No. 19-_____

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 A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal government licenses projects that affect the nation's waters, but the role of ensuring that these projects comply with water-quality requirements is reserved for the states. Under the Clean Water Act, applicants for these projects must request and obtain a certification from the affected states that any discharges into the water will comply with federal and state water-quality requirements.

States must "act" within one year of a request, or under section 401 of the Clean Water Act, they waive their authority to certify the applicant's compliance with water-quality requirements. 33 U.S.C. § 1341. In complex cases, however, applicants and states alike require more than a year to develop the record that states need to make a decision. Thus, applicants often withdraw and resubmit their request before the one-year period expires to avoid forcing the state to decide the request prematurely.

In the decision below, however, the D.C. Circuit held that when applicants take this approach, it results in a waiver of the states' Clean Water Act authority. In doing so, the court deepened a circuit conflict, and it struck a significant blow to the states' role in ensuring the quality of our nation's waters.

The question presented is: Do states waive their authority under section 401 of the Clean Water Act if they do not approve or deny a certification request within one year, even when an applicant withdraws and resubmits the request before that one year ends?

PARTIES

Petitioners California Trout and Trout Unlimited were intervenors in the proceedings below.

California Trout is a nonprofit organization dedicated to protecting California's water resources while balancing the needs of wild fish and people.

Trout Unlimited is a national nonprofit organization dedicated to conserving, protecting, and restoring North America's coldwater fisheries and their watersheds.

The Hoopa Valley Tribe was the petitioner in the proceedings below and is therefore a respondent here. The Federal Energy Regulatory Commission was a respondent in the proceedings below and is therefore a respondent here.

American Rivers, Klamath Water Users Association, PacifiCorp, Upper Klamath Water Users Association, and Siskiyou County were intervenors in the proceedings below and are therefore respondents here.

RULE 29.6 DISCLOSURE

California Trout is a nonprofit corporation organized under the laws of the State of California. It has no parent company, and no publicly traded corporation owns ten percent or more of any of its stock.

Trout Unlimited is a nonprofit corporation organized under the laws of the State of Michigan. It has no parent company, and no publicly traded corporation owns ten percent or more of any of its stock.

RELATED CASES

- *PacifiCorp*, Project No. 2082-058, Federal Energy Regulatory Commission. Judgment entered June 19, 2014.
- *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, No. 14-1271, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered January 25, 2019.

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The opinion of the D.C. Circuit (App. 1a) is reported at 913 F.3d 1099 (D.C. Cir. 2019). The D.C. Circuit's order denying rehearing (App. 17a) is reported at 2019 WL 3928669 (D.C. Cir. April 26, 2019), and its order denying rehearing en banc (App. 19a) is reported at 2019 WL 3958147 (D.C. Cir. April 26, 2019).

The decision of the Federal Energy Regulatory Commission (App. 21a) is reported at 147 FERC ¶ 61,216 (June 19, 2014). The Commission's order denying rehearing (App. 30a) is reported at 149 FERC ¶ 61,038 (October 16, 2014).

JURISDICTION

Petitioners respectfully seek a writ of certiorari to review a decision of the D.C. Circuit under 28 U.S.C. § 1254(1).

The D.C. Circuit issued its opinion on January 25, 2019. Petitioners' timely petition for rehearing and rehearing en banc was denied on April 26, 2019.

On July 23, 2019, Chief Justice Roberts extended the time to file this petition until August 26, 2019. *See California Trout v. Hoopa Valley Tribe*, No. 19A92.

STATUTORY PROVISIONS INVOLVED

Section 401 of the Clean Water Act, 33 U.S.C. § 1341, is reproduced in full in Appendix A to the petition. App. 43a.

INTRODUCTION

This case involves when and how a state waives its authority under the Clean Water Act to ensure that a federally licensed project complies with water-quality requirements.

Section 401 of the Clean Water Act serves as a critical tool for states, U.S. territories, and many Native American tribes to protect the quality of the waters within their boundaries.[1] Under section 401, a federal agency cannot issue a permit or license for "any activity" that "may result in any discharge into the navigable waters" until the state has certified that the applicant has met certain water-quality requirements. 33 U.S.C. § 1341(a)(1). Those water-quality requirements include EPA-approved federal requirements, as well as the certifying states' water-quality requirements. *Id.* § 1341(d).

As this Court has noted, "state certifications under section 401 are essential in the scheme to preserve state authority to address the broad range of pollution" that threatens our nation's waters. *S.D. Warren Co. v.*

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[1] U.S. territories are considered "states" under the Clean Water Act. 33 U.S.C. § 1362(3). Native American tribes may also exercise section 401 certification authority if they receive "treatment as a State" status from the EPA. *Id.* § 1377(e). As of June 2019, 45 tribes have been granted this status. *See* U.S. Envtl. Prot. Agency, EPA Actions on Tribal Water Quality Standards and Contacts (June 24, 2019), https://perma.cc/E465-9GPS.

For brevity, this petition uses the term "states" to refer collectively to the states, U.S. territories, and any tribe that has received "treatment as a State" status.

Me. Bd. of Envtl. Protection, 547 U.S. 370, 386 (2006). Congress provided the states with this power to ensure that "[n]o State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements." *Ibid.* (quoting 116 Cong. Rec. 8984 (1970)).

Under section 401, when a license applicant submits a request for water-quality certification, the certifying state has one year to "act" on the request. 33 U.S.C. § 1341(a)(1). After completing its review, a state can grant the request for certification, grant it with conditions, or deny it. *Ibid.* A state waives its certification authority only if it "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year)." *Ibid*.

In many complex cases, however, applicants and states alike require more than a year to develop the record that states need to make a decision on the request, including preparing sufficient plans, measures, and adaptive management. Complex federal licensing proceedings typically take upwards of five years, and not unlike the federal process, the state process requires following procedures under state administrative procedure acts—procedures that are necessary to ensure the proper implementation of section 401.

Thus, applicants in complex cases often withdraw and resubmit their request before the one-year period expires to avoid forcing the states to decide the request

prematurely. That common practice reflects the fact that the applicant is in control of their own application: They decide when to make the request, whether to withdraw the request, and whether to resubmit the request.

In view of these realities, license applicants, certifying states, and the Federal Energy Regulatory Commission ("FERC") have long operated under a common understanding: that an applicant's decision to withdraw and resubmit a section 401 request triggers a new one-year deadline for the certifying state to act, and does not result in a waiver of the state's authority. *See*, *e.g.*, *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 at 23 (Jan. 11, 2018); App. 40a; *Ridgewood Maine Hydro Partners, L.P.*, 77 FERC ¶ 62,201, 64,425 (Dec. 27, 1996).

The decision below, however, upends that decades-long practice. The D.C. Circuit held that if states do not approve or deny a certification request within one year, even when the applicant withdraws and resubmits the request before the one-year period, states waive their section 401 authority.

That holding deepened an existing circuit conflict. Now, the Second Circuit, Fourth Circuit, and D.C. Circuit all have their own, different approaches to determining when and how states waive their Clean Water Act authority under section 401:

- In the Fourth Circuit, states waive their Clean Water Act authority if they fail to act within one year of the date that the applicant's section 401 request is deemed complete.
- In the Second Circuit, states waive their Clean Water Act authority if they fail to act on a request (whether complete or incomplete) within one year, but not if the applicant triggers a new review period by withdrawing the request and resubmitting a request in its place within the one-year period.
- In the D.C. Circuit, under the decision below, states waive their Clean Water Act authority if they do not approve or deny a certification request within one year, even when the applicant withdraws and resubmits the request within the one-year period.

This division of authority at the circuit level, by itself, shows the need for this Court's review. As described below, in the immediate wake of the D.C. Circuit's decision, litigants are already forum shopping between the circuits.

The D.C. Circuit's decision also has serious implications for state interests, and, more broadly, for federalism principles. Under the Federal Power Act, FERC reviews license applications, *see* 16 U.S.C. § 797, but under the Clean Water Act, the role of ensuring that proposed projects satisfy state water-quality

requirements is reserved for the states, *see* 33 U.S.C. § 1341.

As this Court has repeatedly recognized, these laws preserve important federalism principles. *See*, *e.g.*, *S.D. Warren Co.*, 547 U.S. at 386 (observing that the section 401 certification process is "essential in the scheme to preserve state authority"); *Pub. Util. Dist. No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994) [hereinafter *PUD No. 1*] (noting that, under the Clean Water Act, there are "distinct roles for the Federal and State Governments"); *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152, 174 (1946) (noting that the Federal Power Act reflects a "careful preservation of the separate interests of the States").

The decision below undermines those federalism principles. Under the D.C. Circuit's approach, states cannot fulfill their duty to complete meaningful environmental reviews for complex federally licensed projects. Instead, states hoping to preserve their section 401 authority face an untenable choice: They can issue premature certifications without an adequate record and analysis—a tactic that invites environmental harm lasting for many decades. Or they can reflexively deny every certification request for a complex project—a preservation measure that would embroil the states in unnecessary litigation and frustrate settlement efforts like the ones in this case.

For these and other reasons, a diverse group of eighteen states submitted amicus briefs siding with

Petitioners on the state-waiver issue before the D.C. Circuit: Alaska, California, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, and Wyoming. The implications of the decision below on state interests—as evidenced by more than a third of the states participating in this case—further shows the need for this Court's review.

Finally, the D.C. Circuit's decision threatens to create serious consequences for the quality of our nation's waters. FERC is already applying the D.C. Circuit's decision retroactively. As a result, states may be deemed to have unknowingly waived their certification authority on dozens of projects with pending federal-license applications—despite FERC's longstanding position that withdrawal and resubmission starts a new one-year certification period. The result would be to exempt these projects from critical water-quality requirements that the states would otherwise require.

Because federal licenses for dams are typically granted for periods ranging from thirty to fifty years, and pipeline licenses are permanent, allowing significant projects to bypass water-quality certifications poses an environmental threat that would last for generations.

In sum, the circuit conflict, as well as the broad implications of the decision below, call for this Court's intervention.

STATEMENT

I. The States' Role Under the Clean Water Act

As described above, section 401 of the Clean Water Act applies broadly to any federally permitted or licensed "activity" that "may result in any discharge into the navigable waters." 33 U.S.C. § 1341(a)(1). A common example of such an activity is a hydropower project, like the one in this case, which requires a license from FERC.[2] *See* 16 U.S.C. § 797(e).

Although FERC is responsible for licensing hydropower projects, *see ibid.*, section 401 of the Clean Water Act reserves for the states the role of ensuring that the project satisfies EPA-approved federal requirements, as well as the water-quality requirements of the certifying state. 33 U.S.C. § 1341(d).

Section 401 of the Act requires that the license applicant request a water-quality certification from the state where the discharge originates. *Id.* § 1341(a)(1). After the state completes its review, it has the authority to grant, grant with conditions, or deny certification. *Ibid.*

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[2] Section 401 certifications are required for a wide array of federally licensed projects. Other federal licenses and permits subject to section 401 certification include: pipelines subject to the Natural Gas Act, National Pollutant Discharge Elimination System permits, dredge or fill material permits, and Rivers and Harbors Act permits for activities that have a potential discharge in navigable waters. *See* U.S. Envtl. Prot. Agency, Water Quality Certification: A Water Quality Protection Tool for States and Tribes 1–2 (April 2010).

When a state grants certification (with or without conditions), it allows the federal agency to issue the permit or license, subject to any conditions of the state's certification. *Ibid.* When a state denies certification, the federal agency is prohibited from issuing the permit or license. *Ibid.* In other words, the state's decision is binding on the federal agency.

A state waives its certification authority only if it "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year)." *Ibid.*

If a state is deemed to have waived its section 401 authority, the consequences for the nation's waters are extremely serious. If waiver occurs, the federal licensing process continues without any certification whatsoever from the state that a project will satisfy federal or state water-quality requirements.[3] *Ibid.*

Because hydropower projects are not up for relicensing for many decades, a project could operate in a manner that harms water quality for half a century. *See infra* at 28. For pipeline projects, which receive permanent licenses, a state's section 401 waiver means that the state has waived its authority forever.

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[3] Narrow exceptions exist for circumstances where, despite a state's section 401 waiver, an applicant must satisfy otherwise applicable Clean Water Act requirements, such as requirements related to dredging activity, 33 U.S.C. § 1344, or requirements related to the discharge of pollutants, *id.* § 1342.

II. The Klamath Project

In 1954, the Federal Power Commission (now FERC) issued a fifty-year license to operate the 169-megawatt Klamath Hydroelectric Project. App. 31a. The Klamath Project follows a path along the Klamath River through Oregon and California. The project has seven hydroelectric facilities and one non-generating dam. App. 31a.

The PacifiCorp company now operates the Klamath Project. In 2004, PacifiCorp began the relicensing process for the project. App. 5a. At first, PacifiCorp's relicensing application sought to relicense the project's primary generating facilities. App. 31a. But after extensive studies and negotiations with stakeholders, PacifiCorp ultimately agreed to decommission the primary facilities, which would involve removing four dams. App. 31a–32a. Removing the dams would restore fisheries, reconnecting more than 400 miles of salmon and steelhead habitat that the dams currently block. *Ibid.*

III. The Klamath Settlement Agreement

PacifiCorp's decision to remove the dams emerged from lengthy settlement negotiations. *See* Joint Appendix at 1–5, *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019) [hereinafter D.C. Cir. J.A.]. Those negotiations culminated in a settlement, which established a process and a timeline for decommissioning four dams within the Klamath Project. PacifiCorp filed a copy of the principal

settlement agreement in March 2010 with FERC. App. 31a.

The settlement agreement was signed by PacifiCorp and 47 other parties. D.C. Cir. J.A. at 409–18. Those other parties included the Governors of California and Oregon, the U.S. Department of the Interior, the U.S. Department of Commerce's National Marine Fisheries Services, the Karuk Tribe, the Yurok Tribe, the Klamath Tribes (comprising the Klamath, Modoc, and Yahooskin tribes), several local counties, and conservation groups, including California Trout and Trout Unlimited.[4] *Ibid.*

The target date for decommissioning the Klamath Project was 2020. App. 32a. Given the unprecedented scale and complexity of the decommissioning, however, the settlement agreement included certain preconditions.

Among these preconditions, the settlement agreement required: (a) the enactment of federal legislation, which involved federal funding obligations; (b) California voters' approval of a $250 million bond; (c) an affirmative determination by the Secretary of the Interior that dam removal is in the public interest; and (d) separate concurrences by the Governors of California and Oregon that dam removal is in the public interest. D.C. Cir. J.A. at 351–63, 403–04.

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[4] The California State Water Resources Control Board is the agency that provides water-quality certification for hydroelectric projects in California. *See* Cal. Water Code § 13160. That entity was not a party to the settlement. D.C. Cir. J.A. at 409–18.

While the negotiations over the Klamath settlement agreement were proceeding, PacifiCorp's relicensing application remained pending at FERC. The potential realization of the settlement on the horizon, however, called into question the desirability of proceeding with a federal relicensing application.

After all, the federal relicensing application—and the state section 401 certifications necessary to approve that relicensing application—would become unnecessary if the settlement was fully realized, because an application for license surrender (requiring new section 401 certifications) would follow. Conversely, if the settlement was not fully realized—for example, if the preconditions above were not satisfied—then the original relicensing application would be heard by FERC, and the states would act on section 401 requests for the purpose of relicensing the project on the original application.

Accordingly, FERC stayed action on the relicensing application while the various stakeholders negotiated and implemented the settlement agreement. App. 28a–29a. For the same reasons, PacifiCorp withdrew its section 401 requests to California and Oregon each year and resubmitted section 401 requests in their place, to ensure that California and Oregon would not be forced to decide the requests prematurely. App. 26a–27a. PacifiCorp agreed to do so under the terms of the settlement agreement. *Ibid.* All of the parties understood that California and Oregon were not waiving their section 401 authority, but rather, were expressly preserving that authority. *See ibid.*

IV. The Proceedings Below

The Hoopa Valley Tribe is a tribe that resides downstream from the Klamath Project in northwestern California. Because the Klamath settlement agreement contemplates removing dams that affect fisheries, the tribe stands to gain from the increase in salmon available for them to fish. *See* D.C. Cir. J.A. at 343.

But the tribe did not want the Klamath Project to be decommissioned under the terms that PacifiCorp, the states, the federal government, the conservation groups, and all of the other tribes had established in the settlement agreement. Instead, the Hoopa Valley Tribe sought declaratory relief aimed at terminating PacifiCorp's relicensing application and the associated proceedings before FERC and the states.

To that end, the tribe petitioned FERC for declaratory relief in 2012, seeking to end relicensing. The tribe argued that California and Oregon had waived their section 401 authority by not granting or denying PacifiCorp's *first* certification request within one year, even though PacifiCorp had withdrawn and resubmitted its request. *See id.* at 547–54. In other words, the tribe argued that the one-year clock started from the *first* certification request. *See ibid.*

FERC rejected Hoopa's argument. App. 39a–40a. FERC noted that section 401 "speaks solely to *state action or inaction*, rather than the repeated withdrawal and refiling of applications." App. 40a. Thus, FERC concluded that "[b]y withdrawing its applications before a year has passed, and presenting the states

with new applications," PacifiCorp gave the states "new deadlines." *Ibid.* FERC further noted that "[t]he record does not reveal that either state has in any instance failed to act on an application that has been before it for more than one year." *Ibid.*

Hoopa appealed FERC's decision to the D.C. Circuit, and the D.C. Circuit reversed.

The D.C. Circuit held that when PacifiCorp withdrew and resubmitted its certification requests, it resulted in a waiver of California's and Oregon's section 401 authority. App. 3a.

The D.C. Circuit first voiced agreement with PacifiCorp, FERC, and Petitioners that "[i]mplicit in the statute's reference 'to act on *a request* for certification,' the provision applies to a specific request." App. 11a (quoting 33 U.S.C. § 1341(a)(1)). The court also agreed that the waiver provision "cannot be reasonably interpreted to mean that the period of review for one request affects that of any other request." App. 11a–12a.

In the court's view, however, PacifiCorp's decision to withdraw the request from the states was inconsequential. Emphasizing what it perceived to be improper coordinated action between PacifiCorp and the states, the court held that the new requests were subject to the same period of review as the first, withdrawn request. App. 12a. The court thus concluded that the States waived their section 401 authority by failing to act on PacifiCorp's first request within one year. *Ibid.*

Petitioners sought rehearing en banc. Multiple states supported Petitioners as amici at the rehearing stage, making for a total of eighteen states that supported Petitioners on the state-waiver issue before the D.C. Circuit.[5] *See supra* at 6–7.

The D.C. Circuit denied the petition for rehearing on April 26, 2019.

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[5] The following states filed briefs with the D.C. Circuit opposing Hoopa Valley's petition for review: California, Hawaii, Idaho, Maine, New Hampshire, New York, Oregon, Utah, Washington, and Wyoming. *Hoopa Valley Tribe*, 913 F.3d 1099, No. 14-1271, ECF Nos. 1586196, 1586214, 1589071. The following states filed briefs supporting Petitioners' request for rehearing: Alaska, California, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, New Jersey, Oregon, Rhode Island, South Dakota, Vermont, Washington, and Wyoming. *Id.* at ECF Nos. 1778292, 1778274.

REASONS FOR GRANTING THE PETITION

I. The decision below exacerbated a circuit conflict.

In the decision below, the D.C. Circuit deepened an existing circuit conflict on the question of when and how states waive their Clean Water Act certification authority. Now, there are three distinct approaches:

- In the Fourth Circuit, states waive their Clean Water Act authority if they fail to act within one year of the date that the applicant's section 401 request is deemed complete.
- In the Second Circuit, states waive their Clean Water Act authority if they fail to act on a request (whether complete or incomplete) within one year, but not if the applicant triggers a new review period by withdrawing the request and resubmitting a request in its place within the one-year period.
- In the D.C. Circuit, under the decision below, states waive their Clean Water Act authority if they do not approve or deny a certification request within one year, even when the applicant withdraws and resubmits the request within the one-year period.

As described below, this division of authority warrants this Court's review.

A. Three circuits now have different approaches to section 401 waiver.

1. The Fourth Circuit's Approach

In *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721 (4th Cir. 2009), the Fourth Circuit held that section 401 waiver occurs if the state fails to act within one year of the date the request is deemed complete.

There, the court considered whether Maryland waived its right to certify a natural gas project's compliance with the state's water-quality requirements. *Id.* at 728. When the applicant submitted its initial section 401 request, Maryland "deem[ed]" it incomplete and requested additional information. *Ibid.*

More than a year passed as Maryland "continu[ed] to deem [the request] incomplete," and the applicant continued responding "with a series of submissions" to supplement its original request. *Id.* at 725. Ultimately, more than two years after the request was submitted (but less than one year after Maryland deemed the request complete), Maryland denied certification. *Id.* at 726.

The applicant challenged Maryland's denial. The applicant argued that Maryland waived its right to deny certification by failing to do so within one year of its first submission.

The Fourth Circuit disagreed. Noting that section 401 "is ambiguous on the issue[,]" the court found that "only a valid request . . . will trigger" the one-year waiver period. *Id.* at 729. Reasoning that a request

must be completed to be valid, the court held that the waiver period was not triggered by the applicant's earlier, incomplete submissions. *Ibid.* Consequently, Maryland had not waived its section 401 authority.

Thus, in the Fourth Circuit, states waive their Clean Water Act authority only if they fail to act within one year of the date that the applicant's section 401 request is deemed complete.

2. The Second Circuit's Approach

In *N.Y. Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018), the Second Circuit concluded that waiver occurs if states fail to act on a request (whether complete or incomplete) within one year, but not if the applicant triggers a new review period by withdrawing the request and resubmitting a request in its place within the one-year period.

The case involved facts similar to those of the Fourth Circuit's decision in *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, described above. *See supra* at 17–18. New York deemed the applicant's section 401 request incomplete, and the applicant supplied additional information to support its request. New York ultimately denied certification more than a year after the request was submitted, but less than a year after New York deemed the request complete. *Id.* at 453.

Unlike the Fourth Circuit, the Second Circuit found waiver on these facts.[6] *Id.* at 455. Critically, however, the Second Circuit indicated that this harsh result could be avoided if states simply "request that the applicant withdraw and resubmit the application." *Id.* at 456.

As the court explained, if the applicant agreed to resubmit the request, the resubmission would trigger a new period of review. *See ibid.* The court also cited with approval one of its decisions where the "applicant for a Section 401 certification had withdrawn its application and resubmitted at the Department's request—thereby restarting the one-year review period." *Id.* at 456 n.35 (citing *Constitution Pipeline Co. v. N.Y. State Dep't of Envtl. Conserv.*, 868 F.3d 87, 94 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 1697 (2018)).

Thus, in the Second Circuit, states waive their Clean Water Act authority if they fail to act on a request (whether complete or incomplete) within one year, but not if the applicant starts a new one-year period by withdrawing the request and resubmitting a request in its place.

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[6] Also contrary to the Fourth Circuit's approach, the Ninth Circuit in *California v. FERC*, 966 F.2d 1541, 1552–53 (9th Cir. 1992), held that the one-year period begins when the request is submitted, not when it is "complete." *Cf. supra* at 17–18. Unlike the Second Circuit, however, the Ninth Circuit did not address whether a state waives its section 401 authority when an applicant withdraws and resubmits a request within the one-year period. *California*, 966 F.2d at 1552–53.

3. The D.C. Circuit's Approach

In the decision below, the D.C. Circuit adopted a third approach, deepening the divide among the circuits.

Notably, the court acknowledged that section 401's use of the language "to act on *a request* for certification" suggests that "the provision applies to a specific request." App. 10a. The court further recognized that the waiver provision "cannot be reasonably interpreted to mean that the period of review for one request affects that of any other request." *Ibid.*

Nevertheless, the D.C. Circuit held that waiver occurs if a state fails to act on a request within one year of its *first* submission—even if, within the one-year period, the applicant withdraws and resubmits the request. App. 3a. The court also held that when an applicant takes this approach, it does not start a new period for review. *Ibid.*

The court condemned the decades-long practice described above of withdrawing and resubmitting certification requests—a practice that applicants and certifying states had long followed, and which FERC had repeatedly endorsed. *See supra* at 3–4. Referring to the parties' actions under the settlement agreement as a "scheme" designed to "circumvent" the Clean Water Act, the D.C. Circuit held instead that PacifiCorp's attempts to resubmit its certification requests were ineffective. App. 3a.

Consequently, in the D.C. Circuit, states waive their Clean Water Act authority if they do not approve or deny a certification request within one year, even when the applicant withdraws and resubmits the request within the one-year period.

B. The decision below is already encouraging forum shopping between the circuits.

In addition to deepening the circuit conflict, the D.C. Circuit's decision also created forum-shopping opportunities.

This forum shopping is widely available, because litigants in these cases generally have the option of seeking appellate review in either: (1) the circuit court of appeals in which the federally licensed project or applicant is located; or (2) the D.C. Circuit. *See* 16 U.S.C. § 825l(b) (Federal Power Act); 33 U.S.C. § 1369(b)(1) (Clean Water Act).

In the immediate wake of the D.C. Circuit's decision, litigants have already begun forum shopping.

One example involves a nearly half-billion-dollar pipeline project to carry natural gas to New York. *See* Order Granting Abandonment and Issuing Certificates, *Northern Access 2016 Project*, 158 FERC ¶ 61,145, at 5, 9 (Feb. 3, 2017). A few months after the D.C. Circuit's decision below, FERC relied on the decision to conclude that New York had waived its section 401 authority. *See* Order Denying Rehearing,

Northern Access 2016 Project, 167 FERC ¶ 61,007 (April 2, 2019).

New York petitioned the Second Circuit to review FERC's decision. *N.Y. Dep't of Envtl. Conservation v. FERC*, No. 19-1610 (2d Cir. filed May 28, 2019). Relying on the Second Circuit's decision in *N.Y. Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, *supra* at 18–19, New York contends that it did not waive its Clean Water Act authority.

The pipeline company, on the other hand, argues that the decision below controls, and, therefore, New York waived its authority. In an effort to gain the benefit of the D.C. Circuit's approach and avoid the Second Circuit's approach, the pipeline company has moved to transfer the case to the D.C. Circuit. *See* Intervenors' Motion to Transfer, *N.Y. Dep't of Envtl. Conservation v. FERC*, No. 19-1610, ECF 2596470 (2d Cir. filed June 27, 2019).

As this example shows, unless the Court resolves the conflict among the circuits, litigants in these cases involving projects worth hundreds of millions of dollars will forum shop for the circuit that applies their desired approach.

These forum-shopping litigants have every incentive to do so: The differences between the circuits' approaches are dramatic, and they produce different outcomes. To be sure, they would have produced different outcomes in this case.

In sum, the circuit conflict, and the problems associated with it, warrant this Court's review.

II. The question presented has significant implications for the states and the environment.

The question presented has significant implications in at least two respects. First, the question presented implicates important state interests and, more broadly, principles of federalism. Second, the decision below threatens to cause immediate and lasting harm to the environment.

A. The question presented has significant implications for the states.

Federal law strikes a balance between the role of the federal government and the role of the states in addressing water pollution for federally licensed projects. Under the Federal Power Act, FERC reviews license applications, *see* 16 U.S.C. § 797, but under the Clean Water Act, Congress explicitly sought "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" in waters within their boundaries. 33 U.S.C. § 1251(b).

This Court has repeatedly recognized the federalism principles underlying that balance. *See S.D. Warren Co.*, 547 U.S. at 386 (observing that the section 401 certification process is "essential in the scheme to preserve state authority"); *PUD No. 1*, 511 U.S. at 704 (noting that, under the Clean Water Act, there are "distinct roles for the Federal and State Governments"); *First Iowa Hydro-Electric Coop.*, 328

U.S. at 174 (noting that the Federal Power Act reflects a "careful preservation of the separate interests of the States").

The states' section 401 certification power is the statutory vehicle through which the states exercise their "primary responsibilities and rights . . . to prevent, reduce, and eliminate [water] pollution." 33 U.S.C. § 1251(b). In other words, section 401 is what gives states their "distinct role" under the Clean Water Act. *PUD No. 1*, 511 U.S. at 704.

The decision below undermines that distinct role for the states, and it does so in a way that compromises the federalism principles described above.

Under the decision below, states will be unable to fulfill their duty to complete a meaningful review and analysis for large and complex projects, like the one in this case. Instead, states wishing to preserve their section 401 authority over a complex project for which they lack an adequate record or analysis will face an untenable choice: They can render premature certifications without an adequate record or analysis, or they can reflexively deny certification requests until a certification decision is possible. That is not the scheme Congress designed, and either approach would embroil the states in protracted and unnecessary litigation.

Perhaps worse, the D.C. Circuit's decision will frustrate the states' ability to pursue an important third option: cooperative settlement agreements, like

the one here, which could take longer than a year to fully realize.

Strong policy reasons counsel in favor of settling water-quality disputes, rather than litigating them. FERC itself has made clear that it "looks with great favor on settlements in licensing cases" because "hydroelectric licensing proceedings . . . are multi-faceted and complex," involving "the balancing of many public interest factors, as well as consideration of the views of all interested groups and individuals." Policy Statement on Hydropower Licensing Settlements, 116 FERC ¶ 61,270 (Sept. 21, 2006).

Yet if the only way for states to preserve their section 401 authority is to prematurely grant or reflexively deny certification requests, it will significantly frustrate the states' ability to negotiate long-term settlement agreements, like the one here. The one-year clock—which, under the D.C. Circuit's approach, starts running from the *first* certification request, even if the applicant withdraws and resubmits that request—will expire before a settlement can be reached.

Thus, as a practical matter, the decision below will prevent states, tribes, and other interested parties from settling the myriad water-pollution issues that arise from complex projects—an outcome that erodes the states' ability to effectively address water pollution within their boundaries.

Acting on these and other concerns, more than one-third of all the states submitted amicus briefs to the D.C. Circuit in support of Petitioners. These states

have a wide array of environmental policies and concerns, which are as diverse as one might imagine—for example, those of Utah versus those of Hawaii. Yet all of these states supported Petitioners. No state took an opposite view.

This unified and significant level of state amicus participation only confirms that the question presented has enormous implications for the states. Those implications further show the need for this Court's review.

B. The decision below threatens significant and lasting environmental harm.

In addition to the state interests implicated, the decision below threatens to create consequences for the environment that are too serious to disregard.

The D.C. Circuit did not say whether its decision would only apply prospectively. But FERC has already rejected such an argument, describing it as "not convincing." Declaratory Order on Waiver of Water Quality Certification, *Middle Fork American Project*, 167 FERC ¶ 61,056 (April 18, 2019).

As a result, states may be deemed to have unknowingly waived their certification authority on dozens of federally licensed projects—despite FERC's longstanding position that withdrawal and resubmission started a new one-year period.

There are 87 hydropower projects currently undergoing licensing proceedings before FERC.[7] Many of those projects have been pending for more than a year and, therefore, are now at great risk for a retroactive application of the decision below.

Indeed, in the few months since the decision below was issued, FERC has received a surge of requests seeking a finding that states had waived their authority in pending license applications.[8] FERC has already granted two of these requests, finding waiver by California in a hydropower case, and waiver by New York in a pipeline case. *See* Declaratory Order on Waiver of Water Quality Certification, *Middle Fork American Project*, 167 FERC ¶ 61,056; *see also* Order Denying Rehearing, *Northern Access 2016 Project*, 167 FERC ¶ 61,007 (April 2, 2019).

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[7] *See* FERC, Hydropower: Commission's Responsibilities, https://www.ferc.gov/industries/hydropower.asp (follow the "Pending Licenses, Relicenses, and Exemptions" hyperlink under the "Licensing" column).

[8] *See*, *e.g.*, Southern California Edison Company's Petition for Declaratory Order, *Six Big Creek Hydroelectric Projects*, FERC Project Nos. 67, 120, 2085, 2086, 2174, 2175 (filed June 17, 2019); Pacific Gas and Electric Company's Petition for Declaratory Order, *Kilarc-Cow Creek Hydroelectric Project*, FERC Project No. 606 (filed May 15, 2019); Exelon Generation Company, LLC's Petition for Declaratory Order, *Conowingo Hydroelectric Project*, FERC Project No. P-405 (filed February 28, 2019); Nevada Irrigation District's Request for Waiver, *Yuba-Bear Hydroelectric Project*, FERC Project No. P-2266 (filed February 19, 2019).

Such retroactive findings of waiver, if allowed to stand, will make for grim prospects for our nation's waters. Federal licenses are often granted for many decades. For hydropower projects, like the one in this case, federal licenses are often granted for fifty years. *See* 16 U.S.C. § 799. Natural gas pipeline licenses are permanent. *See* 15 U.S.C. § 717f(e).

Thus, by exempting major projects from water-quality certifications for fifty years—or, in some cases, forever—the D.C. Circuit's approach could result in environmental harm that will last for generations.

III. Strong merits arguments support reversing the decision below.

Regardless of which side is right on the merits, certiorari is needed to resolve the circuit conflict. The strength of Petitioners' merits arguments, however, underscores the need for this Court's review.

On the merits, Petitioners are supported by section 401's text, as well as its purpose.

First, the text of section 401 provides that a state's authority is waived only "[i]f *the State* . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year)." 33 U.S.C. § 1341(a)(1) (emphasis added). Nothing in the text prohibits an *applicant* from submitting and then choosing to withdraw its request for certification before the one-year period expires. Likewise, nothing in the text equates an *applicant's* choice to withdraw and resubmit a request with the *state's* failure or refusal to "act." By holding otherwise, the D.C. Circuit's decision expanded section 401's waiver provision beyond its plain language.

Second, the D.C. Circuit's interpretation of section 401 is contrary to the purpose of that provision. Section 401 "recast pre-existing law and was meant to 'continu[e] the authority of the State . . . to act to deny a permit.'" *S.D. Warren Co.*, 547 U.S. at 380 (quoting S. Rep. No. 92–414, p. 69 (1971)). As described above, the D.C. Circuit's decision undermines the "broad reach" of state power envisioned by section 401. *S.D. Warren Co.*, 547 U.S. at 380.

Furthermore, when Congress enacted section 401's waiver provision, it sought to prevent "sheer inactivity *by the State*"—that is, it sought to prevent *states* from "frustrat[ing] the Federal application" process. H.R. Rep. No. 91-940, at 56 (1970) (emphasis added); *see also Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) ("[T]he 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.") (emphasis added). Congress was not focused on the prospect of an *applicant* choosing to withdraw and resubmit its own request to improve its chances of achieving a desired result in the federal licensing process.

As in other withdraw-and-resubmit situations, that is what occurred here. PacifiCorp chose to withdraw and resubmit its own certification requests to provide time to implement a complex settlement agreement—a settlement agreement that PacifiCorp entered into of its own volition, and which it desired for its own reasons. Thus, when the D.C. Circuit adopted its approach to section 401 waiver, it effectively nullified a decision by the *applicant*—the party that Congress intended to protect.

As these points show, there are strong reasons for reversing the decision below. Those reasons further demonstrate that the D.C. Circuit's decision warrants this Court's review.

* * *

Section 401 of the Clean Water Act is an "essential" federal statute that empowers the states to address water pollution within their boundaries. *S.D. Warren Co.*, 547 U.S. at 386. Such an essential federal statute should not have different meanings for states in different parts of the country. *See Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (noting that the Clean Water Act was intended "to create and manage a uniform system of interstate water pollution regulation"). Especially given the opportunities to forum shop, the circuit conflict calls for this Court's intervention.

Nor can this issue wait until the conflict worsens. The threat to state interests is too great, as evidenced by more than a third of all the states participating before the D.C. Circuit as amici. And without the Court's intervention, the decision below will create an environmental threat of the first magnitude.

The question presented warrants this Court's review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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