No. 22-743

In the Supreme Court of the United States

NEVADA IRRIGATION DISTRICT, *et al.*,

Petitioners,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENT CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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QUESTION PRESENTED

Petitioners are local governmental agencies in California that own and operate hydroelectric facilities, for which they submitted relicensing applications to the Federal Energy Regulatory Commission. Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), required petitioners to obtain from the State of California a certification that their projects would comply with state environmental laws. A State waives its Section 401 certification authority if it "fails or refuses to act on a request for certification" within one year of receiving the request. *Id.* Petitioners submitted certification requests to the California State Water Resources Control Board, but failed to undertake the environmental review mandated by state law. After the Board indicated that it intended to deny petitioners' certification requests without prejudice as a result of that failure, petitioners withdrew and then resubmitted their certification requests in order to avoid that outcome. The question presented is:

Whether the court of appeals correctly held that the record in this case did not contain substantial evidence supporting FERC's finding that the Board engaged with petitioners in a coordinated scheme to avoid Section 401's one-year time limit.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES (continued)

Page

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

STATEMENT

A. Legal Background

1. Congress enacted the Clean Water Act in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The policy underlying the Act is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." *Id.* § 1251(b). "Except as expressly provided" in the statute, States retain the authority to "adopt or enforce" "any standard or limitation respecting discharges of pollutants" or "any requirement respecting control or abatement of pollution" that is more stringent than federal law requires. *Id.* § 1370. The Act thus reflects Congress's intent that States should serve as "the prime bulwark in the effort to abate water pollution." *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 393 (D.C. Cir. 2017).

Section 401 of the Act requires "[a]ny applicant for a Federal license or permit to conduct any activity" that "may result in any discharge into the navigable waters" to obtain "a certification from the State in which the discharge originates or will originate" that the activity will comply with applicable state and federal law. 33 U.S.C. § 1341(a)(1); *see id.* § 1341(d).[1]

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[1] Section 401 specifies that the State has the authority to certify whether the "discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317" of Title 33 of the United States Code, 33 U.S.C. § 1341(a)(1), "and with any other appropriate requirement of State law," *id.* § 1341(d). The enumerated provisions include state and federal authority to establish and enforce water quality standards. *See id.* §§ 1311, 1312, 1313, 1316, 1317.

This certification process is "essential" to Congress's "scheme to preserve state authority" to address water pollution, and ensures that "'[n]o polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standards.'" *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006) (quoting 116 Cong. Rec. 8984 (1970) (statement of Sen. Muskie)).

A State may respond to a request for certification by issuing a certification (along with any appropriate conditions to ensure that the project complies with state and federal law) or by denying the request. *See* 33 U.S.C. § 1341(a)(1); *S.D. Warren*, 547 U.S. at 380. If the State issues a certification, any conditions in the certification become conditions of the federal license or permit. 33 U.S.C. § 1341(d). If the State denies certification, "[n]o [federal] license or permit shall be granted." *Id.* § 1341(a)(1). If FERC is unable to issue a renewed license on a pending application for a hydroelectric project before the existing license expires, FERC "will issue" an interim annual license allowing the project to continue to operate "under the terms and conditions of the existing license" while the relicensing application remains pending. 18 C.F.R. § 16.18(b).

States must "establish procedures for public notice in the case of all applications for certification" and, "to the extent [the State] deems appropriate, procedures for public hearings in connection with specific applications." 33 U.S.C. § 1341(a)(1). Section 401 does not otherwise specify what procedures States must follow in considering requests for certification, leaving that issue to the States. *See City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006).

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 Section 401 "shall be waived with respect to" the federal license or permit application. 33 U.S.C. § 1341(a)(1); *see also* 18 C.F.R. § 5.23(b)(2) (FERC regulation defining "a reasonable period of time" as one year). Congress enacted this waiver provision to prevent States from "indefinitely delaying a federal licensing proceeding" and "to ensure that 'sheer inactivity by the State . . . will not frustrate the Federal application.'" *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (quoting H.R. Rep. 91-940, at 56 (1970)).

In *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), the court of appeals concluded that States had waived their certification authority by entering into a written agreement providing that the States would take no action on a certification request that was "complete and ready for review" and that the licensee would repeatedly withdraw and resubmit the same certification request in an effort to avoid the one-year time limit. *Id.* at 1105. The court emphasized that the case involved "the specific factual scenario" of "an applicant agreeing with the reviewing states to exploit the withdrawal-and-resubmission of water quality certification requests over a lengthy period of time." *Id.* The court explained that it "need not determine" whether other factual scenarios might result in waiver, given that "[t]his case presents the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification." *Id.* at 1104; *see id.* at 1105 (noting that concerns regarding the implications of finding waiver in other circumstances were "inapplicable to the instant case").

2. California vests its authority to issue or deny Section 401 certifications in the State Water Resources Control Board. Cal. Water Code § 13160. The Board's regulations establish procedures governing requests for certification. Cal. Code Regs. tit. 23, § 3830 *et seq*.

In considering a request, the Board must either issue an appropriately conditioned certification or deny certification. Cal. Code Regs. tit. 23, § 3859(a). The Board will issue a certification if there is reasonable assurance that an activity will comply with applicable Clean Water Act provisions and any other appropriate requirements of state law. Cal. Water Code § 13160(b)(1). The Board will deny a certification request when the activity will not comply with these requirements. Cal. Code Regs. tit. 23, § 3837(b)(1). When the application suffers from an inadequacy that leaves the Board unable to determine whether the proposed project will comply, the Board will deny certification without prejudice to the applicant filing a renewed application. *Id.* § 3837(b)(2).[2] The Board must grant or deny a request for certification "before the federal period for certification expires." *Id.* § 3859(a). An applicant may challenge a certification decision by the Board, or may allege that the Board has improperly failed to act, by filing a petition for writ of mandate in California state court. Cal. Water Code § 13330(a).

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[2] "Without prejudice" in this context means only that the applicant may re-apply for certification and any new application will be considered on its own merits, without any preclusive effect resulting from the denial of the prior application. *See Turlock Irr. Dist. v. FERC*, 36 F.4th 1179, 1183 n.7 (D.C. Cir. 2022), *pet. for cert. pending*, No. 22-616 (filed Jan. 4, 2023).

California law requires that any proposed project at issue in a certification request be evaluated under the California Environmental Quality Act (CEQA), which is modeled on the National Environmental Policy Act (NEPA). Cal. Code Regs. tit. 23, § 3856(f); *see* Cal. Pub. Res. Code § 21000 *et seq.* Similar to NEPA, CEQA requires that whenever a project may have significant environmental effects, an environmental impact report must be prepared to describe those effects and to identify potential alternatives and mitigation measures that would avoid or reduce those effects. *See* Cal. Pub. Res. Code §§ 21061, 21080(d), 21100; *compare* 42 U.S.C. § 4332(C). The CEQA analysis includes evaluation of impacts to water quality. *See, e.g.*, Cal. Code Regs. tit. 14, § 15125(d). In enacting CEQA, the California Legislature sought to "foster informed public participation and to enable [governmental] decision makers to consider the environmental factors necessary to make a reasoned decision." *Sierra Club v. County of Fresno*, 6 Cal. 5th 502, 516 (2018); *see* Cal. Code Regs., tit. 14, § 15002(a).

CEQA applies to projects undertaken by state and local agencies and to projects undertaken by private parties for which a discretionary government-issued permit or approval is required. Cal. Pub. Res. Code § 21065. Where a project is undertaken by a public agency but a permit or approval from a separate public agency is required, as in this case, the agency undertaking the project is generally designated the "lead agency" for CEQA purposes and the permitting agency is designated as a "responsible agency." *See id.* §§ 21067, 21069. The lead agency is responsible for preparing the environmental impact report. *Id.* §§ 21100, 21151(a).

California law generally prohibits the Board from issuing a Section 401 certification until the lead agency has prepared and submitted an environmental impact report, *see* Cal. Pub. Res. Code § 21081; Cal. Code Regs. tit. 23, § 3856(f), or determined that no such report is required because the project would have no significant environmental effects, *see* Cal. Pub. Res. Code § 21080(c). In 2020, however, the California Legislature created an exception to that rule, allowing the Board to issue a certification before CEQA review is completed if the Board "determines that waiting until completion of [the CEQA process] poses a substantial risk of waiver of the state board's certification authority" under Section 401 or other federal water quality laws. Cal. Water Code § 13160(b)(2).

B. Procedural Background

1. Petitioners are three local governmental agencies in California that each operate federally licensed hydroelectric facilities. In the 1960s, petitioners obtained from FERC 50-year licenses to operate their respective facilities. Pet. App. 10a, 13a, 15a. Because FERC issued those licenses before Congress enacted Section 401, they do not include any state water quality conditions. *Id.* at 10a, 13a, 16a.

Petitioner Nevada Irrigation District (NID) operates the Yuba-Bear Hydroelectric Project, Pet. App. 10a; petitioner Yuba County Water Agency (Yuba) operates the Yuba River Development Project, *id.* at 13a; and petitioner Merced Irrigation District (Merced) operates the Merced River Hydroelectric Project and Merced Falls Hydroelectric Project, *id.* at 15a-16a &

n.10. The projects are all located on rivers in California that flow generally westward out of the Sierra Nevada. *See id.* at 10a, 13a, 16a.[3]

In advance of the expiration of their FERC licenses, each petitioner filed a relicensing application with FERC, and later submitted to the Board a request for Section 401 water quality certification. Pet. App. 10a, 13a, 16a. Petitioners acknowledged that they were lead agencies for CEQA purposes. *Id.* at 10a, 13a, 16a-17a. After receiving each of the certification requests, the Board advised each petitioner that it could not issue a certification until each petitioner prepared the environmental analysis required by CEQA. *Id.* at 11a, 14a, 16a.

None of the petitioners ever prepared any CEQA analysis. *See* Pet. App. 11a, 14a, 17a. Adhering to common practice at the time, petitioners each withdrew and resubmitted their certification requests at least once. *Id.* at 11a-12a, 14a, 17a. In comments to FERC, the Board predicted that this would occur. It explained that NID would "likely" withdraw and resubmit its certification request because NID had "not started" the CEQA process, and that if the request were not withdrawn, the "Board will deny certification without prejudice" due to NID's failure to comply with CEQA. *Id.* at 11a-12a; *see also id.* at 14a, 16a (indicating that Yuba's and Merced's applications would be denied without prejudice if they were not withdrawn). Project applicants often withdrew and resubmitted certification requests in this situation to avoid having their requests denied without prejudice. *Id.* at 29a &

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[3] "Nevada" in Nevada Irrigation District refers to Nevada County, California. Pet. App. 9a n.5.

n.16. In anticipation of those withdrawals and resubmissions, Board staff sent emails to representatives of Yuba and Merced requesting that they complete the withdrawals and resubmissions by particular dates, to avoid the need to for the Board to prepare denial letters. *Id.* at 14a, 16a.

After the D.C. Circuit decided *Hoopa Valley*, the Board denied each petitioner's most recent certification request without prejudice, explaining that "without completion of the CEQA process, the [Board] cannot issue a certification." Pet. App. 12a; *see id.* at 15a, 17a. Each petitioner then sought from FERC a declaratory order that the Board had waived its certification authority under section 401(a)(1). *Id.* at 12a, 15a, 17a. In 2020, pursuant to its new statutory authority to issue Section 401 certifications without completing the CEQA process, *see supra* p. 6, the Board issued certifications for the projects that incorporated a variety of environmental conditions.[4]

Despite those certifications, FERC has not yet issued a license for any of the projects. The National Marine Fisheries Service concluded that FERC's envi-

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[4] *See* 3 C.A. ER 221-283 (Yuba); 7 C.A. ER 989-1077 (Merced); Cal. State Water Res. Control Bd., Yuba-Bear Hydroelectric Project Water Quality Certification (Aug. 14, 2020), https://tinyurl.com/2ab2auyz (NID). Petitioners filed state court challenges to each of those certifications, arguing that the Board lacks authority under California law to issue a certification for a request that has been withdrawn or denied. *See* No. 20CV-03444 (Cal. Super. Ct., Sacramento County); No. 20CECG03342 (Cal. Super. Ct., Fresno County), *appeal docketed*, No. F084832 (Cal. Ct. App., 5th Dist.); No. MCV087985 (Cal. Super. Ct., Madera County). Those cases are still pending.

ronmental impact statements failed to adequately address the impact of the Yuba River and Yuba-Bear projects on certain endangered fish, necessitating further consultations and environmental review.[5] While petitioners' relicensing applications remain pending before FERC, each petitioner continues to receive an interim license that renews annually by operation of law. *Supra* p. 2; 18 C.F.R. § 16.18(b). Those interim licenses incorporate the terms of petitioners' expired licenses, and do not include any state water quality conditions. *Supra* p. 6.

2. FERC agreed with petitioners that the Board had waived its certification authority with respect to each of the projects. Pet. App. 31a-46a; 53a-71a; 77a-97a. While FERC recognized that, unlike in *Hoopa Valley*, the Board had not entered into any kind of agreement with petitioners to delay action on their certification requests, FERC concluded that "an explicit written agreement to withdraw and refile is not necessary" in order for a State to waive its certification authority under Section 401(a)(1). *Id.* at 41a; *see id.* 63a, 90a. Rather, in FERC's view, "'the dispositive factor' is whether the state coordinates with the project applicant 'to afford itself more time to decide a certification request.'" *Id.* at 21a. FERC determined that the Board had waived its certification authority by virtue of its "direct participation in the withdrawal and resubmittal scheme, namely annual reminder emails that the Board sent to the licensee just before the one-year deadline." *Id.* at 43a; *see id.* at 65a, 92a.

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[5] *See* Letter from Steve Edmondson (FERC Hydropower Branch Supervisor, National Marine Fisheries Service, West Coast Region, Sacramento Area Office), to Kimberly D. Bose, Secretary, FERC (Dec. 2, 2020), https://tinyurl.com/59yue5kt.

FERC rejected the Board's argument that petitioners "withdrew [their] requests voluntarily to avoid the Board denying [their] application[s]." Pet. App. 43a; *see id.* at 65a, 92a. FERC noted that the Board had indicated to petitioners that certification "could not be issued until the CEQA process was complete, and, accordingly, that [petitioners] would likely need to withdraw and resubmit [their] application[s]" to avoid denial without prejudice. *Id.* at 44a; *see id.* at 66a-67a, 93a. FERC also rejected the Board's argument that it was petitioners' failure to engage in the CEQA process, rather than the Board's inaction, that necessitated the withdrawals and resubmissions. *Id.* at 45a; *see id.* at 67a, 95a.

3. The court of appeals vacated FERC's orders on the ground that FERC's findings of waiver were not supported by substantial evidence. Pet. App. 4a; *see id.* at 1a-30a. That holding made it unnecessary for the court to "decide whether the coordination standard FERC advances is consistent with the text of Section 401," because even under that standard, "FERC's findings of coordination are not supported by substantial evidence in the record." *Id.* at 22a. "Instead, the evidence shows only that the [Board] acquiesced in [petitioners'] own decisions to withdraw and resubmit their applications rather than have them denied." *Id.*

With respect to the Yuba-Bear Project, the record "show[ed] merely that the [Board] predicted that NID would decide to withdraw and resubmit" on account of its failure to comply with CEQA, not that the Board "was working to engineer that outcome." Pet. App. 23a. The Board had explicitly stated that "it was fully prepared to 'deny certification without prejudice'" if NID did not withdraw its request. *Id.* With respect to the

Yuba River and Merced River projects, FERC had relied primarily on emails in which Board staff had asked Yuba and Merced to withdraw and resubmit their applications by particular dates, to avoid the need for the Board to prepare denial notices. *Id.* at 24a-26a; *see id.* at 14a, 16a. "Considered in context," the court of appeals explained, "those emails do not support FERC's finding of coordination" because they "merely reflected [the Board's] prediction" that Yuba and Merced "would choose the withdrawal-and-resubmission path" rather than have the Board deny their certification requests, as it was required to do at that time by state law. *Id.* at 25a; *see id.* at 26a; *supra*, p. 6. Apart from those emails, the only other record evidence of coordination FERC cited was "the serial withdrawals-and-resubmissions themselves," but "the mere fact that withdrawals-and-resubmissions occurred cannot demonstrate that the [Board] was engaged in a coordinated scheme to delay certification." Pet. App. 27a.

The court noted the "crucial context" that it was petitioners' own failure to comply with CEQA that had prevented the Board from moving forward with the certification requests. Pet. App. 24a; *see id.* at 28a-29a. That failure suggested that petitioners, rather than the Board, "apparently had a motive for delay." *Id.* That is because petitioners "were operating under interim, annual licenses that were not subject to state-imposed water quality conditions." *Id.* at 26a; *see also id.* at 27a (citing *Turlock*, 36 F.4th at 1183 n.6). The Board, in contrast, "would have had an interest in moving along the environmental review process" because completing that process "would have allowed the [Board] to impose conditions on any eventual new license." *Id.* Indeed, the evidence showed that the

Board was "actively engaged in relicensing proceedings" in several respects. *Id.* at 26a-27a.

The court of appeals also "note[d]" that if petitioners "had preferred not to undertake withdrawal-and-resubmission, they could have declined to do so, forced the [Board] to deny their certification request[s], and, if they believed the denials were unwarranted, challenged them in state court." Pet. App. 29a; *see* Cal. Water Code § 13330(a). But petitioners "chose not to take that path—and nothing in the record shows that the [Board] encouraged that choice." Pet. App. 29a.

Finally, the court observed that the Fourth Circuit had "recently reached the same conclusion in a case with similar facts." Pet. App. 30a (citing *N.C. Dep't of Envtl. Quality v. FERC*, 3 F.4th 655 (4th Cir. 2021)). FERC in that case "had also found waiver based on email correspondence from the certifying agency reminding the project applicant of the deadline for withdrawal-and-resubmission." *Id.* The court of appeals here "agree[d] with the Fourth Circuit's observation" that even under FERC's interpretation of Section 401, "'it must take more than routine informational emails to show coordination'" of the sort that would result in a State waiving its certification authority. *Id.*

ARGUMENT

Based on a review of the entire record, the court of appeals held that substantial evidence did not support a finding that the Board waived its certification authority by "engag[ing] in a coordinated scheme to avoid its statutory deadline for action." Pet. App. 29a. Instead, the evidence demonstrated that petitioners failed to conduct the environmental review required by state law, and then withdrew their Section 401 certification requests in order to avoid having the Board

deny the requests based on that failure. That fact-intensive holding does not warrant further review. Petitioners acknowledge that it is consistent with a Fourth Circuit decision; and the D.C. and Second Circuit decisions that petitioners invoke for their purported conflict addressed materially different questions. The issue petitioners seek to raise is not likely to recur frequently going forward, nor is the decision below likely to inhibit the current or future operations of hydroelectric facilities. And the court of appeals correctly applied the substantial evidence standard to the record before it. Indeed, a contrary ruling would reward petitioners with a windfall that would be at odds with the text and purpose of the Clean Water Act.

1. Petitioners principally contend that this Court should grant certiorari to review a "conflict among the courts of appeals on the meaning of section 401." Pet. 19. They acknowledge that the decision below is "consistent with" the Fourth Circuit's decision on a very similar factual record in *North Carolina Department of Environmental Quality v. FERC*, 3 F.4th 655 (2021). Pet. 25-26. But they argue that the court of appeals' ruling here "cannot be squared with" decisions of the D.C. and Second Circuits. *Id.* at 3; *see id.* at 19-27. That argument badly misreads both the decision below and the cited out-of-circuit authority.

a. The court of appeals did not interpret "the meaning of Section 401" in this case. Pet. 19. Instead, it assumed without deciding that FERC's waiver standard reflected a correct interpretation of the statutory text. Pet. App. 22a. Under that standard, "'the dispositive factor' is whether the state coordinates with the project applicant 'to afford itself more time to

decide a certification request.'" *Id.* at 21a. That standard appears to be generally consistent with the legal standard advanced by petitioners here. *See, e.g.*, Pet. 30.

Applying that legal standard, the court below held that "FERC's findings of coordination are not supported by substantial evidence in the record." Pet. App. 22a. The court explained that the evidence on which FERC relied to find waiver—including routine emails from Board staff to applicants regarding upcoming deadlines, the Board's prediction that applicants would choose to withdraw their requests to avoid having them denied for failure to comply with CEQA, and the fact of the withdrawals and resubmissions themselves—could not support a finding of coordination. *Id.* at 23a-29a. Rather, the evidence "show[ed] only that the [Board] acquiesced in [petitioners'] decision[s] to withdraw [their] requests." *Id.* at 25a.

b. Petitioners contend that this record-specific holding conflicts with *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019). *See* Pet. 20-22. But the facts of that case are not comparable to the circumstances here, and the decision in *Hoopa Valley* does not suggest that the D.C. Circuit "would have held that the State Water Board waived its Section 401 authority on the record here." Pet. 26.

Hoopa Valley involved "a consortium of parties"—including States, "Native American tribes, farmers, ranchers, conservation groups, fishermen," and the project applicant—that entered into a written agreement. 913 F.3d at 1101. The agreement required the applicant to "withdraw and re-file" its Section 401 certification requests indefinitely, and further required "all state permitting reviews" to be "held in abeyance"

during that time. *Id.* at 1101-1102. The parties arrived at that unusual agreement to allow time for negotiations regarding the decommissioning of the dams at issue, which were outdated and could not be modernized in a cost-effective way. *Id.* at 1101. The project applicant withdrew and resubmitted the exact same certification request each year for more than ten years. *Id.* at 1104; *see id.* at 1102.

On those unique facts, the D.C. Circuit held that the States had waived their certification authority. It emphasized that the "certification request ha[d] been complete and ready for review for more than a decade." *Hoopa Valley*, 913 F.3d at 1105. The only thing preventing the relevant state agencies from granting or denying the certification was the "written agreement with the reviewing states to delay water quality certification." *Id.* at 1104. The court worried that this "scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters." *Id.*

Hoopa Valley did not adopt any bright-line rule regarding when waiver occurs under Section 401. *See* 913 F.3d at 1104-1105. But the opinion suggests that the D.C. Circuit will find waiver when "a licensee enter[s] a written agreement with the reviewing state[] to delay water quality certification" through a withdrawal-and-resubmission scheme even though "the certification request [is] complete and ready for review[.]" *Id.* Nothing in that opinion indicates that the D.C. Circuit will find waiver where petitioners never entered any agreement with the Board and their certification requests were "not complete" and "not ready for review." *Turlock Irr. Dist. v. FERC*, 36 F.4th 1179, 1183 (D.C. Cir. 2022). Indeed, more recent D.C. Cir-

cuit authority suggests the opposite. *See id.* (describing a situation where an applicant fails to conduct a CEQA analysis). Unlike the parties in *Hoopa Valley*, moreover, who agreed to the coordinated withdrawal-and-resubmission scheme to buy more time to pursue decommissioning, 913 F.3d at 1101-1102, petitioners here chose to withdraw their certification requests because the Board otherwise would have denied the requests (without prejudice) based on petitioners' failure to comply with state law, *supra* pp. 10-11.

Petitioners assert that the presence of an agreement between the State and the project applicant did not "ma[ke] a difference" to the analysis in *Hoopa Valley*. Pet. 22. But that fact was central to the D.C. Circuit's decision: the court expressly framed the "single issue" before it as "whether 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." *Hoopa Valley*, 913 F.3d at 1103 (emphasis added). The court's sustained focus on the agreement underscores that point. *See id.* at 1101 ("formal agreement"), 1104 ("written agreement," "contractual idleness"), 1105 ("an applicant agreeing with the reviewing states"). More recently, in declining to find a waiver under Section 401, the D.C. Circuit distinguished *Hoopa Valley* partly on the basis that it had involved "a written agreement." *Turlock*, 36 F.4th at 1183.

In any event, petitioners are incorrect in suggesting that the decision below turns on whether a "withdrawal-and-refiling scheme involved a contract rather than an established practice at the States' behest." Pet. 22. The court below applied FERC's rule that no "formal agreement between a licensee and a state" is

"necessary to support a finding of waiver," Pet. App. 60a, after assuming (without deciding) that FERC's standard was "consistent with the text of Section 401," *id.* at 22a. It then held that the record evidence in this case did not support FERC's finding of improper coordination. *Id.* It explained that if petitioners had complied with their CEQA obligations and their requests for certification were ready for review by the Board (as in *Hoopa Valley*), then the Board's actions "might suggest that [it] was seeking to extend its own decisionmaking window" in violation of Section 401. *Id.* at 24a. On the facts of this case, however, the Board's actions "show only that [it] consented to [petitioners'] own decision[s] to withdraw and resubmit [their] certification requests" to avoid having them denied. *Id.* at 24a. That analysis is consonant with the reasoning in *Hoopa Valley*.

Petitioners also assert that the D.C. Circuit would have found waiver here because "California's legal regime . . . required that the State Water Board take more than a year to respond to requests for water-quality certification." Pet. 22. That is incorrect. As the court below recognized, the Board was unable to grant petitioners' certification requests within a year because petitioners failed to satisfy their own obligations under state law—not because any state law required the Board's process to take longer than a year. Pet. App. 28a-29a; *cf. Turlock*, 36 F.4th at 1183. Petitioners knew when their FERC licenses were up for renewal, and could have prepared a CEQA analysis before submitting their certification requests. Had petitioners done so, the Board could have completed its review within a year.[6]

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[6] Petitioners highlight a passage in the decision below stating

c. Petitioners next contend that the decision below conflicts with two decisions of the Second Circuit. Pet. 22-24; *see N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018) (*New York I*); *N.Y. State Dep't of Envtl. Conservation v. FERC*, 991 F.3d 439 (2d Cir. 2021) (*New York II*). Those decisions are even further afield from this case than *Hoopa Valley*. And to the extent they have any bearing on the question presented here, they indicate that the Second Circuit would not find waiver on these facts.

Both of the *New York* cases addressed an issue that is not presented here: whether a State may alter the date on which a Section 401 certification request is deemed to be received by the State—either unilaterally, *see New York I*, 884 F.3d at 455, or by stipulation with the applicant, *see New York II*, 991 F.3d at 447-448. The Second Circuit held that the one-year waiver period under Section 401 begins "when the [state agency] receives a request for water quality certification," not at some later date when the request is deemed to be complete. *New York I*, 884 F.3d at 455; *see New York II*, 991 F.3d at 450. In this case, there is no dispute regarding when the one-year waiver period

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that "'California's criteria for issuing water quality certifications often make it impracticable for a certification to issue within one year of a project applicant submitting its request.'" Pet. 19 (quoting Pet. App. 6a). That is often true—but only where (as here and in *Turlock*) the applicants submit certification requests without first preparing the environmental impact report required by CEQA, which informs the Board's determination of whether the project complies with state environmental laws. *See* Pet. App. 7a & n.4; *see generally Save Tara v. City of West Hollywood*, 45 Cal. 4th 116, 128-132 (2008) (the "intended function" of an environmental impact report is "informing and guiding decision makers").

began for any of petitioners' certification requests. *See* Pet. App. 7a n.4, 11a-17a, 28a.

Nor is there any basis for petitioners' assertion (Pet. 24) that the Second Circuit would have found waiver on the facts of this case. In fact, the cited cases suggest the opposite. The Second Circuit recognized that "[i]f a state deems an application incomplete, it can simply deny the application without prejudice" or "request that the applicant withdraw and resubmit the application." *New York I*, 884 F.3d at 456; *see also New York II*, 991 F.3d at 450 n.11. Petitioners characterize that language as "*dicta*," Pet. 24 n.7, but that only underscores the lack of a genuine conflict. It is dicta because the *New York* cases addressed a different legal question. But to the extent they are relevant to predicting what the "Second Circuit[] would have held" on the facts of this case, *id.* at 26, the *New York* cases indicate that the Second Circuit would have agreed that there was no waiver here.

2. Petitioners argue that this Court should grant review because "the issue presented is recurring and important." Pet. 27; *see id.* at 27-29. That argument overstates both the frequency with which this question will likely recur and the practical significance of the question.

The "withdrawal-and-resubmission" practice (Pet. 29) developed in response to the reality that project applicants often failed "to comply with procedural and substantive prerequisites to certification," preventing the certifying agency from approving a request for certification within one year. Pet. App. 8a; *see supra* pp. 7-8. Many applicants elected to "withdraw their requests for certification before the end of the one-year review period and resubmit them as new requests, rather than have their original requests denied." Pet.

App. 8a. And "for many years," FERC took the position that an applicant's withdrawal and resubmission of a certification request "starts a new one-year review period," avoiding waiver. *Id.* (collecting cases). But in light of FERC's change in position on this issue after *Hoopa Valley*, *see supra* p. 9, the Board now generally denies certification without prejudice when a certification request is incomplete or inadequate, rather than accepting applicants' withdrawals and resubmissions. *See, e.g.*, *Turlock*, 36 F.4th at 1181. Nor is there any indication that the practice of withdrawal and resubmission remains widely used in other States. Instead, States now typically deny certification without prejudice when a certification request is incomplete or inadequate. Any guidance from this Court regarding the withdrawal-and-resubmission practice is therefore unlikely to affect a substantial number of proceedings going forward.

What is more, the decision below did not announce any broad legal holding of the sort petitioners attribute to it. *See* Pet. 28. The court of appeals held only that the particular record before it did not contain substantial evidence supporting a waiver finding under FERC's "coordination" standard. Pet. App. 4a; *see supra* pp. 10-12. The court reserved the possibility that a State might waive its certification authority if it encourages or participates in a withdrawal-and-resubmission scheme in circumstances where the applicant has "complied with its legal obligations under state law" and the certification request already includes the information the State needs to make an informed decision. Pet. App. 24a.

Petitioners assert that the question presented is important because state water quality certification is a principal cause of FERC licensing delays. Pet. 27-

28. But they provide no data to substantiate that assertion. And in California's experience, it is not true. The Board has issued Section 401 certifications for all 26 relicense or original license applications pending before FERC in which a certification has been requested.[7] Petitioners' contention that the decision below "allows California to avoid acting on numerous requests for water-quality certification currently pending before it," Pet. 10 n.3, is simply inaccurate. No such requests exist.

To the extent there are policy concerns about the pace of FERC's issuance of renewed licenses for critical hydropower projects, *see* Pet. 27-28, those concerns are better directed to the federal authorities. But even as to those concerns, petitioners substantially overstate the practical significance to "the Nation's economy and households" of delays by FERC in relicensing

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[7] These applications are: Big Creek Nos. 2A, 8, and Eastwood (FERC Project No. 67); Big Creek No. 3 (FERC Project No. 120); Portal (FERC Project No. 2174); Big Creek Nos. 1 and 2 (FERC Project No. 2175); Mammoth Pool (FERC Project No. 2085); Vermilion Valley (FERC Project No. 2086); Upper North Fork Feather River (FERC Project No. 2105); Kilarc-Cow Creek (FERC Project No. 606); McCloud-Pit (FERC Project No. 2106); Yuba-Bear (FERC Project No. 2266); Upper Drum-Spaulding (FERC Project No. 2310); Lower Drum-Spaulding (FERC Project No. 14531); Merced River (FERC Project No. 2179); Merced Falls (FERC Project No. 2467); Yuba River (FERC Project No. 2246); Don Pedro (FERC Project No. 2299); La Grange (FERC Project No. 14581); South Feather (FERC Project No. 2088); Lassen Lodge (FERC Project No. 12496); Camp Far West (FERC Project No. 2997); South State Water Project (FERC Project No. 2426); DeSabla-Centerville (FERC Project No. 803); Phoenix (FERC Project No. 1061); Devil Canyon (FERC Project No. 14797); Kaweah (FERC Project No. 298); Oroville Facilities (FERC Project No. 2100).

projects. *Id.* at 27. They note that many hydropower projects will soon be up for FERC relicensing, *id.*, but fail to mention that those projects (like their own) will receive interim annual licenses, allowing the applicants to continue to operate under the conditions of their previous license throughout the relicensing process, *supra* p. 2. Petitioners also suggest that the state certification process could delay the issuance of original hydropower licenses. Pet. 27. But they cite no instance of that actually occurring. Very few original license proceedings are pending before FERC, largely because of the limited number of sites available for new hydroelectric facilities that would be economically viable. FERC indicates that there are only nine currently pending applications for original hydroelectric licenses nationwide, six of which are for small projects of five megawatts or less.[8] In contrast, there are more than 130 pending hydroelectric relicensing applications, all eligible for interim annual licenses under the conditions of their expired licenses.[9]

3. Finally, petitioners' merits arguments (Pet. 29-33) are unpersuasive. The court of appeals held that even under FERC's "coordination standard" for Section 401 waivers, the record does not contain substantial evidence supporting a waiver finding. Pet. App. 22a. That fact-intensive holding is correct. FERC's coordination finding rested primarily on "routine informational emails" between Board staffers and petitioners regarding the timing and logistics of

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[8] *See* FERC, *Licensing: Pending License, Relicense, and Exemption Applications*, https://www.ferc.gov/licensing (as of April 7, 2023). By way of comparison, petitioners' Merced River Project and Yuba River Development Project generate 101.25 and 361.9 megawatts, respectively. Pet. 12-13.

[9] *Id.*

petitioners' withdrawals of their certification requests. *Id.* at 30a. "Considered in context," those emails indicate only that the Board "acquiesced in [petitioners'] own decision[s]" to withdraw their certification requests, *id.* at 25a, not that the Board "was seeking to extend its own decisionmaking window by instructing" petitioners to withdraw the requests, *id.* at 24a. Under FERC's own standard, that kind of conduct does not result in waiver of a State's certification authority. *Id.* at 22a-30a.

Petitioners hardly address the court of appeals' analysis of the record in this case. *See* Pet. 29-33. And they generally appear to agree with the legal standard the court applied: They concede that a "State does not waive its authority if applicants independently withdraw their requests for certification." *Id.* at 30 (emphasis omitted). They argue that the waiver inquiry should focus on whether the State has improperly "coordinated" a withdrawal-and-resubmission scheme with the applicant—just like the FERC standard applied by the court below. *Compare* Pet. App. 21a ("'the dispositive factor' is whether the state coordinates with the project applicant 'to afford itself more time to decide a certification request'"), *with* Pet. 30 ("A State practice of establishing, coordinating, and participating in a withdrawal-and-refiling regime constitutes a 'fail[ure]' to act and thus a waiver.").[10]

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[10] Petitioners accuse the court of appeals of committing "a clear error of law" by supposedly "refus[ing] to defer to FERC's determination" regarding waiver. Pet. 3. But the court *accepted* FERC's view of the law for purposes of this case, holding only that FERC's "findings of coordination are not supported by substantial evidence in the record." Pet. App. 22a. That is a straightforward and proper application of the substantial evidence standard that governs judicial review of agency factfinding. *See, e.g.*, *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019).

To the extent that petitioners seek a more expansive waiver standard than the one applied below, they fail to offer any workable alternative. In passing, they assert that a waiver should be found if a State "presum[es] that applicants will withdraw-and-resubmit" their requests and then allows that to occur. Pet. 30. But petitioners do not explain how a court could reliably determine whether an applicant has "independently" withdrawn its request or a State has improperly "presum[ed]" that the applicant will do so. *Id.* Nor do they explain how that nebulous distinction can be squared with the text or purpose of Section 401. A State waives its certification authority if it "fails or refuses to act on a request for certification" within one year of submission. 33 U.S.C. § 1341(a)(1). If the applicant chooses to withdraw an inadequate certification request to avoid having the state agency deny it, the State has not "fail[ed]" or "refus[ed]" to act on that request.

Nor can petitioners establish a waiver by complaining that California has "establish[ed] a legal regime where the State's decision necessarily takes more than a year." Pet. 30. There is no such regime. As "lead agencies" for purposes of CEQA, *see* Pet. App. 10a-17a, petitioners were responsible for preparing the required environmental impact report that would inform the Board's certification decision. Cal. Pub. Res. Code § 21100, 21151. Nothing prevented petitioners from preparing that report before submitting their certification requests to the Board, which would have allowed the Board to complete its review within a year. It was petitioners' own failure to conduct a timely CEQA analysis that delayed certification here, not the Board's process or any timeline mandated by state law. *Supra*, pp. 7-8.

In any event, if petitioners wished to challenge any aspect of the Board's process or the State's CEQA "regime," Pet. 30, they could have decided not to withdraw their requests, "forced the State Board to deny" them, and then "challenged [the denials] in state court." Pet. App. 29a; *see* Cal. Water Code § 13330(a). Petitioners "chose not to take that route—and nothing in the record shows that the State Board encouraged that choice." Pet. App. 29a.

Petitioners do not explain why they declined to pursue any state court challenge along those lines. Nor do they explain why they never undertook any CEQA analysis—despite having many years in which to do so and telling the Board that they would. Pet. App. 10a-17a. As the D.C. Circuit recently observed, however, applicants in petitioners' position have "an incentive to delay" because the terms of their expired licenses (which continue to apply during the relicensing process) often "include[] far fewer environmental conditions than are required" under current law. *Turlock*, 36 F.4th at 1183 n.6; *see supra* p. 6. Petitioners thus "stood to benefit from any delays because a Section 401 certification likely would have imposed additional environmental-protection measures." Pet. App. 27a. And if petitioners' waiver arguments prevailed, they could obtain 50-year licenses to operate their projects without any state water quality conditions. *Id.* at 6a, 30a. That result would be antithetical to the purpose of Section 401: to "preserve[] and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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