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In The
SUPREME COURT OF THE UNITED STATES
October Term 2022

**Nevada Irrigation District; Yuba County Water Agency; Merced Irrigation
District,**

Applicants/Petitioners,

v.

**Federal Energy Regulatory Commission; California State Water Resources
Control Board; South Yuba River Citizens League; California Sportfishing
Protection Alliance; Friends of the River; Mother Lode and Tehipite
Chapter of the Sierra Club,**

Respondents.

**Application for an Extension of Time Within Which
to File a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

**APPLICATION TO THE HONORABLE
ELENA KAGAN, AS CIRCUIT JUSTICE**

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December 19, 2022

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PARTIES TO THE PROCEEDING

Applicants Nevada Irrigation District, Yuba County Water Agency, and Merced Irrigation District were respondents-intervenors in the proceeding below.

Respondent Federal Energy Regulatory Commission (“FERC”) was the respondent below.

Respondent California State Water Resources Control Board (“California Water Board”) was a petitioner below.

South Yuba River Citizens League, California Sportfishing Protection Alliance, Friends of the River, Mother Lode Chapter of the Sierra Club, and the Sierra Club and its Tehipite Chapter were also petitioners below.

STATEMENT PURSUANT TO RULE 29.6

Nevada Irrigation District, Yuba County Water Agency, and Merced Irrigation District are special purpose public corporations created by statute as subdivisions of the State government to develop large irrigation projects. None has a parent corporation; no publicly held company owns 10 percent or more of their stock.

APPLICATION FOR EXTENSION OF TIME

Pursuant to this Court’s Rule 13.5 and 28 U.S.C. § 2101(c), Applicants Nevada Irrigation District, Yuba County Water Agency, and Merced Irrigation District (collectively, “Applicants”) hereby request a 30-day extension of time within which to file a petition for a writ of certiorari, to and including February 6, 2023.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *California State Water Resources Board v. Federal Energy Regulatory Commission*, 43 F.4th 920 (9th Cir. Aug. 4, 2022), a copy of which is attached as Exhibit A.

JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit entered judgment on August 4, 2022. The Court of Appeals denied Applicants’ petition for rehearing and rehearing en banc on October 7, 2022, a copy of which is attached as Exhibit B. This Court’s jurisdiction will rest on 28 U.S.C. § 1254. Under Rules 13.1, 13.3, and 30.1 of this Court, a petition for a writ of certiorari is due to be filed on or before January 5, 2023. In accordance with Rule 13.5, Applicants have filed this application more than 10 days in advance of that due date.

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicants respectfully request a 30-day extension of time within which to file a petition for a writ of certiorari seeking review of the decision of the U.S. Court of Appeals for the Ninth Circuit in this case to and including February 6, 2023 (the first business day following the 30-day extension). An extension is warranted because the

issues presented are worthy of review under Supreme Court Rule 10 and undersigned counsel needs additional time to prepare a petition that will assist this Court in deciding whether to grant certiorari.

1. This case concerns three separate orders issued by the Federal Energy Regulatory Commission (“FERC”) holding that California waived its authority to issue water-quality certifications under section 401 of the Clean Water Act in connection with FERC’s relicensing of three important hydroelectric projects. Section 401 provides that for all covered licensing and permitting actions, the state has “a reasonable period of time (which shall not exceed one year) after receipt” of the certification request to “act” on it. 33 U.S.C. § 1341(a)(1). Otherwise, the state waives this requirement. FERC found that the California Water Board engaged in an impermissible “withdraw and refile” scheme to circumvent the statutory time limit, but the Ninth Circuit reversed.

2. The Ninth Circuit held that the California Water Board had not participated in a withdraw-and-refile scheme to avoid the statutory time limit, and thus had not waived its authority to issue water-quality certifications, despite the undisputed correspondence between the Board and the project licensees, which repeatedly led to the withdrawal and refiling of identical applications. The outcome—the finding of no waiver—conflicts with decisions of the Second and D.C. Circuits, both of which would have found waiver by the State here. See *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) (holding that section 401’s one-year deadline for states to act is an “absolute maximum”); *N.Y. State Dep’t of Conservation*

v. *FERC*, 991 F.3d 439, 447–49 (2d Cir. 2021) (holding that section 401 established “a bright-line rule ... [that] the timeline for a state’s action regarding a request for certification ‘shall not exceed one year’ after ‘receipt of such request’”). Compare *N.C. Dep’t of Env’t Quality v. FERC*, 3 F.4th 655 (4th Cir. 2021) (holding that FERC ignored un rebutted evidence that the state did not initiate the withdraw-and-refile process). The Ninth Circuit purported to distinguish all three of the cases before it from *Hoopa Valley Tribe* (and failed to mention *N.Y. State Dep’t of Conservation*), but its holding of no waiver in these cases necessarily rests on its conclusion that a state does not violate section 401 by participating in an effort to avoid the statutory time limit on its decisions. That decision cannot be reconciled with the analysis of either the D.C. or the Second Circuits.

3. The Ninth Circuit’s decision warrants review. Congress enacted the Federal Power Act “to secure a comprehensive development of national resources,” *First Iowa Hydro-Elec. Coop. v. FERC*, 328 U.S. 152, 180–81 (1946). Under the Federal Power Act, FERC has exclusive authority to issue licenses authorizing the construction, operation and maintenance of new and existing hydroelectric projects. 16 U.S.C. §§ 797(e), 808, 817. FERC-licensed projects are also subject to numerous environmental statutes, including the Clean Water Act. The Clean Water Act requires applicants for federal licenses to conduct activities that may require a discharge into navigable waters to request a water-quality certification from the state in which the discharge will originate to allow that state to review the discharge and impose conditions on it. But Congress carefully balanced that state role with FERC’s

authority and the importance of allowing federally licensed projects to move forward. It did so by providing states with “a reasonable period of time (which shall not exceed one year” to act on certification requests). 33 U.S.C. § 1341(a)(1). This “prevent[s] a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401.” *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). If it is permitted to stand, the Ninth Circuit’s decision will contravene both the statutory text and its important purpose.

4. In addition to its importance, the issue presented is recurring. Since 2019, four courts of appeals have wrestled with the scope of the states’ ability to avoid the statutory deadline in section 401(a)(1), and FERC has addressed the waiver question on numerous occasions.

5. Undersigned counsel respectfully submits that the extension of time requested here is warranted. Counsel of record was retained only on December 12, 2022 to assist in the preparation of a petition for this Court’s review. In addition, counsel has multiple obligations that would make it difficult to complete a petition for certiorari by the current deadline. Those obligations include (1) the filing of appellants’ opening brief in *Bader v. United States*, No. 22-2203 (Fed. Cir), due December 15, 2022; (2) oral argument in *In re TransCare Corp.*, No. 21-2547 (2d Cir.), conducted on December 16, 2022; (3) preparation and filing of the reply brief in *In re: Terrorist Attacks on Sept. 11, 2001*, No. 03-md-1570 (GBD)(SN) (S.D.N.Y.), due December 20, 2022, and (4) planned family vacation days related to the holidays. The extension is also appropriate in light of the importance of these issues because

undersigned counsel requires additional time to thoroughly digest the proceedings below and to prepare a petition that will assist the Court in considering these questions.

CONCLUSION

For these reasons, Applicants respectfully request an extension to and including February 6, 2023, within which to file a petition for a writ of certiorari in this case.

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Respectfully submitted,

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December 19, 2022

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CERTIFICATE OF SERVICE

I certify that, on this 19th day of December 2022, I caused a copy of the foregoing Application for Extension of Time to be served by first-class mail, postage pre-paid, and by email on the following:

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