ORAL ARGUMENT SCHEDULED APRIL 11, 2022
Nos. 21-1120, 21-1121

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TURLOCK IRRIGATION DISTRICT AND MODESTO IRRIGATION DISTRICT,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; TUOLUMNE RIVER TRUST; AMERICAN WHITEWATER; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; FRIENDS OF THE RIVER; SIERRA CLUB AND ITS MOTHER LODE CHAPTER,
Intervenors for Respondent.

On Petition for Review of an Order of the Federal Energy Regulatory Commission, Project Nos. P-2299, P-14581

JOINT BRIEF OF INTERVENORS TUOLUMNE RIVER TRUST, AMERICAN WHITEWATER, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, FRIENDS OF THE RIVER, AND SIERRA CLUB AND ITS MOTHER LODE CHAPTER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), counsel for intervenors Tuolumne River Trust, American Whitewater, California Sportfishing Protection Alliance, Friends of the River, and Sierra Club and its Mother Lode Chapter ("Conservation Group Intervenors") hereby submit the following Certificate as to Parties, Rulings, and Related Cases.

A. Parties and Amici

- *Respondents*: The Federal Energy Regulatory Commission
- *Petitioners*: Turlock Irrigation District; Modesto Irrigation District
- *Intervenors*: Tuolumne River Trust; American Whitewater; California Sportfishing Protection Alliance; Friends of the River; Sierra Club and its Mother Lode Chapter; California State Water Resources Control Board
- *Amici*: Kings River Conservation District; Merced Irrigation District, Missouri Basin Municipal Power Agency, d/b/a Missouri River Energy Services; National Hydropower Association; Nevada Irrigation District; Northwest Hydroelectric Association; Public Utility District No. 1 of Snohomish County, Washington; Rye Development, LLC; San Diego County Water Authority; South Feather Water and Power Agency; Yuba Water Agency; Washington;

Colorado; Connecticut; District of Columbia; Illinois; Maine; Maryland; Minnesota; New Jersey; New Mexico; New York; North Carolina; Oregon; Vermont; Commonwealth of Massachusetts; Commonwealth of Pennsylvania; Commonwealth of Virginia.

B. Rulings Under Review

- *Turlock Irrigation District & Modesto Irrigation District*, "Declaratory Order On Waiver Of Water Quality Certification," Docket Nos. 2299-082, 14581-002 174 FERC ¶ 61,042 (Jan. 19, 2021), JA2012-2032.
- *Turlock Irrigation District & Modesto Irrigation District*, "Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration," Docket Nos. 2299-082, 14581-002, 174 FERC ¶ 62,175 (Mar. 22, 2021), JA2174-2175.
- *Turlock Irrigation District & Modesto Irrigation District*, "Order Addressing Arguments Raised On Rehearing," Docket Nos. 2299-082, 14581-002, 175 FERC ¶ 61,144 (May 21, 2021), JA2176-2194.

C. Related Cases

This case has not previously been before this Court. The following petitions have been docketed and consolidated in this Court: *Turlock Irrigation District et al. v. FERC*, No. 21-1121; *Turlock Irrigation District et al. v. FERC*, No. 21-1120.

Turlock Irrigation District & Modesto Irrigation District v. State Water Resources Control Board & Eileen Sobeck, No.CV63819 (Cal. Super. Ct. for Tuolumne Cnty., filed May 11, 2021) is a related case.

Dated: February 23, 2022

/s/ Lena H. Hughes
Lena H. Hughes

Counsel for Intervenor Tuolumne River Trust

/s/ Julie Gantenbein (w/ permission)
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Counsel for Intervenors American Whitewater, California Sportfishing Protection Alliance, Friends of the River, and Sierra Club and its Mother Lode Chapter

CORPORATE DISCLOSURE STATEMENT FOR TUOLUMNE RIVER TRUST

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Cir. R. 26.1, intervenors Tuolumne River Trust submits this Corporate Disclosure Statement.

TUOLUMNE RIVER TRUST

Tuolumne River Trust is a non-profit organization founded in 1981 to promote stewardship of the Tuolumne River through education, community outreach, restoration projects, and outdoor adventures for its members along the Tuolumne River. Tuolumne River Trust is incorporated and organized under the laws of California. Tuolumne River Trust certifies that it has no parent corporation and that no publicly-held corporation owns 10% or more of its stock.

Dated: February 23, 2022

/s/ Lena H. Hughes
Lena H. Hughes

Counsel for Intervenor Tuolumne River Trust

CORPORATE DISCLOSURE STATEMENT FOR AMERICAN WHITEWATER, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, FRIENDS OF THE RIVER, AND THE SIERRA CLUB AND ITS MOTHER LODE CHAPTER

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Cir. R. 26.1, intervenors American Whitewater, California Sportfishing Protection Alliance, Friends of the River, and The Sierra Club and Its Mother Lode Chapter submit this Corporate Disclosure Statement.

AMERICAN WHITEWATER

American Whitewater is a non-profit corporation incorporated and organized under the laws of the State of Missouri. It does not have a parent corporation and is not publicly held.

CALIFORNIA SPORTFISHING PROTECTION ALLIANCE

California Sportfishing Protection Alliance is a non-profit corporation incorporated and organized under the laws of the State of California. California Sportfishing Protection Alliance does not have a parent corporation and is not publicly held.

FRIENDS OF THE RIVER

Friends of the River is a non-profit corporation incorporated and organized under the laws of the State of California. Friends of the River does not have a parent corporation and is not publicly held.

THE SIERRA CLUB AND ITS MOTHER LODE CHAPTER

The Sierra Club and its Mother Lode Chapter is a non-profit corporation incorporated and organized under the laws of the State of California. The Sierra Club and its Mother Lode Chapter do not have a parent corporation and is not publicly held.

Dated: February 23, 2022

/s/ Julie Gantenbein (w/ permission)
Julie Gantenbein

Counsel for Intervenors American Whitewater, California Sportfishing Protection Alliance, Friends of the River, and Sierra Club and its Mother Lode Chapter

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GLOSSARY

Board	Intervenor State Water Resources Control Board
Br.	Brief of Petitioners
CA-Act	California Environmental Quality Act
Conservation Group Intervenors	Intervenors Tuolumne River Trust, American Whitewater, California Sportfishing Protection Alliance, Friends of the River, and Sierra Club and its Mother Lode Chapter
CWA	Clean Water Act
Declaratory Order	*Turlock Irrigation District & Modesto Irrigation District*, "Declaratory Order On Waiver Of Water Quality Certification," Docket Nos. 2299-082, 14581-002 174 FERC ¶ 61,042 (Jan. 19, 2021), JA2012-2032.
Districts	Petitioners Turlock and Modesto Irrigation Districts
EPA	Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
FERC Br.	Brief of Respondent
Hydropower Amici Br.	Brief of Amici Kings River Conservation District; Merced Irrigation District, Missouri Basin Municipal Power Agency, d/b/a Missouri River Energy Services; National Hydropower Association; Nevada Irrigation District; Northwest Hydroelectric Association; Public Utility District No. 1 of Snohomish County, Washington;

	Washington; Rye Development; San Diego County Water Authority; South Feather Water and Power Agency; Yuba Water Agency
NEPA	National Environmental Policy Act

STATUTES AND REGULATIONS

All pertinent statutes and regulations are contained in the addenda to the Briefs for Petitioners and Respondent.

INTRODUCTION

These petitions present a straightforward statutory interpretation question. The Clean Water Act ("CWA") requires an applicant for certain federal licenses to obtain a certification from a state that the proposed project will comply with the state's water quality standards. If the state "fails or refuses to act" on a water-quality-certification request within a specified time, however, the certification requirement is "waived." 33 U.S.C. § 1341(a)(1). Here, intervenor California State Water Resources Control Board ("Board"), the agency responsible for water quality certifications in California, *denied* petitioners Turlock and Modesto Irrigation Districts' ("Districts") requests within the specified time without prejudice to the Districts filing later requests. FERC thus correctly concluded that the Board had "acted" on the Districts' requests and so the CWA's certification requirement had not been waived.

In seeking this Court's review, the Districts press for a far more complicated conclusion. Rather than ask whether the state "acted" as the statute commands, the Districts would ask whether the state's actions were a secret "scheme to evade" the statutory time-limit. That approach has nothing to recommend it. Most fundamentally, it is foreclosed by the text of the statute. It would also be a nightmare to administer—the Districts admit that their proposed "scheme" inquiry would require consideration of "[m]ultiple factors and fact-specific scenarios."

Br. 46-47. It would also shift challenges to state denials of water quality certifications from state courts, where they belong, to FERC and this Court, as federal license applicants would attempt to paint any denials as "schemes to evade," just like the Districts do here. Nor is the approach required by this Court's decision in *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019). That decision hinged on the state's contractual refusal to act in finding a waiver. Because the Board acted here, no such waiver occurred.

BACKGROUND

A. Legal Background

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *S.D. Warren Co. v. Maine Bd. of Env't Prot.*, 547 U.S. 370, 373 (2006). While the CWA "establishes a regulatory 'partnership' between the Federal Government and the source State," *International Paper Co. v. Ouellette*, 479 U.S. 481, 489-90 (1987), the states remain "the prime bulwark in the effort to abate water pollution." *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 393-94 (D.C. Cir. 2017).

"One of the primary mechanisms through which the states may assert the broad authority reserved to them is the certification requirement set out in section 401" of the CWA. *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (citing 33 U.S.C. § 1341). That section "requires an applicant for a federal license or

permit to conduct any activity 'which may result in any discharge into the navigable waters'" to obtain a water quality "certification" from the state in which the discharge originates. *PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 707 (1994). In that certification, the state certifies that the applicant's activity "will not violate certain water quality standards, including those set by the State's own laws." *S.D. Warren Co.*, 547 U.S. at 374. But "[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" "shall be waived with respect to such Federal application." 33 U.S.C. § 1341(a)(1).

B. Factual Background

The Districts operate two hydroelectric projects located on the Tuolumne River—the Don Pedro Project and the La Grange Project. *Turlock Irrigation District & Modesto Irrigation District*, "Declaratory Order On Waiver Of Water Quality Certification," 174 FERC ¶ 61,042, ¶ 1 (Jan. 19, 2021) ("Declaratory Order"), JA2012. By altering the natural hydrologic flow regime of the river and blocking fish passage, those projects adversely affect the health of the Tuolumne River watershed, its biological and aesthetic resources, and its recreational opportunities. JA0692-0693; JA1245, JA1293-1294, JA1562-1563, JA1564; *see also S.D. Warren*, 547 U.S. at 385. For instance, recreational opportunities in the

Tuolumne River watershed depend upon healthy populations of fish and other aquatic species. JA0692. Yet, because of insufficient flows, the numbers of anadromous fish species currently residing in the watershed are extremely depressed. JA0693; JA1330. The projects thus directly implicate the interests of Conservation Group Intervenors, which are non-profit organizations committed to protecting the nondevelopmental values of the Tuolumne River watershed, and their members, who use the river. JA753-819; JA1725-1779; JA1999-2011.

Under the Federal Power Act, FERC has authority to license certain non-federal hydroelectric facilities for terms of 30 to 50 years. 16 U.S.C. § 791a *et seq*. A licensee is required to reapply for a new license two years before license expiration. 16 U.S.C. § 808(b)(1). In April 2014, the Districts applied for a new license to continue operating the Don Pedro Project as its existing license was set to (and did) expire in April 2016. Declaratory Order ¶2, JA2012-2013. In October 2017, the Districts filed for an original license for the already constructed, but unlicensed La Grange Project after FERC staff found that it requires licensing as well. *Id*. ¶3, JA2013.

As both projects "may result in any discharge into the navigable waters" (33 U.S.C. § 1341(a)(1)), the Districts were also required to obtain water quality certifications from the Board. On January 26, 2018, the Districts applied for water quality certifications from the Board for both projects. Declaratory Order ¶5,

JA2013-2014. In their applications, the Districts announced their intention to serve as "[l]ead [a]gencies" for purposes of completing environmental review under the California Environmental Quality Act ("CA-Act"). JA0707-0712; JA0701-0706. Under CA-Act, "'[l]ead agency' means the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment." Cal. Pub. Res. Code § 21067. Until a June 2020 amendment, the Board could not issue a Section 401 certification before the lead agency had completed the CA-Act process. Cal. Pub. Res. Code. §§ 21006, 21080; *see* Cal. Water Code § 13160.

On January 24, 2019—within one year of receiving the applications—the Board denied the Districts' applications without prejudice. Declaratory Order ¶6, JA2014; JA0820-0822. The Board explained that FERC had not completed review under the National Environmental Policy Act ("NEPA"), that the Districts had not started the CA-Act process, and that the Board could not issue certification before completion of the CA-Act process. Declaratory Order ¶6, JA2014; JA0820-0822.

On April 22, 2019, the Districts again requested water quality certifications for the projects. Declaratory Order ¶8, JA2014-2015. On April 20, 2020—again within one year of receiving the Districts' requests—the Board denied the requests without prejudice. *Id.* ¶9, JA2015. The Board noted that it "may not issue a certification until the requirements for compliance with [CA-Act] are met." *Id.*

The Board also concluded that "the proposed activity does not comply with applicable water quality standards and other appropriate requirements." *Id.*

The Districts submitted third requests for water quality certifications, but withdrew them in November 2020. *Id.* ¶¶10-11, JA2015-2016. On January 15, 2021, the Board—in accordance with an amendment to the California Water Code that authorized the Board to issue certifications before completion of CA-Act in some cases—issued final water quality certifications for the projects. JA2033("Final Certification"). The CWA allows state certifications to set conditions on the proposed activity. 33 U.S.C. § 1341(d). Consistent with the CWA, the Board's Final Certification set several conditions for the Districts' continued operation of the projects. JA2077-2127. One condition requires the Districts to maintain instream flows of 200 cubic feet per second from July through January. JA2054. These flows are necessary "to maintain recreational beneficial uses" of the river and to protect the river's health. JA2054, JA2079-2080. Without them, the river's water temperature would rise; its water quality would drop; predatory fish species would proliferate while the salmon population would dwindle; and access to recreational boating would be slashed. JA2054-2055.

C. Procedural History

In October 2020, the Districts petitioned FERC for an order declaring that the Board had waived its authority under Section 401(a)(1) of the CWA to issue

water quality certifications for the Don Pedro and La Grange Projects by denying the Districts' applications without prejudice in January 2019 and April 2020. Declaratory Order ¶1, JA2012. Conservation Group Intervenors, as well as the Board, opposed the petition. JA1690-1724; JA1725-1779; JA1999-2011.

On January 19, 2021, FERC denied the petition. Declaratory Order ¶1, JA2012. It concluded that the Board did not waive its authority under Section 401(a)(1) because it acted on the Districts' requests within a reasonable time by denying them without prejudice. *Id.* ¶¶20-35, JA2020-2029.

On May 21, 2021, the Districts filed petitions for review. On July 16, 2021, this Court granted Conservation Group Intervenors' motions to intervene. Order, Doc. No. 1906725.

SUMMARY OF ARGUMENT

FERC correctly held that the Board did not waive Section 401's certification requirement because the Board "acted" on the Districts' water-quality-certification requests within a reasonable time by denying them without prejudice within a year of receipt. The text, structure, and purpose of Section 401 all support that straightforward conclusion.

The Districts' counterarguments are meritless. Their theory that a "denial" of certification constitutes a "waiver" of the certification requirement when the denial is supposedly a scheme to evade Section 401's deadline is irreconcilable

with the statute's text. None of the cases the Districts cite supports their interpretation as each of them turned on a state's refusal or failure to act—not illicit intent. The Districts' policy arguments cannot overcome the statute's text, and are mistaken in any event.

ARGUMENT

FERC CORRECTLY HELD THAT THE BOARD DID NOT WAIVE SECTION 401'S CERTIFICATION REQUIREMENT

A. The Board "Acted" On The Districts' Requests And Thus Did Not Waive Section 401's Certification Requirement

1. The plain language of Section 401's waiver provision shows the Board did not waive certification

Under the plain language of Section 401's waiver provision, the Board did not waive Section 401's certification requirement. When a statute's terms are "unambiguous," a court's "inquiry begins with the statutory text, and ends there as well." *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 631 (2018) (citation omitted). The language of Section 401's waiver provision is unambiguous. It states:

> [i]f the State, interstate agency, or Administrator, as the case may be, *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) (emphasis added). Because "act" is not defined in the statute, it has its ordinary meaning, which is either "to take action" *or* "to give a

decision or award." "Act," *Webster's New Collegiate Dictionary* (1971).[1] In other words, "Section 401 requires *state action* within a reasonable period of time, not to exceed one year." *Hoopa Valley Tribe*, 913 F.3d at 1105 (emphasis added). Here, the Board timely "acted" within any ordinary meaning of that term because it denied the Districts' requests within a year of receipt. JA0820-0822; JA1158-1161; JA1162-1165. Under the plain language of Section 401, the Board did not waive its authority; it exercised it.

That the Board denied the Districts' requests *without prejudice* alter the conclusion that denial is an action. Section 401 contains no language delimiting what types of denials qualify as "actions." It would be especially odd to conclude that denials without prejudice are not possible "actions" since denials of water quality certifications typically are without prejudice to renewed requests, as denials *with* prejudice are rare. *See, e.g.,* Complaint at ¶163, *Lighthouse Res. Inc. v. Inslee*, No. 18-cv-5005 (W.D. Wash. Jan. 3, 2018) (challenging Washington Department of Ecology's denial "with prejudice" as unprecedented).[2] It is thus

[1] As noted below, the Fourth Circuit has suggested that Section 401 uses "to act" in the former sense, not the latter. *Infra* pp. 17-18. Conservation Group Intervenors agree with the Fourth Circuit's analysis. But regardless of which meaning applies, the Board's denial satisfies it.

[2] In fact, the EPA's since-vacated Section 401 Rule would have prohibited with-prejudice denials—making without-prejudice denials the *only* permissible type of denials. *See* 40 C.F.R. § 121.8, vacated by *In re Clean Water Act Rulemaking,* - F. Supp.3d--, 2021 WL 4924844 (N.D. Cal. 2021).

unsurprising that the Second Circuit has twice concluded that a state "acts" within the meaning of Section 401 when it denies a water-quality-certification request without prejudice. *See New York State Dep't of Env't Conservation v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018) (*New York I*); *New York State Dep't of Env't Conservation v. FERC*, 991 F.3d 439, 450 n.11 (2d Cir. 2021) (*New York II*).

Nor do a state's grounds for denial—substantive or procedural—affect whether the denial is an "action." Nothing in the statute suggests that a state has failed to "act" when it has denied the request for procedural inadequacies. 33 U.S.C. § 1341(a). In fact, the statute says nothing about the grounds on which states may deny water-quality-certification requests, Declaratory Order ¶32, JA2027, and largely leaves it to the states to establish the certification process. *See Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 754 (4th Cir. 2019) ("State Agencies have broad discretion when developing the criteria for their Section 401 Certification"). For that reason, as FERC recounts (at 13), courts have repeatedly concluded that states may, consistent with applicable state law, deny water-quality-certification requests on procedural grounds. *See, e.g., Bangor Hydro-Elec. Co. v. Bd. of Env't Prot.*, 595 A.2d 438, 443 (Me. 1991) ("Because Bangor Hydro did not provide the information within the time allotted for review the Board properly denied certification.").

Any other result would leave states without suitable recourse in the face of deficient water-quality-certification requests. States are not meant to certify that a proposed activity will comply with applicable standards when they have not been provided sufficient information to make that determination. FERC Br. 34-35. But such curable deficiencies typically do not warrant preclusive denials either. And if denials without prejudice *waived* the certification requirement, applicants could bypass their Section 401 burden just by submitting deficient requests. *See* FERC Br. 35 ("the Districts' proposed rule could incentivize gamesmanship"). Nothing in the language of Section 401 puts states in such a counterintuitive bind.

2. The structure of Section 401 demonstrates that no waiver occurred

Treating a state's denial as a waiver would not only deprive the waiver provision of its plain meaning, but would also contradict the structure of Section 401. In addition to explaining when its certification requirement is waived, Section 401 says the following:

> No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

33 U.S.C. § 1341(a)(1). The statute thus expressly distinguishes between a waiver and a denial. *Cf. Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 652

(4th Cir. 2018) (holding that "under Section 1341(a)(1), 'certification' does not encompass 'waiver,' as the certification requirements do not even apply when a state has waived its certification authority"). While a waiver paves the way for a federal approval, a denial blocks it. Interpreting a denial of certification as itself a waiver illogically pits the provisions of Section 401 against themselves.

3. Denials without prejudice serve Section 401's purpose

The plain meaning of the waiver provision also coheres with Section 401's purpose. *See* FERC Br. 34 (explaining that denials without prejudice within a year effectuate Section 401's purpose). Under the CWA, the states are the "prime bulwark in the effort to abate water pollution." *Keating*, 927 F.2d at 622 (citation omitted). And "[o]ne of the primary mechanisms through which the states may assert the broad authority reserved to them is the certification requirement set out in section 401 of the Act." *Id.* "Through this requirement, Congress intended that the states would retain the power *to block*, for environmental reasons, local water projects that might otherwise win federal approval." *Id.* (emphasis added).

Congress included Section 401's waiver provision not to force state certifications of ill-supported requests, but to ensure that federal applications were not frustrated by "sheer inactivity by the State." H.R. Rep. No. 92-911, at 122 (1972); *see New York II*, 991 F.3d at 448 (explaining that Congress "require[d] affirmative state action 'within a reasonable period of time' in order to prevent

delay due to a certifying state's passive refusal or failure to act."). When a state *denies* an applicant's water quality certification—whether because the project could never meet the state's water quality standards or because the applicant has failed to provide sufficient information to show that it could—it is the state's deliberate decision-making, not "sheer inactivity," that forestalls the project.

B. The Districts' Counterarguments Are Without Merit

1. The Districts' theory equating "denial" with "waiver" cannot be squared with the text of Section 401

The Districts do not attempt to square their waiver argument with the text of Section 401. In fact, while the Districts admit that "section 401's exclusive focus" is "the State's lack of action," (at 36) they never explain how a denial is a failure to act. For that reason alone, their challenge to FERC's decision should fail.

For their part, the Districts' amici ("Hydropower Amici") mistakenly argue that that the Board failed to act on the Districts' requests because its denials without prejudice were not "final, appealable" actions on those requests. Hydropower Amici Br. 19-20. They are doubly wrong.

First, Section 401 does not refer to "final, appealable" action; instead, it deems only a state's failure or refusal "to act" to be a waiver. 33 U.S.C. § 1341(a)(1). Accepting Hydropower Amici's interpretation "would require adding terms to the statute that Congress has not included." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 974 (D.C. Cir. 2011). It would also

require federal agencies and courts to dive into state law questions of appealability just to decide whether the state has "acted." Hydropower Amici's reliance on EPA's since-vacated Section 401 Rule for support (at 19) is puzzling because under that rule *only* denials without prejudice would have been allowed. *See* 40 C.F.R. § 121.8, vacated by *In re Clean Water Act Rulemaking,* -- F. Supp.3d--, 2021 WL 4924844 (N.D. Cal. 2021); *see also Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210, 42,249-50 (July 13, 2020).[3]

Second, Hydropower Amici fail to show that denials without prejudice are nonfinal or nonappealable as a matter of all relevant states' laws. To be sure, denials without prejudice do not preclude the applicant from reapplying. But they are nonetheless the conclusion of the state's decision-making on the application under review, and such denials have been appealed. *See, e.g., Long Lake Energy Corp. v. N.Y. State Dep't of Env't Conservation*, 164 A.D.2d 396, 400 (N.Y. App. Div. 1990) ("[R]espondent's decision to deny the four [water quality certification] applications, albeit without prejudice, had its impact upon petitioner at that point and was final and binding.").

[3] Conservation Group Intervenors incorporate by reference FERC's arguments explaining why EPA's since-vacated Section 401 Rule does not support the Districts' position. *See* FERC Br. 47-49.

2. The Districts' cited cases turned on refusal or failure to act

Rather than grapple with the text of Section 401, the Districts rely on inapposite case law. Br. 32-35, 38-41. The Districts' cited cases have a common feature distinguishing them from this case: the entity charged with acting *refused or failed to act* within the time prescribed. Here, in contrast, the Board acted on each of the Districts' requests within the statutorily-prescribed "reasonable period of time" by denying each of those requests within a year of receipt. 33 U.S.C. § 1341(a)(1).

Chief among the decisions misconstrued by the Districts is this Court's decision in *Hoopa Valley*. There, California and Oregon had entered into a written agreement with the applicant to "defer the one-year statutory limit for Section 401 approval by annually withdrawing-and-resubmitting the water quality certification requests." *Hoopa Valley*, 913 F.3d at 1101. On a petition for review of FERC's decision finding no waiver, this Court "answer[ed] a single issue: whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year." *Id.* at 1103. The Court found that it does. The Court emphasized that "Section 401 requires state action within a reasonable period of time, not to exceed one year." *Id.* at 1104. Yet the States had taken no action on the applicant's requests for over a

decade. *Id.* The applicant's and States' "Agreement explicitly required abeyance of all state permitting reviews." *Id.* at 1101. Although FERC had concluded that the applicant's annual withdrawal-and-resubmission of its request had obviated the need for the States to act, this Court disagreed. It explained that the applicant's and States' agreement made "clear that [the applicant] never intended to submit 'a new request'" for the states to act upon because the applications were not requests for the states to act at all. *Id.* at 1104. Thus, contrary to the Districts suggestion (at 37), *Hoopa Valley* did not hold that anything extending the time it takes an applicant to secure state certification beyond a year constitutes a waiver. Rather, the waiver finding in *Hoopa Valley* turned on the express agreement not to act on the certification requests. 913 F.3d at 1104. It was the states' "deliberate and contractual idleness" that this Court found "defie[d]" Section 401's "state action" requirement. *Id.* Here, in contrast, "state action" unquestionably occurred. The Board timely denied the Districts' requests. JA0820-0822; JA1158-1161; JA1162-1165. The Districts' insistence that its second request was not "new" (at 45) is beside the point. *Hoopa Valley* considered whether the applicant's requests following its initial one were "new" only to decide whether they had restarted the one-year time limit for the states to *act*. *Hoopa Valley*, 913 F.3d at 1104. Because the Board here had already acted on each of the Districts' requests within a year, it does not matter whether the requests were new.

The Fourth Circuit's recent decision in *North Carolina Department of Environmental Quality v. FERC*, 3 F.4th 655 (2021) ("*North Carolina*") reinforces *Hoopa Valley*'s focus on the states' refusal to act. In *North Carolina*, FERC found that North Carolina waived its certification authority when it failed to grant or deny requests that the applicant voluntarily withdrew within a year (but later resubmitted). Although no formal agreement for withdrawal-and-resubmission existed, FERC, relying on *Hoopa Valley*, found that North Carolina had waived certification by "coordinat[ing]" with the applicant. *Id.* at 664. The Fourth Circuit reversed. In addition to finding insufficient evidence of coordination, the court disagreed with FERC's broad reading of *Hoopa Valley*. It explained that *Hoopa Valley* "is a very narrow decision flowing from a fairly egregious set of facts, where the state agencies and the license applicant entered into a written agreement that obligated the state agencies, year after year, to *take no action at all* on the applicant's § 401 certification request." *Id.* at 669. The Fourth Circuit was not even convinced that the State must certify or deny within a year. *Id.* at 670. Because the statute defines waiver as a failure or refusal to "act," rather than a failure to certify or deny, the court found it likely that *any* significant action taken on a request within a reasonable time should preclude a finding of waiver. *Id.* at 669-70. Here, of course, the Board not only took significant action on the Districts' requests—it denied them.

Nor do the Districts gain any support from the Second Circuit's decision in *New York II*. *Contra* Br. 38-40. In *New York II*, the Second Circuit found that New York waived its authority because although it "denied certification," the "denial came too late because, in violation of Section 401, it occurred more than one year after [New York] received [the applicant's] application." 991 F.3d at 442. The Court rejected the argument that, by virtue of an agreement between it and the applicant altering the "receipt" date of the application, New York's denial had been timely. *Id.* Here, in contrast, there is no dispute that the Board's denials were issued within a year of the actual date the Board received the Districts' requests. *New York II* does not suggest that such a denial is a failure to act. Just the opposite: it reiterated that court's earlier conclusion (in *New York I*) that a state can act within the meaning of Section 401 by denying a request without prejudice. *See New York II*, 991 F.3d at 450 n.11. The Districts suggest (at 39-40) that the Second Circuit concluded that a without-prejudice denial only constitutes state action when the denial calls on the applicant to provide additional information. The court said no such thing. *New York II*, 991 F.3d at 450 n.11. Regardless, the Board's denials here did call for additional information (JA0820-0822; JA1158-1161; JA1162-1165)—the Districts just did not provide it.

Finally, this Court's decision in *Allegheny Defense Project v. FERC*, 964 F.3d 1 (2020) (en banc), illustrates the errors in the Districts' arguments. *Contra*

Br. 40-41. There, this Court held that a tolling order issued expressly and solely to extend FERC's time to act on a rehearing petition failed to satisfy FERC's obligation to "act on" a rehearing petition within 30 days. *Allegheny*, 964 F.3d at 12-13. The Court emphasized that the relevant statute required FERC to act on the rehearing petition in one of four prescribed ways—grant rehearing, deny rehearing, abrogate without hearing, or modify without hearing. *Id.* at 13. But the tolling order was issued by FERC's Secretary (who lacked authority to take such actions), was expressly "for the limited purpose' of 'afford[ing] additional time for consideration of the matters raised," and provided that the Commission would "decide in some future order whether to grant rehearing or not." *Id.* at 13-14. The Court thus held the tolling order did not constitute the "kind of action on a rehearing petition" that the statute required. *Id.* at 3-4. Here, unlike in *Allegheny*, the entity charged with acting (the Board) took a statutorily-authorized action on the Districts' requests (denial) not for the express purpose of extending the time for consideration but because the requests were "procedural[ly] inadequa[te]." JA0820; *see also* JA1158-1161; JA1162-1165.[4]

[4] This Court's decision in *Alcoa Power* plainly does not support the Districts either. There, this Court found that the State had "acted" on the applicant's request by granting certification within a year even though the certification conditioned its effectiveness on the applicant securing a bond, which the applicant could not do within Section 401's one-year period. *Alcoa Power*, 643 F.3d at 972-75. This Court explained that "[n]owhere in Section 401 is it stated that a certification must

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3. The Districts' attacks on the Board's motivations for their denials are irrelevant and factually unsupported

Having misconstrued *Hoopa Valley*, the Districts proceed to argue that the Board failed to act on its requests because its two denials were a "scheme to evade" Section 401's deadline. Br. 42-47. The Districts are mistaken for at least two reasons.

First, a state's intent is irrelevant to Section 401's waiver provision. That provision "requires only that a State 'act' within one year of an application." *Alcoa Power*, 643 F.3d at 974. When a State denies a request, it has acted. *Supra* pp. 8-13.

In addition to disregarding Section 401's text, the Districts' illicit-intent test would require FERC and this Court to perform an unwieldy and unprecedented task. The Districts stress that it is not their "position that every denial . . . without prejudice . . . is a scheme to evade the one-year limitation, thereby leading to a waiver of the State's Section 401 certification authority." Br. 46. Instead, "[m]ultiple factors and fact-specific scenarios" will have to be considered. Br. 46-47. The Districts do not explain these factors and fact-specific scenarios—merely assuring the Court that they "are not present in this case." Br. 46. The

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be fully effective prior to the one-year period. . . ; it requires only that a State 'act' within one year of an application and that a certification be 'obtained.'" *Id.* at 974.

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details would presumably have to be worked out in litigation as applicants denied a state water quality certification attempt to convert those denials into a waiver before FERC.

Second, and in any event, the Districts present no evidence that the Board's denials were intended to evade the Section 401's deadline. Declaratory Order ¶28, JA2024-2025. In arguing otherwise, the Districts emphasize that their two requests were largely the same. Br. 43-45. But they fail to explain how that shows that the *Board* harbored any intent to evade the deadline. And the Court need not speculate about the Board's rationale for denying the applications because the Board explained its actions. In denying the Districts' first request, the Board explained that "the Districts, as lead agencies for the Projects, ha[d] not begun the [CA-Act] process" and "[w]ithout completion of the [CA-Act] process, the [Board] cannot issue a certification." JA0820-0822. That the Districts' second application featured the same defect, and was thus denied as well, does not suggest that the Board's reasons for denial were pretextual. *See* JA1158-1161; JA1163 (Board "relies on the environmental document prepared by the lead agency" under CA-Act to make "its own determination as to whether and with what conditions to grant the certification").

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The Court thus declined to "accept Alcoa Power's interpretation" as it "would require adding terms to the statute that Congress has not included." *Id.*

The Districts also suggest that the denials could not have been based on lack of sufficient information because the Board had already found their applications to be "complete." Br. 43-44. But that is a misinterpretation of California law. Under California law, "the application being deemed complete only means that the application has fulfilled the minimum requirements of the State Water Board certification regulations." *In re the Petition of Foothill/eastern Transportation Corridor Agency for Review of the Denial of Waste Discharge Requirements*, Order No. WQ 2014-0154, 2014 WL 5148275, at *1 n.6 (Cal. State Water Res. Bd. Sept. 23, 2014).

> Fulfillment of this requirement by an applicant does not mean, and should not be construed to mean, that the applicable regional water quality control board or the State Water Board has received sufficient information to make its determination that a proposed project or activity is reasonably assured to comply with water quality standards or other applicable requirements of state law.

Id. Among other things, the Board also needed CA-Act documents to make a certification (Cal. Pub. Res. Code. §§ 21006, 21080), which the Districts never provided.

The Districts also point to the denial letters' statements apprising the Districts of their opportunities to submit new requests for certification. *See* JA1159. That the Boards' letters "provid[ed] procedural information" to the Districts evidences no illicit motive. *North Carolina*, 3 F.4th at 675. The Board

denied the Districts' requests without prejudice because their defects were potentially curable—so it was perfectly logical for the Board to inform the Districts of their opportunity to re-file. As the Fourth Circuit recently observed, "it must take more than routine informational emails" to "lead to a finding of waiver under § 401." *Id.* at 675.

The Districts' challenges to the merits of the Board's denial decisions also fail to show a scheme to evade. The Districts argue, for instance, that FERC's non-completion of its NEPA review and the Districts' non-compliance with CA-Act did not justify denial of their water-quality-certification request. Br. 54-57. Similarly, they challenge the Board's conclusion that "'the proposed activity does not comply with applicable water quality standards and other appropriate requirements'" as insufficiently explained. Br. 18. But these are arguments that the Board acted erroneously, not that the Board did not act at all. Because Section 401 asks only whether the state "acted," the merits of the state's action is beyond the scope of FERC's waiver review.

A contrary conclusion would shift cases from state courts to federal ones. "A State's decision on a request for Section 401 certification is generally reviewable only in State court, because the breadth of State authority under Section 401 results in most challenges to a certification decision implicating only questions of State law." *Alcoa Power*, 643 F.3d at 971. That is especially true for denials of

certification because—as FERC noted (Declaratory Order ¶32, JA2027)—the CWA says nothing about the grounds on which a state may deny certification requests, leaving the matter to state law. Accordingly, "[i]f a state refuses to give a certification, the courts of that state are the forum in which the applicant must challenge that refusal if the applicant wishes to do so." H.R. Conf. Rep. No. 91-940, at 2741 (1970). That is where other applicants have challenged states' denials of their requests without prejudice due to insufficient information. *See Bangor Hydro-Elec. Co.,* 595 A.2d at 443; *Long Lake Energy Corp.,* 164 A.D.2d at 400.[5] But if waiver could be established by showing a state's denial was wrong, federal agencies and courts would become the primary avenue for such challenges. *See* FERC Br. 33 ("Districts and Industry Amici proffer an interpretation of Section 401 that federalizes what has always been the *States*' field of jurisdiction.").

Before FERC, the Districts argued that California, unlike other states, does not permit review of such decisions. As FERC notes, the Districts have forfeited this argument by not renewing it here. FERC Br. 52. But regardless, it is meritless. Nothing in Section 401 indicates that whether a state has "acted" turns on the action's appealability. And even if appealability did matter, it would be incumbent on the applicant—the entity charged by Section 401 with obtaining a

[5] One exception to this general rule exists in the Natural Gas Act, pursuant to which applicable appeals are taken to federal courts of appeals. 15 U.S.C. § 717r.

certification—to prove that such review is unavailable. Here, the Districts never sought state court or administrative review, which, according to the Board, was available to them. JA1715-1719. Thus, as FERC noted, the Districts failed to prove that the Board's denials were unreviewable. *Turlock Irrigation District & Modesto Irrigation District*, "Order Addressing Arguments Raised On Rehearing," 175 FERC ¶ 61,144, ¶ 12 (May 21, 2021), JA2182-2183.

4. The Districts' policy arguments are irrelevant and mistaken

The Districts also try to support their position with policy arguments. Br. 47-57. But "policy arguments cannot supersede the clear statutory text. *Universal Health Servs. v. United States*, 579 U.S. 176, 192 (2016).

In any event, the Districts' policy arguments are mistaken. The Districts argue, for instance, that if the Board's denials are not waivers States could "indefinitely delay FERC proceedings by *acting unilaterally*." Br. 28 (emphasis added). But unilateral "action" by a State to block federal licenses is a feature of the statutory scheme Congress enacted, not a flaw. *Supra* pp. 12-13.

Regardless, denials without prejudice for lack of sufficient information do not put applicants in the "untenable position" the Districts depict. Br. 28. To avoid such denials, applicants need only provide the state with the information it needs to make its certification. The Districts knew that the Board required information generated through CA-Act to make its certification and that it was the

Districts' responsibility to complete that process. *Supra* pp. 5-6. Yet the Districts did not even start the CA-Act process. The Districts' "position" resulted from their own inactivity, not the Board's.

CONCLUSION

For the foregoing reasons, this Court should deny the petitions.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a) and D.C. Cir. Rule 32(e)(2) because it contains 5,960 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word-counting feature of Microsoft Word 2016.

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Dated: February 23, 2022

/s/ Lena H. Hughes
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system on February 23, 2022.

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