IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONSTITUTION PIPELINE COMPANY, LLC, Petitioner, v. FEDERAL ENERGY REGULATORY COMMISSION, Respondent.	)	No. 18-1251 Petition for Review

PETITION FOR REVIEW

Pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), Federal Rule of Appellate Procedure 15, and Circuit Rule 15 of the Circuit Rules for the United States Court of Appeals for the District of Columbia Circuit, Constitution Pipeline Company, LLC hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the following orders issued by the Federal Energy Regulatory Commission (the "Commission"):

1. Order on Petition for Declaratory Order, *Constitution Pipeline Company, LLC*, 162 FERC ¶ 61,014 (Jan. 11, 2018); and
2. Order Denying Rehearing, *Constitution Pipeline Company, LLC*, 164 FERC ¶ 61,029 (July 19, 2018).

The Commission's Orders are attached hereto as Exhibits A and B, respectively.

This petition is timely because it is being filed "within sixty days after the order of the Commission upon the application for rehearing." *See* 15 U.S.C. § 717r(b).

Respectfully submitted,

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Dated: September 14, 2018

Exhibit A

162 FERC ¶ 61,014
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Constitution Pipeline Company, LLC Docket No. CP18-5-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued January 11, 2018)

1. On October 11, 2017, Constitution Pipeline Company, LLC (Constitution) filed a petition for declaratory order, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,[1] asking the Commission to find that, under section 401(a)(1) of the Clean Water Act,[2] the New York State Department of Environmental Conservation (New York DEC) waived its authority to issue a water quality certification for the Constitution Pipeline Project. Constitution asserts that New York DEC failed to act within the statute's time limit.[3] For the reasons discussed below, we deny Constitution's petition.

I. Background

2. On June 13, 2013, Constitution applied for a certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act (NGA) to construct and operate the Constitution Pipeline Project.[4] The project would consist of approximately 124 miles of 30-inch-diameter pipeline and related facilities extending from Susquehanna County, Pennsylvania, through Broome, Chenango, Delaware, and Schoharie Counties, New

[1] 18 C.F.R. § 385.207 (2017).

[2] 33 U.S.C. § 1341(a)(1) (2012).

[3] Constitution October 11, 2017 Petition for Declaratory Order (Petition).

[4] Constitution June 13, 2013 Application for a Certificate of Public Convenience and Necessity.

York.[5] These facilities would support 650,000 dekatherms per day of firm transportation service. The Commission issued a conditional certificate of public convenience and necessity to Constitution on November 9, 2016.[6]

3. Concurrent with the Commission proceeding, Constitution submitted an application to New York DEC on August 22, 2013 (First Application), for a water quality certification for the Constitution Pipeline Project under section 401 of the Clean Water Act.[7] On May 9, 2014, Constitution withdrew and resubmitted its application (Second Application), at New York DEC's request.[8] On April 27, 2015, Constitution again withdrew and resubmitted its application (Third Application), again at New York DEC's request.[9]

4. On April 22, 2016, New York DEC issued a letter denying Constitution's application. New York DEC stated that Constitution had failed to provide sufficient

[5] *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199, at P 6 (2014) (Certificate Order), *order den. reh'g and approving variance*, 154 FERC ¶ 61,046 (2016).

[6] The Certificate Order is conditioned, in part, on Constitution obtaining all "applicable authorizations required under federal law (or evidence of waiver thereof)". Certificate Order, 149 FERC ¶ 61,199 at Appendix, Environmental Condition 8.

[7] 33 U.S.C. § 1341(a)(1) (2012). Section 401 prohibits a federal licensing or permitting agency from authorizing any construction or operation activity that may result in a discharge into navigable waters unless the applicant for the federal license or permit obtains a certification (or waiver thereof) from the state where the discharge will originate that the discharge will comply with applicable water quality standards. *See also* Petition at 12; *id.* app. at 000134-49 (reproducing Constitution's cover letter and application forms). For a detailed discussion of the communications between Constitution and New York DEC, see *Constitution Pipeline Company, LLC, v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 91-98 (2d Cir. 2017).

[8] *Id.* at 12-13, *id.* app. at 000540-41 (reproducing Constitution's letter to New York DEC).

[9] *Id.* at 14; *id.* app. at 002299-0022300 (reproducing Constitution's letter to New York DEC).

information to enable the agency to determine whether the application demonstrated compliance with New York's water quality standards.[10]

5. Constitution sought review of New York DEC's denial before the U.S. Court of Appeals for the Second Circuit, under section 19(d)(1) of the NGA.[11] Constitution claimed that New York DEC had waived its authority under section 401 through delay and that Constitution had submitted sufficient information to New York DEC, making the agency's denial arbitrary and capricious. In an opinion issued August 18, 2017, the court concluded that it lacked jurisdiction to address the question of waiver and upheld New York DEC's denial.[12]

6. On October 11, 2017, Constitution filed with the Commission a petition for declaratory order (Petition) requesting that the Commission find that New York DEC waived its authority under section 401 of the Clean Water Act by failing to act within a "reasonable period of time."[13]

II. Procedural Matters

7. Notice of Constitution's petition was published in the Federal Register on October 19, 2017, with comments, interventions, and protests due on November 9, 2017.[14] Timely, unopposed motions to intervene were filed by Catskill Mountainkeeper, Riverkeeper, Inc., and Sierra Club (jointly); Cynthia Beach; Cabot Oil & Gas Corporation; Timothy Camann; Delaware Riverkeeper Network; Energy Transfer

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[10] *Id*. at 17; *id*. app. at 003181-94 (reproducing New York DEC's Notice of Denial).

[11] 15 U.S.C. § 717r(d)(1) (2012) (providing original and exclusive jurisdiction in the circuit in which a facility is proposed to be constructed for the review of an order or action of a state administrative agency acting pursuant to federal law to issue, condition, or deny any permit, license concurrence, or approval required under federal law, with the exception, not relevant here, of the Coastal Zone Management Act).

[12] *Constitution Pipeline Co., LLC, v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 99-100, 102-03 (2d Cir. 2017). The court explained that, under NGA section 19(d)(2), 15 U.S.C. § 717r(d)(2), the Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction over claims regarding an agency's failure to act on a permit required under federal law.

[13] Petition at 1 (citing 33 U.S.C. § 1341(a)(1)).

[14] 82 Fed. Reg. 49,364.

Partners, L.P.; Karen Feridun; Iroquois Gas Transmission System, L.P.; Catherine Holleran; Massachusetts Pipeline Awareness Network; Janet L. Mulroy; New York DEC; Angelo A. Santoro; Marilyn M. Shifflett; Stop the Pipeline; and Waterkeeper Alliance.

8. Comments were filed by the following entities: Cabot Oil & Gas Corporation, Energy Transfer Partners, L.P., International Union of Operating Engineers Local 825, the Business Council of New York State, National Fuel Gas Supply Corporation, Empire Pipeline, Inc., Laborers International Union of North America, and Mary Tuthill. A protest was filed jointly by Catskill Mountainkeeper, Riverkeeper, Inc., and Sierra Club. New York DEC and Stop the Pipeline each filed answers in opposition to the Petition.

9. On November 28, 2017, Constitution filed an answer to New York DEC's answer. Although the Commission's Rules of Practice and Procedure do not permit answers to an answer, the Commission finds good cause to waive its rules and accept the answer because it provides information that has assisted us in our decision making.[15]

10. Intervenors Catskill Mountainkeeper, Riverkeeper, Inc., and Sierra Club request a formal hearing. The Commission has broad discretion to structure its proceedings so as to resolve a controversy in the best way it sees fit.[16] An evidentiary, trial-type hearing is necessary only where there are material issues of fact in dispute that cannot be resolved on the basis of the written record.[17] Catskill Mountainkeeper, Riverkeeper, Inc., and Sierra Club raise no material issue of fact that the Commission cannot resolve on the basis of the written record. Accordingly, the Commission denies the request for a formal hearing.

III. Discussion

11. At issue here is the "waiver" provision in section 401(a)(1) of the Clean Water Act. Section 401(a)(1) limits the time for a state certifying agency, here New York DEC, to act on a request for certification:

[15] 18 C.F.R. § 385.213(a)(2) (2017).

[16] *See Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001 (1984) (Commission has discretion to manage its own proceedings); *PJM Transmission Owners*, 120 FERC ¶ 61,013 (2007).

[17] *See, e.g., Dominion Transmission, Inc.*, 141 FERC ¶ 61,183, at P 15 (2012); *Southern Union Gas Co. v. FERC*, 840 F.2d 964, 970 (D.C. Cir. 1988).

> If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.[18]

Constitution asserts that New York DEC failed to act within several possible "reasonable period[s] of time" based on several different starting dates and spanning several different lengths of time.

12. The issue is correctly before the Commission. Constitution, as an NGA section 7(e) certificate-holder, must present evidence directly to the Commission of a state certifying agency's waiver of its section 401 certification authority.[19] Although Congress charged the U.S. Environmental Protection Agency (EPA) with primary federal oversight of the Clean Water Act,[20] the Commission indisputably has a central role in coordinating agency actions and in setting and enforcing deadlines in NGA proceedings.[21] This was confirmed, moreover, in *Millennium Pipeline Co. v. Seggos*[22]

[18] 33 U.S.C. § 1341(a)(1) (2012).

[19] *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 700-701 (D.C. Cir. 2017); *see also Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) ("[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 Clean Water Act]. 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.").

[20] *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.").

[21] *See Millennium Pipeline Co., L.L.C.*, 161 FERC ¶ 61,186, at P 37 (2017) (noting that Commission's role "as the lead agency for the purposes of coordinating all applicable Federal authorizations," 15 U.S.C. § 717n(b)(1), and, further, the requirement 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 . . . ." 15 U.S.C. § 717n(b)(2)).

[22] 860 F.3d 696.

when the D.C. Circuit, after finding that it lacked jurisdiction under 15 U.S.C. § 717r(d)(2) to decide the waiver issue,[23] directed the NGA section 7(e) certificate-holder "to present evidence of waiver directly to FERC to obtain the agency's go-ahead to begin construction."[24]

A. Length of Waiver Period

13. Constitution urges the Commission to interpret the statutory language, "within a reasonable period of time (not to exceed one year)" to allow for a finding that an agency has waived certification, even if it acts within a year, if the agency has not acted within some shorter, "reasonable" time.[25] Constitution asserts that a full one-year period for waiver will allow New York DEC's unreasonable delay to pass without consequence. The company points to federal and state regulations or laws that establish a shorter period of time for a certifying agency to act on a request for a section 401 certification.[26] Constitution notes that state regulations anticipate a decision from the New York DEC on a permit application within 60 days after the agency receives a complete hearing record.[27]

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[23] *Id*. at 700. 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 the certificate-holder, Millennium, lacked standing. The court found that Millennium had not suffered "injury in fact" because, if the state had waived certification, Millennium could not be injured by state agency delay even if the agency had gone on to deny the certification outright. *See id* at 700-701 (citing 15 U.S.C. § 717r(d)(2)).

[24] *Id*. at 701.

[25] Petition at 8-12.

[26] Petition at 10-11. Constitution cites a U.S. Army Corps of Engineers (Corps) regulations setting waiver at sixty days after a certifying agency's receipt of the applicant's request unless the district engineer determines that a different period is reasonable, and in a narrower circumstance, a Corps regulation setting a maximum period to act at six months. *See* 33 C.F.R. § 325.2(b)(1)(ii) (2017) (explaining procedural requirements for regulated dredge and fill activities by third parties); 33 U.S.C. § 336.1(b)(8)(iii) (2017) (explaining procedural requirements for dredge and fill activities by the Corps itself).

[27] N.Y. Envtl. Conserv. Law § 70-0109(3)(a)(ii) (2017); N.Y. Comp. Codes R. & Regs. tit. 6, § 621.10(a)(3) (2017).

14. In its answer, New York DEC states that the 60-day period applies to adjudicatory administrative hearings under the state's Administrative Procedures Act and Uniform Procedures Act and so does not apply to Constitution's argument about the section 401 waiver period.[28] Instead, New York DEC argues that the language of section 401, Commission precedent, and judicial precedent "make clear" that the waiver period is no less than one year.[29] Intervenor Waterkeeper Alliance asserts that the Commission and the courts should defer to New York DEC's interpretation of section 401.[30]

15. Congress, in limiting the waiver period to "a reasonable period of time (which shall not exceed one year)" left it to the appropriate federal agency, here the Commission,[31] to determine the reasonable period of time for action by a certifying agency, bounded on the outside at one year.

16. Since 1987 the Commission has consistently determined, both by regulation and in our orders on proposed projects, that the reasonable period of time for action under section 401 is one year after the date the certifying agency receives a request for certification.[32] We see no reason to alter that determination. The substantial benefits

[28] New York DEC Answer at 10.

[29] New York DEC Answer at 7-10

[30] Waterkeeper Alliance November 9, 2017 Motion to Intervene at 3-4.

[31] Neither Constitution nor New York DEC challenges here the Commission's authority to interpret section 401 in this instance. Rather, each would have the Commission concur with its view of the provision.

[32] *See Millennium Pipeline Co., LLC*, 160 FERC ¶ 61,065, at P 13, *order denying reh'g* 161 FERC ¶ 61,186, at PP 1, 9, 40-41 (2017); *Georgia Strait Crossing Pipeline LP*, 107 FERC ¶ 61,065, at P 7 (2004) (holding that the certifying state agency was required to act "*within one year*" of receiving the 401 application); *AES Sparrows Point LNG*, 129 FERC ¶ 61,245, at P 63 (2009) (holding that state agency had one year to act on a section 401 application); *see also* 18 C.F.R. § 4.34(b)(5)(iii) (2017) (regulation governing section 401 certification requirements for hydropower license applicants). There is no corresponding Commission regulation under the NGA.

from this interpretation, which we have primarily discussed in the hydroelectric context,[33] apply equally to natural gas transportation projects. First, our interpretation avoids the difficulty of having to ascertain and construe the requirements of numerous divergent state statutes and regulations (i.e., regarding what is a triggering request for certification) and provides clarity and certainty to all parties.[34] 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.[35] Rather, it provides the maximum allowable time prescribed by the Clean

[33] *Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, Order No. 464, 52 Fed. Reg. 5446, 5447-48 (Feb. 23, 1987), FERC Stats. & Regs. ¶ 30,730 (1987) (initially proposing that certification would be deemed waived if no action is taken on a certification request by 90 days after the public notice of the acceptance of the license application or one year from the date the certifying agency receives the certification request, whichever came first, but ultimately retained the full one-year waiver period because it best served competing interests). See also discussions of waiver in the following rulemakings: *Hydroelectric Licensing Under the Federal Power Act*, Order No. 2002, 68 Fed. Reg. 51,070, 51,095-97 (Aug. 25, 2003), FERC Stats. & Regs. ¶ 31,150, at P 265 (2003) (cross-referenced at 104 FERC ¶ 61,109; *Regulations Governing Submittal of Proposed Hydropower License Conditions and other Matters*, Order No. 533, 56 Fed. Reg. 23,108, 23,126-28 (May 20, 1991), FERC Stats. & Regs. ¶ 30,921 (1991) (cross-referenced at 55 FERC ¶ 61,193), *order on reh'g*, 56 Fed. Reg. 61,137, 61,148-50 (Dec. 2, 1991), FERC Stats. & Regs. ¶ 30,932, at 30,343-47 (1991).

[34] *See* Order No. 533, FERC Stats. & Regs. ¶ 30,932 at 30,345 ("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.

[35] *See* Order No. 533, FERC Stats. & Regs. ¶ 30,932 at 30,345-46.

Water Act. Finally, the Commission has concluded that the public interest is best served by avoiding uncertainty associated with open-ended certification deadlines.[36]

17. The Commission's interpretation also strikes the appropriate balance between the interests of the applicant and the certifying agency. An applicant is guaranteed an avenue for recourse after one year, if it chooses, for adverse treatment by the certifying agency through delay (petition for a waiver determination before the Commission) or through denial (petition for review in the appropriate federal appellate court[37]). A certifying agency remains free to deny the request for certification with or without prejudice within one year if the certifying agency determines that an applicant fails to fully comply with the state's filing requirements or fails to provide timely and adequate information necessary to support granting a water quality certification.[38]

18. Constitution argues that three shorter periods for waiver are justified based on "coercive state action"[39] and "gaming"[40] by New York DEC. The first period ran from Constitution's First Application on August 22, 2013, to Constitution's withdrawal on May 9, 2014. Constitution asserts that New York DEC threatened to deny the application, coercing Constitution to withdraw and resubmit it. The resulting delay to the federal permitting process was unreasonable, Constitution continues, because New York DEC's basis for the contemplated denial—a disagreement over the proposed pipeline route and Constitution's use of remote sensed surveys for properties—exceeded

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[36] *See*, *e.g.*, Order No. 464, FERC Stats. & Regs. ¶ 30,730 at 30,540 ("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.").

[37] *E.g.*, *Berkshire Envtl. Action Team, Inc. v. Tenn. Gas Pipeline Co., LLC*, 851 F.3d 105, 108 (1st Cir. 2017) (acknowledging exclusive federal jurisdiction under NGA section 19(d)(1), 15 U.S.C. § 717r(d)(1), to review a state agency's ruling on an application for a water quality certification).

[38] Order No. 533, FERC Stats. & Regs. ¶ 30,921 at 30,135, *order on reh'g*, FERC Stats. & Regs. ¶ 30,932 at 30,345; Order No. 464, FERC Stats. & Regs. ¶ 30,730 at 30,544.

[39] Petition at 22

[40] *Id.* at 21.

the state's authority under section 401. The second period ran from Constitution's Second Application on May 9, 2014, to New York DEC's request on April 21, 2015, that Constitution again withdraw and resubmit its application. Constitution asserts that agency staff made deceptive statements that their review would be complete within a few months of the resubmission. The third period ran from Constitution's Third Application on April 27, 2015, to New York DEC's denial of the application 361 days later on April 22, 2016. Constitution alleges that New York DEC stopped communicating with Constitution for the final eight months preceding the denial despite earlier communications from agency staff that Constitution's application and supplements were sufficient for review and that the section 401 certification had been prepared and was pending issuance.[41]

19. New York DEC responds that it did not insist or in any way force or induce Constitution to withdraw and resubmit its applications.[42] New York DEC also refutes the eight-month hiatus in communication. New York DEC states that communications with Constitution continued in late 2015 and early 2016 regarding a plan for a third party to monitor project construction, permits for geotechnical investigations to evaluate the feasibility of trenchless stream-crossing methods, and a supplement to Constitution's application.[43]

20. Constitution requests that we determine a reasonable period of time to be less than one year based on a state agency's actions and statements (both verbal and written).[44] We decline to do so because entertaining, on a case-by-case basis, challenges to a certifying agency's processing of a water quality certification would create uncertainty for both state certifying agencies and applicants, and is contrary to Commission precedent in both hydroelectric and natural gas proceedings.[45] Accordingly, we affirm

[41] Constitution also argues that the eight months of inaction are made less reasonable because the second resubmission did not change the content of the first resubmission that had already been under review for 11 months. We reject this characterization of the second resubmission below.

[42] New York DEC Answer at 11-12.

[43] New York DEC Answer at 12-13.

[44] To support its position, Constitution offers declarations from company personnel about conversations by telephone or in person with agency staff. *See* Petition at 12-18.

[45] *See supra* notes 31, 32.

that the length of the section 401 waiver period is one year and remind all participants that the deadlines prescribed by federal law, including those applicable to states, are binding.

21. In the alternative, we conclude that Congress intended to give state agencies up to one year to act on water quality certification applications, and that the reference to a reasonable period was meant to be suggestive, rather than prescriptive. The legislative history indeed demonstrates that Congress intended for states to act expeditiously, but neither it nor the statutory language reveal a intent that federal agencies review the reasonableness of the timing of state action on a case-by-case basis. Doing so would not only be difficult, as we have discussed, but it would severely undercut the authority that Congress gave the states if that authority were subject to reversal any time that a federal licensing or permitting agency felt that a state had taken too long to act. Had Congress wanted to establish such a regime, it could have made clear that federal agencies were to be the arbiters of reasonableness. It did not.

B. Voluntary Withdrawal and Resubmission

22. Constitution also asserts that waiver occurred when New York DEC failed to act within one year of Constitution's Second Application dated May 9, 2014, because the Third Application dated April 27, 2015, was identical to the Second Application.[46] New York DEC publicly acknowledged that it had requested the second withdrawal and resubmission with no changes to "application materials previously provided."[47] For this reason, coupled with the fact that New York DEC issued a notice of complete application on the same day Constitution submitted the Third Application, Constitution characterizes the Third Application as merely a continuation of New York DEC's review of Constitution's Second Application, such that the waiver period did not restart on April 27, 2015.

[46] Although Constitution claims that its first withdrawal and resubmission on May 9, 2014, was coerced (*see supra* at paragraph 18), Constitution does not appear to make this same argument with respect to its second withdrawal and resubmission.

[47] New York DEC, "DEC Announces Public Comment Period on Proposed Constitution Pipeline Until May 14" (Apr. 29, 2015), http://www.dec.ny.gov/press/101519.html; *see also* New York DEC, Environmental Notice Bulletin, *Notice of Complete Application* (Apr. 27, 2015), http://www.dec.ny.gov/enb/20150429_reg0.html.

23. Constitution's argument implies that New York DEC reviewed a static collection of information from the time Constitution filed the Third Application on April 27, 2015. This is not accurate.[48] Regardless, the content of Constitution's Third Application is not material to our legal analysis. Section 401 states that the reasonable period of time starts to run "after receipt of such request [for certification]." The Commission has consistently interpreted the triggering date for the waiver provision to be the date an application is filed with the certifying agency.[49] Constitution emphasizes that the second cycle of withdrawal and resubmission did not change the application materials before New York DEC. We reiterate that once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under section 401(a)(1). We continue to be concerned, however, that states and project sponsors that engage in repeated withdrawal and refiling of applications for water quality certifications are acting, in many cases, contrary to the public interest and to the spirit of the Clean Water Act by failing to provide reasonably expeditious state decisions.[50] Even so, we do not conclude that the practice violates the letter of the statute. Section 401 provides that a state waives certification when it does not act on an application within one year. The statute speaks solely to a state's action or inaction, not to the repeated withdrawal and resubmission of applications. By withdrawing its applications before a year had passed, and by presenting New York DEC with new applications, Constitution gave New York DEC new deadlines. The record does not show that New York DEC in any instance failed

[48] For example, after the Third Application, Constitution submitted a response on June 2, 2015, to the 15,000 public comments on its application, including about stream-crossing methods. Petition at 15. Later that month Constitution submitted an updated Stream Crossing Feasibility Analysis. *Id*. at 15.

[49] *Millennium Pipeline Co., L.L.C.*, 160 FERC ¶ 61,065 at PP 13-16, *order den. reh'gs and motions to stay*, 161 FERC ¶ 61,186 at PP 38-42.

[50] *See PacifiCorp*, 149 FERC ¶ 61,038, at PP 18-20 (2014); *see also Central Vermont Public Service Corporation*, 113 FERC ¶ 61,167, at P 16 (2005) (noting that the process of repeatedly filing and withdrawing water quality certification applications is a "scheme developed by [the state agency] and other parties, and [is] neither suggested, nor approved of, by the Commission").

to act on an application that was before it for more than the outer time limit of one year.

The Commission orders:

Constitution's petition for declaratory order is denied as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)

Exhibit B

164 FERC ¶ 61,029
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Constitution Pipeline Company, LLC Docket No. CP18-5-001

ORDER DENYING REHEARING

(Issued July 19, 2018)

1. On January 11, 2018, the Commission denied a petition for declaratory order filed by Constitution Pipeline Company, LLC (Declaratory Order).[1] Specifically, the Commission determined that under Section 401(a)(1) of the Clean Water Act,[2] the New York State Department of Environmental Conservation (New York DEC) had not waived its authority to issue a water quality certification for the Constitution Pipeline Project. On February 12, 2018, Constitution filed a request for rehearing.

2. For the reasons discussed below, we deny the request for rehearing.

I. Background

3. The Declaratory Order provides a detailed discussion of past proceedings.[3] In brief, Constitution applied to the Commission on June 13, 2013, for a certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act (NGA)[4] to

[1] *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 (2018) (Declaratory Order).

[2] 33 U.S.C. § 1341(a)(1) (2012).

[3] Declaratory Order, 162 FERC ¶ 61,014 at PP 2-6.

[4] 15 U.S.C. § 717f (2012).

construct and operate the Constitution Pipeline Project.[5] The Commission issued a conditional certificate to Constitution on December 2, 2014.[6]

4. Concurrent with that proceeding, Constitution submitted an application to New York DEC on August 22, 2013 (First Application), for a water quality certification for the Constitution Pipeline Project under Section 401 of the Clean Water Act.[7] On May 9, 2014, Constitution withdrew and resubmitted its application (Second Application), at New York DEC's request.[8] On April 27, 2015, Constitution withdrew and resubmitted its application (Third Application), again at New York DEC's request.[9] On April 22, 2016, New York DEC issued a letter denying Constitution's application.

5. On October 11, 2017, Constitution petitioned the Commission for a declaratory order to find that New York DEC had waived its authority to issue a water quality certification for the Constitution Pipeline Project.

6. Section 401(a)(1) limits the time for a certifying agency to act on a request for certification:

> If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification

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[5] Constitution June 13, 2013 Application for a Certificate of Public Convenience and Necessity, Docket No. CP13-499-000.

[6] *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (2014) (Certificate Order).

[7] 33 U.S.C. § 1341(a)(1) (2012). Section 401 prohibits a federal licensing or permitting agency from authorizing any construction or operation activity that may result in a discharge into the navigable waters unless the applicant obtains a certification (or waiver thereof) from the state where the discharge will originate that the discharge will comply with applicable water quality standards. For a detailed discussion of the communications between Constitution and New York DEC, see *Constitution Pipeline Company, LLC, v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 91-98 (2d Cir. 2017).

[8] Constitution October 11, 2017 Petition for Declaratory Order at 12-13; *id*. App. at 000540-41 (reproducing Constitution's letter to New York DEC).

[9] *Id*. at 14; *id*. App. at 002299-0022300 (reproducing Constitution's letter to New York DEC).

> requirements of this subsection shall be waived with respect to such Federal application.[10]

Constitution asserted that New York DEC failed to act within several possible "reasonable periods of time" based on several different starting dates and spanning several different lengths of time.

7. In the Declaratory Order we denied Constitution's petition. We reaffirmed our long-standing interpretation that a "reasonable period of time" for agency action under Section 401 is one year after the date that the certifying agency receives a request for certification.[11] We further found that the record did not show that New York DEC in any instance failed to act on an application from Constitution outside of the one-year time limit.[12] Constitution filed a request for rehearing on February 12, 2018.

II. Discussion

A. Section 401 Does Not Mandate a Case-by-Case Review

8. On rehearing, Constitution claims that the Commission "erred by adopting a 'one-year' rule," contending that Section 401(a) instead "obligates" the Commission to make a case-by-case determination of the "reasonable period of time" in which the relevant certifying agency must act on an application for a water quality certification, based on the particular circumstances presented and the challenges raised in each case.[13]

9. As discussed in the Declaratory Order, to the extent that Congress left it to federal licensing and permitting agencies, here the Commission, to determine the reasonable period of time for action by a state certifying agency, bounded on the outside at one year, we have concluded that a period up to one year is reasonable.[14] In fact, Constitution concedes that Section 401 gives "discretion [to] the licensing agency to determine the

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[10] 33 U.S.C. § 1341(a)(1) (2012).

[11] Declaratory Order, 162 FERC ¶ 61,014 at PP 16, 20.

[12] *Id*. P 23.

[13] Constitution February 12, 2018 Request for Rehearing at 9, 11.

[14] Declaratory Order, 162 FERC ¶ 61,014 at P 15. We noted that neither Constitution nor New York DEC challenged the Commission's authority to interpret Section 401 in this case.

length of the time that qualifies as a 'reasonable period,'"[15] leaving it to dispute only, and with no support, that the selection of a bright-line, one-year period is impermissible. In the alternative, we concluded in the Declaratory Order that the phrase "within a reasonable period of time (which shall not exceed one year)" could be reasonably interpreted as giving state agencies up to one year to act, and the reference to "a reasonable period" was meant to be suggestive, not prescriptive (in other words, states should act as quickly as possible, with one year the outer bound).[16] Constitution unconvincingly attempts to refute this conclusion.[17] Constitution's position relies solely on a reading of Section 401(a)(1)'s contested phrase as unambiguous, an argument that Constitution itself defeats by needing to rely on the legislative history to make its claim.[18] We have concluded that neither the legislative history nor the text of Section 401(a)(1) "reveal an intent that federal agencies review the reasonableness of the timing of state action on a case-by-case basis."[19] Under whichever theory we proceed, Section 401(a)(1) does not mandate a particular outcome other than that the waiver period cannot be longer than a year.

10. We explained in the Declaratory Order why we have concluded that the period for a state to act under Section 401 expires one year after the date that the certifying agency receives a request for certification, noting that this holding yields substantial benefits to the applicant, the certifying agency, and the Commission.[20] We added that entertaining case-by-case challenges would create uncertainty for all parties and be contrary to decades of Commission precedent in both hydroelectric and natural gas proceedings.[21]

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[15] Request for Rehearing at 14.

[16] *See* Declaratory Order, 162 FERC ¶ 61,014 at P 21.

[17] Request for Rehearing at 13.

[18] In its request for rehearing, Constitution quotes the same statements from the legislative history of Section 401 that appeared in Constitution's petition for declaratory order. Request for Rehearing at 13-14 (noting that the legislative history "clearly supports Constitution's reading of Section 401"); Petition for Declaratory Order at 8-9.

[19] Declaratory Order, 162 FERC ¶ 61,014 at P 21.

[20] *Id*. PP 16-17, 20.

[21] Declaratory Order, 162 FERC ¶ 61,014 at P 20. Our conclusion is consistent with *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018), in which the court rejected the state's interpretation that the trigger for the 401 waiver period "after receipt of such request" is the date when the state finds that the application

(continued ...)

11. Constitution objects that the benefits of the Commission's "bright line rule" for waiver are no basis to depart from the statute's "plain language" requiring case-by-case determinations of the reasonable period of time for waiver.[22] We disagree with this characterization. As discussed above, the phrase "within a reasonable time" is not plain. It is open to interpretation by the appropriate federal permitting agency. Nothing in the statute requires that this interpretation vary case-by-case. Indeed, like Constitution's petition for declaratory order, the request for rehearing points to regulations from the U.S. Army Corps of Engineers and Environmental Protection Agency that limit the reasonable period of time to six months, two months, or sixty days.[23] At most, these regulations—which in fact constitute bright-line rules—reflect other federal permitting agencies' conclusions and do not bind the Commission.[24]

12. Constitution cites *Avenal Power Center, LLC v. USEPA* for the proposition that the statute's "clear and unambiguous" language "cannot be overridden by a regulatory process created for the convenience of an Administrator . . . ."[25] However, that case involved an internal EPA appeals process that extended beyond the Clean Air Act's one-

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for 401 certification is complete. *Id*. at 455-56. The court found that this interpretation would allow states to "blur this bright-line rule into a subjective standard" and would allow states to theoretically request supplemental information indefinitely. *Id*. There, subjective uncertainty would have led to inappropriately long waiver periods. Here the problem is reversed; Constitution's request for case-by-case determinations of the reasonable period of time for waiver would introduce subjective uncertainty leading to inappropriately short waiver periods.

[22] Request for Rehearing at 11.

[23] *Id*. at 15; *see also* Declaratory Order, 162 FERC ¶ 61,014 at PP 13-14 (addressing same); Constitution October 11, 2017 Petition for Declaratory Order at 10-11 (citing same). Constitution also repeats a reference to a New York statute and regulation that anticipate New York DEC's action on a permit application within 60 days after the agency receives a complete record. New York DEC previously explained that these standards apply to adjudicatory administrative hearings under the state's Administrative Procedures Act and Uniform Procedures Act and so do not apply to the Section 401 waiver period. Declaratory Order, 162 FERC ¶ 61,014 at P 14.

[24] Further, we are not aware of instances in which a court has ruled on the propriety of these regulations.

[25] Request for Rehearing at 11 (quoting *Avenal Power Ctr., LLC v. USEPA*, 787 F. Supp. 2d 1, 4 (D.D.C. 2011)).

year limit for final decision on a permit application.[26] Here, the Commission has not attempted to extend the period established by Section 401.

B. Restarting the Waiver Period When Applications Are Withdrawn and Resubmitted

13. In the Declaratory Order the Commission explained that once an application for a Section 401 water quality certification is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under Section 401(a)(1).[27] We concluded that Constitution, by withdrawing its applications before a year had passed and by presenting New York DEC with new applications, had given New York DEC new deadlines.[28] The record did not show that New York DEC in any instance failed to act on an application that was before it for more than the outer time limit of one year.[29]

14. Relying on *Brock v. Pierce County*,[30] *Dolan v. United States*,[31] and *Avenal Power Center v. USEPA*,[32] Constitution argues that Section 401 establishes a jurisdiction-stripping deadline at one year that the parties cannot set aside.[33]

15. The cited cases are inapposite. The statutes at issue in *Brock*, *Dolan*, and *Avenal Power Center* respectively required final determinations from the agency or court within 120 days from the filing of a complaint,[34] 90 days from sentencing,[35] or one year from the

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[26] 787 F. Supp. 2d 1, 4 (D.D.C. 2011).

[27] Declaratory Order, 162 FERC ¶ 61,014 at P 23.

[28] *Id*. P 23.

[29] *Id*.

[30] 476 U.S. 253, 259 (1986).

[31] 560 U.S. 605, 610 (2010).

[32] 787 F. Supp. 2d at 4.

[33] Request for Rehearing at 12.

[34] *Brock*, 476 U.S. at 254-255.

[35] *Dolan*, 560 U.S. at 608.

filing of an application.[36] The parties did not dispute that the statutory deadlines had lapsed; rather they disputed whether the lapse had effected a loss of jurisdiction. None of these opinions discussed whether or how a change to the trigger event might alter the period of time for action. We agree that if a state's failure to act results in the waiver of the certification requirement in Section 401, no later action by either or both parties can alter this result.[37] But here New York DEC did not fail to act within the one-year deadline set by Section 401(a)(1).

16. Constitution repeats a series of arguments from its petition for declaratory order to the effect that New York DEC admitted that Constitution's second withdrawal and Third Application were an "unwarranted fiction" to extend the time for review of the application beyond the time allowed under any interpretation of Section 401.[38] Constitution contends that the maximum reasonable period of time for New York DEC's decision expired on May 9, 2015, one year after receipt of the Second Application and eleven months before New York DEC's denial on April 22, 2016.[39] Constitution asserts that the Commission's interpretation of Section 401 allows state agencies to skirt hard choices and engage in legalistic gamesmanship by insisting that applicants reapply by simply resubmitting their existing applications, thus "fostering a regulatory scheme that is detrimental to the public interest."[40]

17. As we explained in the Declaratory Order, a comparison of the contents of Constitution's Second Application and Third Application is not material to our analysis. The statute speaks solely to a state's action or inaction on an application, not to the repeated withdrawal and resubmission of applications.[41] We reaffirm our conclusion that once an application for a Section 401 water quality certification is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling

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[36] *Avenal Power Center*, 787 F.Supp.2d at 2.

[37] *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, at 700 (D.C. Cir. 2017). *See also Cent. Vt. Pub. Serv. Corp.*, 113 FERC ¶ 61,167, at PP 14-16 (2005) (holding that Section 401 contains no provision authorizing either the Commission or the parties to extend the statutory deadline, by private agreement or other action).

[38] Request for Rehearing at 17-18; Petition for Declaratory Order at 19-20.

[39] *Id*. at 17, 19.

[40] *Id*. at 18-9, 21-22.

[41] Declaratory Order, 162 FERC ¶ 61,014 at P 23, *PacifiCorp*, 149 FERC 61,038, at P 20 (2014).

of an application restarts the one-year waiver period under Section 401(a)(1).[42] In the Declaratory Order, we noted our continuing concern that when states and project sponsors engage in repeated withdrawal and refiling of applications for water quality certifications, they act, in many cases, contrary to the public interest and to the spirit of the Clean Water Act by failing to provide reasonably expeditious state decisions.[43] Even so, we did not conclude that the practice violates the letter of the statute.[44]

18. We explained in the Declaratory Order that the Commission's interpretation of Section 401 strikes the appropriate balance between the interests of the applicant and the certifying agency.[45] An applicant is guaranteed an avenue for recourse after a year of inaction by filing a petition for a waiver determination before the Commission (as did the applicant in *Millennium Pipeline Company, L.L.C.*[46]), or after a denial by filing a petition for review in the court of appeals.[47] A state certifying agency remains free to deny the request for certification within one year if the agency determines that an applicant has failed to fully comply with the state's filing or informational requirements.[48] These options do not preclude a state from assisting applicants with revising their submissions,

[42] Declaratory Order, 162 FERC ¶ 61,014 at P 23; *PacifiCorp*, 149 FERC 61,038, at P 20 (2014).

[43] Declaratory Order, 162 FERC ¶ 61,014 at P 23.

[44] *Id.*; *see also N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d at 456 (noting that the state certifying agency "could also request that the applicant withdraw and resubmit the application"); *Constitution Pipeline Co. v. N.Y. State Dep't of Envtl. Conserv.*, 868 F.3d 87, 94 (2d Cir. 2017) (noting Constitution had withdrawn its application for Section 401 certification and resubmitted at the Department's request—thereby restarting the one-year review period).

[45] Declaratory Order, 162 FERC ¶ 61,014 at P 17.

[46] 160 FERC ¶ 61,065 (2017).

[47] Declaratory Order, 162 FERC ¶ 61,014 at P 17. *E.g., Berkshire Envtl. Action Team, Inc. v. Tenn. Gas Pipeline Co., LLC*, 851 F.3d 105, 108 (1st Cir. 2017) (acknowledging exclusive federal jurisdiction under NGA section 19(d)(1), 15 U.S.C. § 717r(d)(1), to review a certifying agency's ruling on an application for a water quality certification).

[48] Declaratory Order, 162 FERC ¶ 61,014 at P 17.

do not harm the process of public notice and comment, and do not increase an applicant's incentive to litigate.[49]

19. Because Constitution's withdrawal and resubmission of its application presented New York DEC with new deadlines, we deny the company's claim that the receipt of the initial application should be an anchor point for setting the state's review deadline regardless of Constitutions decision to repeatedly withdraw and refile its application.[50]

C. The Commission's Issuance of the Certificate Order Does Not Interfere with Section 401 Certification Authority

20. Constitution asserts that New York DEC is using the Section 401 certification process to mount an impermissible collateral attack on the Commission's findings, now final, in the NGA section 7 certificate proceeding for the Constitution Pipeline Project.[51] Constitution also seems to suggest that the reasonableness of the timing of New York DEC's action on its Section 401 application is impacted by the Commission's issuance of a certificate of public convenience and necessity for the Constitution Pipeline Project.[52]

21. Constitution ignores the fact that, as with virtually every certificate issued by the Commission that authorizes construction of natural gas pipeline facilities, the certificate for the Constitution Pipeline Project is conditioned upon a showing that Constitution "has received all applicable authorizations required under federal law (or evidence of waiver thereof)" prior to construction.[53] Among these authorizations is the Section 401 water quality certification from New York.

22. More broadly, nothing in the NGA affects the rights of states under the Clean Water Act.[54] Section 401 of the Clean Water Act grants authority to the states to

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[49] *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d at 456.

[50] Request for Rehearing at 19.

[51] *Id*. at 15-16 (citing *Am. Energy Corp. v. Rockies Express Pipeline, LLC*, 622 F.3d 602, 605 (6th Cir. 2010) and *Williams Nat. Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 266 (10th Cir. 1989)); *see also id.* at 7.

[52] *See id.* at 7, 15.

[53] Certificate Order, 149 FERC ¶ 61,199, app., envtl. condition 8.

[54] 15 U.S.C. § 717b(d)(3) (2012) (using the full title of the Federal Water Pollution Control Act).

condition or block a federal license or permit. Any condition in a water quality certification "shall become a condition on any Federal license or permit subject to the provisions of [Section 401]."[55] And "no license or permit shall be granted if [water quality] certification has been denied" by the certifying agency.[56] Arguments that state actions under Section 401 are inconsistent with the Commission's mandate under the NGA to approve appropriate interstate natural gas projects are outside of our jurisdiction to resolve, and must be addressed to Congress or to the courts.

D. Conclusion

23. We reaffirm our conclusion that New York DEC did not waive its authority under Clean Water Act Section 401 to approve or deny Constitution's application for a water quality certification for the Constitution Pipeline Project.

The Commission orders:

Constitution Pipeline Company, LLC's February 12, 2018 request for rehearing of the Commission's January 11, 2018 Order on Petition for Declaratory Order is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[55] 33 U.S.C. § 1341(d) (2012).

[56] *Id.* § 1341(a)(1).

Document Content(s)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONSTITUTION PIPELINE COMPANY, LLC, Petitioner, v. FEDERAL ENERGY REGULATORY COMMISSION, Respondent.	)	No. 18-_____

PETITIONER'S RULE 26.1 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner Constitution Pipeline Company, LLC makes the following disclosure:

Constitution Pipeline Company, LLC is a limited liability natural gas pipeline company organized and existing under the laws of the State of Delaware. The members of Constitution include Williams Partners Operating LLC (41 percent), Cabot Pipeline Holdings, LLC (25 percent), Piedmont Constitution Pipeline Company, LLC (24 percent), and WGL Midstream CP, LLC (10 percent). The respective members' direct and indirect parents are Williams Partners Operating LLC, The Williams Companies, Inc., WGL Midstream, Inc., WGL Holdings, Inc., Washington Gas Resources Corp., Wrangler 1, LLC, AltaGas Utility Holdings (U.S.) Inc., AltaGas Services (U.S.) Inc., AltaGas Ltd., Duke

Energy Pipeline Holding Company, LLC, and Duke Energy Corporation. The following publicly-held corporations directly or indirectly own a 10% or more interest in Constitution Pipeline Company, LLC: The Williams Companies, Inc., Duke Energy Corporation, and AltaGas Ltd. Cabot Oil & Gas Corporation is an indirect, beneficial owner of a 25% membership interest through its wholly-owned subsidiary, Cabot Pipeline Holdings, LLC. Duke Energy Corporation is an indirect owner of Duke Energy Pipeline Holding Company, LLC.

Respectfully submitted,

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Counsel for Petitioner Constitution Pipeline Company, LLC

Dated: September 14, 2018

CERTIFICATE OF SERVICE

I certify that on September 14, 2018, I served a copy of the foregoing Petition for Review and Rule 26.1 Statement by e-mail and U.S. mail on the following, which include the Respondent and all members of the service lists in the Federal Energy Regulatory Commission ("FERC") proceedings, FERC docket numbers CP18-5-000 and CP18-5-001:

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I further certify that I served a copy of the foregoing Petition for Review and Rule 26.1 Statement by U.S. mail on:

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General Information

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