

160 FERC ¶ 61,065
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. CP16-17-000

DECLARATORY ORDER FINDING WAIVER UNDER SECTION 401
OF THE CLEAN WATER ACT

(Issued September 15, 2017)

1. On July 21, 2017, Millennium Pipeline Company, L.L.C. (Millennium) filed a Request for Notice to Proceed with Construction of its Valley Lateral Project in Orange County, New York.¹ To receive a notice to proceed, Millennium must demonstrate that it has obtained all federally-required environmental permits and authorizations, or waiver thereof, including authorizations under the Clean Water Act (CWA). Millennium states in its request that the New York State Department of Environmental Conservation (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 deadline. By comment filed on July 25, 2017, New York DEC asserts that it did not waive its section 401 authority. On August 30, 2017, New York DEC denied Millennium's application for certification.
2. For the reasons discussed below, we find that the New York DEC, by failing to act within the one-year timeframe required by the CWA, waived its authority to issue or deny a water quality certification.

I. Background

3. On November 13, 2015, Millennium applied for a certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act (NGA) requesting authorization to construct and operate the Valley Lateral Project in Orange County, New York. 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 incremental firm transportation service to the Valley Energy Center in the Town of Wawayanda, New York. The

¹ Millennium Pipeline Co., L.L.C. July 21, 2017 Request for Notice to Proceed.

Commission granted a certificate of public convenience and necessity to Millennium authorizing the project on November 9, 2016 (Certificate Order).² The Certificate Order requires Millennium to file documentation that it has received all authorizations required under federal law, or evidence of waiver thereof, including certification under section 401 of the CWA, prior to commencing construction.³

4. Similarly, section 401 prohibits any construction activity which may result in a discharge into navigable waters until the applicant obtains a water quality certification (certification) or such certification has been waived. Section 401 of the CWA reads, in part:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate. . . . *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.* No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.⁴

5. Concurrent with the Commission proceeding, Millennium applied for a section 401 certification from the New York DEC. New York DEC received Millennium's application on November 23, 2015.⁵ On December 7, 2015, and June 17, 2016, New York DEC sent Notices of Incomplete Application to Millennium requesting additional information. The first notice stated that Millennium's application was determined to be incomplete pending the Commission's issuance of the Environmental Assessment (EA)

² *Millennium Pipeline Company, L.L.C.*, 157 FERC ¶ 61,096 (2016). Rehearing is currently pending before the Commission, but the issue of water quality certification waiver was not raised.

³ *Id.* at Environmental Condition 9.

⁴ 33 U.S.C. § 1341(a)(1) (2012) (emphasis added).

⁵ 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.

for the project. The Commission's EA was issued on May 9, 2016. The second notice requested additional information regarding potential impacts on three protected species and minor clarifications regarding previously-submitted data. Millennium provided responses on August 16 and 31, 2016.

6. After the Commission issued the November 9, 2016 Certificate Order, New York DEC informed Millennium that, "regardless of any action by FERC, including the issuance of a Certificate of Public Convenience and Necessity [...], no construction activities may commence with respect to the Project unless the [section 401] Application is approved and [the New York DEC] issues a [certification]."⁶

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 NGA alleging that the New York DEC unlawfully delayed action on the water quality certification and waived its authority under CWA section 401.⁷ In an opinion issued on June 23, 2017, the D.C. Circuit dismissed Millennium's petition on jurisdictional grounds.⁸ Although the Court noted that the CWA "makes clear that waiver occurs after one year of agency inaction,"⁹ it concluded that Millennium needed to return to the Commission and "present evidence of the Department's waiver."¹⁰ If the Commission denied the company's claim, Millennium could then seek review of the Commission's action. Because the Court did not rule on the merits, it did not determine whether New York DEC waived its authority under section 401 of the CWA, nor did it decide what would be the triggering event for section 401's one-year deadline for action.

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

⁶ New York State Department of Environmental Conservation November 18, 2016 Letter.

⁷ 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).

⁸ *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 698 (D.C. Cir. 2017) (finding that Millennium has no cognizable injury and therefore lacks standing).

⁹ *Id.* at 700 (citing 33 U.S.C. § 1341(a)(1)).

¹⁰ *Id.* at 701.

alleged that the New York DEC 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.

9. On July 26, 2017, New York DEC filed comments disagreeing with the contention that the "CWA Section 401 Water Quality Certification has been waived" for the Valley Lateral Project. New York DEC stated that it has one year from the date a complete certification application was received to render its decision, which, with respect to Millennium's application, was August 31, 2016. New York DEC does 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. New York DEC requests that the Commission deny, or alternatively, hold in abeyance, Millennium's request to proceed with construction until August 31, 2017.¹¹

10. On August 30, 2017, New York DEC provided Notice that Millennium's application for certification is deemed denied as of the date of the Notice.¹² New York DEC does not, in its filing, further address the issue of whether its action on Millennium's application is timely.¹³

II. Discussion

11. Millennium's Commission-issued certificate provides that it cannot commence construction until it has obtained all applicable federal authorizations, including section 401 certification. As noted above, section 401 provides that if a state permitting agency "fails or refuses to act on a request for certification within a reasonable period of time

¹¹ New York State Department of Environmental Conservation July 25, 2017 Comment Letter (filed July 26, 2017). New York DEC states that it "fully intends to make a final decision . . . no later than August 30, 2017." *Id.*

¹² New York State Department of Environmental Conservation August 30, 2017 Notice of Decision Letter (filed August 31, 2017).

¹³ In Attachment A to its Notice of Decision, New York DEC moves to reopen the record and stay the Commission's November 9, 2016 Certificate Order, or in the alternative, requests rehearing and stay of the order. Because these requests, as well as New York DEC's rationale for denying certification, are not relevant to the issue of waiver under CWA section 401, they will be addressed by the Commission in a separate order.

(which shall not exceed one year) after receipt of such request, the certification requirements of [section 401] shall be waived with respect to such Federal application.”¹⁴ Commission natural gas certificate regulations do not provide any further guidance for determining whether a certifying agency has waived its section 401 authority.¹⁵

12. The crux of evaluating waiver in the instant case is determining the triggering event that began the one-year review process. Millennium argues that the one-year period began when New York DEC first received Millennium’s application on November 23, 2015. New York DEC argues that the one-year period did not begin until August 31, 2016, which is the date it received a “complete” application from Millennium, following the receipt of additional information it requested.

13. “[T]he starting point for interpreting a statute is the language of the statute itself.”¹⁶ Determining whether the plain meaning of the statutory text resolves the issue includes consideration of “the particular statutory language at issue, as well as the language and design of the statute as a whole.”¹⁷ Section 401 provides that water quality certification is waived when the certifying agency “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.”¹⁸ Thus the term “receipt” specifies the triggering event. The dictionary definition of “receipt” is the act or process of receiving.¹⁹ Therefore, in this context, the plain meaning of “after receipt of the request” is the day the agency receives a certification application, as opposed to when the agency considers the application to be complete. Giving effect to the plain text of a statute,²⁰ the one-year review period began November 23, 2015, the date that New York DEC received the application.

¹⁴ 33 U.S.C. § 1341(a)(1).

¹⁵ 18 C.F.R. 157.206(b)(2)(i) (2017) requires compliance with the CWA, but does not provide further detail.

¹⁶ *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987) (internal quotation and citation omitted).

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

¹⁸ 33 U.S.C. § 1341(a)(1) (emphasis added).

¹⁹ *Definition of Receipt*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/receipt> (last visited August 14, 2017).

²⁰ *W. Minn. Mun. Power Agency v. FERC*, 806 F.3d 588, 592-93 (D.C. Cir. 2015).

14. To the extent there is any ambiguity in the statutory text, we interpret the triggering date for the waiver provision to be the date a certification application is filed with the relevant agency. Our interpretation is consistent with Congress's intent, given that Congress explained that the review period of one year was established to "ensure that sheer inactivity by the State ... will not frustrate the federal application."²¹

15. Moreover, Commission precedent supports the conclusion that the triggering event is the date of receipt of a certification request. In *Georgia Strait Crossing Pipeline LP*,²² the Commission found that the Washington Department of Ecology had waived its section 401 authority after it denied the pipeline's certification request more than two years after receipt. The state argued that the one-year period began when the U.S. Army Corps of Engineers (Corps) issued notice of an application for a permit under section 404 of the CWA. The Commission disagreed, stating that "[t]he clear and unambiguous language in Section 401(a)(1) required Ecology to act within one year of receiving [the] request for Section 401 certification."²³ Likewise, in *AES Sparrows Point LNG*, AES was required to obtain section 401 certification and a section 404 permit before proceeding with construction of its liquefied natural gas terminal.²⁴ AES argued that the Maryland Department of the Environment had waived section 401 authority by failing to act on the request within one year of receipt of the company's application. Maryland contended that the one-year clock began with the issuance by the Commission and the Corps of a joint public notice of availability of the draft Environmental Impact Statement in the proceeding. The Commission found the "triggering event to be—as specified in the statute—the 'receipt of' the request for a water quality certification" and determined that Maryland waived certification.²⁵

²¹ 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.

²² 107 FERC ¶ 61,065 (2004).

²³ *Id.* at P 7.

²⁴ *AES Sparrows Point LNG, LLC*, 126 FERC ¶ 61,019 (2009) (Order Issuing Certificate).

²⁵ *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 61-63 (2009) (Order on Rehearing and Clarification and Denying Stay). While rehearing was pending at the Commission, AES also brought the waiver issue to court, filing a petition for review with the United States Court of Appeals for the Fourth Circuit, against the Maryland Department of the Environment. The court, in an order issued five days after the Commission's rehearing order, determined that Maryland had not waived its section 401 authority, but only after determining that the Corps' interpretation that only a complete (*continued ...*)

16. The Commission's hydropower regulations and case law, as well as court precedent, also support the conclusion that the one-year waiver period begins upon receipt of the application. The regulations directly address the issue, stating: “[a] certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act *if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification.*”²⁶ Prior to the adoption of this regulation, the Commission's “practice [had] been to deem the one-year waiver period to commence when the certifying agency finds the request acceptable for processing.”²⁷ In 1987, the Commission promulgated section 4.34(b)(5)(iii) of its regulations to make clear that receipt of a certification application was the triggering event.²⁸ Since 1987, the Commission has found “the language and intent of the Clean Water Act to be clear, and our regulations, [section 4.34(b)(5)(iii)], provide that failure to meet the one-year deadline will constitute waiver.”²⁹ Judicial opinions have been consistent with this interpretation. The D.C. Circuit has noted that:

Section 401(a)(1) requires that a State “act on a request for certification[] within a reasonable period of time (which shall not exceed one year) after receipt of such request,” or else “the certification requirements of this subsection shall be waived with respect to such Federal application.” 33 U.S.C. § 1341(a)(1). 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. Moreover, the Conference Report on Section 401 states that the time limitation was meant

certification request, as determined by the Corps, would trigger the one-year waiver period, was entitled to *Chevron* deference. *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721 (4th Cir. 2009). The Commission was not a party to that case nor was the Commission's interpretation of section 401 at issue.

²⁶ 18 C.F.R. § 4.34(b)(5)(iii) (2017) (emphasis added). There is no corresponding Commission regulation under the NGA.

²⁷ Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act, Order No. 464, 52 Fed. Reg. 5446-01, 5446 (Feb. 23, 1987) (citing *Washington County Hydro Development Associates*, 28 FERC ¶ 61,341 (1984)).

²⁸ *Id.*

²⁹ *E.g.*, *Central Vermont Public Service Corp.*, 113 FERC ¶ 61,167, at P 21 (2005).

to ensure that “sheer inactivity by the State ... will not frustrate the Federal application.” H.R. Rep. 91-940, at 56 (1970), reprinted in 1970 U.S.C.C.A.N. 2691, 2741. Such frustration would occur if the State’s inaction, or incomplete action, were to cause the federal agency to delay its licensing proceeding.³⁰

The Ninth Circuit also appears to have approved of the Commission’s regulatory approach.³¹

17. Here, consistent with our precedent in both NGA cases and hydroelectric licensing proceedings under the Federal Power Act, we conclude that the triggering date for waiver under section 401 of the CWA as the date the certifying agency receives a certification application. In this case, New York DEC received Millennium’s formal written application on November 23, 2015. By failing to act on Millennium’s request for certification by November 23, 2016, we find that the agency waived its certification authority. To find otherwise would frustrate the purpose of the one-year review period specified by the CWA and allow state agencies to indefinitely delay proceedings by determining applications to be incomplete.

18. This does not leave a state water quality certifying agency without remedy. If a state agency concludes that a certification application does not meet CWA requirements, it can deny the application. New York DEC declined to take that step or to otherwise timely act on Millennium’s application. Accordingly, it waived its certification authority.

The Commission orders:

The New York State Department of Environmental Conservation has waived its water quality certification authority under section 401 of the Clean Water Act with respect to the Millennium Pipeline Company Valley Lateral Project, CP16-17-000.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,

³⁰ *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

³¹ *See State of California ex. rel. State Water Resources Control Bd. v. FERC*, 966 F.2d 1541, 1553-54 (9th Cir. 1992) (discussing the Commission’s approach to establish the triggering event as when the certifying agency received the request).

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Deputy Secretary.

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