No. 19-257

In the
Supreme Court of the United States

CALIFORNIA TROUT & TROUT UNLIMITED,
Petitioners,

v.

HOOPA VALLEY TRIBE & FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

HOOPA VALLEY TRIBE'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the D.C. Circuit correctly concluded that a state's express agreement to not act on an applicant's request for certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), for a period of time greater than one year constitutes a refusal or failure to act by the state that results in waiver of the state's certification authority under 33 U.S.C. § 1341(a)(1)?

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INTRODUCTION

Pursuant to Section 401(a)(1) of the Clean Water Act, an applicant seeking a federal license to operate hydroelectric facilities on navigable waters must request and obtain a certification from the relevant state that any discharge from the proposed federally licensed project would comply with applicable state water quality standards. 33 U.S.C. § 1341(a)(1). Section 401(a)(1) prevents issuance of a federal license until the required water quality certification has been obtained or until the state waives its certification authority. *Id.* Once the state either grants or waives certification, the federal license may be issued. *Id.* Issuance of a federal license is barred if the state timely denies certification. *Id.*

Section 401(a)(1) addresses waiver of certification and when it has occurred. "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, the certification requirements of this subsection shall be waived with respect to such Federal application." *Id.* "The purpose of the waiver provision is to prevent 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).

In the decision below, the D.C. Circuit addressed the question of "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." Petitioners' Appendix [Pet. App.] 10a. The case presented "the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification." *Id.* at 12a. Although the applicant withdrew-and-resubmitted its certification request each year pursuant to agreement, neither the applicant nor the States of California or Oregon intended any action be taken on the certification requests. *Id.* at 10a-13a. The states and applicant agreed on this withdrawal-and-resubmission scheme solely as an attempt to avoid a finding of waiver under Section 401. *Id.*

Section 401 requires state action within a reasonable period of time not to exceed one year. 33 U.S.C. § 1341(a)(1). The D.C. Circuit found that "California and Oregon's deliberate and contractual idleness defies this requirement." Pet. App. 13a. Because the states expressly committed to not process the certification requests pending before them as well as future requests, the D.C. Circuit concluded that the states waived their certification authority under Clean Water Act Section 401. *Id.* at 10a – 14a.

The D.C. Circuit correctly applied the plain language of Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), to the unique facts of this case. This Court should deny certiorari because the D.C. Circuit's decision does not conflict with any decision of any court. Sup. Ct. R. 10(a). Nor does the case present issues that otherwise require this Court's intervention. Sup. Ct. R. 10(c).

The D.C. Circuit decision implements Congress' intent as expressed in Clean Water Act Section 401 by ensuring timely state action on certification requests. The decision does not limit or impair state authority to protect water quality in any respect. States retain their full authority to deny or condition proposed federal licenses that could impair water quality within their state. The D.C. Circuit decision also prevents the impairment of federal jurisdiction that occurs from the kind of coordinated withdrawal-and-resubmission scheme at issue in this case. Review by this Court is also not required at this time because the U.S. Environmental Protection Agency (EPA), the agency charged with primary authority to administer the Clean Water Act, has recently initiated a comprehensive rulemaking to address implementation of Section 401 certification, including issues addressed in the D.C. Circuit decision.

There is not any compelling reason that supports granting the petition in this fact-specific and correctly decided case. Sup. Ct. R. 10. The petition should be denied.

STATEMENT

In 1954, the Federal Power Commission (now, the Federal Energy Regulatory Commission (FERC)) issued a fifty-year license for operation of the Klamath Hydroelectric Project (Project). Pet. App. 22a. The Project consists of five principal mainstem dams and other related hydropower developments that span approximately 64 river miles on the Klamath River within northern California and southern Oregon. Joint

Appendix at 139, *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019) [herein D.C. Cir. J.A.].

Respondent Hoopa Valley Tribe is a federally recognized Indian tribe. The Hoopa Valley Reservation is located within the State of California and downstream from the Project. The Klamath River flows through the Hoopa Valley Reservation downstream of the Project.

I. The Re-Licensing Proceeding.

The Project license, currently held by PacifiCorp, expired in 2006. Pet. App. 22a. Prior to that date, on February 25, 2004, PacifiCorp filed an application with FERC for a new Project license. *Id*. In December 2005, FERC issued notice that the re-licensing application was ready for environmental analysis. D.C. Cir. J.A. at 161. In January 2007, the Departments of Interior and Commerce issued final mandatory conditions pursuant to Federal Power Act Sections 4(e) and 18 regarding minimum flows, fish passage, and other mitigation requirements. D.C. Cir. J.A. at 112-125. Other governments and resource agencies, including the Hoopa Valley Tribe, submitted recommended conditions pursuant to Federal Power Act Sections 10(a) and 10(j). D.C. Cir. J.A. at 161-162.

FERC completed environmental analysis for the Project re-licensing and published its Final Environmental Impact Statement in November 2007. Pet. App. 22a. FERC found that the Project causes significant impacts on the Klamath River environment and that placing new terms and conditions in the license would "enhance water quality, help restore

anadromous fish to historical habitat, protect fish and terrestrial resources, improve public use of recreational facilities and resources, and maintain and protect historic and archaeological resources within the area affected by project operations." D.C. Cir. J.A. at 244. As of November 2007, FERC had completed all steps necessary to re-license the Project with environmentally protective conditions. *Id*. at 800.

Today, more than thirteen years after license expiration, the re-licensing has not been completed and the Project continues operating pursuant to annual licenses that incorporate the terms and conditions of its expired license issued in the 1950's. A primary reason for the delay that has occurred in the re-licensing proceeding is the failure and refusal of the States of California and Oregon to act on water quality certification requests filed by PacifiCorp.

II. The Certification Proceeding and Related Agreements.

PacifiCorp applied for water quality certification from the California State Water Resources Control Board (SWRCB) and the Oregon Department of Environmental Quality (ODEQ) in March 2006. Pet. App. 24a. In 2010, PacifiCorp and other parties entered into an agreement known as the Klamath Hydroelectric Settlement Agreement (KHSA). Pet. App. 5a. The KHSA provided that decommissioning and removal of certain Project dams could commence in 2020 upon satisfaction of numerous contingencies, including Congressional approval. Pet. App. 5a-6a. Though the Hoopa Valley Tribe supports removal of Project dams, the Tribe did not sign the KHSA. Section

6.5 of the KHSA called for abeyance of water quality certification proceedings and required PacifiCorp to "withdraw and re-file its applications for Section 401 certifications as necessary to avoid the certifications being deemed waived under the CWA . . ." Pet. App. 6a.

ODEQ and the State of Oregon are KHSA signatories. D.C. Cir. J.A. at 409-410. After the KHSA became effective, ODEQ agreed to hold Oregon's Section 401 certification proceeding in "abeyance." D.C. Cir. J.A. at 498. In a March 29, 2010 letter to PacifiCorp, ODEQ confirmed it would accept PacifiCorp's request to not process its future water quality certification requests:

> On March 22, 2010, [ODEQ] received a request from [PacifiCorp] to hold in abeyance further review of the application for water quality certification under Section 401 of the Clean Water Act for PacifiCorp Energy's Klamath Hydroelectric Project . . . . *In accordance with Section 6.5 of the KHSA, ODEQ will hold in abeyance further processing of Klamath Hydroelectric Project Section 401 applications submitted prior to a Secretarial Determination* . . . . During the period prior to a Secretarial Determination, PacifiCorp will withdraw and resubmit its application to ODEQ for water quality certification, as necessary to avoid waiver under the Clean Water Act.

D.C. Cir. J.A. at 498 (emphasis added).

California Governor Arnold Schwarzenegger signed the KHSA on behalf of California's Natural Resources Agency. D.C. Cir. J.A. at 409. On May 18, 2010, pursuant to a request made under the KHSA, the California SWRCB resolved to: "hold in abeyance PacifiCorp's application for water quality certification for the Klamath Hydroelectric Project until removal of the California mainstem facilities of the Project . . . ." D.C. Cir. J.A. at 501. The SWRCB passed subsequent resolutions to continue and extend the abeyance of processing PacifiCorp's certification requests. D.C. Cir. J.A. at 508-09; 522-525; 628, 641.

Following execution of the KHSA, PacifiCorp withdrew and resubmitted its certification request with the SWRCB in 2010, 2011, 2012, 2013, and 2014. D.C. Cir. J.A. at 506-507, 524-525, 623-625, 794-795. PacifiCorp also withdrew and resubmitted its certification request each year pursuant to its agreement with the ODEQ. D.C. Cir. J.A. at 528-530, 637-640, 789-793. Despite the withdrawals-and-resubmissions of the certification requests, neither PacifiCorp nor the States of California or Oregon intended that any action be taken on the certification requests. D.C. Cir. J.A. at 383, 498-502, 522-523. The sole purpose of withdrawing-and-resubmitting the certification requests was an attempt to avoid waiver under Section 401. *Id.* In the meantime, absent certification or waiver of certification, FERC was precluded from completing the re-licensing, but was also required by the Federal Power Act to allow the Project to continue operating on annual licenses that incorporated terms and conditions of its expired license. 33 U.S.C. § 1341(a)(1); 16 U.S.C. § 808(a)(1).

III. The Proceedings Below.

On May 25, 2012, the Tribe petitioned FERC for a declaratory order that the States of Oregon and California had waived their water quality certification authority under Clean Water Act Section 401 for failing and/or refusing to act on a certification request within a reasonable period of time (which shall not exceed one year) after receipt of such request. Pet. App. 33a. On June 19, 2014, FERC dismissed the Tribe's petition, finding "little to be gained from finding that the states have waived certification and then issuing a license." Pet. App. 28a-29a.

On July 18, 2014, the Tribe requested rehearing at FERC. Pet. App. 34a. FERC denied rehearing on October 16, 2014. Pet. App. 42a. FERC "agree[d] with the Tribe that continued delays in completing the water quality certification are inconsistent with Congress' intent." Pet. App. 38a. FERC added:

> We continue to be concerned that states and licensees that engage in repeated withdrawal and refiling of applications for water quality certification are acting, in many cases, contrary to the public interest by delaying the issuance of new licenses that better meet current-day conditions than those issued many decades ago, and that these entities are clearly violating the spirit of the Clean Water Act by failing to provide reasonably expeditious state decisions; however, notwithstanding that concern, we do not conclude that they have violated the letter of that statute.

Pet. App. 39a. FERC concluded: "As we have explained, it is the Clean Water Act that prescribes when a state agency has waived certification; it is not an exercise of discretion vested in the Commission. If our interpretation of the statute is incorrect, that would be for the courts to determine." Pet. App. 42a.

On appeal, the D.C. Circuit panel unanimously reversed and vacated FERC's orders under review, concluding that California and Oregon had each waived their Section 401 certification authority by entering into and participating in the "coordinated withdrawal-and-resubmission scheme" with PacifiCorp. Pet. App. 10a-14a.

> While the statute does not define 'failure to act' or 'refusal to act,' the states' efforts, as dictated by the KHSA, constitute such failure and refusal within the plain meaning of these phrases. Section 401 requires state action within a reasonable period of time, not to exceed one year. California and Oregon's deliberate and contractual idleness defies this requirement.

Id. at 12a-13a.

> The record indicates that PacifiCorp's water quality certification request has been complete and ready for review for more than a decade. There is no legal basis for recognition of an exception for an individual request made pursuant to a coordinated withdrawal-and-resubmission scheme, and we decline to recognize one that would so readily consume Congress's generally applicable statutory limit.

> Accordingly, we conclude that California and Oregon have waived their Section 401 authority with regard to the Project.

Id. at 14a. On April 26, 2019, the D.C. Circuit denied the petition for rehearing *en banc* filed by Intervenors California Trout and Trout Unlimited. Pet. App. 17a-20a. Respondent FERC did not seek rehearing at the D.C. Circuit, nor has FERC petitioned for certiorari.

ARGUMENT

Certiorari should not be granted in this case. The D.C. Circuit's decision below is not in conflict with any other decision of any court. Sup. Ct. R. 10(a). Nor does this matter present issues that otherwise warrant this Court's review. Sup. Ct. R. 10(c). The D.C. Circuit correctly applied the plain language of Section 401 of the Clean Water Act in what it considered to be "an undemanding inquiry." Pet. App. 10a. The decision below does not limit states' authority to deny certification or issue certifications with conditions pursuant to Section 401 of the Clean Water Act. The decision below confirms that states must act in accordance with the time limit expressly prescribed by Congress in Section 401. There is not any compelling reason that supports granting the petition in this fact-specific and correctly decided case. Sup. Ct. R. 10. The petition should be denied.

I. The D.C. Circuit's Decision Does Not Conflict With The Decision Of Any Other Court.

In the decision below, the D.C. Circuit addressed the question of "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." Pet. App. 10a. No other court has addressed this question of law or addressed the unique set of facts presented. There is no split of circuit authority. The Court should deny the petition for a writ of certiorari.

A. There Is No Conflict With Fourth Circuit Authority.

In *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721 (4th Cir. 2009), the Fourth Circuit addressed the question of when the one-year review period for Section 401 certification commenced. *Id.* at 729-30. The Fourth Circuit found the text of the Clean Water Act ambiguous on that question. *Id.* at 729. The Fourth Circuit relied upon and gave *Chevron* deference to an Army Corps of Engineers' regulation, 33 C.F.R. § 325.2(b)(1)(ii), which provided that the state's review period under Section 401 commenced upon the state's receipt of a "valid request for certification." *Id.* Pursuant to the Corps' regulation, the first "valid request for certification" was received by the State of Maryland on April 25, 2008 and thus the state's denial of certification on April 24, 2009 (within one-year from the first valid request for certification) was timely and no waiver occurred. *Id.* at 729-30.

There is no conflict between the decision below and the Fourth Circuit's decision in *AES Sparrows Point LNG*. The D.C. Circuit decision below did not address whether the one-year certification review period commences upon receipt of a "valid request" for

certification, which was the issue in *AES Sparrows Point LNG*. The decision below did not address the Army Corps' of Engineers' regulation that was determinative in *AES Sparrows Point LNG*. Unlike *AES Sparrows Point LNG*, the decision below involved a state's failure and refusal to act on a request for certification. The decision below and *AES Sparrows Point LNG* are fully compatible. That is, in a case governed by the Army Corps' of Engineers' regulations, once a valid request for certification is received, a state must act on that request within one-year, at the most.

B. There Is No Conflict With Second Circuit Authority.

In *N.Y. Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018), consistent with the D.C. Circuit's decision below, the Second Circuit held that the State of New York waived its Section 401 certification authority by failing to act within one-year of a request for certification. *Id.* at 455-456. The state received a request for certification on November 23, 2015 and then purported to deny the certification request on August 30, 2017 (nearly two years after the initial certification request). *Id.* at 453-454. The Second Circuit held that the plain language of Clean Water Act Section 401 creates a bright-line rule as to when the review period for certification begins. *Id.* at 455-56. Because the State of New York failed to act within one-year of the request for certification, the Second Circuit found the state had waived its authority. *Id.*

The Second Circuit responded to concerns presented by the state that requiring action within one-year from

the certification request would require premature decisions. *Id.* at 456. The Second Circuit, in dicta, explained that a state retained authority to deny applications without prejudice, "which would constitute 'acting' on the request under the language of Section 401." *Id.* The Second Circuit also noted in one passing sentence that the state "could also request that the applicant withdraw and resubmit the application." *Id.* No further explanation, analysis, or reasoning is provided regarding that statement, which is dicta not central to the Second Circuit's holding. And as discussed below, *Constitution Pipeline Co. v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87 (2d Cir. 2017), *cert. denied,* 138 S. Ct. 1697 (2018), cited by the Second Circuit, did not make any ruling regarding withdrawal-and-resubmission of certification requests or any issues addressed by the decision below. *Id.* at 456, n. 35.

The Second Circuit's opinion did not address the situation presented by the D.C. Circuit decision below in which the states expressly refused and, pursuant to mutual agreement, failed to process an applicant's certification requests for many years. The Second Circuit's holding is consistent with the D.C. Circuit's decision below; that is, a state's failure or refusal to act on a Section 401 certification within one-year of receipt of a certification request will result in waiver. That is the result compelled by the plain language of Section 401 of the Clean Water Act. The Fourth Circuit, Second Circuit, and D.C. Circuit are in accord on this question.

Nor does *Constitution Pipeline Co. v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87 (2d Cir. 2017),

cert. denied, 138 S. Ct. 1697 (2018) address the questions raised by the decision below. In that case, the applicant for a Section 401 certification withdrew and resubmitted its certification request on at least two occasions. The applicant argued that the state had waived its Section 401 certification authority by failing to act within one-year of the initial certification request. *Id.* at 99-100. The Second Circuit ruled that it lacked jurisdiction to address that issue. *Id.* at 100. That Second Circuit decision is not in conflict with the D.C. Circuit's decision below.

C. There Is No Conflict With Ninth Circuit Authority.

Petitioners also cite *California v. FERC*, 966 F.2d 1541 (9th Cir. 1992) as a source of possible conflict. That case involved application of a FERC regulation that provides the one-year certification review period commences upon the state's receipt of a certification request. *Id.* at 1552. That regulation became effective on May 11, 1987 and FERC applied the regulation retroactively to pending license applications including those pending for more than one year from the receipt of a certification request. *Id.* at 1552-1554. The Ninth Circuit held that FERC's regulation was consistent with Clean Water Act Section 401, that retroactive application of the regulation to pending license applications was permissible, and that California waived its certification authority by not acting on a request within one year of the date of receipt of the request. *Id.* This Ninth Circuit opinion is not in conflict with and is consistent with the D.C. Circuit's decision below because both decisions show that

Section 401 requires state action on a certification request within one year.

II. The D.C. Circuit's Decision Does Not Involve Legal Issues That Require This Court's Review.

States have broad authority to deny or impose conditions on federal licenses pursuant to Clean Water Act Section 401. 33 U.S.C. § 1341(a)(1); *S.D. Warren Co. v. Me. Bd. of Envtl. Protection*, 547 U.S. 370 (2006); *PUD No. 1 v. Washington, Dept. of Ecology*, 511 U.S. 700 (1994). The D.C. Circuit decision below does not limit the authority of states to protect water quality through the certification provisions of Section 401. Rather, it ensures and requires that states timely exercise their authority to protect water quality within their state.

For certification requests that have been pending for less than one year and for all future certification requests, the D.C. Circuit decision has no effect whatsoever on states' authority to veto, pursuant to denials issued under Section 401, proposed federal projects that may cause harmful effects to water quality. 33 U.S.C. § 1341(a)(1); *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011) (recognizing states' power to veto federal projects through timely denial of Section 401 water quality certification). For such certification requests, the D.C. Circuit decision also has no effect on states' authority to issue certifications containing terms and conditions protective of water quality. State authority to timely exercise the power granted by Section 401 of the Clean Water Act is unimpaired.

This case does not present any challenge to state authority to deny certification or condition federal licenses pursuant to Clean Water Act Section 401. This case arose out of the failure and refusal of California and Oregon to timely exercise their authority to protect water quality pursuant to Section 401. Although the states had the option to veto the Klamath Project license through denial or regulate the Project through imposition of mandatory conditions, the states chose to not exercise their statutory authority under Section 401. Instead, the states committed through the KHSA and formal resolutions to not process any certification request filed by the applicant relating to the federal license. D.C. Cir. J.A. at 498-502, 522-523, 628. The states prospectively agreed to and did annually accept PacifiCorp's letters purporting to withdraw and resubmit the same certification request solely in an attempt to avoid a waiver finding. D.C. Cir. J.A. at 498, 506, 524; Pet. App. 11a-12a. Neither PacifiCorp nor the states intended any action be taken on the certification requests. *Id.*

The coordinated withdrawal-and-resubmission scheme presented in this case circumvented FERC's federal licensing jurisdiction and cut FERC and the public out of the process related to the Project's re-licensing or decommissioning. The scheme could have continued forever in the states' discretion, preventing FERC from exercising its federal jurisdiction over the re-licensing proceeding, until being ruled unlawful in the D.C. Circuit decision below. The D.C. Circuit decision does not limit or negate state authority to regulate water quality under Clean Water Act Section 401. To the contrary, the decision properly prevents

states from avoiding their statutory obligations and will ensure timely and effective protection of water quality under Section 401.

Petitioners claim that for "large and complex projects," the decision below will force states to either "render premature certifications without an adequate record or analysis, or . . . reflexively deny certification requests until a certification decision is possible." Pet. 24. The argument is incorrect. In complex applications involving federally licensed hydroelectric dams, FERC's default integrated licensing process (ILP) provides extensive time for consultation and study with state agencies on water quality related issues prior to the time that a certification request is filed. 18 C.F.R. Part 5. For hydroelectric re-licensing, the ILP begins no less than five years prior to license expiration. 18 C.F.R. § 5.5(d). The ILP provides opportunities for state certification agencies to consult, comment, request studies, and seek water quality related information shortly after the ILP begins, and this process continues through the filing of the re-license application. 18 C.F.R. §§ 5.8-5.22. Under FERC's existing process, significant work relating to water quality certification occurs before the first certification request is filed, leaving one additional year for the state to finalize its decision to issue certification with conditions or deny certification.

Amici states concede that "[m]ost requests for water quality certification by States can be, and are, approved or denied well within the one-year timeframe set forth in Section 401." Brief of *Amici Curiae* in Support of Petitioners, at 9. If a state cannot make a

final decision on a certification request within one-year without additional information, it has the option under Section 401 to deny the application. In addition to the ILP, states could also develop their own pre-filing requirements to provide additional time to prospectively evaluate issues relating to upcoming certification requests.

Nor does the D.C. Circuit decision frustrate states' ability to enter into cooperative settlement agreements. In the re-licensing of hydroelectric dams, FERC's existing process begins five years prior to license expiration, which provides adequate time to negotiate comprehensive re-licensing settlements. Nor is there any reason why a settlement could not be negotiated following the issuance of certification or following a denial of certification without prejudice. Petitioners' argument that the decision below will impair settlement is unsupported speculation.

Nor does the D.C. Circuit decision threaten the KHSA or efforts to remove the dams from the Klamath River. The KHSA was substantially amended in 2016 due to the failure to satisfy its preconditions, including federal funding approval. Pet. App. 6a. The "Amended KHSA" created an alternative proposal for decommissioning, not dependent on Congressional approval, which is currently pending before FERC. *Id.* The decision below does not address the Amended KHSA or the transfer and surrender proposed by that new agreement. ODEQ has already issued a final water quality certification under Section 401 relating to the Amended KHSA's decommissioning proposal.

The decision whether to approve the transfer and surrender proposal remains pending before FERC.

Arguments regarding the potential application of the decision below to other pending certification requests provide no valid basis to grant certiorari. The decision below addresses a potentially unique factual situation where state certification agencies explicitly committed to not process current and future certification requests pursuant to an agreement with the applicant. The set of facts presented in the decision below constituted a clear failure and refusal by the states to act on a certification request.

Facts in other pending proceedings may vary, in some cases significantly, from those addressed by the D.C. Circuit below. For example, the D.C. Circuit expressly declined to resolve the different situation where an applicant withdraws and resubmits a wholly new or materially different certification request in its place. Pet. App. 12a. Nor did the D.C. Circuit address the situation where an applicant unilaterally withdraws a certification request without involvement by or coordination with a state. *Id.* Other fact patterns may differ significantly from the specific facts addressed by the D.C. Circuit, which addressed the situation where a state and applicant expressly agree to a coordinated scheme by which the state commits to not process the certification request while the applicant withdraws and resubmits the exact same application for the purpose of avoiding a waiver finding. *Id.* Here, the states' own conduct constituted an express refusal or failure to act. While different facts in a future case

might present a closer question, that is no basis to grant certiorari here.

Even if waiver is found to occur in another proceeding, that does not mean that the specific project will be exempt from water quality standards or other protective conditions; rather, it only means that states will forego their mandatory conditioning authority under Section 401 due to their failure or refusal to act within the one-year time period mandated by Congress. If a state's mandatory conditioning authority under Section 401 is waived, FERC retains the ability, and has an independent legal obligation, to include conditions protective of water quality in a federal license. 16 U.S.C. § 797(e); 16 U.S.C. § 803(a)(1). FERC must consider state agencies' recommendations related to license issuance and conditions, which can include water quality protective conditions. 16 U.S.C. § 803(a)(2). *See, e.g., FPL Energy Maine Hydro LLC*, 139 FERC 61215, P 15 (2012) (including in federal license conditions from waived Section 401 certification).

III. The D.C. Circuit Decision Preserves Federal Jurisdiction to Regulate Hydroelectric Development.

The coordinated withdrawal-and-resubmission scheme at issue in this case, where the states and the applicant agreed that the Section 401 certification requests would not be processed and the applicant would simply re-file the exact same request each year for the sole purpose of avoiding waiver, has serious adverse consequences for the environment and the public interest in the context of hydroelectric dam re-

licensing under the Federal Power Act. In ruling such a scheme unlawful, the D.C. Circuit decision prevents the impairment of FERC's jurisdiction to regulate hydropower developments on our nation's waters.

Upon re-licensing at FERC, a hydroelectric project is not only required to comply with the terms of a timely issued water quality certification, but is also required to comply with the many conditions required under Sections 4(e), 10(a), 10(j), and 18 of the Federal Power Act, as well as other applicable requirements of federal law. *City of Tacoma v. FERC*, 460 F.3d 53, 73-74 (D.C. Cir. 2006); 16 U.S.C. §§ 797(e); 803(a), (j), 811. But until the re-licensing proceeding concludes or a new license is issued by FERC, FERC must allow the existing project to continue operating on annual licenses that contain the terms and conditions of the expired license, which was generally issued thirty to fifty years prior. 16 U.S.C. § 808(a)(1). In some cases, like here, the delay in water quality certification following license expiration extends for more than a decade. Pet. App. 11a.

Delay pending re-licensing of an existing hydroelectric project harms the public interest in ensuring that projects meet current requirements of federal law. Delay in re-licensing is advantageous to the project owner who can continue to operate and generate profits from its existing hydroelectric development for additional years on an expired license without the need to upgrade or modify the project to comply with current federal environmental laws and mitigation requirements. This dynamic, in which the project owner benefits from delay resulting from a

withdrawal-and-resubmission scheme, likely impedes rather than promotes timely and effective re-licensing settlements. With certainty, it is harmful to water quality and environmental protection. The decision below properly holds that such a coordinated scheme of withdrawal-and-resubmission between a state and applicant is unlawful under the plain language of Clean Water Act Section 401. 33 U.S.C. § 1341(a)(1).

Absent a finding of waiver, the coordinated scheme of withdrawal-and-resubmission at issue in this case unlawfully deprives FERC of the jurisdiction granted to it by the Federal Power Act. In this case, the states and applicant agreed to an abeyance of state certification activities for a period of years which was implemented through the withdrawal-and-resubmission of certification requests. If such a withdrawal-and-resubmission scheme were lawful, states could hold certification proceedings (and thus federal licensing proceedings) in abeyance potentially forever. Absent the states' issuance of certification or a finding of waiver, FERC would be forever deprived of its jurisdiction to issue a new license with new appropriate terms and conditions. At the same time, in a re-licensing, FERC would be required by the Federal Power Act, 16 U.S.C. § 808(a)(1), to allow the existing project to continue operating on terms of its expired license even though that same project would be required to meet current federal law requirements upon the conclusion of re-licensing. In federal re-licensing, delay in issuing water quality certification prevents timely mitigation of impacts of existing projects.

Congress provided states with significant authority to protect water quality within their state in Clean Water Act Section 401. But Congress did not intend states to use Section 401 to delay federal licensing or to deprive FERC or other federal licensing authorities of their regulatory jurisdiction. The "purpose of the waiver provision [in Section 401] is to prevent a state from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401." *Alcoa*, 643 F.3d at 972. Congress, in Section 401, gave states authority to issue or deny certification within a specific one-year time frame. 33 U.S.C. § 1341(a)(1). Section 401 provides no procedure for a state to toll or extend the one-year maximum timeframe mandated by Congress. *Id.*

The EPA recently promulgated proposed rules regarding Section 401 certification, which are consistent with the D.C. Circuit decision below. 84 Fed. Reg. 44080 (August 22, 2019). The EPA is the federal agency charged with administration of the Clean Water Act. Pet. App. 11a. Consistent with the D.C. Circuit decision below, EPA's proposed rule provides that states are "not authorized to request the project proponent to withdraw a certification request or to take any other action for the purpose of modifying or restarting the established reasonable period of time," which EPA confirms as being not more than one year. 84 Fed. Reg. 44080, 44120 (proposed rule § 121.4(e), (f)). The interpretation of Section 401 in EPA's proposed rule is also consistent with EPA's current regulatory interpretation of Section 401. 40 C.F.R. § 121.16; Pet. App. 11a.

The position advocated by Petitioners and their amici is inconsistent with the Clean Water Act, Federal Power Act, environmental protection, and the public interest. Review of the D.C. Circuit decision by this Court is not warranted. The Petition for Writ of Certiorari should be denied.

IV. The D.C. Circuit Ruled Correctly On The Merits.

The decision below was correctly decided. Petitioners agree that waiver occurs if the state fails or refuses to act on a certification request within a reasonable period of time (which shall not exceed one year). 33 U.S.C. § 1341(a)(1). That is exactly what happened here. The D.C. Circuit, in its decision below, focused on the states' express agreement to not process certification requests for a period of years – and potentially forever. Pet. App. 10a-14a.

> While the statute does not define 'failure to act' or 'refusal to act,' the states' efforts, as dictated by the KHSA, constitute such failure and refusal within the plain meaning of these phrases. Section 401 requires state action within a reasonable period of time, not to exceed one year. California and Oregon's deliberate and contractual idleness defies this requirement. By 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.

Id. at 12a-13a.

Petitioners and their amici mischaracterize the D.C. Circuit's opinion and attempt to shift the focus to the applicant's conduct, suggesting that the conduct of an applicant should not be attributed to a state for purposes of a waiver finding. But the D.C. Circuit focused not on the applicant's conduct but rather on the states' coordination and express agreement with the applicant to not process the pending or future certification requests. *Id.* at 10a-14a. It was the states, through their own conduct here, that failed and refused to act on the requests. *Id.*

Nor does the decision below undermine state authority to protect water quality under Section 401. States' authority to veto or condition projects that could impair water quality remains in full effect. States may not, however, refuse to implement their authority through a scheme that prevents completion of the federal licensing proceeding.

CONCLUSION

The writ for petition of certiorari should be denied.

Respectfully submitted,

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