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)