No. 19-257

In the Supreme Court of the United States

CALIFORNIA TROUT, ET AL., PETITIONERS

v.

HOOPA VALLEY TRIBE, ET AL.

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

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

JAMES P. DANLY
General Counsel
ROBERT H. SOLOMON
Solicitor
CAROL J. BANTA
Senior Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Federal Energy Regulatory Commission (Commission) has authority to issue licenses for the construction, operation, and maintenance of hydroelectric projects on jurisdictional waters. See 16 U.S.C. 797(e). If a proposed hydroelectric license "may result in any discharge into the navigable waters" of the United States, the Clean Water Act, 33 U.S.C. 1251 *et seq.*, requires that the applicant provide the Commission with "a certification from the State in which the discharge originates." 33 U.S.C. 1341(a)(1). The statute further states that "[i]f the State * * * fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." *Ibid.* The question presented is:

Whether the court of appeals correctly determined that California and Oregon waived water quality certification under 33 U.S.C. 1341(a)(1), where, pursuant to a written agreement between the States and the applicant to delay certification, the applicant repeatedly withdrew and resubmitted its certification request over the course of more than a decade.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (D.C. Cir.):

Hoopa Valley Tribe v. *Federal Energy Regulatory Commission*, No. 14-1271 (Jan. 25, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 913 F.3d 1099. The orders of the Federal Energy Regulatory Commission (Pet. App. 21a-42a) are reported at 147 F.E.R.C. ¶ 61,216 and 149 F.E.R.C. ¶ 61,038.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2019. A petition for rehearing was denied on April 26, 2019 (Pet. App. 17a-20a). On July 23, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 26, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act, 16 U.S.C. 791a *et seq.*, provides the Federal Energy Regulatory Commission (FERC or Commission) with the authority to issue licenses for the construction, operation, and maintenance of hydroelectric projects on jurisdictional waters. 16 U.S.C. 797(e). The Commission may issue hydroelectric licenses for up to 50 years. See 16 U.S.C. 808(e). In deciding whether to issue or reissue a license, the Commission is required to consider "the power and development purposes for which licenses are issued," and to "give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife * * * , the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. 797(e). If a new license is not granted prior to the expiration of an existing license, the Commission may issue to the licensee an annual license to operate the project from year to year, "under the terms and conditions of the existing license until * * * a new license is issued." 16 U.S.C. 808(a)(1); see 18 C.F.R. 16.18.

If a proposed hydroelectric or other federal license "may result in any discharge into the navigable waters" of the United States, Section 401 of the Clean Water Act mandates that the applicant "provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate * * * that any such discharge will comply with" certain provisions of the Clean Water Act. 33 U.S.C. 1341(a)(1); see *S. D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 373 (2006) (holding that "operating a dam to produce hydroelectricity 'may result in any discharge into the navigable waters' of the United States" such that

state certification is required). As part of the certification, the State also may require the applicant to comply with "any * * * appropriate requirement of State law," which "shall become a condition on any Federal license or permit." 33 U.S.C. 1341(d); see *PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700, 711-714 (1994) (construing Section 401 to permit States to "condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other 'appropriate requirement[s] of State law'") (quoting 33 U.S.C. 1341(d)).

Section 401 of the Clean Water Act makes federal licensing contingent on state certification: "No [federal] license or permit shall be granted until the certification required by this section has been obtained or has been waived." 33 U.S.C. 1341(a)(1); see, *e.g.*, *Keating* v. *FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991); see also Pet. App. 4a ("[A] state's water quality review serves as a precondition to any federal hydropower license issued by FERC."). At the same time, Section 401 does not permit a State to "indefinitely delay[] a federal licensing proceeding by failing to issue a timely water quality certification." *Alcoa Power Generating Inc.* v. *FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). Instead, Section 401 provides that if a State "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." 33 U.S.C. 1341(a)(1). The Commission determines whether a State has waived certification for the licensing of a proposed hydroelectric project. See *Alcoa Power*, 643 F.3d at 972; *City of Tacoma* v. *FERC*, 460 F.3d 53, 67-68 (D.C. Cir. 2006). If the Commission

determines that the State has waived certification, it may then act on the application. See 33 U.S.C. 1341(a)(1) ("No license or permit shall be granted until the certification required by this section has been obtained *or has been waived*.") (emphasis added).

2. a. This case concerns the Klamath Hydroelectric Project (the Project), which is located primarily on the Klamath River in California and Oregon. Pet App. 4a-5a. The Project consists of seven hydroelectric developments and one non-generating dam. *Id.* at 22a. In 1954, FERC's predecessor, the Federal Power Commission, issued a 50-year original license for the Project to a predecessor of PacifiCorp. *Ibid.*; see *id.* at 5a. The license expired in 2006. *Id.* at 5a. Since that time, PacifiCorp has operated the Project under annual interim licenses. *Ibid.*; see *Klamath Water Users Ass'n* v. *FERC*, 534 F.3d 735, 737 (D.C. Cir. 2008).

On February 25, 2004, PacifiCorp filed an application with the Commission for a new license for the Klamath Project. Pet. App. 22a. The company sought to relicense five of the Project's generating developments and to decommission the other three, "lower" dams (including the non-generating dam). *Id.* at 5a; see *id.* at 22a. In connection with that application, in March 2006, PacifiCorp filed requests with the California Water Board (California) and Oregon Department of Environmental Quality (Oregon) for water quality certification under Section 401 of the Clean Water Act. *Id.* at 33a. In 2007, the Commission issued a final environmental impact statement in the relicensing proceeding. *Id.* at 22a. The Commission recommended adopting PacifiCorp's proposal, with additional environmental measures. *Ibid.*

In 2008, a group of parties began settlement discussions regarding the decommissioning of the dams. Pet. App. 5a. On March 5, 2010, PacifiCorp filed with the Commission the resulting Klamath Hydroelectric Settlement Agreement (Settlement Agreement). *Ibid.*; see *id.* at 22a-23a. The Settlement Agreement was signed by the Governors of the States of California and Oregon (collectively, States), PacifiCorp, the U.S. Department of the Interior, the U.S. Department of Commerce's National Marine Fisheries Services, several Native American tribes, and a number of local counties, irrigators, and conservation and fishing groups. *Id.* at 23a. The Settlement Agreement provided for decommissioning PacifiCorp's licensed Klamath River dams by 2020. *Ibid.*

As part of the Settlement Agreement, the States and PacifiCorp agreed to defer the one-year statutory limit for certification under Section 401 by annually withdrawing and resubmitting water quality certification requests. Pet. App. 5a; see *id.* at 24a. Specifically, the Settlement Agreement provides that "PacifiCorp shall withdraw and re-file its applications for Section 401 certifications as necessary to avoid the certifications * * * being deemed waived under the [Clean Water Act]." *Id.* at 6a (quoting Settlement Agreement 42). As contemplated by the Settlement Agreement, PacifiCorp annually withdrew and refiled its certification request eight times. *Id.* at 24a.

The Settlement Agreement's completion was contingent on federal legislation and action by the Secretary of the Interior. Pet. App. 23a; see *id.* at 6a. That federal legislation, however, was never enacted. *Id.* at 6a. As a result, in April 2016, some of the parties to the Settlement Agreement (the States, federal agencies, and two

tribes) entered into an amended agreement that created an alternative plan for decommissioning, in which licensing for the lower dams would be transferred to a newly formed corporation. *Id.* at 6a-7a. On September 23, 2016, PacifiCorp filed for an amended license to enable transfer of the dams to that corporation. *Id.* at 7a. The Commission approved dividing the dams into two projects, but has not yet approved transfer of the licensing of the lower dams to the new corporation. *Ibid.*

b. The Hoopa Valley Tribe's (Tribe) reservation is downstream from the Klamath Hydroelectric Project. Pet. App. 6a. The Tribe was not a party to the Settlement Agreement. *Ibid.* On May 25, 2012, the Tribe petitioned FERC for a declaration that the States had waived their Section 401 authority by failing to act within the Clean Water Act's one-year deadline, and that PacifiCorp had failed to diligently prosecute its license application for the Project. *Id.* at 7a. The Tribe requested that the Commission dismiss PacifiCorp's relicense application and direct PacifiCorp to decommission the Project. See *id.* at 24a.

The Commission denied the Tribe's petition. Pet. App. 21a-29a. The Commission "agree[d] with the Tribe that the circumstances of this case are far from ideal," insofar as "[t]he Commission could act on PacifiCorp's application but for the absence of water quality certification" from the States. *Id.* at 25a. The Commission further expressed "some sympathy" for the Tribe's argument that the States' "failure to act within one year and their agreement with PacifiCorp not to do so amount to waiver." *Id.* at 28a; see *ibid.* ("Indefinite delays in licensing proceedings do not comport with at least the spirit of the Clean Water Act."). But the Commission determined that "the express terms of the

Clean Water Act" precluded it from "issu[ing] and implement[ing] a new license until water quality certification has been issued." *Id.* at 25a. The Commission further stated that neither dismissing the license application nor finding waiver and issuing the license would resolve the impasse, and that either action would likely result in further delay and litigation. See *id.* at 26a-29a.

The Commission subsequently denied the Tribe's petition for rehearing. Pet. App. 30a-42a. As relevant here, the Commission reiterated that "continued delays in completing the water quality certification are inconsistent with Congress' intent" in enacting the one-year statutory deadline for state certification. *Id.* at 38a. While the Commission stated that "repeated withdrawal and refiling of applications for water quality certification" may, "in many cases," be "contrary to the public interest" and "clearly violat[e] the spirit of the Clean Water Act," the Commission reiterated its view that the States had not waived certification under "the letter of that statute." *Id.* at 39a. In the Commission's view, under Section 401's text, each withdrawal and resubmission started a new one-year period, and the States had not failed to act on any particular request within that period. *Id.* at 39a-40a.

3. The court of appeals granted the Tribe's petition for review and vacated the Commission's orders. Pet. App. 1a-16a.

The court of appeals first explained that because "FERC is not the agency charged with administering the [Clean Water Act], the Court owes no deference to its interpretation of Section 401 or its conclusion regarding the states' waiver." Pet. App. 8a (citing *Alcoa Power*, 643 F.3d at 972); see *id.* at 11a (explaining that the Environmental Protection Agency (EPA) is the

agency charged with administering the statute). Turning to the text of Section 401, the court found it "clear" that a full year is "the absolute maximum" period in which a State must act on a request. *Id.* at 10a-11a. Here, however, "[t]he pendency of the requests for state certification * * * has far exceeded the one-year maximum," because PacifiCorp had filed its original requests with the two States more than a decade before the court's decision. *Id.* at 11a.

The court of appeals rejected the contention that each withdrawal and resubmission of PacifiCorp's request for certification reset the statutory deadline. Pet. App. 11a-14a. The court explained that PacifiCorp did not withdraw its request and "submit[] a wholly new one" each year; the court therefore "decline[d] to resolve the legitimacy of such an arrangement," or to "determine how different a request must be to constitute a 'new request' such that it restarts the one-year clock." *Id.* at 12a. Instead, the court focused on the particular facts of this case—including that PacifiCorp "entered a written agreement with the reviewing states to delay water quality certification," and that each year, "PacifiCorp sent a letter indicating withdrawal of its water quality certification and resubmission of the very same" application. *Ibid.*; see *id.* at 13a.

The court of appeals determined that the States' "deliberate and contractual idleness defie[d] [the statute's] requirement" to act within a reasonable period of time, not to exceed one year. Pet. App. 13a. The court further found the "withdrawal-and-resubmission" arrangement inconsistent with the statutory purpose. *Ibid.* The court explained that, "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." *Ibid.* The court distinguished the Second Circuit's decision in *New York State Department of Environmental Conservation* v. *FERC*, 884 F.3d 450 (2018), which suggested that a State could request that an applicant withdraw and resubmit an application for certification, because that statement was "dicta." Pet. App. 13a-14a (emphasis omitted); see *New York State Dep't of Envtl. Conservation*, 884 F.3d at 455-456.

The court of appeals also disagreed with the Commission's view that finding waiver would be futile, because it would require the Commission to deny PacifiCorp's license, and PacifiCorp would then have to file a decommissioning plan, which would itself require state certification. Pet. App. 14a-16a. The court therefore vacated and remanded the Commission's orders and directed the agency to "proceed with its review of, and licensing determination for," the Project. *Id.* at 16a.

ARGUMENT

Petitioners contend (Pet. 23-30) that the court of appeals erred in holding that the States waived their authority to issue water quality certifications under Section 401 of the Clean Water Act by contractually agreeing to delay certification through the repeated withdrawal and resubmission of certification requests. Petitioners further argue (Pet. 16-22) that the decision below diverges from those of other courts of appeals. Those contentions lack merit. The court of appeals reasonably interpreted Section 401 of the Clean Water Act as applied to the facts of this case, and its decision does not conflict with any decision of this Court or of another court of appeals. Even if review of the question presented were otherwise warranted, it would be premature at this time because the EPA—the agency charged

with administering the Clean Water Act—is developing new regulations interpreting Section 401. The petition for a writ of certiorari should be denied.

1. Contrary to petitioners' contentions (Pet. 23-30), the court of appeals' decision violates neither the statutory text nor its purpose.

a. With respect to the text, the court of appeals reasonably determined, on the facts of this case, that the States "fail[ed] or refus[ed] 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); see Pet. App. 11a-13a. Specifically, the court relied on the States' entry into a written agreement with PacifiCorp "to delay water quality certification," and on PacifiCorp's resulting "withdrawal * * * and resubmission of *the very same*" application year after year, which resulted in a delay of more than a decade. Pet. App. 12a (emphasis added).

b. i. With respect to the statutory purpose, petitioners first contend (Pet. 23, 29-30) that the decision below undermines the important role that States play in addressing water pollution. Petitioners are correct (*ibid.*) that the Clean Water Act preserves a significant role for the States. Specifically, it affords States the authority to determine whether a discharge from a covered activity complies with applicable water quality requirements. Indeed, Section 401 enables a State to block federal approval by denying a request for certification: "No license or permit shall be granted if certification has been denied by the State." 33 U.S.C. 1341(a)(1).

The purpose of Section 401 is not, however, limited to "continu[ing] the authority of the State . . . to act to deny a permit." Pet. 29 (quoting *S. D. Warren Co.* v.

Maine Bd. of Envtl. Prot., 547 U.S. 370, 380 (2006)) (brackets in original). Section 401 also includes a waiver provision, the "purpose of [which] 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); see Pet. App. 13a ("Congress intended Section 401 to curb a *state's* 'dalliance or unreasonable delay.'") (quoting 115 Cong. Rec. 9264 (1969)).

The court of appeals reasonably concluded that the States' actions here were inconsistent with that statutory purpose. Pet. App. 12a-13a. The court focused on the facts of this case, in which the States had agreed by contract to extend the waiver period for more than a decade by annual withdrawal-and-resubmission of the same request for certification. *Ibid.* "By shelving water quality certifications," the court explained, "the states usurp FERC's control over whether and when a [hydropower] license will issue." *Id.* at 13a. The court continued that, "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." *Ibid.*; see *id.* at 12a (coordinated withdrawal-and-resubmission "serves to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project"). Thus, by rejecting the States' extended delay through coordinated, repeated withdrawal-and-resubmission of the same request, the court gave effect to the statute's purpose. Cf. *Constitution Pipeline Co.*, 162 F.E.R.C. ¶ 61,014, at ¶ 23 (2018) ("[S]tates and project sponsors that engage in repeated withdrawal and refiling of applications for water quality certifications

are acting, in many cases, contrary to the public interest and to the spirit of the Clean Water Act by failing to provide reasonably expeditious state decisions"); accord Pet. App. 28a (Commission stating that "[i]ndefinite delays in licensing proceedings do not comport with at least the spirit of the Clean Water Act."); see *id.* at 35a, 39a.

ii. Petitioners relatedly contend (Pet. 24-26) that by enforcing the statute's one-year waiver period, the court of appeals' decision leaves States unable to fulfill their role under the Clean Water Act. Accord States Amicus Br. 19. Specifically, petitioners suggest that one year will not be enough time for States to develop an adequate record and complete an appropriate analysis for complex projects; without the ability to extend the waiver period by the withdrawal-and-resubmission mechanism, petitioners maintain, States must either "render premature certifications" or "reflexively deny certification requests." Pet. 24.

As an initial matter, however, the court of appeals addressed only the "specific factual scenario presented in this case, *i.e.*, an applicant agreeing with the reviewing states to exploit the withdrawal-and-resubmission of water quality certification requests over a lengthy period of time." Pet. App. 13a; see *id.* at 3a, 10a, 11a, 12a, 14a. The court did not hold that an applicant may *never* reset the deadline for a State to act by withdrawing a request for certification and then submitting another request. *Id.* at 12a. Because PacifiCorp had sent a one-page letter to California and Oregon, each year, that indicated its withdrawal of the request and resubmission of the very same document, the court "decline[d] to resolve the legitimacy" of withdrawal and submission of a "new" request. *Ibid.* And it likewise

stated that it "need not determine how different a request must be to constitute a 'new request' such that it restarts the one-year clock." *Ibid.*

In any event, to the extent the statutory "one-year review period could result in incomplete applications and premature decisions," the court of appeals explained that "it is the role of the legislature, not the judiciary, to resolve such fears." Pet. App. 14a; *accord Constitution Pipeline Co.*, 168 F.E.R.C. ¶ 61,129, at ¶ 42 (2019) ("Arguments that the [court's] waiver conclusion is inconsistent with Congressional intent must be addressed to Congress, which alone has authority to revise federal legislation."). If the statutory one-year time limit provides insufficient time for States to consider certain certification requests, their proper recourse is with Congress, rather than the courts.

iii. Petitioners further assert (Pet. 26-28) that, by increasing the frequency with which the Commission may find that a State has waived its certification authority, the decision below will undermine the States' ability to protect the environment through certification. See also States Amicus Br. 14. Petitioners fail to recognize, however, that delays in certification can themselves threaten environmental harm. As the EPA has explained, "[p]erpetual delay of relicensing efforts * * * delays the implementation and enforcement of water quality requirements that have been updated and made more stringent in the years or decades since the last relicensing process." *Updating Regulations on Water Quality Certification*, 84 Fed. Reg. 44,080, 44,108 (Aug. 22, 2019). In this case, for example, the Project has continued to operate under annual interim licenses—based on terms set in 1954—during the period in which PacifiCorp repeatedly withdrew and resubmitted the same

certification application to the States. See Pet. App. 5a; 18 C.F.R. 16.18; see also *Hoopa Valley Tribe* v. *FERC*, 629 F.3d 209, 211-213 (D.C. Cir. 2010) (upholding Commission's policy of declining to impose interim conditions on an annual license unless a project threatens "irreversible environmental harm" or has "'unanticipated, serious impacts' on fishery resources," as well as its determination that those standards were not met in this case) (citation omitted).

Nor are petitioners correct (Pet. 26-28) that the Commission has improperly applied the court of appeals' decision to pending license applications, threatening environmental harm. Before the decision below, the Commission had explained its interpretation of Section 401 in several cases, including the 2018 *Constitution Pipeline* order. See States Amicus Br. 16-17 (discussing *Constitution Pipeline*). There (as in this case), the Commission determined that an applicant could restart the waiver period by withdrawing and resubmitting its request; while the Commission was "concerned that, in many cases," withdrawal and resubmission is "contrary to the public interest and to the spirit of the Clean Water Act," it found the "practice" not barred by "the letter of the statute." 162 F.E.R.C. ¶ 61,014, at ¶ 23. In that case, a pipeline twice withdrew and refiled its application for water quality certification, at the request of the New York Department of Environmental Conservation; the State ultimately denied the certification three years after the initial filing. See *id.* ¶ 18.

Following the decision below, the Commission sought a voluntary remand of its *Constitution Pipeline* order, which was then pending on judicial review in the D.C. Circuit, in order to consider the effect of the court of appeals' decision in this case. The Commission issued

a further order on remand on August 28, 2019. *Constitution Pipeline*, 168 F.E.R.C. ¶ 61,129. Considering the specific facts of that case, the Commission found waiver. The Commission explained that both the State and the applicant acknowledged that the State had asked the applicant to withdraw and resubmit its request, and that (as in this case) the parties' intent was "to exploit the withdrawal and resubmission of water quality certification requests" in order to avoid waiver, contrary to Section 401's "plain language." *Id.* ¶¶ 33-34, 37. The Commission declined to decide the question left open by the court of appeals here, *i.e.*, "how different a subsequent request must be to constitute a 'new request' such that it restarts the one-year clock," because the applicant had simply withdrawn and resubmitted its request in a two-page letter. *Id.* ¶¶ 38-39 (citation omitted).

Petitioners cite (Pet. 26-27) two other proceedings in which FERC has relied on the decision below in pending license applications. Those decisions do not suggest that the Commission has relied on the decision improperly, or that further review is warranted. In *Placer County Water Agency*, 167 F.E.R.C. ¶ 61,056 (2019) (cited by petitioners as "*Middle Fork American Project*," Pet. 26-27), the applicant and the California Water Resources Control Board had coordinated to withdraw and refile a request seven times between 2011 and 2019, "delay[ing] a certification decision by over six years." *Id.* ¶ 12; see *id.* ¶¶ 4-6. In addition, the record revealed that the applicant "did not ever file a new application," "because the parties only exchanged correspondence indicating that they would refile without actually doing so." *Id.* ¶ 18 & n.24.

In *National Fuel Gas Supply Corp.*, 164 F.E.R.C. ¶ 61,084 (2018) (cited by petitioners as "*Northern Access 2016 Project*," Pet. 21, 27), the Commission held—before the decision below—that the New York Department of Environmental Conservation had waived its certification authority where the parties agreed to alter the date "on which the application was deemed received" so as to extend the certification period. *Id.* ¶ 35 (citation omitted); see *id.* at ¶¶ 39-45. Following the court of appeals' decision in this case, the Commission denied the state agency's request for rehearing in *National Fuel Gas Supply Corp.* 167 F.E.R.C. ¶ 61,007 (2019). The Commission explained that the decision below supported its initial determination, insofar as the court of appeals in this case rejected "an agreement * * * reached to delay the state agency's action on a water quality certification application." *Id.* ¶ 11; see *id.* ¶¶ 12, 20.

2. Petitioners contend (Pet. 16) that the decision below "deepened an existing circuit conflict on the question of when and how states waive their Clean Water Act certification authority." See Pet. 4, 16-22. As already discussed, however, the court of appeals' decision was limited to the specific facts before it. In any event, the decision below does not contribute to any division in the courts of appeals that warrants this Court's review.

Petitioners' suggestion of a circuit split (Pet. 16-22) relies on decisions from the Second and Fourth Circuits. But those decisions focus on whether an application for certification must be "valid" or "complete" before Section 401's waiver period begins to run—not the permissibility of repeated withdrawals and resubmissions of the same request pursuant to an agreement between an applicant and a State. *Ibid.*

Petitioners first cite (Pet. 17-18) *AES Sparrows Point LNG, LLC* v. *Wilson*, 589 F.3d 721 (4th Cir. 2009). There, Maryland received a request for water quality certification on January 9, 2007, and denied the request on April 24, 2009. *Id.* at 725-726. The applicant sought review pursuant to the Administrative Procedure Act, 5 U.S.C. 701 and 706, contending that Maryland's denial was untimely and "therefore, not in accordance with law." *AES Sparrows Point*, 589 F.3d at 728. Deferring to a regulation of the Army Corps of Engineers (the relevant federal permitting agency in that case), the Fourth Circuit held that Section 401's one-year certification period did not begin to run until the Corps verified that the state certifying agency had received a "valid" request—in that case, on April 25, 2008. *Id.* at 729. Because Maryland denied the request for certification within one year of that determination, the court held that the State did not waive its authority under Section 401. *Ibid.*

In *New York State Department of Environmental Conservation* v. *FERC*, 884 F.3d 450 (2d Cir. 2018), the applicant submitted a request for water quality certification on November 18, 2015, which the relevant New York agency received on November 23, 2015. *Id.* at 453. The state agency informed the applicant that it deemed the application incomplete on multiple occasions. *Ibid.* When the agency had not acted on the application by July 21, 2017, the applicant asked the Commission to determine that the agency had waived its Section 401 authority. *Id.* at 454. The Commission held that it had, relying on the "plain language of Section 401—which states that the window for review opens upon 'receipt of such request'" by the certifying authority. *Ibid.* (quoting 33 U.S.C. 1341(a)(1)). The Second Circuit agreed,

stating that "[t]he plain language of Section 401 outlines a bright-line rule regarding the beginning of review: the timeline for a state's action regarding a request for certification 'shall not exceed one year' after 'receipt of such request.'" *Id.* at 455 (quoting 33 U.S.C. 1341(a)(1)). The Second Circuit thus rejected the argument that "th[e] time limit applies only for 'complete' applications." *Id.* at 456. The court did not address the Fourth Circuit's decision in *AES Sparrows Point*. See *id.* at 455-456.

Because the decision below did not address whether Section 401's one-year period for certification begins to run when the state agency first receives an application —or only when that application is deemed "valid" or "complete"—the decision below does not conflict with those of the Second and Fourth Circuits. Petitioners nonetheless point out (Pet. 19) that in rejecting New York's argument that the one-year period begins to run only when an application is "complete," the Second Circuit suggested that if the one-year period provides a State insufficient time to act, the State could deny an "incomplete" application "without prejudice" or "request that the applicant withdraw and resubmit the application." *New York State Dep't of Envtl. Conservation*,884 F.3d at 456. As the court of appeals recognized, however, that statement "was not central to the" Second Circuit's "holding" that the one-year period runs from the time of receipt. Pet. App. 14a. Instead, the Second Circuit's statement was a response, in "*dicta*," to concerns that a one-year review period could result in incomplete applications and premature state decisions. *Ibid.* In addition, in suggesting that withdrawal and resubmission might be permissible in some circumstances, the Second Circuit did not address the form

that such withdrawal and resubmission might take, consider what changes might render a second submission a new request, or determine how long a State and an applicant might delay review. The decision below, which focused on the facts of this case, see pp. 7-8, 10-13, *supra*, thus does not conflict with the Second Circuit's brief suggestion that withdrawal and resubmission might be possible in some circumstances.

3. Finally, even if the question presented otherwise warranted review, such review would be premature at this time. EPA—the agency charged with administering the Clean Water Act, see Pet. App. 11a—is currently engaging in rulemaking to revise its regulations implementing Section 401.

EPA's existing certification regulations are nearly 50 years old. In 1971, EPA promulgated regulations at 40 C.F.R. Pt. 121, which interpret a provision of the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, that is similar, but not identical, to Section 401. See 36 Fed. Reg. 22,487 (Nov. 25, 1971). EPA never updated the regulations to reflect Congress's enactment, in 1972, of the Clean Water Act. 84 Fed. Reg. at 44,081; see Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. Recognizing that the "[o]utdated" regulations are "causing confusion and uncertainty," in April 2019, the President issued an Executive Order that, *inter alia*, instructed EPA to initiate a rulemaking to update the regulations. Exec. Order No. 13,868, § 3, 84 Fed. Reg. 15,495, 15,496 (Apr. 15, 2019). The President directed EPA to propose new regulations within 120 days and to finalize the rule within 13 months, by May 2020. *Ibid.*

In response to the Executive Order, the EPA Administrator signed a proposed rule on August 8, 2019.

84 Fed. Reg. at 44,080. The proposed rule is EPA's "first comprehensive effort" to promulgate regulations implementing Section 401 and reflects the agency's "first holistic analysis of the statutory text, legislative history, and relevant case law informing the implementation of the [Clean Water Act] section 401 program." *Id.* at 44,084. EPA invited the public to comment on the proposed rule by October 21, 2019. *Id.* at 44,080.[1]

In the August 2019 proposed rule, EPA proposed to interpret Section 401 to impose a one-year outer limit on the time in which a State must act after it receives an applicant's request for certification. 84 Fed. Reg. at 44,120 (proposing new language at 40 C.F.R. 121.4(a)); *ibid.* (proposing new language at 40 C.F.R. 121.4(e)). With respect to the type of coordinated withdrawal-and-resubmission mechanism at issue in this case, EPA proposed a new regulation clarifying that the "certifying authority is not authorized to request the project proponent to withdraw a certification request or to take

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[1] In the Executive Order, the President also instructed EPA to issue new guidance on water quality certifications superseding its 2010 interim guidance. Exec. Order No. 13,868, § 3, 84 Fed. Reg. at 15,496. EPA issued that superseding guidance in June 2019. *Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes* 1 n.1 (June 7, 2019), https://www.epa.gov/sites/production/files/2019-06/documents/cwa_section_401_guidance.pdf (June 2019 Guidance). Cf. Pet. 8 n.2 (citing to the 2010 version of the guidance). The guidance is "intended to assist federal permitting agencies and states and tribes until the EPA promulgates a final rule updating its [Clean Water Act] Section 401 regulations." June 2019 Guidance 1 n.1.

any other action for the purpose of modifying or restarting the established reasonable period of time." *Ibid.* (proposing new language at 40 C.F.R. 121.4(f)).[2]

In proposing the new regulations, EPA "agree[d]" with the court of appeals' determination in this case "that 'Section 401's text is clear' that one year is the absolute maximum time permitted for a certification." 84 Fed. Reg. at 44,107-44,108 (quoting Pet. App. 10a). Thus, EPA proposed to interpret Section 401 "in a manner consistent with" the decision below. *Id.* at 44,086. But EPA also recognized that the decision in this case has limited reach. *Id.* at 44,091 (observing that the court of appeals "declined to 'resolve the legitimacy' of an alternative arrangement whereby an applicant may actually submit a new request in place of the old one") (quoting Pet. App. 12a). And EPA noted that "where the certifying authority and project proponent are working collaboratively and in good faith, it may be desirable to allow the certification process to extend" beyond the deadline set by Section 401. *Id.* at 44,108. EPA therefore solicited comments on "whether there is any legal basis to allow a federal agency to extend the reasonable period of time beyond one year from receipt." *Ibid.*

In light of EPA's ongoing rulemaking, review of the court of appeals' decision would not be warranted at this time even if the issue otherwise warranted review by this Court. Congress charged EPA with administering the Clean Water Act, and EPA therefore is responsible

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[2] EPA further observed that Congress left the terms "certification request" and "receipt" in Section 401 undefined, and it therefore proposed to establish uniform definitions of those terms. 84 Fed. Reg. at 44,101.

for developing regulations to ensure effective implementation of the Section 401 program. 33 U.S.C. 1251(d) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency * * * shall administer this chapter."). EPA has proposed regulations interpreting the relevant statutory language and invited public comments, and the Executive Order provides for the regulations to be finalized by May 2020. Once the regulations are finalized, federal agencies will be able to apply them in the first instance, followed by review in the lower courts. Given the ongoing rulemaking, review of the court of appeals' decision at this time would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JAMES P. DANLY
General Counsel
ROBERT H. SOLOMON
Solicitor
CAROL J. BANTA
Senior Attorney
Federal Energy Regulatory Commission

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