No. 22-743

In the Supreme Court of the United States

NEVADA IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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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). Under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, an applicant for a hydroelectric license from FERC is required to apply for a certification from the State in which the licensed project may result in a discharge into navigable waters. 33 U.S.C. 1341(a)(1). The Commission generally cannot issue a federal license until the applicant obtains the requisite state water-quality certification. The Clean Water Act provides, however, 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.* In these consolidated cases, the Commission found that a California state agency had coordinated with petitioners to withdraw and resubmit the same requests over and over again, as a means of circumventing the statutory one-year period for acting on a pending certification request. The Commission relied on its findings of coordination to determine that the state agency had waived its certification authority. The question presented is as follows:

Whether the court of appeals erred in holding that the administrative record lacks substantial evidence to support the Commission's findings of coordination.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes, regulations, and rule:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 43 F.4th 920. The court's opinion addressed consolidated petitions for review of three sets of orders by the Federal Energy Regulatory Commission. The orders of the Commission in *Nevada Irrigation District* (Pet. App. 31a-46a, 47a-52a) are reported at 171 F.E.R.C. ¶ 61,029 and 172 F.E.R.C. ¶ 61082, respectively. The orders of the Commission in *Yuba County Water Agency* (Pet. App. 53a-71a, 72a-76a) are reported at 171 F.E.R.C. ¶ 61,139 and 172 F.E.R.C. ¶ 61,080, respectively. The order of the Commission in *Merced Irrigation District* (Pet. App. 77a-97a) is reported at 171 F.E.R.C. ¶ 61,240.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2022. A petition for rehearing was denied on October 7, 2022 (Pet. App. 99a-102a). On December 21, 2022, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 6, 2023, 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 non-federal hydroelectric projects on jurisdictional waters. 16 U.S.C. 797(e). The Commission may issue hydroelectric licenses for up to 50 years. 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.

The Commission generally operates under a broad mandate to specify the conditions on which a license is granted. See 16 U.S.C. 803. In certain circumstances,

however, the Commission can be required to include licensing terms established by other agencies. 16 U.S.C. 797(e), 811; see *Escondido Mut. Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). These consolidated cases concern one such situation, in which the Commission can be required to incorporate into the terms of a federal license certain water-quality measures established by state agencies under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

Section 401 of the Clean Water Act provides that any applicant seeking a federal license for activities "which may result in any discharge into the navigable waters" must provide the federal licensing authority with a "certification from the State in which the discharge originates or will originate" that certain effluent limitations and water-quality requirements will be met. 33 U.S.C. 1341(a)(1). Operating a dam to produce hydroelectricity may result in a "discharge" into navigable waters, *ibid.*, and FERC licensing or relicensing proceedings for such a project therefore generally trigger Section 401's water-quality certification process. See *S. D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 373-374 (2006); see also *id.* at 377 (explaining that the term "'discharge'" bears its "plain meaning" in this context and includes the release of water from a hydroelectric dam) (citation omitted).

A State may condition its certification under Section 401 "upon any limitations necessary to ensure compliance with state water quality standards or any other 'appropriate requirement of State law.'" *PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700, 713-714 (1994) (quoting 33 U.S.C. 1341(d)); see *id.* at 705 (explaining that the Clean Water Act permits States to "impose more stringent water quality controls" than

federal law would otherwise prescribe). FERC, in turn, is required to incorporate any limitations or conditions specified in a State's water-quality certification into any license the Commission ultimately grants for the project at issue. 33 U.S.C. 1341(d). If the State denies the requested Section 401 certification, then "[n]o [federal] license or permit shall be granted." 33 U.S.C. 1341(a)(1).

By interposing the States in the process for granting federal licenses, Section 401 furthers the Clean Water Act's policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. 1251(b). At the same time, Section 401 is not designed to be a vehicle for States to "indefinitely delay[]" federal licensing proceedings. *Alcoa Power Generating Inc.* v. *FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). Congress therefore specified that the water-quality certification requirements set forth in Section 401(a) are deemed to be "waived" for a given federally licensed activity 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 [a] request" for certification. 33 U.S.C. 1341(a)(1); cf. 18 C.F.R. 4.34(b)(5)(iii) (FERC regulation treating the statutory maximum one-year period as the applicable deadline). If a State waives certification, FERC may proceed to act on a licensing 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. Petitioners are California public agencies that operate hydroelectric projects in California. Pet. App. 9a-10a. In the 1960s, the Commission's predecessor

agency granted long-term licenses to operate the projects. *Id.* at 10a, 13a, 15a-16a. As those licenses have expired in recent years, petitioners have sought new long-term licenses from the Commission. The projects are currently being operated under annual licenses issued by the Commission to maintain the status quo during the relicensing proceedings. See *ibid.* The Commission has yet to issue a new long-term license for any of the projects.

Petitioners' licensing applications triggered Section 401's requirement for state water-quality certifications for each project. Petitioners each applied for a certification from the relevant California state agency, the California State Water Resources Control Board (State Board or Board). Pet. App. 10a, 13a, 16a.

Under California law at the time, the State Board could not grant a Section 401 certification until the Board received an environmental impact report under the California Environmental Quality Act of 1970 (CEQA), Cal. Pub. Res. Code §§ 21000 *et seq.* (West 2016). See Pet. App. 6a-7a. CEQA is the state-law analogue to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Much like NEPA, CEQA "sets procedural requirements," including the preparation of an "Environment Impact Report," to ensure that state and local officials take into account "'the environmental consequences of their decisions before they are made.'" *City of Carmel-by-the-Sea* v. *United States Dep't of Transp.*, 123 F.3d 1142, 1163 (9th Cir. 1997) (quoting *Citizens of Goleta Valley* v. *Board of Supervisors*, 801 P.2d 1161, 1167 (Cal. 1990)). If an environmental report is required under CEQA for a project involving multiple public agencies, California law designates a "lead agency" that is responsible for preparing

the report. Cal. Code Regs. tit. 14, § 15084(a) (Oct. 14, 2022); see *id.* §§ 15050(a), 15051.[1]

As a practical matter, it was "often not feasible" for the report required by CEQA to be completed within the one-year period established by Section 401 for a State to act on a pending certification request. Pet. App. 8a. Over time, a practice developed in California (and elsewhere) in which applicants submitted certification requests, withdrew them before the end of Section 401's one-year period, and then "resubmit[ted] them as new requests." *Ibid.* The theory behind the practice was that "a withdrawn-and-resubmitted request" would restart Section 401's one-year clock, "affording the project applicant more time to comply with procedural and substantive prerequisites to certification and the state more time to decide whether and under what conditions it will grant the certification request." *Ibid.* Although the Commission "expressed misgivings" about potential delay of federal licensing proceedings through such practices, it accepted for many years that withdrawal and resubmission of an application operated to restart Section 401's one-year period. *Id.* at 8a-9a.

In 2019, however, the D.C. Circuit held that that two States had waived their Section 401 authority by agreeing with project applicants to withdraw and resubmit the same certification requests over an extended period

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[1] After the events at issue here, California amended its laws to permit the State Board to grant certification before the CEQA process is complete. Pet. App. 6a n.2. Specifically, the Board may now grant a certification request under Section 401 "before completion of the [CEQA] environmental review," when the Board determines that "waiting until completion of that environmental review * * * poses a substantial risk of waiver of the state board's certification authority." Cal. Water Code § 13160(b)(2) (West Supp. 2022).

of time. See *Hoopa Valley Tribe* v. *FERC*, 913 F.3d 1099, 1104, cert. denied, 140 S. Ct. 650 (2019). In that case, a FERC relicensing application for a project consisting of a network of hydroelectric dams had triggered a requirement for the applicant to request water-quality certifications from both California and Oregon. *Id.* at 1101. The applicant proposed to relicense only some of the existing dams in the project and to decommission others; in the course of negotiations about decommissioning, the applicant and the States "agreed to defer the one-year statutory limit for Section 401 approval by annually withdrawing-and-resubmitting the water quality certification requests." *Ibid.* A third party challenged that agreement in proceedings before FERC, arguing that the States had waived their Section 401 authority. *Id.* at 1102. The Commission found no waiver, *ibid.*, but the D.C. Circuit disagreed. The D.C. Circuit viewed the case as concerning "a written agreement with the reviewing states to delay water quality certification," and held that Section 401's statutory one-year period for acting on a certification request does not permit such a tolling arrangement. *Id.* at 1104.

3. The Commission applied *Hoopa Valley Tribe* in petitioners' licensing proceedings and found in each case that the State Board had waived its water-quality certification authority by "coordinating" with petitioners in a scheme to withdraw and resubmit the same requests multiple times to circumvent Section 401's one-year deadline. Pet. App. 9a. For each project, petitioners were responsible under state law for preparing the environmental reports required by CEQA, and petitioners did not do so. See *id.* at 10a-17a. Petitioners instead withdrew and resubmitted their requests over a period of years while their CEQA obligations remained unmet.

After *Hoopa Valley Tribe*, the State Board denied the most recently refiled certification requests for each project, within one year of receiving those requests. Petitioners sought relief from the Commission, which found waiver.

a. *Nevada Irrigation District.* Petitioner Nevada Irrigation District first submitted a certification request for the Yuba-Bear Project to the State Board in 2012. Pet. App. 10a. In 2013, two weeks before the expiration of Section 401's one-year period, petitioner filed a letter with the Board seeking to withdraw and resubmit the request. *Id.* at 11a. The Board obliged and treated the resubmitted request as triggering a new one-year period under Section 401. *Ibid.* Petitioner again withdrew and resubmitted its certification request each year from 2014 to 2018. *Id.* at 12a.

In 2019, on the same day that the D.C. Circuit issued its decision in *Hoopa Valley Tribe*, the State Board acted on petitioner's most recently filed request—within one year of the most recent resubmission of that request—by denying the request without prejudice for failure to have completed the CEQA process. Pet. App. 12a; see *id.* at 36a. Petitioner did not resubmit its request to the Board after the request was denied without prejudice; instead, petitioner asked FERC to find waiver in light of *Hoopa Valley Tribe*. *Id.* at 37a.

The Commission found that the State Board had waived its Section 401 certification authority for the Yuba-Bear Project. Pet. App. 31a-46a; see *id.* at 47a-52a (rehearing). The Commission acknowledged that the State Board and petitioner had never entered into any "explicit written agreement" on withdrawal and resubmittal as a means of evading Section 401's one-year period. *Id.* at 41a. But the Commission viewed the par-

ticular facts here as included within the rationale of *Hoopa Valley Tribe*, relying in part on a filing the Board had submitted to FERC indicating that the Board itself fully "expected [petitioner] to withdraw and refile its application," which petitioner did. *Ibid.* The Commission emphasized that the certification proceedings had lasted "nearly six years beyond" the one-year deadline triggered by petitioner's initial request. *Id.* at 42a.

b. *Yuba County Water Agency.* Petitioner Yuba County Water Agency first submitted a Section 401 certification request for the Yuba River Project to the State Board in 2017. Pet. App. 13a. Shortly before the one-year period would have expired for petitioner's request, an employee of the Board emailed petitioner a reminder about the upcoming deadline, noting that petitioner had not prepared the CEQA report (and that the Board therefore could not grant the request), and stating: "Please submit a withdraw/resubmit of the certification application as soon as possible." *Id.* at 14a (quoting email). Petitioner complied. *Ibid.* In 2019, after *Hoopa Valley Tribe*, the Board denied the resubmitted request without prejudice, based on petitioner's "failure to begin the CEQA process." *Id.* at 15a.

The Commission determined that the State Board had waived its certification authority under Section 401 for the Yuba River Project. Pet. App. 53a-71a; see *id.* at 72a-76a (rehearing). Although the Board found no "explicit written agreement to withdraw and refile," *id.* at 63a, it relied on the email described above (and related later correspondence) to find that petitioner's "withdrawal and refiling of its application was in response to the Board's request that it do so." *Ibid.* The Commission stated that such "coordination" was itself "sufficient evidence that the California Board sought the withdrawal

and resubmittal * * * to circumvent the one-year statutory deadline for the state agency to act." *Id.* at 64a.

c. *Merced Irrigation District*. Petitioner Merced Irrigation District first submitted a water-quality certification request for the Merced River Project in May 2014. Pet. App. 16a. In 2015, about one month before the end of Section 401's one-year period for the State Board to act on that request, a staff member for the Board sent an email to petitioner regarding the upcoming deadline, stating: "Please withdraw the [request] and simultaneously resubmit an application for water quality certification prior to May 13, 2015." *Ibid.* (quoting email). Petitioner withdrew and resubmitted its request in 2015—and again in 2016, 2017, and 2018. *Id.* at 17a.

A similar process played out for the Merced Falls Project. The original licensee for that project was Pacific Gas & Electric (PG&E). Pet. App. 15a-16a. PG&E submitted a certification request to the State Board for the Merced Falls Project in May 2014; PG&E withdrew and resubmitted that request in 2015 and again in 2016. *Id.* at 79a, 81a-82a. In 2017, PG&E transferred its license for the project to petitioner, Merced Irrigation District, which then became the lead agency under California law for preparing the CEQA report. *Id.* at 16a n.10, 94a n.74. In 2017 and 2018, petitioner withdrew and resubmitted a certification request for the project. *Id.* at 82a-83a.

After *Hoopa Valley Tribe*, the State Board denied petitioners' certification requests for both projects without prejudice to resubmission, relying in each case on petitioner's "failure to comply with CEQA." Pet. App. 17a. Petitioner sought relief from the Commission, which found that the Board had waived its Section 401 authority. *Id.* at 77a-97a. In particular, the Commission found that, "based on the four years of the applicants with-

drawing and resubmitting their applications with nearly identical two-page letters and without filing a new application or any new supporting information," the Board had "de facto consented" to the repeated withdrawals and resubmissions "for the purpose of avoiding [Section 401's] one-year deadline." *Id.* at 93a. In the Commission's view, the Board's "actions, whether implied or explicit, constituted a failure to act within the one-year deadline." *Ibid.*

4. The State Board and several environmental groups petitioned the Ninth Circuit for review of the Commission's orders. Pet. App. 18a. The court of appeals consolidated the petitions. 20-72432 C.A. Order (May 20, 2021). In a unanimous opinion, the court granted the petitions and vacated the Commission's orders with respect to each project. Pet. App. 1a-30a.

The court of appeals recognized that, after *Hoopa Valley Tribe*, the Commission had begun finding waiver in cases "where project applicants had withdrawn and resubmitted certification requests," even in the absence of any "express agreement[] to delay certification." Pet. App. 20a. Those cases involved what the Commission described as "coordinated schemes" to evade the one-year period in Section 401, even though the coordination was "informal" rather than explicit. *Ibid.* The Commission had distinguished cases of informal coordination from others involving "an applicant's unilateral withdrawal and resubmittal," which the Commission viewed as "not trigger[ing] a waiver." *Id.* at 20a-21a.

The court of appeals declined to address whether the "coordination standard" that the Commission had begun to apply after *Hoopa Valley Tribe* "is consistent with the text of Section 401." Pet. App. 22a. The court instead agreed with the State Board's alternative argu-

ment that "FERC's findings of coordination are not supported by substantial evidence." *Ibid.*

For example, in *Nevada Irrigation District*, the Commission had found that the Board had coordinated with the Nevada Irrigation District to evade the one-year deadline in part based on certain comments the Board had submitted to FERC during the federal environmental review process for the Yuba-Bear Project. Pet. App. 23a. The court of appeals, however, viewed that evidence as failing to warrant an inference of coordination, stating that the comments "show[ed] merely that the State Board predicted that [the Nevada Irrigation District] would decide to withdraw and resubmit." *Ibid.* The court did not view the Board's comments as suggesting that the Board was "working to engineer" a withdrawal and resubmission. *Ibid.* Likewise, the court was unpersuaded by the emails on which the Commission had relied to find coordination in *Yuba County Water Agency* and *Merced Irrigation District*. The court viewed the emails as showing only that the Board had "predict[ed]" that petitioners would avail themselves of the opportunity to withdraw and resubmit, not that the Board was coordinating with petitioners to circumvent Section 401's one-year period. *Id.* at 25a.

The court of appeals also emphasized other evidence in the record which it viewed as tending to undercut the Commission's findings of coordination. The court noted that the Board was apparently prepared to deny petitioners' certification requests without prejudice, within the one-year period for acting, had petitioners not withdrawn and resubmitted them. Pet. App. 25a-26a. The court further noted that petitioners, as the parties that had "failed to comply with CEQA," appeared to have a "motive for delay." *Id.* at 24a. By contrast, the court

viewed the Board as having "an interest in moving [the process] along," so that the Board could exercise its authority under Section 401 to impose water-quality conditions on any long-term licenses the Commission may issue. *Id.* at 26a. The projects are currently operating under annual licenses that do not incorporate such conditions. See *ibid.*; see also p. 5, *supra*.

Petitioners sought rehearing en banc, which the court of appeals denied without any noted dissent. Pet. App. 99a-102a.

ARGUMENT

Petitioners contend (Pet. 27-33) that the court of appeals incorrectly decided an important question concerning the circumstances in which a State waives its certification authority under Section 401 of the Clean Water Act, 33 U.S.C. 1341(a)(1). But petitioners largely fail to grapple with the actual holding of the decision below. The Ninth Circuit held that, on the particular record here, substantial evidence did not support the Commission's findings that the State Board had coordinated with petitioners in a withdrawal-and-resubmission scheme to evade Section 401's one-year deadline for the Board to act on a pending request. That highly fact-bound decision does not warrant further review. Petitioners further contend (Pet. 19-26) that the decision below implicates a conflict of authority in the courts of appeals regarding Section 401 and waiver. But petitioners fail to demonstrate any substantial disagreement that would warrant review at this time. Accordingly, the petition for a writ of certiorari should be denied.[2]

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[2] A related question concerning Section 401 and waiver is pending before the Court in *Turlock Irrigation District* v. *FERC*, No. 22-616 (filed Jan. 4, 2023).

1. In these consolidated cases, the Commission held that the State Board had waived its certification authority under Section 401 by coordinating with petitioners in a scheme to withdraw and resubmit the same certification requests multiple times as a means of evading Section 401's one-year period for the Board to act on a pending request. The court of appeals, in turn, held that the Commission's findings of coordination lacked a basis in substantial evidence. Pet. App. 22a. Although the Commission disagrees with that holding, the decision below does not satisfy this Court's ordinary criteria for certiorari. The question whether substantial evidence supported the Commission's findings of coordination is highly fact-bound, lacks prospective significance, and does not otherwise warrant further review.

a. 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," then the water-quality certification requirements of Section 401(a) "shall be waived with respect to" the federal licensing or permit application that triggered the Section 401 certification process. 33 U.S.C. 1341(a)(1). By the express terms of the statute, the one-year period in Section 401 begins to run upon "receipt" of the relevant certification request. *Ibid.* When an applicant submits a request but then withdraws it before the one-year mark, there is no request pending before the State and thus nothing for the State to grant or deny. A State does not "fail[] or refuse[] to act" on a certification request when the applicant's unilateral withdrawal of the request deprives the State of an opportunity to address it. *Ibid.*

Harder questions may arise when an applicant withdraws a certification request and then resubmits the

same or a substantially similar request. Historically, the Commission had declined to look behind any particular withdrawal and had treated each refiling of a certification request as restarting the one-year period prescribed in Section 401. See Pet. App. 8a-9a (collecting decisions). The Commission began to take a different approach only after the D.C. Circuit's decision in *Hoopa Valley Tribe* v. *FERC*, 913 F.3d 1099, cert. denied, 140 S. Ct. 650 (2019), which marked the first occasion when any court of appeals had found a Section 401 waiver based on a pattern of withdrawals and resubmissions.

As explained above (at pp. 6-7), *Hoopa Valley Tribe* involved a settlement agreement between a licensee and two States that "explicitly required" the licensee to withdraw and resubmit the same Section 401 certification requests over and over again as a way of purportedly holding the Section 401 proceedings in "abeyance" while the parties negotiated over decommissioning certain dams. 913 F.3d at 1101; see *id.* at 1101-1102. The D.C. Circuit viewed that aspect of the settlement agreement as an impermissible effort to "toll[]" Section 401's one-year period for a State to act on a pending request. *Id.* at 1103. The court held that a State waives its Section 401 certification authority when it agrees with an applicant to engage in such a "coordinated withdrawal-and-resubmission scheme." *Ibid.*

In a series of orders after *Hoopa Valley Tribe*, including the orders at issue here, the Commission has determined that a State waives its Section 401 authority when it "coordinate[s]" with an applicant to withdraw and resubmit the same certification request, even in the absence of any explicit agreement. Pet. App. 9a. The Commission has thus viewed the logic and rationale of *Hoopa Valley Tribe* as extending to some informal or

implicit forms of coordination to circumvent Section 401's one-year period. See *id.* at 38a (explaining that a "formal agreement" is not "necessary to support a finding of waiver," given other evidence of coordinated action); see also *id.* at 40a-45a, 63a-66a, 89a-94a.

b. Here, the court of appeals reserved judgment on whether "the coordination standard" reflected in the Commission's orders "is consistent with the text of Section 401." Pet. App. 22a. The court thus expressly declined to "reach the statutory-interpretation issue" of whether or under what circumstances a State's informal or implicit coordination on withdrawal and resubmittal can give rise to waiver. *Id.* at 22a n.11. The court instead held only that, even if coordination is a permissible basis for finding waiver, the Commission's "findings of coordination [were] not supported by substantial evidence in the record." *Id.* at 22a.

Petitioners assert (Pet. 3) that the court of appeals committed a "clear error of law" when it did not "defer to FERC's assessment" that the State Board had coordinated with petitioners. But petitioners do not dispute that the Commission's findings of fact are reviewed under the substantial-evidence standard. See 16 U.S.C. 825*l*(b) ("The finding of the Commission as to the facts, *if supported by substantial evidence*, shall be conclusive.") (emphasis added). As this Court has recently reiterated, "[t]he phrase 'substantial evidence' is a 'term of art' used throughout administrative law to describe how courts are to review agency factfinding." *Biestek* v. *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citation omitted). An agency's findings are supported by substantial evidence if the agency had before it "such relevant evidence as a reasonable mind might accept as adequate to

support a conclusion." *Ibid.* (quoting *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938)).

The court of appeals correctly identified the governing substantial-evidence standard for review of the Commission's factfinding. See Pet. App. 18a (recognizing that substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion") (citation omitted). In the Commission's view, the court erred when applying that standard to this record. But a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. And petitioners identify no sound basis for departing from the Court's traditional approach here.

Petitioners contend (Pet. 20) that the decision below necessarily addressed "a legal issue" rather than a "substantial evidence question," on the theory that the decision "reflects an interpretation of what" it means for a State to fail or refuse to act under Section 401. As already explained, however, the court of appeals declined to address the statutory-interpretation question. See Pet. App. 22a. The court instead proceeded on the assumption that FERC is correct that a State fails or refuses to act when it coordinates with an applicant on a withdrawal-and-resubmission scheme to evade Section 401's one-year period, but the court found that this particular administrative record lacks substantial evidence of coordination. See *ibid.*

Petitioners further contend (Pet. 30) that the court of appeals failed to take account of "established * * * practice" in California, which they describe as having created "a legal regime where the State's [Section 401] decision necessarily takes more than a year." But the

court of appeals acknowledged the historical practices that petitioners invoke, including the ways in which California law had previously contributed to those practices by requiring that the State Board receive a CEQA report before granting certification. See Pet. App. 8a-9a. Those historical practices do not establish that *all* withdrawals and resubmissions in California during the relevant period necessarily occurred in coordination with the Board, rather than as a result of the applicant's independent decisionmaking—including, for example, a judgment by the applicant that it would prefer to withdraw and resubmit its request rather than have the Board be compelled to deny the request on CEQA grounds. And petitioners agree (Pet. 30) that a "State does not waive its authority if applicants *independently* withdraw their requests for certification and then later resubmit those requests."

In these cases, the Commission found that petitioners had not acted independently but had instead acted in coordination with the Board; the court of appeals disagreed, holding that the record lacks substantial evidence of coordination; and the substantial-evidence holding does not warrant further review.

2. The decision below does not conflict with any decision of this Court or another court of appeals, nor does it otherwise warrant review. Petitioners' contention that the decision below "deepens" an existing conflict of authority lacks merit. Pet. 19 (capitalization and emphasis omitted); see Pet. 19-27. Petitioners do not identify any substantial conflict of authority and fail to show that these cases would have come out differently in another circuit.

a. Petitioners principally contend (Pet. 19-22) that the decision below conflicts with the D.C. Circuit's deci-

sion in *Hoopa Valley Tribe*. As the Ninth Circuit explained, however, these cases are a step removed from the facts of *Hoopa Valley Tribe*, because these cases do not involve any "express agreement[] to delay certification through withdrawal-and-resubmission." Pet. App. 20a. These cases instead involve what the Commission found to be "informal" or implicit coordination between the State Board and petitioners. *Ibid.* The D.C. Circuit has not yet had occasion to address how *Hoopa Valley Tribe* applies to a case involving such coordination. And in any event, the Ninth Circuit did not actually resolve whether coordination warrants a finding of waiver even in the absence of an express agreement; the court held only that this record lacks substantial evidence of coordination. See p. 18, *supra*.

Petitioners maintain (Pet. 22) that *Hoopa Valley Tribe* and the decision below are necessarily in conflict because a settlement agreement is "no different" than what petitioners describe as California's "established regime" of anticipating and encouraging withdrawal-and-resubmission practices. In general, the Commission has taken the position that the critical question is not whether an explicit agreement exists but rather whether the State coordinated with the applicants in the scheme or was otherwise complicit in an effort to evade Section 401's one-year period. See FERC C.A. Br. 52-53. As described above, however, the Ninth and D.C. Circuits have yet to definitely address FERC's position, and petitioners thus fail to demonstrate any conflict.

b. Petitioners likewise err in contending (Pet. 22-24) that the decision below conflicts with a pair of Second Circuit decisions: *New York State Dep't of Envtl. Conservation* v. *FERC*, 991 F.3d 439 (2021) (*New York II*), and *New York State Dep't of Envtl. Conservation* v.

FERC, 884 F.3d 450 (2018) *(New York I)*. In both cases, the Second Circuit rejected efforts by a New York state agency to evade Section 401's one-year period by altering the date on which a certification request was deemed to have been received by the agency (and thus the start of Section 401's one-year clock)—either by unilaterally declaring the request to have been received only when the agency considered it complete, see *New York I*, 884 F.3d at 455-456, or by agreeing with the applicant to alter the date of receipt, see *New York II*, 991 F.3d at 447-448. Because the Second Circuit rejected those efforts, it agreed with the Commission that both cases involved a State failing to take action on a pending request at the one-year mark, which is an express basis for finding waiver under Section 401. See *id.* at 444, 447-450; *New York I*, 884 F.3d at 455-456.

Petitioners invoke general language in both decisions about the "bright-line rule" established by Section 401. Pet. 23 (citation omitted). But the relevant bright line to which the Second Circuit was referring was the requirement that a State act on a *pending* request within one year of receiving it. See, *e.g.*, *New York II*, 991 F.3d at 450. The two decisions did not involve withdrawal of a request before the one-year deadline and subsequent resubmission of the same request, and they do not demonstrate any conflict of authority between the Second and Ninth Circuits.

c. Petitioners lastly contend (Pet. 25) that the Second and D.C. Circuit decisions described above are in conflict with the Fourth Circuit's decision in *North Carolina Dep't of Envtl. Quality* v. *FERC*, 3 F.4th 655 (2021). That contention is incorrect and, in any event, would not support further review here, in a case arising

from the Ninth Circuit that does not itself implicate or create any circuit conflict.

In *North Carolina*, the Commission found that a State had waived its Section 401 authority by coordinating with an applicant on a scheme to withdraw and resubmit the same request in order to give the State more time for considering the request. 3 F.4th at 667. FERC had relied on *Hoopa Valley Tribe* in finding waiver. *Id.* at 668. The Fourth Circuit reviewed *Hoopa Valley Tribe* and described it as a "very narrow decision flowing from a fairly egregious set of facts." *Id.* at 669. Ultimately, however, the Fourth Circuit declined to "definitively resolve" the circumstances under which a coordinated withdrawal-and-resubmission scheme might warrant a finding of waiver. *Id.* at 671. The Fourth Circuit instead "assume[d] for purposes of [its] opinion that FERC's approach to the issue is correct, such that a finding of waiver under § 401 is appropriate if the applicant and state agency, in order to avoid the one-year review period, coordinate on a withdrawal-and-resubmission scheme." *Ibid.* The Fourth Circuit went on to hold that the administrative record in *North Carolina* lacked substantial evidence of coordination. See *id.* at 671-676.

The Ninth Circuit charted a similar analytical path in the decision below. See Pet. App. 30a (relying on *North Carolina* and describing the Fourth Circuit as having "reached the same conclusion in a case with similar facts"). Accordingly, both circuits have not yet definitively resolved whether or when coordination is a permissible basis for finding waiver under Section 401.[3]

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[3] In a portion of the Fourth Circuit's decision in *North Carolina* that petitioners do not invoke, the court hypothesized that a State may "act" on a pending certification request for purposes of Section 401, 33 U.S.C. 1341(a)(1), by taking "significant and meaningful"

3. Further review is unwarranted for two additional reasons. First, in 2020, after the events at issue here, California amended its laws to permit the State Board to grant Section 401 certification without first receiving a completed CEQA report. See Pet. App. 6a n.2; p. 6 n.1, *supra*. Petitioners acknowledge (Pet. 9 n.3) those changes but speculate that the Board will continue to "evade[]" Section 401 through "withdrawal-and-refile procedure[s]." Yet petitioners fail to explain why the Board would have any incentive to do so. If the Board wishes to grant a request before the CEQA process is complete, it may now do so (subject to the requirements of state law as amended). See, *e.g.*, *Turlock Irrigation Dist.* v. *FERC*, 36 F.4th 1179, 1182 (D.C. Cir. 2022), petition for cert. pending, No. 22-616 (filed Jan. 4, 2023). State law also permits the Board to deny a request without prejudice to resubmission, as the Board ultimately did here for all the projects. See pp. 8-10, *supra*.

Second, further review is unwarranted at this time because the procedures for granting or denying certification under Section 401 are currently the subject of ongoing federal rulemaking proceedings. In 2020, the Environmental Protection Agency (EPA) promulgated a rule setting forth requirements for Section 401 certifications, including provisions to address waiver. See 85 Fed. Reg. 42,210, 42,286 (July 13, 2020). The Section 401 proceedings at issue here predated the effective

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steps with regard to the request short of granting or denying it, *North Carolina*, 3 F.4th at 670. That reading of the statute would be incorrect and anomalous. See FERC C.A. Br. 40-45; cf. *North Carolina*, 3 F.4th at 670 n.5 (acknowledging that no other circuit "has adopted this interpretation"). But the relevant discussion was dicta and was not endorsed by the Ninth Circuit here.

date of the 2020 rule and thus do not reflect the changes made by that rule.[4]

EPA has also since announced a new rulemaking with regard to Section 401, 86 Fed. Reg. 29,541, 29,542 (June 2, 2021), and those rulemaking proceedings remain pending, see 87 Fed. Reg. 35,318, 35,377-35,381 (June 9, 2022) (proposed rule). EPA's proposed rule would not specifically address withdrawals and resubmissions. See *id.* at 35,341.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2023

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[4] The 2020 rule has been the subject of several challenges. When EPA announced its intent to engage in further rulemaking, it invited the district court in which one of those challenges had been brought to remand the 2020 rule to the agency without vacatur. The district court instead remanded *with* vacatur in an order that this Court later stayed pending further litigation. *Louisiana* v. *American Rivers*, 142 S. Ct. 1347 (2022); see Gov't Mem. in Opp. at 6-12, *American Rivers*, *supra* (No. 21A539) (procedural history). The Ninth Circuit recently held that the district court erred in vacating the rule and reversed that aspect of the court's order. See *In re Clean Water Act Rulemaking*, 60 F.4th 583, 593-596 (2023). The 2020 rule thus remains in force, although it does not apply here for the reasons explained above.