161 FERC ¶ 61,186
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

Millennium Pipeline Company, L.L.C. Docket No. CP16-17-003

ORDER DENYING REHEARINGS AND MOTIONS TO STAY

(Issued November 15, 2017)

1. On September 15, 2017, the Commission issued a Declaratory Order Finding Waiver Under Section 401 of the Clean Water Act (Declaratory Order).[1] The Declaratory Order found that the New York State Department of Environmental Conservation (New York DEC) waived its authority to issue a water quality certification under section 401(a)(1) of the Clean Water Act (CWA)[2] by failing to act before the statutorily-imposed one-year deadline. The New York DEC filed a request for rehearing and stay of the Declaratory Order on October 13, 2017. On October 16, 2017, Sarah E. Burns and Amanda King, Melody Brunn and the Brunn Estate, and Pramilla Malick (collectively, Petitioners) filed a joint request for rehearing and rescission of the Declaratory Order.

2. On October 27, 2017, Commission staff issued Millennium a Notice to Proceed with Construction (Notice to Proceed). On October 30, 2017, the New York DEC filed a Request for Stay of the Notice to Proceed.[3]

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[1] *Millennium Pipeline Company, L.L.C.*, 160 FERC ¶ 61,065 (2017).

[2] 33 U.S.C. § 1341(a)(1) (2012).

[3] On October 30, 2017, New York DEC also petitioned the United States Court of Appeals for the Second Circuit for a temporary stay of the Commission's Notice to Proceed until the Commission acts on New York DEC's request for rehearing of the Declaratory Order. *In re New York State Department of Environmental Conservation v. FERC*, 2d Cir. No. 17-3503, Petitioner's Emergency Petition for a Writ of Prohibition (Oct. 30, 2017) (Emergency Petition). New York DEC also requested the court to stay

3. For the reasons discussed below, we deny the requests for rehearing, stay, and rescission.

I. Background

A. Certificate Order

4. On November 9, 2016, the Commission granted Millennium a certificate of public convenience and necessity authorizing the Valley Lateral Project in Orange County, New York (Certificate Order).[4] The project will consist of 7.8 miles of 16-inch-diameter pipeline and related facilities, and will provide 127,200 dekatherms per day of firm transportation service to the Valley Energy Center in the Town of Wawayanda, New York. The Certificate Order was conditioned upon Millennium filing documentation that it had received all authorizations required under federal law, or evidence of waiver thereof, including certification under section 401 of the CWA, prior to commencing construction.[5]

5. Concurrent with the Commission proceeding, Millennium applied for a section 401 certification from the New York DEC.[6] New York DEC received Millennium's application on November 23, 2015.[7] On December 7, 2015, New York DEC sent a Notice of Incomplete Application to Millennium, requesting additional information.[8]

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the effectiveness of the Notice to Proceed on an interim basis while the court considers the merits of its petition. *Id.* at 34. On November 2, 2017, the court granted an administrative stay pending consideration of the petition by the next available three-judge panel. *In re New York State Dep't of Envtl. Conservation v. FERC*, 2d Cir. No. 17-3503 (Nov. 2, 2017). New York DEC's Emergency Petition is pending at the court.

[4] *Millennium Pipeline Company, L.L.C.*, 157 FERC ¶ 61,096 (2016).

[5] Certificate Order, 157 FERC ¶ 61,096 at Appendix B, Condition 9.

[6] Millennium described its application as "containing nearly 1200 pages of analysis and construction details, including explanations of how water quality would be protected." Millennium Request for Notice to Proceed at 2.

[7] New York DEC does not dispute that it received Millennium's application on November 23, 2015. *See* Emergency Petition at 6.

[8] New York DEC Request for Rehearing at 3.

The notice stated that Millennium's application would be deemed incomplete until the Commission issued an Environmental Assessment (EA) for the project.

6. On May 9, 2016, Commission staff issued the project EA. On June 17, 2016, New York DEC issued a second notice, requesting additional information relating to potential impacts on water quality and endangered species.[9] Millennium provided responses on August 16 and 31, 2016. By letter to Millennium dated November 18, 2016, New York DEC indicated that Millennium's application was complete as of August 31, 2016.[10]

7. In December 2016, Millennium petitioned the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) under section 19(d)(2) of the Natural Gas Act (NGA), alleging that the New York DEC had unlawfully delayed action on the water quality certification and waived its authority under CWA section 401.[11] The court dismissed Millennium's petition, determining that Millennium's waiver claim was not properly before the court, and suggested that Millennium could return to the Commission and "present evidence of the Department's waiver."[12]

8. On July 21, 2017, Millennium filed with the Commission a Request for Notice to Proceed with Construction of the Valley Lateral Project. In its request, Millennium alleged that New York DEC had waived its authority to issue a section 401 certification by failing to act within one year of receiving Millennium's application on November 23, 2015. New York DEC disagreed, arguing that it had one year from the date the

[9] *Id.*

[10] *Id.* at 8 and Exhibit K (appending the Nov. 18, 2016 letter from New York DEC to Millennium).

[11] 15 U.S.C. § 717r(d)(2) (2012) (providing original and exclusive jurisdiction in the D.C. Circuit for the review of the alleged failure to act by federal or state agency on an application for a permit required under federal law, other than the Coastal Zone Management Act).

[12] *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 701 (D.C. Cir. 2017).

application was "complete" to render its decision, i.e., until August 31, 2017.[13] On August 30, 2017, New York DEC denied Millennium's application for certification.[14]

B. Declaratory Order

9. On September 15, 2017, the Commission issued the Declaratory Order, finding that New York DEC waived its authority to issue a water quality certification under section 401 of the CWA by failing to act before the statutorily-imposed one-year deadline. The Declaratory Order explains that, based on the plain language of the CWA and Congress's intent in including the waiver provision, the Commission interprets the one-year waiver period as beginning the day the state agency receives a certification application—not when the agency considers the application to be complete. In addition, the Declaratory Order concludes that Commission precedent in both NGA and hydroelectric licensing proceedings under the Federal Power Act support interpreting receipt as the triggering event for the waiver period.

10. New York DEC and Petitioners filed timely requests for rehearing of the Declaratory Order on October 13 and 16, 2017, respectively. New York DEC's filing includes a request for stay pending rehearing and any appeals of the Declaratory Order.

C. Notice to Proceed with Construction

11. On October 20, 2017, Millennium filed a Request for a Notice to Proceed with Construction, demonstrating that it had obtained all federally-required environmental permits, or waiver thereof, necessary for construction of the project. On October 26, 2017, New York DEC filed an opposition to Millennium's renewed request, and Millennium filed an answer to New York DEC's opposition. On October 27, 2017, Commission staff granted Millennium's request and issued a Notice to Proceed.

12. On October 30, 2017, New York DEC filed a Request for Stay of the October 27, 2017 Notice to Proceed pending resolution of its request to reopen, or in the alternative, rehearing of and motion to stay, the Certificate Order; its request for rehearing of the

[13] New York DEC did not define what it considers to be a "complete application," but in this case it appears New York DEC considered Millennium's application to be "complete" once it received Millennium's August 31, 2016 response to the agency's request for additional information.

[14] New York DEC August 30, 2017 Notice of Decision Letter (filed August 31, 2017).

Declaratory Order; and, any subsequent appeals. On November 2, 2017, Millennium filed an answer in opposition to New York DEC's motion for stay.

II. Discussion

A. Requests for Stay

13. New York DEC's only support for its October 13 request for stay of the Declaratory Order is the assertion that a stay is necessary to "prevent potential irreparable harm to the State's environment."[15]

14. In its October 30 Request for Stay, New York DEC claims that a stay of construction is necessary to prevent potential harm to the state's environment and natural resources during the Commission's consideration of the requests for rehearing and any subsequent appeals. New York DEC asserts that a stay is necessary to "prevent potential irreparable harm to the State's environment, including potential harm derived from the Department's reduced oversight of the Project, and trenching and other land- and water-based disturbances."[16] Furthermore, New York DEC contends that issuing a Notice to Proceed before issuing an order on the New York DEC's request for rehearing of the Declaratory Order "defies logic and undermines New York's Section 401 CWA jurisdiction to determine if a project is consistent with New York water quality standards."[17]

Commission Determination

15. For the reasons discussed below, the Commission finds that justice does not require a stay and therefore denies New York DEC's request to stay the Notice to Proceed. The Commission grants a stay when "justice so requires."[18] In determining whether this standard has been met, the Commission considers several factors, including: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is

[15] New York DEC Request for Rehearing at 2.

[16] New York DEC October 30 Request for Stay at 3.

[17] New York DEC October 30 Request for Stay at 1-2.

[18] *Tennessee Gas Pipeline Co., L.L.C.*, 157 FERC ¶ 61,154, at P 4 (2016); *Algonquin Gas Transmission, LLC*, 156 FERC ¶ 61,111, at P 9 (2016); *Enable Gas Transmission*, 153 FERC ¶ 61,055, at P 118 (2015) (*Enable*); *Transcontinental Gas Pipe Line Co., L.L.C.*, 150 FERC ¶ 61,183, at P 9 (2015).

in the public interest.[19] If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.[20]

16. In order to support a stay, the movant must substantiate that irreparable injury is "likely" to occur.[21] The injury must be both certain and great, and it must be actual and not theoretical. Bare allegations of what is likely to occur do not suffice.[22] The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.[23] Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.[24]

17. New York DEC makes no specific assertions of potential irreparable injury to support its October 13 request for stay of the Declaratory Order; accordingly, we deny that request without further discussion.

18. With respect to its October 30 Stay Request, New York DEC's alleged irreparable injury is a vague claim of environmental harm and an argument that the Commission erred in finding waiver of its water quality certification authority under section 401 of the CWA. This fails to amount to "proof indicating that the harm is certain to occur in the near future."[25]

19. We further find New York DEC's allegation regarding "potential harm derived from the Department's reduced oversight of the Project, including trenching and other land- and water-based disturbances," unavailing. In the EA, Commission staff examined the project's impacts on geology, soils, groundwater, surface water, wetlands, vegetation,

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[19] Ensuring definiteness and finality in our proceedings also is important to the Commission. *See Constitution Pipeline Co., L.L.C.*, 154 FERC ¶ 61,092, at P 9 (2016); *Enable*, 153 FERC ¶ 61,055 at P 118; *Millennium Pipeline* Co., *L.L.C.*, 141 FERC ¶ 61,022, at P 13 (2012).

[20] *See, e.g.*, *Algonquin Gas Transmission, L.L.C.* 156 FERC ¶ 61,111 at P 9.

[21] *See Transcontinental Gas Pipe Line Co., LLC*, 150 FERC ¶ 61,183 at P 10 (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

aquatic resources, wildlife, threatened and endangered species, land use, visual resources, socioeconomics, cultural resources, air quality, noise, reliability and safety, cumulative impacts, and alternatives.[26] Based on the analysis in the EA, the Commission determined that the Valley Lateral Project, if constructed and operated in accordance with Millennium's application and the environmental conditions imposed by the Certificate Order, would not significantly affect the quality of the human environment.[27] In granting Millennium's request to proceed with construction, Commission staff confirmed compliance with all pre-construction procedures. Millennium is required to follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EA, including following its Environmental Construction Standards. Given these requirements, we find that impacts related to ground-disturbing activities will be minimized and we do not believe that denying the request for stay puts the environment at risk.

20. New York DEC's concern about "reduced oversight" also does not rise to the level of "irreparable harm" where the Department's participation in the Commission's environmental review of the Project resulted in significant Project modifications,[28] and the Commission imposed mandatory environmental monitoring. Millennium is required to assign a trained environmental inspector for each construction spread and at least one inspector to monitor horizontal directional drilling (HDD) activities and to be present where additional temporary workspace is within 50 feet of a waterbody.[29] Furthermore,

[26] New York DEC and the New York Department of Agriculture and Markets participated in the development of the environmental analysis. *E.g.*, Certificate Order, 157 FERC ¶ 61,096 at PP 48-49.

[27] Certificate Order, 157 FERC ¶ 61,096 at P 133.

[28] *See id.* at P 48 (noting that at New York DEC's request Millennium revised the crossing method for Department-regulated forested wetlands and the timing of open-cut stream crossings). In addition, at New York DEC's request Millennium revised its Environmental Construction Standards to require use of biodegradable materials for bank stabilization at stream banks and to require use of a native wetland seed mix preferred by the Department for revegetation. *Id.*

[29] *Id.* at P 71, and Appendix B Environmental Condition 3 (requiring trained environmental inspectors), Condition 6 (requiring implementation plan that specifies procedures if noncompliance occurs), and Condition 7 (requiring one environmental inspector per spread).

Commission staff will conduct routine compliance inspections of the project throughout construction and restoration.

21. In its stay request, New York DEC also disagrees with Commission staff's approval of Millennium's request to modify environmental condition 14, which requires concurrence from the U.S. Fish and Wildlife Service (FWS) and New York DEC on bog turtle surveys in wetlands within the project survey corridor.[30] New York DEC argues that Millennium should have sought rehearing to modify an environmental condition. While environmental condition 14(a) required Millennium to complete bog turtle surveys and file concurrence from the resource agencies, the Notice to Proceed made clear that since Millennium had provided the survey reports to the agencies and received concurrence from FWS finding that the project may affect, but is not likely to adversely affect, the bog turtle (and no response from New York DEC), no further coordination or consultation is required.[31] We find Commission staff's determination that Millennium complied with this condition appropriate, and modification of the condition reasonable.[32]

22. We further find that it would not be in the public interest to stay construction of the Valley Lateral Project. The Commission found that the project is required by the public convenience and necessity, and commencement of construction will allow Millennium to provide natural gas transportation service to the Valley Energy Center,[33]

[30] New York DEC Request for Stay at 2.

[31] *See* 50 C.F.R. 402.13(a) (2017) ("If during informal consultation it is determined by the Federal agency, with the written concurrence of the [FWS], that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.").

[32] Certificate Order, 157 FERC ¶ 61,096 at Appendix B, Condition 2 ("The Director of OEP has delegated authority to . . . [modify] . . . conditions of the Order. . . .").

[33] The Valley Energy Center is a new 680 megawatt natural-gas fueled combined-cycled generator located in the Lower Hudson Valley, which once in service, will generate enough electricity to power 600,000 homes.

which is currently under construction and has a February 2018 anticipated in-service date.[34]

23. For these reasons, the Commission finds that New York DEC has not demonstrated that it will suffer irreparable harm and further finds that a stay would not be in the public interest. Therefore, the October 30 Request for Stay is denied.

B. Section 401 Waiver

24. New York DEC asserts that the Commission erred in finding that New York DEC waived its water quality certification authority under section 401 of the CWA. The department argues that the CWA does not indicate what form a "request for certification" must take in order to trigger the one-year waiver period. Based in part on the United States Court of Appeals for the Fourth Circuit's (Fourth Circuit) holding in *AES Sparrows Point LNG, LLC v. Wilson (AES Sparrows)*,[35] New York DEC interprets section 401 as requiring a complete application to trigger the one-year waiver period. It claims that its interpretation is consistent with New York's procedural regulations. New York DEC also states that because it is charged with determining whether to issue a water quality certification for the project, it—not the Commission—is the appropriate agency to interpret the statutory deadline.

25. New York DEC asserts that the Commission's interpretation of section 401 would require states to act on *any* request for a water quality certification, which could frustrate states' obligations under the CWA. It argues that being forced to deny an incomplete application would unnecessarily limit New York DEC's options, be inefficient, and penalize both the state and the applicant by foreclosing the opportunity to work cooperatively on the incomplete application.

26. The Petitioners support New York DEC's interpretation of the CWA. They express concern that the Commission's interpretation of the section 401 waiver provision would "incentivize pipelines applicants, like Millennium here, to provide little or no information or explanation in its application materials and to drag out the process to deprive the permitting agency with needed record evidence upon which it would

[34] By November 2016, CPV Valley had obtained "all regulatory approvals, including its air permits from New York DEC and a certificate of public convenience and necessity from the New York Public Service Commission." CPV Valley, LLC Answer in Opposition to New York DEC Motion for Reopening and Stay at 11, Docket No. CP16-17-001 (filed Sept. 15, 2017).

[35] 589 F.3d 721 (4th Cir. 2009).

nonetheless have to act."[36] They suggest that this would result, as it did here, in the Commission being able to "simply nullify" the state permitting process because the state could not complete its review fast enough based on inadequate information.[37]

Commission Response

27. As a threshold matter, we disagree with the New York DEC's contention that New York DEC, as the certifying state agency, is the appropriate agency to interpret "any ambiguous terms of the CWA."[38] In general, courts do not afford deference to state agency interpretations of federal law even where state agencies are delegated substantial roles in cooperative federalist schemes.[39] And while it is true that states are sometimes given deference by courts in interpreting federal law where a federal agency has approved a state agency's plan or interpretation of federal law,[40] that is not the case here. There is no evidence that the Environmental Protection Agency—the federal agency charged with primary federal oversight of the CWA[41]—has approved any of New York's

[36] Petitioners Request for Rehearing at 22-23.

[37] *Id.* at 22.

[38] New York DEC Request for Rehearing at 6.

[39] *See, e.g., Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495-96 (9th Cir. 1997) (explaining that California Department of Health Services' interpretation of federal Medicaid Act is reviewed *de novo* because "a state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes under *Chevron*"); *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989) (per curiam) (In holding that the lower court gave improper deference to the New York Department of Social Services' interpretation of federal law, the court stated that "[t]he issue here is not the one posed in *Chevron* because no federal agency is involved. Instead, the question is whether the state law and implementing regulations are consistent with federal law. This is an issue of law, subject to *de novo* review in federal court . . .").

[40] *See, e.g., Perry v. Dowling*, 95 F.3d 231, 237 (2d Cir. 1996) ("In these circumstances, in which the state has received prior federal-agency approval to implement its plan, the federal agency expressly concurs in the state's interpretation of the statute, and the interpretation is a permissible construction of the statute, that interpretation warrants deference.").

[41] *See* 33 U.S.C. § 1341(a)(1) (2012) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency shall administer this chapter.").

procedural regulations it purports to rely on, much less its interpretation of these regulations as applied to the CWA waiver provision.

28. Further, we do not agree that the Fourth Circuit's holding in *AES Sparrows* is determinative in this case. AES Sparrows Point, LLC (AES) was seeking to construct and operate a liquefied natural gas terminal and associated pipeline for which it obtained authorization and a certificate of public convenience and necessity from the Commission.[42] AES was also required to obtain under the CWA both an individual section 404 dredging and discharge permit from the Army Corps of Engineers (Corps)[43] and section 401 water quality certifications from the Maryland Department of the Environment (Maryland) and the Pennsylvania Department of Environmental Protection (Pennsylvania). After several requests for additional information by both the Corps and Maryland, followed by responses from AES, the Corps and the Commission issued a joint public notice.[44] The Corps' portion of the notice provided, in part, that "[f]or [Corps] permitting purposes, the applicant is required to obtain a Water Quality Certification in accordance with Section 401 of the [CWA] from [Maryland and Pennsylvania]."[45] The notice specified that "[t]he Section 401 certifying agencies have a statutory limit of one year in which to make their decisions."[46] When Maryland denied

[42] *AES Sparrows Point LNG, LLC*, 126 FERC ¶ 61,019 (2009) (Order Issuing Certificate).

[43] Section 404 of the CWA requires a permit from the U.S. Army Corps of Engineers (Corps) before dredged or fill material may be discharged into U.S. waters. An individual permit is required for activities with potentially significant impacts. Individual permit applications are processed and reviewed by the Corps. However, discharges that will have only minimal adverse effects are allowed under a general permit, which are issued on a nationwide, regional, or state basis for particular categories of activities. The general permit process eliminates individual review and allows certain activities to proceed with little or no delay, provided that the general or specific conditions for the general permit are met. *See* Section 404 Permit Program, EPA.GOV, https://www.epa.gov/cwa-404/section-404-permit-program (last visited Nov. 9, 2017). Millennium's construction activities for the Valley Lateral project fell under the Nationwide 12 general permit.

[44] *AES Sparrows*, 589 F.3d at 725 (citing 73 Fed. Reg. 24276–02, 24277 (May 2, 2008)).

[45] *Id.*

[46] *Id.* As the Commission explained in its order on rehearing and clarification of the certificate order issued to AES, the Commission's view (which was not at issue in the *AES Sparrows* court case) was that the language contained in the joint notice

the water quality certification within one year of the joint notice, AES petitioned the Fourth Circuit to review the denial, arguing in part that the waiver period should have been triggered when AES first filed its application for certification with Maryland.

29. In denying AES's petition for review, the Fourth Circuit deferred to the Corps' interpretation of the CWA, as set forth in its regulations. The court found that because the Corps is charged with determining whether to issue AES a CWA section 404 permit for the project, the Corps' interpretation of the waiver period as set forth in the Corps' regulations at 33 C.F.R. § 325.2(b)(1)(ii) is entitled to "*Chevron*"[47] deference.[48] The cited Corps regulation states that, "[i]n determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a valid request for certification."[49]

30. The court concluded that, "[h]ere, the Corps' interpretation that only a valid request for § 401(a)(1) water quality certification, as determined by the Corps, will trigger the one-year waiver period in connection with a § 404 permit is permissible. . . ."[50] The Fourth Circuit also noted that AES's reliance on the Commission's regulation governing waiver of section 401 authority with respect to hydroelectric license applications was misplaced given that the Commission is not charged with administering the CWA.[51]

31. Millennium's case is distinguishable from *AES Sparrow*. In this proceeding, the only federal agency that has interpreted the one-year waiver provision in section 401(a)(1) is the Commission. Unlike in *AES Sparrow*, the Corps' interpretation of the

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was "a recitation of the[] statutory provisions" and "did not, and could not, modify the 'triggering event' set forth in the statute. . . ." *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 62 (2009) (Order on Rehearing and Clarification and Denying Stay).

[47] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984) (granting deference to interpretations of statutes made by those government agencies charged with enforcing the statute, unless such interpretations are unreasonable).

[48] *AES Sparrows*, 589 F.3d at 729.

[49] 33 C.F.R. § 325.2(b)(1)(ii) (2008).

[50] *AES Sparrows*, 589 F.3d at 729.

[51] *See id.* at 728, 730. The Commission was not a party to the *AES Sparrows* case.

CWA is not at issue in this proceeding because Millennium was not required to obtain a dredging and discharge permit under section 404 of the CWA. Millennium's project did not require an individual 404 permit and instead fell under a nationwide general permit.[52] Thus, no comparable Corps notice was issued.[53] Indeed, the Corps confirmed in an October 16, 2017 letter that it wishes to remain neutral in the disagreement over waiver under section 401.[54] Moreover, the fact that the Fourth Circuit gave deference to the Corps' interpretation of section 401 in the 404 context does not mean that the Corps' interpretation was the best or most accurate interpretation—it simply means that the court found the interpretation to be a reasonable one with respect to the processing of an individual 404 permit and the accompanying 401 permit.

32. *AES Sparrow* can be read as granting deference to the Corps with respect to procedural issues related to section 404 of the CWA, which the Corps has the exclusive authority to implement. However, it should not be read as holding that a determination by the Corps with respect to its duties is binding on all other agencies with CWA responsibilities under sections of that act with respect to which the Corps has no unique responsibility. Indeed, courts have held that the Commission is required to make

[52] A May 11, 2017 letter from the New York District of the Corps confirmed the applicability of a nationwide permit for Millennium's project. Millennium October 26, 2017 Supplemental Information – Agency Correspondence filing, Attachment A.

[53] The Corps' regulations that require the Corps to issue public notice of the application and to verify that the certifying agency has received a valid request for certification do not apply to nationwide permits. *See* 33 C.F.R. § 325.3(b) (2017) (establishing separate notice requirements for general permits, including nationwide permits).

[54] *See* Millennium October 26, 2017 Supplemental Information – Agency Correspondence Filing, Attachment A ("In this situation, the Corps does not endorse the position taken by either side of this dispute. This office would prefer to allow the parties involved in the dispute to resolve this legal question. Should the Federal Court resolve this legal question, the Corps would abide by whatever final determination the Federal Courts make in this case.").

procedural determinations relating to section 401,[55] with no suggestion that the Commission must defer to the Corps or any agency in resolving these issues.

33. Further, unlike the Corps in *AES Sparrow*, New York DEC does not have a comparable regulation governing waiver. In its rehearing request, New York DEC cites section 621.7 of New York Codes, Rules and Regulations,[56] which New York DEC describes as providing that, "[the] public notice procedure for all applications, including for [water quality certifications], is triggered by a complete application."[57] Unlike the Corps' waiver regulation, New York DEC's cited regulation, section 621.7, makes no mention of waiver and does not define receipt. Although New York DEC argues that the 401 waiver period is also triggered by this complete application date referenced in section 621.7 of its regulations, New York's regulatory definition of "complete application" contemplates an application that is complete in form but still requires additional information:

> *Complete application* means an application for a permit which is in an approved form and is determined by the department to be complete for the purpose of commencing review of the application but which may need to be supplemented during the course of review in order to enable the department to make the findings and determinations required by law.[58]

This definition suggests that New York DEC should have issued a notice of complete application when it received Millennium's 1,200 page application, even if supplemental information was required.[59]

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[55] *See City of Tacoma, Wash. v. FERC*, 460 F.3d 53 (D.C. Cir. 2006) (Commission must confirm whether state has complied with section 401's notice requirements); *Keating v. FERC*, 927 F.2d 616 (D.C. Cir. 1991) (Commission must determine whether state revocation of certification was effective).

[56] N.Y. COMP. CODES R. & REGS. tit. 6, § 621.7 (2017).

[57] New York DEC Request for Rehearing at 5.

[58] N.Y. COMP. CODES R. & REGS. tit. 6, § 621.2(f).

[59] New York DEC also appears to have failed to follow section 621.7(a) of its regulations which require it to "immediately upon determining that an application is complete . . . provide notice of complete application" to any interested person and publish notice of complete application no more than 10 days later. N.Y. COMP. CODES R. &

34. Moreover, New York DEC appears to apply its interpretation of section 401 unevenly. Only on rehearing and in response to recent challenges in federal court has New York DEC fully and clearly articulated its position on section 401 waiver. Courts afford less deference to agency interpretations that do not have a basis in practice or which are formed for the first time on appeal.[60] In its brief to the United States Court of Appeals for the Second Circuit (Second Circuit) in *Constitution Pipeline Co. v. Seggos (Constitution)*,[61] New York DEC explains that Constitution Pipeline Company, LLC (Constitution) voluntarily withdrew and resubmitted its joint application for section 401 and 404 permits under the CWA, which "[t]he parties understood . . . would necessarily extend the maximum one-year review process 'by which requests for certifications are to be approved or denied as set forth in in [sic] Section 401(a)(1)' of the CWA."[62] New York DEC further explained in its brief that, "[g]iven the incomplete nature of the application at that time, if Constitution had refused to re-submit the application materials, [New York DEC] would likely have denied the Section 401 Certification."[63] This explanation demonstrates that as recently as October 2016, New York DEC acted under the assumption that an incomplete application requiring additional information would still trigger the one-year waiver period. Indeed, New York DEC had issued a notice of incomplete application pursuant to its regulations and had requested substantial supplemental information from Constitution, yet still understood the one-year waiver period had begun and thus requested resubmission of Constitution's application to reset the clock.

35. New York DEC's actions were similarly inconsistent regarding the section 401 waiver period trigger in its consideration and denial of National Fuel Gas Supply Corporation and Empire Pipeline, Inc.'s (together, National Fuel) joint request for a 401 permit for the Northern Access Pipeline Project. In its August 10, 2017 brief to the

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REGS. tit. 6, § 621.7(a). New York DEC has stated that Millennium's application was complete on August 31, 2016, yet it first published notice of complete application on July 5, 2017.

[60] *See, e.g., Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action.").

[61] 868 F.3d 87 (2d. Cir. 2017).

[62] Final-Form Brief for Respondents at 18-19, *Constitution* (No. 16-1568).

[63] *Id.* at 19.

Second Circuit, New York DEC states that, although National Fuel submitted its incomplete 401 application in February 2016, "National Fuel and the Department later agreed that, for purposes of the Department's section 401 review, the application would be deemed received on April 8, 2016, extending the deadline for a final decision on the section 401 certification to April 7, 2017."[64] While we do not opine here on the validity of that argument, we note that if New York DEC had applied in that proceeding the interpretation of section 401 that it offers here on rehearing, entering into such an agreement would be entirely unnecessary—New York DEC could simply have postponed the start of the one-year waiver period indefinitely by deeming the application incomplete. We also note that New York DEC did not issue a notice of complete application to begin its public comment period until January 18, 2017,[65] yet nevertheless felt obligated to act by April 7, 2017,—one year from the agreed upon "receipt" date—when it denied National Fuel's application.

36. Regardless of the degree of deference that the courts may ultimately accord the Commission's interpretation of section 401, the Commission is the proper agency to decide in the first instance whether New York DEC has waived its authority under section 401 of the CWA. This much was confirmed by *Millennium Pipeline Co. v. Seggos*,[66] where the D.C. Circuit, after finding that the court lacked jurisdiction to decide the waiver issue presented here,[67] suggested an appropriate next step for Millennium would be to "present evidence of waiver directly to FERC to obtain the agency's go-ahead to begin construction."[68] If the Commission had no authority to decide whether

[64] Proof Brief for Respondents at 15, *National Fuel Gas Supply Corp. v. Seggos*, No. 17-1164 (2d Cir. Petition filed April 21, 2017).

[65] *Id.* at 18-19.

[66] 860 F.3d 696.

[67] *Id.* at 698. Specifically the D.C. Circuit held that it did not have jurisdiction to decide whether New York DEC had waived its section 401 authority because Millennium lacked standing. The court found that Millennium had not suffered "injury in fact" because, given the CWA's waiver provision, Millennium could not be injured by state agency delay. *See id.*

[68] *Id.* at 700. *See also Keating v. FERC*, 927 F.2d at 622 ("[T]he question before us focuses on FERC's authority to decide whether the state's purported revocation of its prior [section 401 water quality] certification satisfied the terms of section 401(a)(3) [of the CWA]. We have no doubt that the question posed is a matter of federal law, and that it is one for FERC to decide in the first instance.").

waiver had occurred, the court surely would not have recommended that Millennium raise the issue before us.

37. Moreover, unlike in previous CWA cases where courts have declined to give deference to the Commission's interpretation of substantive provisions,[69] the Commission indisputably has a central role in setting deadlines in NGA proceedings. The Energy Policy Act of 2005 (EPAct 2005),[70] which amended the NGA, designates the Commission "as the lead agency for the purposes of coordinating all applicable Federal authorizations,"[71] and declares that "[e]ach Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission."[72] While we recognize that EPAct 2005 does not supersede the waiver deadline established by the CWA,[73] it does reinforce the Commission's role in coordinating agency actions and in setting and enforcing deadlines under the NGA. Courts have recognized that where "statutes are 'capable of co-existence,' it becomes the *duty* of [the] court 'to regard each as effective' – at least absent clear congressional intent to the contrary."[74] Arguably, allowing the Commission to provide a uniform interpretation of the waiver issue presented here is the precise scenario that Congress envisioned when it directed the Commission to set schedules and coordinate agency actions in accordance with federal law in EPAct 2005.

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[69] *See, e.g., Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 297 (D.C. Cir. 2003) (reviewing Commission's interpretation of the word "discharge" in section 401(a)(1) of the CWA *de novo* because the Environmental Protection Agency is charged with administering that chapter of the CWA).

[70] Pub. L. No. 109–58, 119 Stat. 594 (2005).

[71] 15 U.S.C. § 717n(b)(1) (2012).

[72] *Id.* § 717n(b)(2).

[73] EPAct 2005 directs the Commission, in establishing schedules for federal authorizations, to "comply with applicable schedules established by Federal law." *Id.* § 717n(c)(1)(B).

[74] *FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) (emphasis in original) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

38. As we explained in the Declaratory Order,[75] section 401(a)(1) of the CWA is unambiguous.[76] The plain meaning of "after receipt of request" is the day the agency receives a certification application, rather than when the agency considers the application to be complete. New York DEC argues that this reasoning contradicts the Commission's conclusion that section 401 is ambiguous because it "reads additional words into the statute by interpreting 'request' to mean 'written certification application.'"[77] But this argument ignores the rest of section 401, including the plain meaning of words like "application" and "receipt." The preceding sentence in section 401(a)(1) uses the phrase "applications for certification." Given the context, the word "application" is most reasonably interpreted as "a form used in making a request."[78] This meaning is further supported by the use of the word "receipt," which is defined as "the act or process of receiving;"[79] "receiving" is commonly understood as "to come into possession of."[80] New York DEC says that "[n]obody contends that receipt of a *verbal* request for a [water quality certification] would trigger the waiver period, but that interpretation –

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[75] Declaratory Order at P 13.

[76] *See, e.g., North Carolina. v. FERC*, 112 F.3d 1175, 1183-84 (D.C. Cir. 1997) (finding section 401(a)(1) "clear and unambiguous" and noting that "[o]nly after a request has been made can a state waive its certification right, and then only by refusing to respond to the request within a reasonable period of time.").

[77] New York DEC Request for Rehearing at 6.

[78] *Definition of Application*, MERRIAM-WEBSTER.COM, https://www.merriamwebster.com/dictionary/application (last visited Nov. 9, 2017). Further, "request" is ordinarily understood to mean to ask, petition, or entreat. *Mallard v. U.S. Dist. Ct. for the S.D. of Iowa*, 490 U.S. 296, 301 (1989).

[79] *Definition of Receipt*, MERRIAM-WEBSTER.COM, https://www.merriamwebster.com/dictionary/receipt (last visited Nov. 9, 2017). *See also United States v. Ramos*, 685 F.3d 120, 131 (2d Cir. 2012) (finding that courts have determined that the ordinary meaning of "receive" includes "to take possession or delivery of") (citations omitted); *United States v. Pruitt*, 638 F.3d 763, 766 (11th Cir. 2011) (noting that where the statute does not define terms like "receipt," courts have given the term its plain meaning and holding that the "ordinary meaning of 'receive' is 'to knowingly accept' or 'to take possession or delivery of'" (quoting Webster's Third New International Dictionary: Unabridged 1894 (1993)).

[80] *Definition of Receiving*, MERRIAM-WEBSTER.COM, https://www.merriamwebster.com/dictionary/receiving (last visited Nov. 9, 2017).

however unreasonable – is not ruled out by FERC's arbitrary interpretation of the term 'request.'"[81] To construe section 401 as requiring anything other than a written application is unreasonable because it requires reading ambiguity into the statute. Determining whether the plain meaning of the statutory text resolves a dispute over statutory interpretation includes consideration of "the particular statutory language at issue, as well as the language and design of the statute as a whole;"[82] it does not involve assigning unreasonable explanations and reading in isolation each individual word in the statute.

39. New York DEC cites *AES Sparrow* to support its assertion that section 401(a)(1) is ambiguous on what triggers the waiver period. While the Fourth Circuit did find that the CWA "is ambiguous on the issue" of "whether an invalid as opposed to only a valid request for a water quality certification will trigger" the one-year waiver period,[83] other courts have found the waiver language to be unambiguous. In upholding the Commission's interpretive rule in hydroelectric proceedings, which makes clear that receipt of a certification application is the triggering event for the one-year period under section 401(a)(1) of the CWA,[84] the D.C. Circuit stated: "In imposing a one-year time limit on States to 'act,' Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request. This is clear from the plain text."[85] The United States Court of Appeals for the Ninth Circuit similarly found that the Commission's "rulemaking was fully consistent with the letter and intent of 401(a)(1) of the CWA."[86]

40. We disagree with the policy arguments offered by both New York DEC and the Petitioners. As we explained in the Declaratory Order, the Commission's interpretation of section 401 does not leave a state water quality certifying agency without remedy because it can deny an incomplete application. Indeed, New York DEC stated that it

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[81] New York DEC Request for Rehearing at 6.

[82] *S. California Edison Co. v. FERC*, 195 F.3d 17, 23 (D.C. Cir. 1999).

[83] *AES Sparrows*, 589 F.3d at 729.

[84] 33 U.S.C. § 1341(a)(1) (2012).

[85] *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

[86] *State of California ex. rel. State Water Resources Control Bd. v. FERC*, 966 F.2d 1541, 1553-54 (9th Cir. 1992) (*California v. FERC*) (discussing the Commission's rulemaking in which the Commission made clear that receipt of section 401 application triggers the one-year waiver period).

would have done just this if Constitution had refused to withdrawal and resubmit its "incomplete" application.[87] Our interpretation ensures that an applicant has recourse within one year of submitting a certification application because the applicant can challenge the state agency's denial in court. Under New York DEC's reading of the statute, a state agency can request supplemental information over an indefinite period of time, holding both the applicant and the effectiveness of the Commission's authorizations in limbo. Congress surely did not intend to allow this practice when it enacted the waiver provision to "ensure that sheer inactivity by the States . . . will not frustrate the federal application."[88]

41. With respect to hydropower projects, since 1987 the Commission has consistently determined, both by regulation and in our orders on proposed projects, that "one year after the date the certifying agency receive[s] a written request for certification" is the appropriate interpretation of section 401.[89] For many of the same reasons that supported the Commission's adoption of this interpretation in hydroelectric proceedings, using the receipt date as the triggering date for the one-year period in gas proceedings provides substantial benefits.[90] First, our interpretation avoids the difficulty

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[87] *See supra* text accompanying note 58.

[88] Clean Water Act 1970 Amendments Conference Report, H.R. Conf. Rep. 91-940 (1970), reprinted in 1970 U.S.C.C.A.N 2691, 2741.

[89] 18 C.F.R. § 4.34(b)(5)(iii) (2017). *See also California v. FERC*, 966 F.2d 1541 (affirming Commission finding of waiver based on state failure to act within one year of receipt of certification request). While there is no comparable regulation for NGA proceedings, the Commission has formally clarified that the term "receipt" as used in its regulation governing notification of an agency's receipt of a request for a federal authorization (i.e., permits, etc.) required for a natural gas infrastructure project, 18 C.F.R. 385.2013(a), means the day that a request for a federal authorization is submitted to an agency, not the day an agency takes official notice that a complete application has been received and is ready for processing. *Regulations Implementing the Energy Policy Act of 2005; Coordinating the Processing of Federal Authorizations for Applications Under Sections 3 and 7 of the Natural Gas Act and Maintaining a Complete Consolidated Record*, Order No. 687, FERC Stats. & Regs. ¶ 31,232, at P 23 (2006) (cross-referenced at 117 FERC 61,076) (Final Rule).

[90] See discussions of waiver in *Hydroelectric Licensing Under the Federal Power Act*, Order No. 2002, FERC Stats. & Regs. ¶ 31,150, at P 265 (2003) (cross-referenced at 104 FERC ¶ 61,109 (2003); *Regulations Governing Submittal of Proposed Hydropower License Conditions and other Matters*, Order No. 533, FERC Stats. & Regs. ¶ 30,921 (cross-referenced at 55 FERC ¶ 61,193 (1991)), *order on reh'g*, FERC Stats. & Regs.

of having to ascertain and construe the requirements of numerous divergent state statutes and regulations, providing clarity and certainty to all parties.[91] Second, the Commission's reading of section 401 does not infringe on states' authority to fashion procedural regulations they deem appropriate or, if necessary, to deny applications for failure to meet such regulations.[92] Rather, it provides the maximum allowable time prescribed by the CWA. Finally, the Commission has concluded that the public interest is best served by avoiding undue delay associated with open-ended certification deadlines.[93] Moreover, while the Commission has not had as much cause to deal with the waiver issue with respect to natural gas pipeline cases as it has with hydropower cases, it has clearly held, in two pipeline cases, that a state's one-year review period begins with receipt of an application, not when a state considers an application to be complete.[94]

¶ 30,932, at 30,343-47 (1991); *Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, Order No. 464, FERC Stats. & Regs. ¶ 30,730 (1987).

[91] *See* Order No. 533, FERC Stats. & Regs. ¶ 30,932 ("The Commission's experience has been that it is sometimes far from clear what the applicable law governing filings is. It is much easier and more predictable for the Commission and all parties concerned to determine when an application for water quality certification is actually filed with a state agency and commence the running of the one-year waiver period from that date, instead of the date when an application is accepted for filing in accordance with state law."). *See also* Order No. 2002, FERC Stats. & Regs. ¶ 31,150 at P 265 (declining to adopt commenters' recommendation that the one-year waiver period begin when the state certifying agency deems application complete because that practice was found to be unduly burdensome).

[92] *See* Order No. 533, FERC Stats. & Regs. ¶ 30,932.

[93] *See, e.g.*, Order No. 464, FERC Stats. & Regs. ¶ 30,730 ("This decision is based on the Commission's conclusion that giving the certifying agencies the maximum period allowed by the CWA will not unduly delay Commission processing of license applications and that a major objective of the rule—obtaining early certainty as to when certification would be deemed waived and avoiding open-ended certification deadlines—has been achieved by revising the date from which the waiver period is calculated.").

[94] *See AES Sparrows Point LNG*, LLC, 129 FERC ¶ 61,245, at P 63 (2009), *order vacating certificate*, 145 FERC ¶ 61,113 (2013) (Commission order vacating certificate because applicant decided not to construct LNG terminal and pipeline facilities); and *Georgia Strait Crossing Pipeline*, 107 FERC ¶ 61,065 at P 7 (2004), *order on clarification and reh'g*, 108 FERC ¶ 61,053 (2004).

42. The argument that denying incomplete applications would unnecessarily limit the New York DEC's options, be inefficient, and penalize both the state and the applicant by foreclosing the opportunity to work cooperatively on the incomplete application is unpersuasive.[95] Denying an incomplete application does not prevent the state from working with an applicant; a denial can be issued without prejudice to an applicant's refiling in accordance with the state agency's requirements. The Commission's interpretation of section 401 does not "incentivize pipelines applicants, like Millennium here, to provide little or no information or explanation in its application materials and to drag out the process to deprive the permitting agency with needed record evidence upon which it would nonetheless have to act."[96] Providing insufficient information or explanation to the state agency would place an applicant at serious risk of having its application denied on the basis of failing to provide necessary information, a conclusion that—assuming that the requested material was truly necessary to support a state decision—likely would prove difficult to challenge on appeal. Nor does the Commission's holding "simply nullify" the state permitting process. Holding an agency to a statutorily-imposed deadline in no way nullifies the state's authority to act in a timely manner.

43. For the foregoing reasons the Commission denies rehearing and affirms that under section 401(a)(1) of the CWA, an agency waives its authority to act on an application for a water quality certification if the agency fails to act within one year after the date the certifying agency receives a request for certification.

C. Other Issues Raised by Petitioners

44. In addition to the section 401 water quality certification arguments, Petitioners also allege that the Commission: (1) lacked jurisdiction under the NGA to approve the Valley Lateral Project; (2) violated the CWA by issuing the Certificate Order prior to New York DEC issuing a water quality certification; (3) failed to properly evaluate no action and colocation alternatives; (4) failed to assess the risks of Millennium's proposed wetland mitigation by HDD, including neglecting to investigate the subsurface geotechnical challenges or the risk management strategy in the event of drilling failures; (5) unlawfully segmented its environmental reviews under the National Environmental Policy Act, thereby denying Petitioners due process; and (6) violated the Endangered Species Act (ESA) by issuing the Certificate Order and Declaratory Order.

[95] New York DEC Request for Rehearing at 5.

[96] Petitioners Request for Rehearing at 22-23.

45. These arguments constitute a collateral attack on the Certificate Order because they challenge the Commission's findings regarding potential environmental impacts, safety risks, and other issues that were addressed in the EA[97] and Certificate Order.[98] The statutory deadline for requesting rehearing of the Certificate Order was December 9, 2016.[99] Accordingly, we need not address these arguments here. We also note that, with the exception of the argument that the Commission violated the CWA by issuing the Certificate Order before New York DEC issued a water quality certification, each of these arguments were raised on rehearing in response to the Certificate Order, and they will be addressed by the Commission in a separate order. However, this is not the proper forum to re-litigate issues disposed of by the Certificate Order.[100]

46. With respect to the assertion that the Commission's Certificate Order violated the CWA because the New York DEC had not yet issued a water quality certification, the D.C. Circuit has held that issuing a certificate order conditioned on obtaining a section 401 certification is permissible.[101] The Commission's finding of waiver in this proceeding is consistent with the CWA and does not change the validity of issuing a conditional certificate order.

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[97] May 9, 2016 EA. For discussion of no-action alternative, see 112; for alternatives generally, 112-124; for wetlands, 44-48; for threatened and endangered species, 60-65; and for discussion of HDD technique, including risk-management, 17-19 and Millennium's HDD Plan.

[98] Certificate Order, 157 FERC ¶ 61,096. For discussion of jurisdiction, see PP 14-23; for segmentation, PP 56-61; for ESA, PP 87-99; and for alternatives, P 48.

[99] *See* 15 U.S.C. § 717r(a).

[100] *See, e.g., Arlington Storage Company, LLC*, 151 FERC ¶ 61,160, at P 20 (2015).

[101] *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 397-399 (D.C. Cir. 2017) ("The plain text of the Clean Water Act does not appear to prohibit the kind of conditional certificate the Commission issued here. On its face, section 401(a)(1) does not prohibit *all* "license[s] or permit[s]" issued without state certification, only those that allow the licensee or permittee "to conduct any activity ... which may result in any discharge into the navigable waters." (quoting *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 279 (D.C. Cir. 2015) (Rogers, dissenting in part and concurring in the judgment))). *See also Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1320-21 (D.C. Cir. 2015) (upholding the Commission's conditional approval of a natural gas project where certificate of public convenience and necessity was conditioned on applicant obtaining Clean Air Act permit from the state).

The Commission orders:

(A) The New York State Department of Environmental Conservation's October 13, 2017 request for rehearing and stay of the Commission's September 15, 2017 Declaratory Order is denied.

(B) The New York State Department of Environmental Conservation's October 30, 2017 request for stay of the Commission's October 27, 2017 Notice to Proceed with Construction is denied.

(C) The request for rehearing and rescission filed jointly by Sarah E. Burns and Amanda King, Melody Brunn and the Brunn Estate, and Pramila Malick on October 16, 2017, is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.