division 3, Chapter 28, Article 4, Sections 3855 and 3856 of the California Code of Regulations. The SWRCB

acknowledged receipt of the Districts' request for water quality certification on February 15, 2018 (*see* Attachment A). On January 24, 2019, the SWRCB issued a letter notifying the Districts' that the request for water quality certification for the La Grange Project was denied without prejudice (*see* Attachment A).

On April 22, 2019, the Districts filed with the SWRCB a second request for water quality certification in support of the Districts' October 11, 2017 application for license (*see* Attachment B). On May 21, 2019, the SWRCB acknowledged receipt of the Districts' second request for certification (see Attachment B). In a letter dated April 20, 2020, the SWRCB issued a second letter notifying the Districts' that the request for water quality certification for the La Grange Project was denied without prejudice (*see* Attachment B).

In order to ensure the Districts' October 11, 2017 license application remains in good standing before FERC, the Districts are filing with the SWRCB a third request for certification for the La Grange Project in support of the Districts' October 11, 2017 license application. If you have any questions regarding this request, please contact the undersigned. Please note that Mr. Cooke should be used as the contact for Turlock Irrigation District for all future correspondence.

Respectfully submitted,

/s/
Michael I. Cooke
Turlock Irrigation District
P.O. Box 949
Turlock, CA 95381
(209) 648-6819
micooke@tid.org

/s/
John B. Davids
Modesto Irrigation District
P.O. Box 4060
Modesto, CA 95352
(209) 526-7564
john.davids@mid.org

APPENDIX I — DENIAL WITHOUT PREJUDICE OF WATER QUALITY CERTIFICATION LETTER FOR DON PEDRO PROJECT, DATED APRIL 20, 2020

State Water Resources Control Board

April 20, 2020

Mr. Steve Boyd
Turlock Irrigation District
P.O. Box 949
Turlock, CA 95381

Mr. John B. Davids
Modesto Irrigation District
P.O. Box 4060
Modesto, CA 95352

Don Pedro Hydroelectric Project
Federal Energy Regulatory Commission Project No. 2299
Tuolumne County

SUBJECT: DENIAL WITHOUT PREJUDICE OF WATER QUALITY CERTIFICATION

Dear Mr. Boyd and Mr. Davids:

On April 22, 2019, the Turlock Irrigation District (TID) and Modesto Irrigation District (MID) (collectively, Districts) submitted to the State Water Resources Control Board (State Water Board or Board) a new request for water quality certification (certification) pursuant to section

401(a)(1) of the Federal Clean Water Act (33 U.S.C. § 1341 et seq.) for the relicensing of the Don Pedro Hydroelectric Project (Project). Waterbodies associated with the Project include the Tuolumne River and its tributaries.

After review of the application for certification and other relevant information, the State Water Board must either: (1) issue an appropriately conditioned certification; or (2) deny certification. (Cal. Code Regs., tit. 23, § 3859.) The State Water Board may issue certification if the Board determines that an activity will comply with applicable water quality standards and other appropriate requirements. Prior to taking certification action, however, the requirements of the California Environmental Quality Act (CEQA) must be met, including preparation and review of any necessary environmental documents. Absent CEQA compliance, the State Water Board will deny the certification without prejudice. (Cal. Code Regs., tit. 23, §§ 3836, subd. (c); 3837, subd. (b)(2).)

The Districts are the lead agencies for the Project for purposes of CEQA compliance, but they have not begun the CEQA process. As a responsible agency, the State Water Board relies on the environmental document prepared by the lead agency, but makes its own determination as to whether and with what conditions to grant the certification, taking into consideration the information provided in the lead agency's document. (Pub. Resources Code, §§ 21080.1, subd. (a), 21002.1, subd. (d).) The State Water Board may not issue a certification until the requirements for compliance with CEQA are met. Additionally, the Federal Energy Regulatory Commission

has not yet completed its National Environmental Policy Act environmental process for the Project.

The Districts are hereby notified that the April 22, 2019 request for water quality certification for the Project is denied without prejudice, effective the date of this letter. The State Water Board encourages the Districts to submit a new request for certification.

Further, at this time, the proposed activity does not comply with applicable water quality standards and other appropriate requirements. Noncompliance with these requirements may be grounds for denial of an application for certification. (Cal. Code Regs., tit. 23, 3837, subd. (b)(1).) State Water Board staff is available to discuss compliance with water quality standards and other requirements with you.

If you have questions regarding this letter, please contact Chase Hildeburn in the Water Quality Certification Program of the Division of Water Rights, at (916) 323-0358 or at Chase.Hildeburn@waterboards.ca.gov. Written correspondence should be directed to:

State Water Resources Control Board
Division of Water Rights – Water Quality Certification Program
Attn: Chase Hildeburn
P.O. Box 2000
Sacramento, CA 95812-2000

Sincerely,

for

Eileen Sobeck
Executive Director

APPENDIX J — DENIAL WITHOUT PREJUDICE OF WATER QUALITY CERTIFICATION LETTER FOR LA GRANGE PROJECT, DATED APRIL 20, 2020

April 20, 2020

Mr. Steve Boyd
Turlock Irrigation District
P.O. Box 949
Turlock, CA 95381

Mr. John B. Davids
Modesto Irrigation District
P.O. Box 4060
Modesto, CA 95352

La Grange Hydroelectric Project
Federal Energy Regulatory Commission Project No. 14581
Tuolumne County

SUBJECT: DENIAL WITHOUT PREJUDICE OF WATER QUALITY CERTIFICATION

Dear Mr. Boyd and Mr. Davids:

On April 22, 2019, the Turlock Irrigation District (TID) and Modesto Irrigation District (MID) (collectively, Districts) submitted to the State Water Resources Control Board (State Water Board or Board) a new request for water quality certification (certification) pursuant to section 401(a)(1) of the Federal Clean Water Act (33 U.S.C. § 1341 et seq.) for the licensing of the La Grange Hydroelectric

Project (Project). Waterbodies associated with the Project include the Tuolumne River and its tributaries.

After review of the application for certification and other relevant information, the State Water Board must either: (1) issue an appropriately conditioned certification; or (2) deny certification. (Cal. Code Regs., tit. 23, § 3859.) The State Water Board may issue certification if the Board determines that an activity will comply with applicable water quality standards and other appropriate requirements. Prior to taking certification action, however, the requirements of the California Environmental Quality Act (CEQA) must be met, including preparation and review of any necessary environmental documents. Absent CEQA compliance, the State Water Board will deny the certification without prejudice. (Cal. Code Regs., tit. 23, §§ 3836, subd. (c); 3837, subd. (b)(2).)

The Districts are the lead agencies for the Project for purposes of CEQA compliance, but they have not begun the CEQA process. As a responsible agency, the State Water Board relies on the environmental document prepared by the lead agency, but makes its own determination as to whether and with what conditions to grant the certification, taking into consideration the information provided in the lead agency's document. (Pub. Resources Code, §§ 21080.1, subd. (a), 21002.1, subd. (d).) The State Water Board may not issue a certification until the requirements for compliance with CEQA are met. Additionally, the Federal Energy Regulatory Commission has not yet completed its National Environmental Policy Act environmental process for the Project.

Appendix J

The Districts are hereby notified that the April 22, 2019 request for water quality certification for the Project is denied without prejudice, effective the date of this letter. The State Water Board encourages the Districts to submit a new request for certification.

Further, at this time, the proposed activity does not comply with applicable water quality standards and other appropriate requirements. Noncompliance with these requirements may be grounds for denial of an application for certification. (Cal. Code Regs., tit. 23, 3837, subd. (b)(1).) State Water Board staff is available to discuss compliance with water quality standards and other requirements with you.

If you have questions regarding this letter, please contact Chase Hildeburn in the Water Quality Certification Program of the Division of Water Rights, at (916) 323-0358 or at Chase.Hildeburn@waterboards.ca.gov. Written correspondence should be directed to:

State Water Resources Control Board
Division of Water Rights – Water Quality
Certification Program
Attn: Chase Hildeburn
P.O. Box 2000
Sacramento, CA 95812-2000

Sincerely,

Eileen Sobeck
Executive Director

APPENDIX K — REQUEST FOR SECTION 401 CERTIFICATION FOR LA GRANGE PROJECT, DATED APRIL 22, 2019

April 22, 2019

DELIVERED VIA EMAIL; DATE STAMP REQUESTED

Eileen Sobeck, Executive Director
California State Water Resources Control Board
1001 "I" Street 14th Floor
Sacramento, CA 958 14

Re: La Grange Hydroelectric Project, FERC Project No. 14581 New Request for Water Quality Certification

Dear Director Sobeck:

On January 26 2018, Turlock Irrigation District and Modesto Irrigation District (collectively, the "Districts") filed their original request for water quality certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, in support of the Districts' application before the Federal Energy Regulatory Commission ("FERC") for an original license for the La Grange Hydroelectric Project No. 14581 ("La Grange Project") (copy attached). The request for water quality certification was filed in accordance with Title 23, Division 3, Chapter 28, Article 4, Sections 3855 and 3856 of the California Code of Regulations. The State Water Resources Control Board ("SWRCB") acknowledged receipt of the Districts'

request for water quality certification on February 15, 2018 (copy attached).

On January 24, 2019, the SWRCB issued a letter notifying the Districts' that their request for water quality certification for the La Grange Project was denied without prejudice (copy attached). The letter stated that in order to maintain an active certification application with the SWRCB, the Districts would need to request certification again. In response, the Districts' hereby file their new request for water quality certification for the La Grange Project.

If you have any questions regarding this request, please contact the undersigned. Please note that Mr. Davids should be used as the contact for Modesto Irrigation District for all future correspondence.

Respectfully submitted,

/s/
Steve Boyd
Turlock Irrigation District
P.O. Box 949
Turlock, CA 95381
(209) 883-8364
seboyd@tid.org

/s/
John B. Davids
Modesto Irrigation District
P.O. Box 4060
Modesto, CA 95352
(209) 526-7564
john.davids@mid.org

APPENDIX L — REQUEST FOR SECTION 401 CERTIFICATION FOR DON PEDRO PROJECT, DATED APRIL 22, 2019

April 22, 2019

DELIVERED VIA EMAIL; DATE STAMP REQUESTED

Eileen Sobeck, Executive Director
California State Water Resources Control Board
1001 "I" Street, 14th Floor
Sacramento, CA 95814

Re: Don Pedro Hydroelectric Project, FERC Project No. 2299
New Request for Water Quality Certification

Dear Director Sobeck:

On January 26 2018, Turlock Irrigation District and Modesto Irrigation District (collectively, the "Districts") filed their original request for water quality certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, in support of the Districts' application before the Federal Energy Regulatory Commission ("FERC") for a new license for the Don Pedro Hydroelectric Project No. 2299 ("Don Pedro Project") (copy attached). The request for water quality certification was filed in accordance with Title 23, Division 3, Chapter 28, Article 4, Sections 3855 and 3856 of the California Code of Regulations. The State Water Resources Control Board ("SWRCB") acknowledged receipt of the Districts' request for water quality certification on February 15, 2018 (copy attached).

Appendix L

On January 24, 2019, the SWRCB issued a letter notifying the Districts' that their request for water quality certification for the Don Pedro Project was denied without prejudice (copy attached). The letter stated that in order to maintain an active certification application with the SWRCB, the Districts would need to request certification again. In response, the Districts' hereby file their new request for water quality certification for the Don Pedro Project.

If you have any questions regarding this request, please contact the undersigned. Please note that Mr. Davids should be used as the contact for Modesto Irrigation District for all future correspondence.

Respectfully submitted,

/s/ Steve Boyd
Steve Boyd
Turlock Irrigation District
P.O. Box 949
Turlock, CA 95381
(209) 883-8364
seboyd@tid.org

/s/ John B. Davids
John B. Davids
Modesto Irrigation District
P.O. Box 4060
Modesto, CA 95352
(209) 526-7564
john.davids@mid.org

Enclosures

APPENDIX M — DENIAL WITHOUT PREJUDICE OF WATER QUALITY CERTIFICATION LETTER FOR DON PEDRO AND LA GRANGE PROJECTS, DATED JANUARY 24, 2019

STATE WATER RESOURCES CONTROL BOARD

JAN 24 2019

Mr. Steve Boyd	Mr. John B. Davids
Turtock Irrigation District	Modesto Irrigation District
P.O. Box 949	P.O. Box 4060
Turtock, CA 95381	Modesto, CA 95352

Dear Mr. Boyd and Mr. Davids:

DENIAL WITHOUT PREJUDICE OF WATER QUALITY CERTIFICATION FOR DON PEDRO HYDROELECTRIC PROJECT AND LA GRANGE HYDROELECTRIC PROJECT, FEDERAL ENERGY REGULATORY COMMISSION PROJECTS NOS. 2299 AND 14581, TUOLUMNE COUNTY

On January 26, 2018, the State Water Resources Control Board (State Water Board) received a request from Turtock Irrigation District (TID) and Modesto Irrigation District (MID) (collectively, Districts) for water quality certification (certification) pursuant to section 401(a)(1) of the Federal Clean Water Act (33 USC § 1341 et seq.) for the relicensing of the Don Pedro Hydroelectric Project and licensing of the La Grange Hydroelectric Project (collectively, Projects), Federal Energy Regulatory Commission (FERC) Projects No. 2299 and 14581. Waterbodies associated with the Projects include the Tuolumne River and its tributaries.

In taking certification action, the State Water Board must either: (1) issue an appropriately conditioned water quality certification; or (2) deny certification. (Cal. Code Regs., tit. 23, § 3859.) A water quality certification may be issued if it is determined that there is reasonable assurance that an activity will comply with state and federal water quality standards and that the appropriate environmental documents have been adopted to support certification and meet the requirements of the California Environmental Quality Act (CEQA). However, when a proposed project's compliance with water quality standards is not yet determined, but the application suffers from a procedural inadequacy, the State Water Board may deny certification without prejudice. (Cal. Code Regs., tit. 23, § 3837, subd. (b)(2)).)

At this time, FERC has not yet completed its National Environmental Policy Act (NEPA) environmental analysis for the Projects. Additionally, the Districts, as lead agencies for the Projects, have not begun the CEQA process. Without completion of the CEQA process, the State Water Board cannot issue a certification.

The Districts are hereby notified that the January 26, 2018 request for certification for the Projects is denied without prejudice, effective the date of this letter. The denial without prejudice carries with it no judgment on the technical merits of the activity. In order to maintain an active certification application, the Districts will need to request certification for the Projects.

If you have questions regarding this letter, please contact, Chase Hildeburn, Projects Manager in the Water Quality Certification Program of the Division of Water Rights; at (916) 323-0358 or at Chase.Hildeburn@waterboards.ca.gov. Written correspondence should be directed to: State Water Resources Control Board; Division of Water Rights – Water Quality Certification Program; Attn: Chase Hildeburn; P.O. Box 2000; Sacramento, CA 95812-2000.

Sincerely,

/s/

Eileen Sobeck
Executive Director

APPENDIX N — REQUEST FOR SECTION 401 CERTIFICATION FOR DON PEDRO PROJECT, DATED JANUARY 26, 2018

January 26, 2018

Eileen Sobeck, Executive Director
California State Water Resources Control Board
1001 "I" Street, 14th Floor
Sacramento, CA 95814

Subject: Don Pedro Hydroelectric Project,
FERC Project No. 2299
Application for Water Quality Certificate

Dear Ms. Sobeck:

Pursuant to Section (§) 5.23(b) of the Code of Federal Regulations , by this letter, Turlock Irrigation District and Modesto Irrigation District (collectively, the Districts) file with the State Water Resources Control Board (Board) an application for Water Quality Certification under Section 401 of the Clean Water Act in support of the Districts' application before the Federal Energy Regulatory Commission (FERC) for a new license for the Don Pedro Hydroelectric Project (Project; FERC Project No. 2299). This application for a Water Quality Certification is also being made pursuant to Title 23, Division 3, Chapter 28, Article 4, Sections 3855 and 3856 of the California Code of Regulations.

Physical addresses, mailing addresses, and telephone numbers for Turlock Irrigation District and Modesto

Irrigation District are as follows:

Physical Address:	*Physical Address:*
Turlock Irrigation District	Modesto Irrigation District
333 East Canal Drive	1231 11th Street
Turlock, CA 95380	Modesto, CA 95354
(209) 883-8222	(209) 526-7337

Mailing Address:	*Mailing Address:*
Turlock Irrigation District	Modesto Irrigation District
P.O. Box 949	P.O. Box 4060
Turlock, CA 95381	Modesto, CA 95352

The names and mailing addresses of individuals authorized to act as the Districts' agents for this application for a Water Quality Certificate are as follows:

Turlock Irrigation District:	*Modesto Irrigation District:*
Steve Boyd	Anna Brathwaite
Director of Water Resources	Staff Attorney, FERC
and Regulatory Affairs	Project Manager
(209) 883-8364	(209) 526-7384
seboyd@tid.org	anna.brathwaite@mid.org

The Project is located in Tuolumne County on the mainstem of the Tuolumne River and consists of the Don Pedro Reservoir, the Don Pedro powerhouse, and associated facilities necessary to operate the Project as described in the amendment to the Final License Application (AFLA).

Appendix N

On April 28, 2014, the Districts filed with FERC an Application for License for a Major Project - Existing Dam for the Don Pedro Hydroelectric Project. On October 11, 2017, the Districts filed with FERC the AFLA for the Don Pedro Hydroelectric Project. This AFLA replaces t he Districts' April 2014 filing in its entirety. An electronic copy of the AFLA, and additional infom1ation filings made on November 27 and December 13, 2017, are provided with this application for water quality certification. A record of consultation with state and federal agencies and other interested parties is included with the AFLA filing.

The Districts believe the AFLA contains all the information required under Section 3856 of Title 23 of the California Code of Regulations in regards to contents of a complete application for a Water Quality Certificate. Should the Districts file with FERC amendments to the AFLA, the Districts will promptly provide to the Board a copy of each amendment, as required under Section 3834 of the California Code of Regulations.

The Districts intend to be the Lead Agencies for the purpose of complying with the requirements of the California Environmental Quality Act, and will coordinate with the Board and other responsible agencies.

If you have any questions regarding this request for a Clean Water Act Section 401 Water Quality Certificate, please contact the undersigned at the addresses and telephone numbers listed below.

Sincerely,

/s/ Steve Boyd	/s/ Anna Brathwaite
Steve Boyd	Anna Brathwaite
Turlock Irrigation District	Modesto Irrigation District
P.O. Box 949	P.O. Box 4060
Turlock, CA 95381	Modesto, CA 95352
(209) 883-8364	(209) 526-7564
seboyd@tid.org	anna.brathwaite@mid.org

Enclosure: DVD containing complete set of AFLA documents and additional information filed with FERC through January 26, 2018

APPENDIX O — REQUEST FOR SECTION 401 CERTIFICATION FOR LA GRANGE PROJECT, DATED JANUARY 26, 2018

January 26, 2018

Eileen Sobeck, Executive Director
California State Water Resources Control Board
1001 "I" Street, 14th Floor
Sacramento, CA 95814

Subject: La Grange Hydroelectric Project, FERC Project No. 14581 Application for Water Quality Certificate

Dear Ms. Sobeck:

Pursuant to Section (§) 5.23(b) of the Code of Federal Regulations, by this letter, Turlock Irrigation District and Modesto Irrigation District (collectively, the Districts) file with the State Water Resources Control Board (Board) an application for Water Quality Certification under Section 401 of the Clean Water Act in support of the Districts' application before the Federal Energy Regulatory Commission (FERC) for an original license for the La Grange Hydroelectric Project (Project; FERC Project No. 14581). This application for a Water Quality Certification is also being made pursuant to Title 23, Division 3, Chapter 28, Article 4, Sections 3855 and 3856 of the California Code of Regulations.

Physical addresses, mailing addresses, and telephone numbers for Turlock Irrigation District and Modesto Irrigation District are as follows:

Physical Address:
Turlock Irrigation District
333 East Canal Drive
Turlock, CA 95380
(209) 883-8222

Mailing Address:
Turlock Irrigation District
P.O. Box 949
Turlock, CA 95381

Physical Address:
Modesto Irrigation District
1231 11th Street
Modesto, CA 95354
(209) 526-7337

Mailing Address:
Modesto Irrigation District
P.O. Box 4060
Modesto, CA 95352

The names and mailing addresses of individuals authorized to act as the Districts' agents for this application for a Water Quality Certificate are as follows:

Turlock Irrigation District:
Steve Boyd
Director of Water Resources and Regulatory Affairs
(209) 883-8364
seboyd@tid.org

Modesto Irrigation District:
Anna Brathwaite
Staff Attorney, FERC Project Manager
(209) 526-7384
anna.brathwaite@mid.org

The Project is located in Stanislaus and Tuolumne counties on the mainstem of the Tuolumne River. Project facilities include the La Grange Diversion Dam, the La Grange headpond, and the La Grange powerhouse, along with associated facilities necessary to operate the Project as described in the license application.

Appendix O

On October 11, 2017, the Districts filed with FERC an Application for License for a Major Water Power Project, 5 Megawatt or Less — Existing Dam for the La Grange Hydroelectric Project. An electronic copy of the Final License Application (FLA), and additional information filings made on November 27 and December 13, 2017, are provided with this application for water quality certification. A record of consultation with state and federal agencies and other interested parties is included with the FLA filing.

The Districts believe this license application contains all the information required under Section 3856 of Title 23 of the California Code of Regulations in regards to contents of a complete application for a Water Quality Certificate. Should the Districts file with FERC amendments to this license application, the Districts will promptly provide to the Board a copy of each amendment, as required under Section 3834 of the California Code of Regulations.

The Districts intend to be the Lead Agencies for the purpose of complying with the requirements of the California Environmental Quality Act, and will coordinate with the Board and other responsible agencies.

If you have any questions regarding this request for a Clean Water Act Section 401 Water Quality Certificate, please contact the undersigned at the addresses and telephone numbers listed below.

Sincerely,

/s/	/s/
Steve Boyd Turlock Irrigation District P.O. Box 949 Turlock, CA 95381 (209) 883-8364 seboyd@tid.org	Anna Brathwaite Modesto Irrigation District P.O. Box 4060 Modesto, CA 95352 (209) 526-7384 anna.brathwaite@mid.org