No. 19-257

IN THE
SUPREME COURT OF THE UNITED STATES

CALIFORNIA TROUT, *et al.*,
Petitioners,
v.

HOOPA VALLEY TRIBE, *et al.*,
Respondents.

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

BRIEF FOR THE STATES OF OREGON, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, IDAHO, ILLINOIS, INDIANA, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, RHODE ISLAND, SOUTH DAKOTA, UTAH, WASHINGTON, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Under Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), applicants for federal licenses or permits must secure state water quality certification before the relevant federal agency can approve the application. That certification requirement "shall be waived" 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)." *Id.*

The question presented is: Does a State waive its Section 401 certification authority if an applicant withdraws a certification request before the one-year period ends and subsequently resubmits one?

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This case has substantial implications for the interest of Oregon, California, and other States in state water quality certification for complex federally licensed projects. The decision of the court of appeals in this case, and actions taken by federal regulatory agencies to implement that decision, have resulted and will continue to result in States being deemed to have unwittingly waived their authority to certify that certain projects requiring federal licenses and permits comply with state water quality requirements. As a result, complex federal projects are likely to be approved without state certification even though they are inconsistent with those requirements, threatening significant environmental harm and degrading the quality of water needed for human health, fisheries, irrigation, and other uses.[1]

INTRODUCTION

The Clean Water Act recognizes and maintains States' historical responsibility for protecting water quality within their jurisdictions. One of the ways in which it does so is through the state certification process set forth in Section 401. Under that provision, as a precondition to federal approval of any permit or license "which may result in a discharge into the navigable waters," the applicant must first secure state certification that the project in question "will comply with" state water quality requirements. 33 U.S.C.

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[1] Counsel of record for all parties received timely notice of intent to file this brief under Rule 37.2(a).

§ 1341(a)(1). This state certification is "essential in the scheme to preserve state authority to address the broad range of pollution." *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006).

This case arises from lengthy and complex negotiations involving multiple parties—including federal agencies, the States of Oregon and California, Native American tribes, farmers, ranchers, conservation groups, fisherman, and a private company called PacifiCorp—regarding the Klamath Hydroelectric Project, a series of dams along the Klamath River in southern Oregon and northern California. *See generally* Pet. App. 4a-7a. PacifiCorp's license for operating the Project expired in 2006. Because the dams are more than 50 years old and are "not in compliance with modern environmental standards," *id.* at 5a, and because of the dams' significant adverse effect on salmon and other fish species in the river, the possible relicensing of the dam was controversial in the region.

In 2006, PacifiCorp sought Section 401 certification from Oregon and California for the dam relicensing. *Id.* at 11a. Under FERC's standard rules, PacifiCorp was automatically issued annual licenses while its relicense application was pending, 18 C.F.R. § 16.18, and FERC retained the authority to impose additional interim protections for the benefit of fish. *Hoopa Valley Tribe v.* FERC, 629 F.3d 209, 211 (D.C. Cir. 2010). Shortly thereafter, PacifiCorp entered negotiations with both States and other stakeholders to resolve the various issues pertaining to the possible

decommissioning or relicensing of the dams. While those negotiations were ongoing, rather than have its pending applications for state water quality certification denied by Oregon and California, PacifiCorp withdrew the certification requests and resubmitted substantially similar applications. Pet. App. 24a. PacifiCorp ultimately opted to seek to decommission most of the dams rather than relicense them. *Id.* at 5a.

In 2010, the parties entered into the Klamath Hydroelectric Settlement Agreement (KHSA), which envisioned that the dams would be decommissioned by 2020 and imposed interim environmental requirements on their continued operation until then. Pet. App. 5a. The agreement provided that PacifiCorp "shall withdraw and re-file its applications for Section 401 certifications as necessary to avoid the certifications being deemed waived under the CWA" while the parties continued to work toward decommissioning. *Id.* at 6a. That process continued, though it was complicated by Congress's failure to adopt implementing legislation that the parties anticipated would be forthcoming. *Id.*

Meanwhile, in 2012, the Hoopa Valley Tribe—which was not a party to the KHSA—sought a declaration from FERC that PacifiCorp had failed to diligently prosecute its relicensing application because Oregon and California had waived their Section 401 certification authority by failing to act on PacifiCorp's applications within one year. Pet. App. 7a; *see* 33 U.S.C. § 1341(a)(1). FERC denied that petition, con-

sistent with its longstanding view that an applicant's withdrawal of a state certification request before a year has elapsed precludes state waiver. *See* Pet. App. 7a. The tribe sought review in the U.S. Court of Appeals for the D.C. Circuit. *Id.* All other interested parties, including FERC and PacifiCorp, filed briefs in support of FERC.

The court of appeals nonetheless vacated FERC's order, holding that a State waives its certification 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. The court described the withdrawal-and-resubmission procedure utilized here as a "scheme" to "circumvent FERC's regulatory authority of whether and when to issue a federal license." *Id.*[2]

That holding, and the court's reasoning, is a source of serious concern for States. It threatens to cause significant harm to water quality across the country. The Act assigns States central responsibility for protecting water quality within their borders, but under the decision below, States may very well be deemed to have unwittingly waived their authority to certify whether numerous large-scale projects comply with state water quality requirements. Those projects

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[2] In 2016, FERC placed PacifiCorp's relicensing application in abeyance while it processes PacifiCorp's alternative applications intended to result in dam decommissioning. 155 FERC ¶ 61,271 (June 16, 2016). PacifiCorp's relicensing application remains in abeyance at FERC today.

would be exempted from vital state water quality requirements for decades, until their next federal relicensing, or permanently if no relicensing is required. That is especially troubling because the court of appeals' holding is at odds with the text of Section 401 and contradicts FERC's own longstanding interpretation. Nothing in the Act prevents an applicant from withdrawing a request for State water quality certification and resubmitting a similar, or even identical, request. This Court's review is warranted.

ARGUMENT

A. The court of appeals' decision thwarts the Clean Water Act's protection of state regulation of water pollution.

The Clean Water Act, 33 U.S.C. § 1251 *et seq.*, is a comprehensive statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* §1251(a). To accomplish that goal, the Act assigns "distinct roles for the Federal and State Governments." *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 704 (1994). That structure gives states, not the federal government, primary responsibility for regulating water quality. "It is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution" in the Nation's waters. 33 U.S.C. § 1251(b) (emphasis added); *see also PUD No. 1 of Jefferson County*, 511 U.S. at 707.

State regulation of water quality under the Act is comprehensive. Among other things, States are required to establish, subject to approval by the EPA, water quality standards for in-state waters. 33 U.S.C. § 1311(b)(1)(C); *id.* § 1313. These standards must protect public health and welfare, and must include a statewide anti-degradation policy. *Id.* § 1313(c)(2)(A); *see also id.* § 1313(d)(4)(B).

Section 401 is a key part of that overall statutory structure. As this Court has explained, "[s]tate certifications under §401 are essential in the scheme to preserve state authority to address the broad range of pollution." *S.D. Warren Co.*, 547 U.S. at 386. Section 401 requires "[a]ny applicant for a Federal license or permit" that "may result in any discharge into the navigable waters" to obtain state certification "that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title." 33 U.S.C. § 1341(a)(1).[3] "No license or permit shall be granted if certification has been denied by the State." *Id.* State certification must also "set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure" that the project complies with water quality requirements "and with any other appropriate requirement of State law." *Id.* § 1341(d).

[3] The provisions include a state's effluent limitations, 33 U.S.C. § 1311, 1312; water quality standards and implementation plans, *id.* § 1313; national standards of performance, *id.* § 1316; and toxic and pretreatment standards, *id.* § 1317. Collectively, these provisions form the backbone of a state's water quality programs.

Congress enacted Section 401 because it recognized that federal permits and licenses might otherwise operate to deprive states of their ability to regulate water pollution. As a result of the state certification requirement, however, "'[n]o polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standards.'" *S.D. Warren*, 547 U.S. at 386 (quoting 116 Cong. Rec. 8984 (1970) (Sen. Muskie)). Because States are the "prime bulwark in the effort to abate water pollution," Section 401 reserves to them "the power to block, for environmental reasons, local water projects that might otherwise win federal approval." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011).

Section 401 provides that a state may waive this certification authority if it "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." 33 U.S.C. § 1341(a)(1). The court of appeals in this case held that this waiver may occur even if an applicant withdraws its application before one year has passed and resubmits it. For the reasons discussed in the petition and below, that conclusion is incorrect as a matter of pure statutory interpretation. *See* Pet. 29-31; *infra* 11-14. But it is especially problematic when viewed against the backdrop of the structure of the Clean Water Act and its division of authority between the Federal Government and the States. *See* Pet. 23-26.

The court of appeals worried that "if allowed, the withdrawal-and-resubmission scheme" could be used to "usurp FERC's control over whether and when a federal license will issue." Pet. App. 13a. That concern is misplaced because, under the Act, States have the authority to preclude federal licensing by simply denying certification altogether. *See* 33 U.S.C. § 1341 ("No license or permit shall be granted if certification has been denied by the State."); *Alcoa*, 643 F.3d at 971. A State cannot be said to "usurp" power that Congress has expressly granted it. Indeed, even FERC itself did not express that concern, and did not argue that the States had waived their certification authority. Instead, FERC argued that "consistent with prior decisions of this Court and the Commission's prior decisions," California and Oregon did not fail to act on Pacificorp's application within one year. Brief for Respondent Federal Energy Regulatory Commission, 2014 WL 10741231, at 19 (Nov. 24, 2014). Moreover, as Hoopa Valley Tribe advocated, FERC retains the authority to find that an applicant has not diligently pursued a licensing application and deny it on that basis. *E.g.*, *Mountain Rhythm Resources,* 90 FERC ¶ 61,088 (Jan. 30, 2000).

Instead, the one-year time limit set forth in Section 401 was directed at a different concern: that a State might otherwise "indefinitely delay[] a federal licensing proceeding by failing to issue a timely water quality certification." *Alcoa*, 643 F.3d at 972. But that is emphatically not what happened in this case, nor is it generally why applicants and States sometimes utilize the withdraw-and-resubmit procedure.

Most 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. Occasionally, however, because of the size or complexity of the project, and because the federal licensing process itself may take several years, an applicant is unable to submit a complete request for certification at the outset. FERC has long recognized this reality and has condoned the practice of withdrawal and resubmission as an alternative to a State's outright denial of certification. *Barrish & Sorenson Hydroelectric Co., Inc.*, 68 FERC ¶ 62,161, 64,258 (Aug. 12, 1994); *Cent. Vt. Pub. Serv. Co.*, 113 FERC ¶ 61,167, 61,653 ¶ 19 (Nov. 17, 2005); *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 ¶ 23 (Jan. 11, 2018) ("We reiterate that once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under section 401(a)(1)."). In these cases, withdrawal and resubmission allows for the efficient use of both public and private resources, by deferring the development of conditions and criteria for federal projects until the extent of the projects and their full environmental impacts, including impacts on water quality, are known. The result is that projects that are approved include all of the necessary provisions, including water quality conditions, included in the federal license or permit.

The project at issue in this case is a good example of how a project may evolve substantially over the course of the federal licensing process, making it impossible at the outset to assess the impacts of the pro-

ject in its final form. The Klamath Hydroelectric Project is a federally licensed project consisting of seven hydroelectric developments and one non-generating dam on the Klamath River in southern Oregon and northern California. Pet. App. 22a. Because the dams are decades old, produce relatively little power, would not likely be of economic benefit under modern facilities and operational requirements, and are the source of significant environmental concern, the parties engaged in a lengthy negotiation that ultimately produced the KHSA, an agreement to decommission rather than relicense the dams. Pet. App. 4a-7a; *supra* 2-3. It made little sense to commit applicant and agency time and resources toward submitting and reviewing a water quality certification for an action that would likely not occur. Withdrawing and resubmitting the application thus served the public interest by avoiding expending resources on an application for relicensing the existing facilities even as the parties worked toward developing a different proposal for the states to review.

Applicants choose to withdraw and resubmit applications because they view it as being in their best interest. If the applicant believes a state agency is willfully delaying a project, the applicant always retains the option of not withdrawing its certification request and challenging any denial in court. But that rarely, if ever, occurs. Instead, applicants often prefer withdrawing a request to having it denied, which may delay and jeopardize funding for projects. Withdrawal allows the applicant to continue working with the state certification agency toward a certification with

mutually agreeable conditions. FERC's longstanding approval of the withdraw-and-resubmit procedure effectively acknowledged as much. In contrast, the D.C. Circuit's holding in this case, if allowed to stand, will force States to prematurely deny applications for complex projects in order to avoid being deemed to have waived their Section 401 certification authority.

B. The court of appeals' decision misconstrues the plain text of Section 401.

This Court should also grant the petition because the court of appeals' interpretation of the Clean Water Act is incorrect as a matter of pure statutory interpretation. As noted above, the waiver provision of the Act was intended to prevent states from exercising a pocket veto over a project through sheer inactivity. It was not intended to, and does not, prevent a multilateral agreement involving the Federal government, States, Tribes, and other interested parties of the type that was involved in this case. *See* Pet. 29-31.

Under Section 401, a state waives its certification authority only if it "fails or refuses to act on a request for certification, within a reasonable time period (which shall not exceed one year) after receipt of such request." 33 U.S.C. § 1341(a)(1). Nothing in that language suggests that a state is required to act on a request for certification that is no longer pending because it has been withdrawn. The far more compelling interpretation is that a withdrawn certification request—like other types of withdrawn requests for government approvals—"shall have no effect after the

date of withdrawal, and shall be considered as not having been made." 35 U.S.C. § 366 (describing withdrawn international patent application). Nor is it reasonable to ascribe to States a project applicant's decision to withdraw a certification request in order to avoid having the request denied. It is the action of the applicant—the very party that the time limitation is intended to protect—that results in a delay of water quality certification, not a failure or refusal by the state agency.

Nothing in the text of the statute prohibits an applicant from submitting and then withdrawing its request for certification before the one-year period for making a decision expires. *See, e.g.*, *Hardt v. Reliance Standard Life Ins.*, 560 U.S. 242, 251 (2010) (court "must enforce plain and unambiguous statutory language according to its terms"). Nor does anything in the text of the statute support the court of appeals' interpretation that resubmissions are "not new requests" unless they differ substantially from previous, withdrawn requests for certification. Under the plain text of Section 401, the period for state review commences upon "receipt of *such* request" (which refers back to the statutory language "a request for certification"). 33 U.S.C. § 1341(a)(1) (emphasis added); *see also King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (noting that "such" refers to "the *same*" object previously described). Section 401 does not speak in terms of "any request" or "any identical request," nor does it call for a judgment regarding how similar a withdrawn application is to a new application for the same project. There is simply no textual support for

the court of appeals' holding that submittal of a similar or even identical request is not "a request for certification" that triggers a new one-year certification period for states to act.

Instead of following the statutory text, the court of appeals incorrectly engaged in what appears to be a policy-driven interpretation of Section 401 based on its mistaken view of how Section 401 operates. *See supra* 8-10. This Court has already rejected a similar nontextual interpretation of Section 401. In *PUD No. 1 of Jefferson County*, 511 U.S. at 721, a state's authority under section 401 to regulate flow from a hydroelectric dam was challenged. The Court rejected the argument that it "should limit the State's authority" under Section 401 "because FERC has comprehensive authority to license hydroelectric projects." *Id.* The Court refused to "read implied limitations" into the States' 401 certification authority in order to protect FERC's comprehensive power over hydropower licensing. *Id.* at 723; *see also American Rivers, Inc. v. FERC*, 129 F.3d 99, 111 (2d Cir. 1997) (rejecting argument that FERC should have authority to review and reject a State's conditions of water quality certification in order to avoid incursion on FERC's authority over hydropower). The court of appeals here similarly erred by inappropriately reading words into Section 401 that Congress did not include, to further a policy not articulated in the Clean Water Act.

C. The court of appeals' decision threatens significant environmental harm from unintentional waiver of state authority.

The court of appeals' incorrect interpretation of Section 401 threatens to have far-reaching, adverse effects for States, both in the context of this case and more broadly. States have reasonably relied on FERC's decades-old practice of acknowledging that the withdrawal and resubmittal of an application starts a new clock for the states to act on Section 401 certification application in other matters. The court of appeals' abrupt reinterpretation of Section 401 has led applicants in many more cases to request that FERC declare that a state has waived its water quality certification authority, with the result that federal projects that are licensed far into the future will not have water quality provisions included as a condition of licensure. FERC and other federal agencies are also interpreting the opinion to deem *any* withdrawal and resubmission of an application for state water quality certification as a waiver of state authority, even—or perhaps especially—in permitting matters that were pending before the opinion issued. All of those determinations undermine comity between the state and federal governments and diminish state authority in a fashion that was never contemplated by Congress in adopting Section 401. Such an important question should be decided by this Court.

1. The court of appeals' decision threatens the KHSA.

As an initial matter, the decision below has injected significant uncertainty into the future of the KHSA, a painstakingly negotiated agreement regarding the future of the Klamath River, which is an important regional resource. *Supra* 2-3. In reliance on FERC's longstanding interpretation, the KHSA required that PacifiCorp follow the then-accepted practice of withdrawing and resubmittal of a Section 401 application to preserve the States' authority to act should the decommissioning plan under negotiation not come to fruition. While the court of appeals viewed that as a "scheme" to "circumvent FERC's regulatory authority of whether and when to issue a federal license" (which, again, overlooks States' underlying discretion to simply deny certifications), Pet. App. 10a, it was a contract term agreed to by the United States Departments of the Interior and Commerce, *id.* at 23a.[4] The possibility that Oregon and California will have waived their water quality certifications has upended expectations and left the KHSA parties unsure how to proceed. The question whether the KHSA waived state authority over water quality warrants this Court's review on its own.

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[4] Notably, the agency responsible for issuing Section 401 certifications in California was not a party to the KHSA, D.C. Cir. J.A. 409-18, and so was not a party to the PacifiCorp's contractual agreement to withdraw and resubmit its section 401 application.

2. FERC has adopted an exceptionally broad view of the court of appeals' decision that puts waterways across the nation at risk.

The importance of the question presented runs even deeper given how federal agencies have interpreted the court of appeals' decision. Since it was issued, FERC has relied on the decision to hold that states have waived their certification authority in a number of cases that go well beyond the facts of this case, where there was a written contract between States and an applicant that explicitly abated all state permitting reviews. In so doing, FERC has removed the states from the permitting process of many projects pending at the time of court of appeals' decision.

One example of FERC's broad interpretation of the court of appeals' opinion is *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129 (Aug. 28, 2019), for a 125-mile natural gas pipeline project in Pennsylvania and New York. There, FERC reversed its own decision finding that New York had not waived its certification authority when the applicant for the federal permit repeatedly withdrew and resubmitted the application. In January 2018, the commission denied a request for a declaration that waiver had occurred, based on its "longstanding interpretation that 'once an application for a Section 401 water quality certification is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under Section 401(a)(1).'" *Id.* ¶¶ 22-23.

On voluntary remand from the circuit court for the purpose of reconsideration in light of the decision in this case, FERC adopted an inflexible rule of waiver:

> The plain language of Section 401 establishes 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." The fact that a state is reviewing additional information does not toll the one-year waiver deadline. Clearly a state that acted one year and a day after it received an application would have waived certification. Likewise, a single withdrawal and resubmission could amount to waiver.

Id. ¶ 37.

In another case, *National Fuel Gas Supply Corporation Empire Pipeline, Inc.*, 167 FERC ¶ 61,007 (Apr. 2, 2019), involving a 99-mile natural gas pipeline in Pennsylvania and New York, FERC interpreted the court of appeals' decision as precluding applicants from agreeing to extend a State's deadline to allow the applicant to complete the certification request. There, the applicant submitted a request for water quality certification on March 2, 2016, but the applicant agreed with New York that it would be deemed submitted on April 8, 2016, allowing the state until April 7, 2017 to act. On the latter date, the state denied the request for certification, and the applicant

sought a declaration that the state had waived its authority over water quality. FERC decided that New York had waived its authority, and the state sought rehearing. The commission held that, notwithstanding the applicant's agreement, the lack of a state decision by March 2, 2017 "constituted a failure and refusal to act as contemplated by section 401," equating the state's action to "dalliance or unreasonable delay" of the type Congress sought to prevent. *Id.* ¶¶ 11-12.

A final example is *Placer County Water Agency*, 167 FERC ¶ 61,056 (Apr. 18, 2019), a project to relicense for 30 or 50 years a combined 235 megawatt hydroelectric facility on the Middle Fork of the American River in California. In that proceeding, the applicant petitioned the commission to declare that California had waived its certification authority. The applicant had withdrawn its request for water quality certification each year before a decision had been made in seven successive years. On each occasion, the applicant then resubmitted its request. FERC held that the court of appeals' opinion "appears applicable to all similarly-situated cases," including all cases in which withdrawal and resubmission was used. *Id.* ¶ 14. FERC so held even though it was the applicant that withdrew and resubmitted the applications, and it was the applicant that now sought to show that its actions resulted in the state waiving its authority. The state had not entered into any kind of agreement or scheme to delay certification indefinitely, and had

in fact issued certification the day before FERC issued its decision.[5]

The effect of FERC's action in these and other cases is to establish a bright-line rule: in FERC's view, withdrawal and resubmission is never, under any circumstances, a permissible outcome of a request for state water quality certification. The States are now faced with a bleak choice: (i) *issue* a water quality certification based on whatever limited information may be submitted by an applicant (and face legal challenges by opponents of the federal project, or by applicants who contend that any issuance and/or conditions of certification lack evidentiary support); (ii) *deny* requests for certification with the possibility of imperiling worthy projects (and face legal challenges by applicants challenging the denial); or (iii) *take no action* and allow major federal projects to proceed with no state oversight. And for projects for which a request for certification has been withdrawn, a State is not given even that bleak choice—FERC deems State certification waived, even if the State has issued or denied certification on a resubmitted request before FERC makes a decision on licensure. Section 401 of the Clean Water Act was not intended to require such results.

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[5] State of California, State Water Resources Control Board, *In the Matter of Water Quality Certification for the Placer County Water Agency, Middle for American River Hydroelectric Project* (Apr. 17, 2019), *available at* https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/mfar2079/wqc.pdf

3. Other federal agencies are also adopting broad views of waiver that could result in irreparable harm to state waters.

In the wake of the court of appeals' decision, other agencies have followed FERC's lead in establishing an inflexible rule that has the effect of eliminating the role of the states in water quality permitting for federal projects.

For example, the lead federal agency for the Clean Water Act, the Environmental Protection Agency (EPA), has issued guidance and proposed draft rules that will limit state participation in setting water quality limits for federally permitted projects. The guidance reverses EPA's previous view that only a "complete application" triggers a state's one-year deadline and, citing the court of appeals' decision in this case, asserts that "the timeline does not pause or stop for any reason." EPA, *Clean Water Act Section 401 Guidance For Federal Agencies, States and Authorized Tribes* 3 (June 7, 2019).[6] The proposed regulations similarly would codify the broadest possible reading of the court of appeals' decision: "[T]he EPA proposes to conclude that a certifying authority must act on a section 401 certification within a reasonable period of time which shall not exceed one year and that *there is no tolling provision to stop the clock at any time*." 84 Fed. Reg. 44,080, 40,099 (2019) (emphasis added). EPA's proposed rules thus would abrogate

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[6] *Available at* https://www.epa.gov/sites/production/files/2019-06/documents/cwa_section_401_guidance.pdf

established agency practices and court interpretations that have developed over the nearly 50 years since Section 401 was adopted.

Thus, EPA and federal permitting agencies are using the decision below as a legal justification to fundamentally change the way in which decisions on complex federal projects are made. A state could simply deny a certification request whenever an application is incomplete and the applicant cannot promptly remedy the problem, thereby ensuring that the federal project could not go forward absent years of litigation. But that is hardly a satisfactory solution for anyone. Before the court of appeals' decision in this case, the State could instead work with the applicant and other stakeholders to ensure that it had the necessary information to determine appropriate conditions of approval. Such a process is not contrary to the intent of Congress or the text of Section 401. But that option has been removed, leaving the States with the choice of denying certification and defending the resulting litigation; issuing certification with conditions likely to be challenged by project opponents as inadequate or by project applicants as speculative; or waiving certification. That is not the robust role for the States that the Clean Water Act requires.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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