ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1415

IN THE

United States Court of Appeals for the District of Columbia Circuit

MILLENNIUM PIPELINE COMPANY, L.L.C.,

Petitioner,

v.

BASIL SEGGOS, in his official capacity as Commissioner of the New York State Department of Environmental Conservation, and NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

On Petition for Review from the New York State Department of Environmental Conservation

OPENING BRIEF FOR PETITIONER

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December 5, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES

1. The following are parties in this Court:

a. Petitioner: Millennium Pipeline Company, L.L.C.

b. Respondents: Basil Seggos, in his official capacity as Commissioner of the New York State Department of Environmental Conservation, and the New York State Department of Environmental Conservation.

2. Millennium Pipeline Company, L.L.C. is a limited liability company that operates an interstate natural-gas pipeline system extending across southern New York. Millennium Pipeline Company, L.L.C. is owned by the following entities, whose ownership interests collectively total 100 percent: Columbia Gas Transmission Corporation, 47.5 percent; National Grid Millennium, LLC, 26.25 percent; and DTE Millennium Company, 26.25 percent.

B. RULINGS UNDER REVIEW

Millennium challenges the New York State Department of Conservation's refusal to act on Millennium's request for environmental permits necessary for Millennium's planned natural-gas infrastructure in New York. *See* 15 U.S.C. § 717r(d).

C. RELATED CASES

There are no related cases of which undersigned counsel is aware currently pending in this Court or in any other court involving substantially the same parties and the same or similar issues.

/s/ Catherine E. Stetson
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Dated: December 5, 2016

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GLOSSARY

Millennium:	Millennium Pipeline Company, L.L.C.
EPA:	Environmental Protection Agency
FERC or the Commission:	Federal Energy Regulatory Commission
Department:	New York State Department of Environmental Conservation

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OPENING BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

Millennium Pipeline Company, L.L.C. submitted an application to the New York State Department of Environmental Conservation in November 2015 for various permits for facilities necessary to connect Millennium's existing natural-gas pipeline system to a generator station in southern New York. JA __ [Zimmer Draft Ex. E]. One of those permits was a water-quality certificate under Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1). Under the schedule

set by the Federal Energy Regulatory Commission (FERC), the Department had until August 7, 2016, to approve, condition, or deny Millennium's application. JA__ [FERC scheduling order]. FERC recently granted a certificate of public convenience and necessity for Millennium's project pursuant to Section 7 of the Natural Gas Act, 15 U.S.C. § 717f, and the Section 401 permit application pending before the Department relates to those facilities.

The Department has retained Millennium's application for over a year. But August 7 came and went without action. Instead, on November 18, the Department asserted it had "at a minimum, until August 30, 2017" to act on the application. JA __ [11/18/16 Letter to Ron Happach]. The Department exceeded the Clean Water Act's one-year deadline for action as well, which was likewise "inconsistent with the Federal law governing" the issuance of water-quality certificates. *See* 15 U.S.C. § 717r(d)(3). The Department's failure to take action on Millennium's Section 401 application prevents Millennium from constructing its FERC certificated facilities.

Millennium has petitioned this Court for review of the Department's refusal to act. This Court has jurisdiction under § 19(d)(2) of the Natural Gas Act, 15 U.S.C. § 717r(d)(2), which gives the Court "original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a . . . State administrative agency acting pursuant to Federal law to issue, condition, or deny

any permit required under Federal law" for a natural-gas facility. *See Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 242 (D.C. Cir. 2013).

INTRODUCTION

This petition is straightforward. On November 20, 2015, Millennium submitted an application seeking various permits, including a water-quality certificate under Section 401 of the Clean Water Act, from the New York State Department of Environmental Conservation so that it could connect its existing natural-gas pipeline system to an electric generating station in New York, an undertaking spanning less than eight miles in length.[1] The Natural Gas Act and the Clean Water Act both set hard deadlines for the Department to act on Millennium's request: The Natural Gas Act's deadline was August 7, 2016, as provided for in the Federal Energy Regulatory Commission's federal-authorization schedule. The Clean Water Act's was, at the latest, November 23, 2016,[2] one year after the

[1] In addition to the water-quality certificate, Millennium also sought an Article 15 stream-disturbance permit, an Article 24 freshwater-wetlands permit, and a State Pollutant Discharge Elimination System (SPDES) permit from the Department, pursuant to New York state law, as well as a Nationwide Permit 12 from the United States Army Corps of Engineers for utility-line activities, pursuant to Section 404 of the Clean Water Act. JA __ [Zimmer Draft Ex. E].

[2] Millennium's application was actually dated and submitted on November 20, 2015. The Department maintains, however, that the application was not received until November 23, 2015. Millennium is giving the Department the benefit of the doubt, because under either date, the Department has failed to grant, deny, or condition Millennium's water-quality certificate within its allotted time to act.

Department received Millennium's application. The Department failed to honor either deadline.

The Department's refusal to act therefore violates the Natural Gas Act and the Clean Water Act, which both require the Department to comply with certain strict deadlines in adjudicating applications for federal permits required for natural-gas projects like Millennium's that may result in discharge into navigable waters. And the Department's violation of these deadlines is of a kind that empowers this Court to correct on an expedited basis.

The Natural Gas Act generally requires that when a state agency refuses to comply with a FERC permitting deadline, the Court should instruct the agency to issue a decision, one way or the other, by a date certain. Under the Clean Water Act, a state agency must act on a request for a water-quality certificate "within a reasonable period of time," and in all events within one year of receipt, or the certification requirements "shall be waived." 33 U.S.C. § 1341(a)(1). The Department received Millennium's application on November 23, 2015. One year came and went on November 23, 2016, without action. Thus, by exceeding the *Clean Water Act*'s deadline as well, the Department waived any right to deny Millennium's certificate request. Because Millennium is entitled to action on its application, because the Department thus has only one course of action on remand, and because additional delay would only further undermine the purposes of both

the Natural Gas Act and the Clean Water Act, this Court should remand and direct the Department to *grant* Millennium's application.

ISSUE PRESENTED FOR REVIEW

Whether the Department unlawfully refused to grant, deny, or condition Millennium's Section 401 application by the August 7, 2016 deadline set by the Federal Energy Regulatory Commission or by November 23, 2016 one-year anniversary of Millennium's application.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reprinted in the addendum to this brief.

STATEMENT OF THE CASE

The Valley Lateral Project. Millennium operates an interstate natural-gas pipeline system extending across southern New York State. JA __ [Authorization Order I.2.]; *see* 15 U.S.C. § 717n(d)(2) (deeming the FERC proceedings part of the record in this case). In November 2015, Millennium applied to FERC for authorization to build and operate 7.8 miles of 16-inch-diameter pipeline and appurtenant facilities—a $39 million infrastructure initiative known as the Valley Lateral Project—to connect Millennium's existing pipeline system to the CPV Valley Energy Center, an electric-power generator in Wawayanda, New York. JA __ [Authorization Order Intro. at1; I.3; I.5]. The Valley Lateral Project will allow Millennium to provide 127,200 dekatherms per day of incremental firm

transportation service[3] to the CPV Valley Energy Center. JA __ [Authorization Order I.3]. In practical terms, the Valley Lateral Project will enable the CPV Valley Energy Center to provide its projected 650-megawatt capacity to the market—a supply capable of serving more than 650,000 households and businesses in downstate New York with a reliable and efficient source of electrical power, saving ratepayers more than $400 million a year. *See* Millennium Pipeline Co., L.L.C., *Abbreviated Application for a Certificate of Public Convenience and Necessity for the Valley Lateral Project, Resource Report 1—General Project Description*, Section 1.2 (Nov. 2015).[4] And because it has agreed to provide the sole means of transport for the natural gas required by the CPV Valley Energy Center through the Valley Lateral Project, Millennium plans to put the Project into service by April 2017. *Id.*

FERC has exclusive authority to authorize new natural-gas-pipeline infrastructure. *See Summers*, 723 F.3d at 240. But the facilities that make up that infrastructure often also require additional federal permits before construction may commence. *See Islander E. Pipeline Co.*, 102 FERC ¶ 61,054, 61,130 (Jan. 17, 2003) (noting that FERC "routinely issues certificates for natural gas pipeline

[3] In natural-gas parlance, "firm" service is guaranteed, while "interruptible" service is not. *Ga. Indus. Grp. v. FERC*, 137 F.3d 1358, 1360 n.6 (D.C. Cir. 1998).

[4] *Available at* https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14044371.

projects subject to . . . federal permitting requirements"). For the Valley Lateral Project, Millennium must secure, among other permits, a water-quality certificate under Section 401 of the Clean Water Act. JA __ [Zimmer Draft Ex. E]. Millennium accordingly submitted an application seeking a water-quality certificate to the New York State Department of Environmental Conservation, which acts pursuant to the Clean Water Act to process federal water-quality certificates for qualifying New York projects. *See* JA __ [Zimmer Draft Ex. E]; *see also* New York State Dep't of Envtl. Conservation, *Water Quality Certifications for Projects Requiring a Federal Permit* (explaining that, under the Clean Water Act, qualifying applicants "are required to apply for and obtain a Water Quality Certification from DEC indicating that the proposed activity will not violate water quality standards").[5]

The Energy Policy Act of 2005. Congress intended permitting under the Clean Water Act to operate as "a partnership between the States and the Federal Government, animated by a shared objective" of ensuring water quality, so that local regulators with local knowledge would be empowered to process permits locally, under "substantial guidance" from the EPA. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). But Congress also knew that parochial opposition to

[5] *Available at* http://www.dec.ny.gov/permits/6546.html (last visited November 28, 2016).

interstate natural-gas infrastructure might cause state agencies to delay or outright refuse to process needed permits, leaving projects in limbo and "imped[ing] 'public convenience and necessity.'" *Summers*, 723 F.3d at 241 (quoting 15 U.S.C. § 717f(e)); *see also Regional Energy Reliability & Security: DOE Authority to Energize the Cross Sound Cable: Hearing Before the Subcomm. on Energy & Air Quality of the H. Committee on Energy & Commerce*, 108th Cong. 1 (2004). The separate permitting processes before FERC and state agencies also led to piecemeal appeals in state and federal courts—appeals that could, even if meritless, "kill a project with a death of a thousand cuts." *Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 85 (2d Cir. 2006) (quoting *Natural Gas Symposium: Symposium Before the S. Comm. on Energy & Nat. Res.*, 109th Cong. 41 (2005) (statement of Mark Robinson, Director, Office of Energy Projects, FERC)).

Congress addressed both risks in the Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594 (2005), which amended the Natural Gas Act to enforce timely compliance across all federal and state administrative agencies.[6] Congress

[6] For a detailed explanation of the sort of state-agency delay that spurred Congress to establish these uniform federal deadlines, see generally Claudia Copeland, Congr. Research Serv., *Clean Water Act Section 401: Background and Issues* (July 2, 2015), *available at* https://www.fas.org/sgp/crs/misc/97-488.pdf; The INGAA Found., Inc., *Expedited Federal Authorization of Interstate Natural Gas Pipelines: Are Agencies Complying with EPAct 2005?* (Dec. 12, 2012), *available at* http://www.ingaa.org/File.aspx?id=19472.

designated FERC the lead agency for coordinating necessary federal authorizations for natural-gas transportation projects, and required that state agencies "cooperate with the Commission and comply with the deadlines established by the Commission." 15 U.S.C. § 717n(b). To that end, Congress gave FERC the power to establish schedules for state agencies to process required federal permits. *Id.* § 717n(c). To ensure that the federal deadlines would have teeth, Congress gave this Court original and exclusive jurisdiction over suits alleging that a state agency has failed to grant, deny, or condition a federal permit required for a natural-gas facility, *id.* § 717r(d)(2), and mandated that such suits be expedited. *Id.* § 717r(d)(5). By coupling enumerated review criteria with hard deadlines and an expedited review procedure in the event of inaction, Congress ensured that yet-to-be-approved infrastructure projects would not stall out due to "generalized complaints effectively amount[ing] to NIMBY—not in my backyard." *Cf. T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 800 (6th Cir. 2012). The Energy Policy Act, in short, allowed state agencies to carry out their roles under the Clean Water Act—but ensured that natural-gas companies could seek swift redress if their applications got bogged down in the state bureaucracy.

The FERC and Department Applications. In mid-November 2015, Millennium submitted its application to FERC for a certificate of public convenience and necessity for the Valley Lateral Project. JA __, __ [Zimmer Draft

Ex. C; Zimmer Draft Ex. D]. FERC issued a notice of the certificate application for the Project several days later. JA __ [Notice of Application]; *see also* 80 Fed. Reg. 76,012 (Dec. 7, 2015). FERC's notice "alerted agencies issuing federal authorizations" that it would set a deadline "to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's Environmental Assessment (EA) for the Project." JA __ [Notice of Schedule]; *see also* 81 Fed. Reg. 9836, 9836 (Feb. 26, 2016). FERC followed through on this announcement in February 2016 when it issued its notice of schedule for environmental review: That notice set a deadline for state agencies to issue final decisions on federal permits for the Project by August 7, 2016. JA __ [Notice of Schedule].

The Department was already well aware of and actively reviewing the Valley Lateral Project long before FERC set that August 2016 deadline. The Department had already approved the CPV Valley Energy Center years earlier, on the understanding that Millennium would build the infrastructure necessary to deliver gas to that critical energy facility. JA __ [Authorization Order I.3 n.4]. Millennium also notified the Department in April 2015 that it would be participating in FERC's pre-filing review process—a process in which the applicant, stakeholders, and FERC staff meet in advance of the application being filed to streamline the approval process. JA __ [4/30/15 Libby email]. Millennium

also availed itself of the Department's own pre-filing review process in August 2015, N.Y. Comp. Codes R. & Regs. tit. 6, § 621.5, and held several meetings with Department staff, some in the field, over the ensuing months to discuss the information that the Department would require related to Millennium's application. JA __ [Zimmer Aff. ¶¶ 8, 24].

After participating in the Department's pre-filing process for some seven months and exchanging dozens of emails, Millennium filed its formal application for a water-quality certificate on November 20, 2015, which the Department received on November 23, 2015. JA __-__ [Libby and Zimmer emails]. That application was comprehensive. It contained nearly 1,200 pages of analysis, maps and blueprints providing construction details and explaining in detail all the measures Millennium would implement to address any potential water-quality impacts associated with the Valley Lateral Project. *See* JA __, __. [Libby and Zimmer emails].

The Valley Lateral Project "would not cross designated High Quality or Exceptional Value waterbodies, or state or federal wild and scenic rivers." JA __ [Environmental Assessment at 39]. Nevertheless, in keeping with the Department's expressed preferences, Millennium proposed in the application and

in subsequent submissions to use horizontal directional drilling or conventional bore[7] with respect to nine of the twelve stream crossings associated with pipeline to be installed as part of the Valley Lateral Project. JA __, __ [Zimmer Letter; Zimmer Aff. ¶¶ 8, 24]. By installing pipeline well below the associated streambeds and thus avoiding the streams entirely, these techniques result in no impacts to water quality. JA __ [Zimmer Letter]. Of the remaining three stream crossings, two are expected to involve dry streambeds during construction. JA___ [Zimmer Letter]. That leaves one stream crossing, ten feet wide, along the length of Millennium's eight-mile pipeline project. JA __ [Zimmer Aff. ¶ 33]. Millennium's commitment to minimize trench crossings ensures that the water-quality impacts of the Valley Lateral Project—a minor project to begin with—are de minimis.

While the FERC proceedings were under way, the Department was tasked with conducting its own review under Section 401 of the Clean Water Act. That Act gave the Department, at the outside, a year to act after receipt of Millennium's application. *See* 33 U.S.C. § 1341(a)(1).

[7] Horizontal directional drilling and conventional bore is a trenchless method typically used to install pipelines under roads and bodies of water. That method consists of drilling an initial pilot hole and then progressively enlarging that hole as needed to fit pipeline, which to date have been as large as sixty inches in diameter. *See generally* JA __ [Zimmer Draft Ex. E at 2-16 to 2-17]. This method is designed to avoid contact with surface water—and thus to minimize issues relevant to the Clean Water Act.

The Department's Refusal To Act. To its credit, the Department actively worked with Millennium during the *pre-filing* process. But after it received Millennium's detailed certificate application, the Department's approach changed. On December 7, 2015, the Department issued what it styled as a "notice of incomplete application," stating that Millennium's application "is deemed incomplete pending [FERC's] issuance of an Environmental Assessment." JA __ [Zimmer Letter Ex. D]. There was, of course, nothing "incomplete" about Millennium's application because of the pending FERC proceeding; the FERC proceeding quite commonly runs in parallel to the state proceeding, which is why the Department's regulations do not require that an Environmental Assessment be submitted with the application. But because FERC issued its Environmental Assessment in May 2016, the Department's "notice of incomplete application" had the effect of unilaterally delaying any action on Millennium's application for five months. JA __ [Zimmer Draft Ex. K]. Indeed, between December 2015 and FERC's issuance of the Environmental Assessment in May 2016, the Department provided no comments at all to Millennium except for a few emails regarding one aspect of Millennium's application.[8]

[8] The Department did, however, file three comment letters in the FERC docket focused on potential alternative routes for the project, none of which related to Millennium's requested water-quality certificate. *See* JA __ [Zimmer Letter Exs. E, G, and H].

FERC concluded in its Environmental Assessment that "approval of the Valley Lateral Project would not constitute a major federal action significantly affecting the quality of the human environment." [Environmental Assessment at 125]. As to water quality impacts, the Environmental Assessment also concluded that, with implementation of Millennium's Environmental Construction Standards as well as applicable permit conditions, the Valley Lateral Project "would minimize and mitigate impacts on surface waters and these impacts would not be significant." [Environmental Assessment at 42].

These findings, however, apparently were insufficient for the Department's purposes. The Department followed up FERC's issuance of the Environmental Assessment by sending Millennium a second "notice of incomplete application" on June 17, 2016. The Department's second "notice of incomplete application" identified new grounds on which it purportedly found Millennium's permit request still lacking: the need for additional information regarding potential impacts to three protected species (Indiana and northern long-eared bats, and bog turtles); and minor clarifications regarding data already included in the application. JA __ [Zimmer Letter Ex. M].

More delay ensued after that. In an attempt to respond to the Department's request for information about the potentially affected bats, the Department required Millennium to sign a non-disclosure agreement to ensure the confidentiality of

information related to the bats' roosting trees. Millennium signed the non-disclosure agreement just one week after the Department's "notice of incomplete application," on June 24, 2016. The Department failed to countersign the agreement until July 20, 2016, resulting in nearly another month's worth of delay. JA ___ [Zimmer Aff. ¶ 21].

Presented with the Department's continued inaction, Millennium subsequently provided two letters, dated August 16 and August 31, 2016, in further response to the Department's second notice. And although Millennium repeatedly attempted to obtain additional feedback from the Department in September and October 2016, the Department provided *no correspondence* (email or otherwise) to Millennium during those months. In the meantime, FERC issued a certificate of public convenience and necessity for the Valley Lateral Project on November 9, 2016. *Millennium Pipeline Co.*, 157 FERC ¶ 61,096 (Nov. 9, 2016) (reprinted at JA __). Millennium promptly sent the Department a letter requesting approval "at its earliest opportunity." JA __ [Zimmer Letter at 6].

The Department has *still* not taken any action on Millennium's application. Instead, by letter dated November 18, 2016, the Department took the position that, while "the Applicant has fully responded to" the second notice, it would "continue its review of the Application, as supplemented to determine if a valid request for a WQC [water-quality certificate] has been submitted." JA __ [11/18/16 Letter to

Ron Happach]. The Department went on to state that by its calculations, "NYSDEC has, at a minimum, until August 30, 2017 to either approve or deny the Application." And then the Department delivered the kicker: "NYSDEC reminds the Applicant that, regardless of any action by FERC, including the issuance of a Certificate of Public Convenience and Necessity . . . , *no construction activities may commence with respect to the Project unless the Application is approved* and NYSDEC issues a WQC." *Id.* (emphasis added).

Out of other options, with the Department's decision now deferred indefinitely, and unable to press forward with its FERC-approved project, Millennium petitioned this Court to compel the Department to act.

SUMMARY OF ARGUMENT

The Department's refusal to act on Millennium's certificate in violation of federal deadlines is the type of agency delay that this Court polices under the Natural Gas Act. Under that Act, FERC sets deadlines by which decisions on federal authorizations for a natural-gas transportation project must be made. The water-quality certificate sought by Millennium under the Clean Water Act is a federal authorization relating to the Valley Lateral Project. FERC set an August 7, 2016 deadline for all decisions on federal authorizations relating to the Valley Lateral Project. The Department missed that generous deadline by more than three-and-a-half months (and counting). But the Department did not merely ignore

FERC's deadline. The Department's severe delay also ran afoul of the deadline established by the Clean Water Act, and that independent violation carries its own particular consequence.

If this were an ordinary failure-to-act case under the Natural Gas Act, Millennium's recourse would be clear: this Court would address the agency's inaction by "remand[ing] the proceeding to the agency to take appropriate action" and "set[ting] a reasonable schedule and deadline for the agency to act on remand." 15 U.S.C. § 717r(d)(3). Under the Clean Water Act, however, a state agency with the authority to issue water-quality certificates must act on a permit request "within a reasonable period of time (which shall not exceed one year) after receipt of such request." 33 U.S.C. § 1341(a)(1). A "reasonable period of time" to act on Millennium's wholly routine application has long since expired under the circumstances. Regardless, the Department exceeded the statutorily mandated one-year ceiling when it failed to act by November 23, 2016, one year after it received Millennium's permit request.

When an agency fails to act on a Clean Water Act permit application within one year of its receipt, the statute instructs that the Section 401 "certification requirements" of the pending application "shall be waived." *Id.* By failing to act within a year of receiving Millennium's permit request, the Department thus has waived its authority to deny that request. Affording the Department an additional

opportunity to prevent construction the Valley Lateral Project by denying Millennium's application on remand when it lacks the legal authority to do so would only further frustrate the interests served by both the Natural Gas Act and the Clean Water Act. This Court accordingly should remand and direct the Department to promptly approve Millennium's permit request.

STANDING

The failure of the Department to act on the Clean Water Act certification will "prevent the construction" of Millennium's FERC-jurisdictional facilities. 15 U.S.C. § 717r(d)(3). Thus, Millennium's standing is self-evident. *Sierra Club v. EPA*, 292 F.3d 895, 899–900 (D.C. Cir. 2002). Millennium is the "object of the action (or forgone action) at issue"—the Department's refusal to act on Millennium's permit request. *Id.* at 900 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). As recent correspondence from the Department demonstrates, in the absence of the Department's improperly withheld approval, Millennium may not commence work on the Valley Lateral Project. *See* JA __ [Authorization Order, Envtl. Condition 9] (conditioning Millennium's certificate of convenience and public necessity for the Valley Lateral Project on Millennium receiving "all applicable authorizations required under federal law"); __ [11/18/16 Letter to Ron Happach] ("[N]o construction activities may commence with respect to the Project unless the Application is approved and NYSDEC issues a WQC.").

Because the Department has unlawfully failed to act on Millennium's application, Millennium is entitled to Department action on—and approval of—its water-quality certificate. An order from this Court directing the Department to grant Millennium's certificate on remand will redress its legally cognizable harm. There is therefore "little question that [the Department's] inaction has caused [Millennium] injury, and that a judgment . . . requiring the action will redress it." *Sierra Club*, 292 F.3d at 900 (quoting *Lujan*, 504 U.S. at 561–562).

Because Millennium plainly is harmed by the Department's inaction, and because it seeks the remedy expressly prescribed in the Natural Gas Act, it is in a very different position than the petitioner in *Weaver's Cove Energy, LLC v. Rhode Island Department of Environmental Management*, 524 F.3d 1330, 1333 (D.C. Cir. 2008), whose petition for review was dismissed *sua sponte* on standing grounds. *Weaver's Cove* also involved a petition for expedited review brought under the Natural Gas Act, but the commonalities end there. The petitioner in *Weaver's Cove* had already *received* two determinations on requested water-quality certificates from two different state agencies—one approval and one denial—both of which actions were being administratively appealed at the time. *Id.* at 1331–32. Instead of seeking action from the state agencies (because they had by that time already acted), the petitioner there asked this Court to opine that the state agency denying its permit request had waived its review by similarly excessive delay, so

that the petitioner could use that declaration in service of yet another permit review before the United States Army Corps of Engineers. As this Court explained, however, the Corps's review would not be affected by that declaration in any event. *See id.* at 1333–34.

The petitioner's request for a declaration in *Weaver's Cove* is a far cry from Millennium's grounds for standing: harm occasioned by agency inaction, which federal law specifically identifies as triggering this Court's jurisdiction (and fast-track review), and which may be remedied by this Court's direction to the agency to act.

STANDARD OF REVIEW

For cases brought on expedited review under the Natural Gas Act, the standard of review is twofold. First, a court will "review de novo whether the state agency complied with the requirements of the relevant federal law." *Islander E. Pipeline Co.*, 482 F.3d at 94. Second, if the state agency has complied with federal requirements, "the court then analyzes the state agency's factual determinations 'under the more deferential arbitrary-and-capricious standard of review usually accorded state administrative bodies' assessments of state law principles.'" *Id.* (citation omitted).

Whether the Department's refusal to act exceeded the deadlines under the Natural Gas Act and the Clean Water Act is a question of federal law that this

Court reviews de novo. And because the Department did not comply with federal requirements—because it did not act at all—it is disentitled to any semblance of deferential review.

ARGUMENT

Approval delayed is, all too often, approval denied. Congress recognized that central truth about the bureaucratic tendency toward inaction in the administrative-permitting context when it enacted the Clean Water Act in 1972, and again in enacting the Energy Policy Act of 2005. Congress elected to impose bright-line deadlines for state agencies like the Department charged with reviewing natural-gas transportation projects like the Valley Lateral Project. For whatever reason, the Department has unlawfully refused to take any action on Millennium's permit request. It now falls to this Court to enforce the federal deadlines the Department has ignored to date.

I. THE DEPARTMENT'S REFUSAL TO ACT ON MILLENNIUM'S PERMIT REQUEST EXCEEDED FEDERAL DEADLINES.

A. The Department Exceeded FERC's Express Federal Deadline.

Under the Natural Gas Act, FERC "act[s] as the lead agency for the purposes of coordinating all applicable Federal authorizations." 15 U.S.C. § 717n(b). FERC carries out that role by, among other things, "establish[ing] a schedule for all Federal authorizations." *Id.* § 717n(c)(1). With FERC's authority to set a schedule for federal authorizations comes a corresponding duty on state

agencies to follow the schedule FERC establishes. State agencies "considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission." *Id.* § 717n(b)(2).

FERC established a schedule for all federal authorizations for the Valley Lateral Project in its February 2016 notice of scheduling. *See* JA __ [Notice of Schedule]. That notice called for state agencies "to complete all necessary reviews and to reach a final decision on a request for a federal authorization" for the Valley Lateral Project by August 7, 2016. *Id.* And there is no question that a water-quality certificate issued under Section 401 of the Clean Water Act is a federal authorization. The Natural Gas Act defines "Federal authorization" as "any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law with respect to . . . a certificate of public convenience and necessity." 15 U.S.C. § 717n(a)(2). Millennium cannot proceed with its planned construction under the Valley Lateral Project unless and until the Department approves its request—notwithstanding FERC's approval of the Project. *See* JA __ [Authorization Order, Envtl. Condition 9] (conditioning Millennium's certificate of convenience and public necessity for the Valley Lateral Project on Millennium receiving "all applicable authorizations required under federal law"). Millennium's permit request to the Department is therefore subject to FERC's

August 7, 2016 federal-authorization deadline.

Because Millennium's applications are subject to FERC's August 7, 2016 federal-authorization deadline, the Natural Gas Act commanded that the Department "shall . . . comply with" that deadline. 15 U.S.C. § 717n(b)(2). And "shall" means "shall": "The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive." *Ass'n of Civilian Technicians, Mont. Air Chapter No. 29 v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994); *see also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to . . . discretion.").

It is now early December, and the Department continues to sit on Millennium's permit request. In disregarding FERC's express deadline, the Department acted inconsistently with federal law—a conclusion the Natural Gas Act makes explicit by providing that "[t]he failure of an agency to take action on a permit required under Federal law . . . in accordance with the Commission schedule established pursuant to [15 U.S.C. § 717n(c)] *shall be considered inconsistent with Federal law*." 15 U.S.C. § 717r(d)(2) (emphasis added).

B. The Department Also Exceeded The Clean Water Act's Maximum Statutory Deadline.

Under the Clean Water Act, a State administrative agency authorized to

issue water-quality certificates must act on an application "within a reasonable period of time (which shall not exceed one year) after receipt of such request." 33 U.S.C. § 1341(a)(1). If it fails to act on an application within that time, the agency's ability to withhold approval "shall be waived." *Id.* Ignoring the Clean Water Act's deadline is also "inconsistent with the Federal law governing" the issuance of water-quality certificates. *See* 15 U.S.C. § 717r(d)(3). Because the Department's failure to issue such a certificate, if left unremedied, "would prevent the construction, expansion, or operation" of a qualifying natural-gas facility, this Court can and should remedy this independent federal violation. *Id.*

The "reasonable period of time" in a typical case, of course, should be much shorter than the one-year ceiling. And in a case such as this, which also implicates FERC's jurisdiction under the Natural Gas Act, any "reasonable" period of time should be aligned with the (extensive) period of time FERC prescribed for all state and federal agencies to complete their reviews: August 7, 2016, over eight months after Millennium submitted its application to the Department. And to be quite clear: the Department had more than even those eight months to undertake its work. Months *before* even receiving Millennium's application, the Department had actively engaged in discussions with Millennium, had conducted its own pre-filing review, and was involved in the FERC pre-filing review. By any rational estimation, the "reasonable time" for the Department to act on a wholly routine

application expired months ago, and in all events by August 7, 2016.

The question of what amount of time would have been "reasonable" under the circumstances—whether August 7 or earlier—is, however, a purely academic exercise. By refusing to act on Millennium's application by November 23, 2016, the Department transgressed even the outermost limit of the Clean Water Act, which requires action within one year of "receipt of such request," 33 U.S.C. § 1341(a)(1). The Department thus waived its right to deny Millennium's application as a matter of federal law.

The Department has already signaled its response to this statutory-waiver argument: According to the Department, the Clean Water Act's one-year deadline did not even *begin* to run until the Department declared Millennium's application "complete." *See* JA __ [11/18/16 Letter to Ron Happach]. And even today, the Department has hedged on making that determination; its latest missive declares that Millennium has responded to the Department's questions—but holds out the possibility that more questions could yet be forthcoming, which apparently could render Millennium's long-pending application "incomplete" yet again.[9]

[9] The Department appears to have conflated the concept of a complete *application* with the question of complete *review*. The fact that the Department had questions upon reviewing Millennium's application did not make the *application* itself incomplete. If Millennium's application itself was deficient, the recourse for the Department was to timely deny the application outright, not to deem it eternally "incomplete."

That is not the way the statute works. The one-year, outer-limit deadline runs from an agency's "*receipt*" of a request for a Clean Water Act permit. *See, e.g.*, *Wyo. Valley Hydro Partners*, 58 FERC ¶ 61,219, 61,694 (Feb. 27, 1992) (noting that "one-year period begins when the certifying agency receives the request for certification"); *see also* N.Y. State Dep't of Envtl. Conservation, National Fuel Gas Northern Access 2016 Project, *Topics Related to 401 Water Quality Certification, Streams and Wetlands* (Sept. 21, 2015), at 3, FERC Case No. CP-15-115 (notifying another Section 401 applicant that in the Department's view, "the deadline for approval is determined pursuant to Section 401 of the Clean Water Act. It is one year from the Department's *receipt of the application*.") (emphasis added).[10] If an applicant has not complied with some procedural filing requirement, its recourse is "to deny the request for certification," *id.*, not to string along the applicant indefinitely with ever-evolving standards of "completeness." [11]

[10] *Available at* http://elibrary.ferc.gov/idmws/search/intermediate.asp?link_info=yes&doclist=14380944.

[11] FERC's regulations interpreting Clean Water Act Section 401 in the context of hydroelectric-licensing proceedings state an "agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency *received* a written request for certification." 18 C.F.R. § 4.34(b)(5)(iii) (emphasis added). The Federal Power Act (which covers hydroelectric licensing) and the Natural Gas Act have parallel requirements that applicants under both statutes are required to seek Clean Water Act Section 401 certification, when applicable, for proposed projects.

After all, if determining the start (and therefore the end) of the Clean Water Act's one-year clock were left to the free-wheeling discretion of the same state agencies whose actions that clock purports to control, why bother?

But the Court need not parse this point of statutory interpretation so finely in order to render its judgment. Under any imaginable standard save the Department's own say-so, Millennium's application was received as of November 23, 2015. In the Department's first purported "Notice of Incomplete Application," the Department failed to identify anything missing from Millennium's comprehensive application—which comprised nearly 1,200 pages of detailed analysis across all relevant aspects of the Valley Lateral Project—other than FERC's forthcoming Environmental Assessment. JA __, __ [Zimmer Draft Letter Ex. E; Zimmer Draft Letter Ex. F]. But FERC's pending Environmental Assessment did not render Millennium's application *incomplete*. (After all, the Department's own regulations do not require that an Environmental Assessment be filed along with the application. *See generally* N.Y. Comp. Codes R. & Regs. tit. 6 § 621.3(a) (general requirements for complete application); *id.* § 621.4(e) (application requirements for water-quality certificate); *id*. § 621.6(d), (e), (f) (grounds for incompleteness determination)). An Environmental Assessment assesses the potential for significant impacts across all aspects of a project. The Department's consideration was limited to assessing the water-quality impacts, if

any, associated with the Valley Lateral Project. The absence of information pertaining to categories of impacts *other* than water quality is irrelevant to Millennium's application.

The Department's second attempt to justify its refusal to act fares no better. More than six months after its first notice, and a month *after* FERC issued its Environmental Assessment, the Department sent Millennium a second "notice of incomplete application." The second notice raised entirely new issues—all of which the Department could have raised months earlier. *See* JA __ [Zimmer Draft Ex. M]. But the Department's after-the-fact rationalizations do not relate back to its original "notice of incomplete application." And, again, the Clean Water Act's countdown runs from when the application is "received"; not from when the agency in its sole discretion deems the application sufficiently "complete."

Bottom line: The Department was obligated to act on Millennium's permit request "within a reasonable period of time," and in any event no later than one year after receiving that request. The Department has failed to identify any legitimate basis justifying its refusal to act pursuant to its limited authority. The Department's federally mandated—and therefore the relevant—deadline to act ran, at the latest, on November 23. The Department's creative, self-imposed, and still-tentative deadline of, "at a minimum, August 30, 2017," is untethered from the controlling federal law. And because the relevant deadline has come and gone, the

Department has waived any right to deny Millennium's permit request.

II. THE COURT SHOULD REMAND TO THE DEPARTMENT FOR IT TO PROMPTLY GRANT MILLENNIUM'S REQUESTED WATER-QUALITY CERTIFICATE.

The only question remaining, then, is remedy. And the remedy is as clear as the violation itself. Under 15 U.S.C. § 717r(d)(3), when a state agency unlawfully fails to act, the Court "shall remand the proceeding to the agency to take appropriate action" and "set a reasonable schedule and deadline for the agency to act on remand." In keeping with the Natural Gas Act's plain language, the appropriate action the agency must take is "to issue, condition, or deny" the requested permit. *See Summers*, 723 F.3d at 242 (citing 15 U.S.C. § 717r(d)(2)).

That remedy is consistent with the usual course the Court takes when it finds agency inaction unlawful. When an agency fails to "take some decision by a statutory deadline," the Court commands the agency "'to take action upon [the] matter.'" *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63–64 (2004) (citation omitted); *see also Kaufman v. Mukasey*, 524 F.3d 1334, 1338 (D.C. Cir. 2008) (holding that "when an agency is compelled by law to act," the Court may "'compel the agency to act'") (citation omitted); *cf.* 5 U.S.C. § 706(1) (reviewing courts may "compel agency action unlawfully withheld or unreasonably delayed"). The Natural Gas Act merely replaces the open-ended remand that the Court sometimes orders, *see Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1265 (D.C.

Cir. 2007) (Rogers, J., concurring) (noting that it can take years for an agency to act when the Court remands), with a requirement that the Court set a date-certain deadline for prompt action. *See* 15 U.S.C. § 717r(d)(3).

But the Court can and should do more than set a deadline here. To be sure, this Court does not commonly remand with directions that an agency reach a specific outcome; it generally orders as much relief as is warranted in the circumstances and no more, while leaving further proceedings to the agency. But this case calls for something different. The Natural Gas Act instructs that a reviewing court should require the agency on remand to take "appropriate action." 15 U.S.C. § 717r(d)(3). An open-ended remand ostensibly leaves the Department three options: Grant the application; deny it; or impose various (unknown) conditions on it. But only one of those options is actually "appropriate" here: Because it has waived its right to deny Millennium's Section 401 application by exceeding the federal one-year outer limit for action on the application, the Department has but one course of action available to it: grant. *See* 33 U.S.C. § 1341(a)(1). Any other outcome will simply boomerang this case back up to the court of appeals, wasting the court's resources and Millennium's alike.

This Court should therefore remand and direct the Department to approve Millennium's certificate request by January 17, 2017, or within seven days of the Court's judgment. *Cf. Berger v. Iron Workers Reinforced Rodmen Local 201*, 843

F.2d 1395, 1441 (D.C. Cir.) (per curiam), *on reh'g*, 852 F.2d 619 (D.C. Cir. 1988) (per curiam) (noting that "[i]n the circumstances of this too-prolonged litigation, . . . a remand would be as unfortunate as it is unnecessary"). Any additional delay from the Department threatens not only Millennium's planned April 2017 in-service date; it also threatens the CPV Valley Energy Center and the promise that undertaking holds for providing a reliable and affordable source of electrical power to hundreds of thousands of households and businesses in New York. As of the filing of this brief, it has already been more than three months since the Department's time to act by FERC's federal-authorization deadline expired, and more than a year since Millennium submitted its permit request to the Department. Enough is enough.

CONCLUSION

For the foregoing reasons, the petition for review should be granted. The Court should remand this proceeding to the Department and direct the Department to approve, by January 17, 2017 or within seven days of the Court's judgment, whichever is earlier.

Respectfully submitted,

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December 5, 2016

CERTIFICATE OF COMPLIANCE

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/s/ Catherine E. Stetson
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I certify that on December 5, 2016, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

I also certify that I caused copies of the foregoing to be delivered via e-mail and Federal Express overnight delivery to the following:

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