ORAL ARGUMENT SCHEDULED FOR MARCH 3, 2017

Case No. 16-1415

United States Court of Appeals for the District of Columbia Circuit

MILLENNIUM PIPELINE COMPANY, L.L.C.,

Petitioner,

v.

BASIL SEGGOS, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, AND NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents,

CPV VALLEY, LLC,

Intervenor.

PETITION FOR REVIEW FROM THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

PROOF BRIEF FOR RESPONDENTS

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Dated: January 17, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The principal parties in this proceeding are set forth in the Opening Brief of Petitioner (Dec. 5, 2016) and the Brief of Intervenor CPV Valley, LLC in Support of Petitioner (Dec. 12, 2016).

Additionally, Sarah E. Burns and Amanda King moved to intervene in support of Respondents in this proceeding on January 4, 2017. Burns and King identify themselves as co-owners of a parcel of land targeted for Petitioner's proposed right-of-way. Protect Orange County, an unincorporated association, and various individual members of that association who are residents of Orange County, also moved to intervene in support of Respondents on January 4, 2017. Petitioner opposed the two motions to intervene on January 8, 2017. The motion remains pending before this Court.

B. Ruling Under Review

The Department incorporates by reference the statement of Petitioner regarding the ruling under review.

C. Related Cases

There are no related cases in this Court or any other court involving substantially the same parties or issues.

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GLOSSARY

Army Corps	United States Army Corps of Engineers
CPV Valley	Intervenor CPV Valley, LLC
CPV Br.	Brief of Intervenor CPV Valley, LLC (ECF No. 1651187)
The Department	Respondent New York State Department of Environmental Conservation
ECL	New York State Environmental Conservation Law
EPA	United States Environmental Protection Agency
FERC	The Federal Energy Regulatory Commission
J.A.	Joint Appendix
Joint Application	Application submitted by Millennium to the Department seeking a certification under section 401 of the Clean Water Act, as well as related state permits required by the project.
Millennium	Petitioner Millennium Pipeline Company, L.L.C.
NEPA	The National Environmental Policy Act, 42 U.S.C. § 4331, *et seq*.
N.Y.C.R.R.	Official Compilation of Codes, Rules & Regulations of the State of New York
Pet.Br.	Petitioner's Brief filed December 5, 2016
Project	Where such a reference is appropriate in context, the term "project" refers to Millennium's proposed construction and operation of a new 7.8-mile, 16-inch diameter natural gas pipeline near Wawayanda, New York

SEQRA	The New York State Environmental Quality Review Act, N.Y. Environmental Conservation Law article 8

STATUTES AND REGULATIONS

The Department incorporates by reference the pertinent statutes and regulations attached as addenda to the Opening Brief for Petitioner and the Brief of Intervenor CPV Valley, LLC in Support of Petitioner.

PRELIMINARY STATEMENT

Impatient with the pace of the Department's administrative review of Millennium's application for a water quality certification under Clean Water Act section 401, 33 U.S.C. § 1341, Millennium petitions this Court to compel the Department to grant the certification. Millennium's petition must be dismissed.

The Department's administrative review has not concluded because Millennium's application has not yet been determined to be complete. A complete application is necessary, among other things, to implement the Clean Water Act's public notice requirements. As late as November 2016—days before filing the petition—Millennium submitted to the Department hundreds of pages of briefing and documentation, which are actively being reviewed.

Even if this Court were to find that the Department had delayed excessively (and it should not), the statutory remedy would be to remand to the Department with a reasonable date by which its review must be finished. No support exists for Millennium's demand that this Court assume the role of environmental regulator and order the Department to

certify that Millennium's pipeline meets governing water quality standards.

ISSUE PRESENTED

1. Whether Millennium's petition is properly before this Court when FERC has not determined that the Department waived its section 401 review.

2. Whether the Department unlawfully delayed its review of Millennium's application for a Clean Water Act section 401 certification, when the Department twice determined that Millennium's application was incomplete, and is currently engaged in active administrative review of the application.

3. Whether the only relief to which Millennium would be entitled is an order from this Court remanding the matter to the Department in accordance with the Natural Gas Act, rather than an order compelling the Department to grant the section 401 certification.

LEGAL FRAMEWORK

A. Natural Gas Act

The Natural Gas Act governs FERC's regulation and approval of the interstate transportation and sale of natural gas. 15 U.S.C. § 717 *et seq*. FERC has authority to issue a "certificate of public convenience

and necessity" for construction and operation of a natural gas project. 15 U.S.C. § 717f(e). That certificate, however, is not the only authorization required for the project: applicants must also obtain all other authorizations required by federal law. *See* 15 U.S.C. §§ 717n(a), (c). One necessary authorization is a state certification under section 401 of the Clean Water Act that the proposed project will comply with the Clean Water Act, state water quality standards, and other appropriate requirements of state law. 33 U.S.C. §§ 1341(a)(1), (d); *see* Legal Framework § C, *infra*.

If this Court determines that an agency's delay is "inconsistent with the Federal law governing such permit," the Court "shall remand the proceeding to the agency to take appropriate action" and "shall set a reasonable schedule and deadline for the agency to act on remand." 15 U.S.C. § 717r(d)(3).

B. National Environmental Policy Act

The Natural Gas Act designates FERC as the lead agency "for the purpose of coordinating all applicable Federal authorizations and . . . complying with the National Environmental Policy Act [NEPA]." 15 U.S.C. § 717n(b)(1). FERC must interpret and administer the Natural

Gas Act in accordance with NEPA's policy to protect environmental quality, including water quality. *See* 42 U.S.C. § 4332. FERC is required to prepare a "detailed statement" of the environmental impact of any major federally-permitted Natural Gas Act project that would significantly affect environmental quality, including measures designed to avoid, minimize and mitigate those impacts. 42 U.S.C. § 4332(C). Where it is not clear whether a project is "major," FERC must prepare an environmental assessment of potential impacts to determine whether a full environmental impact statement is necessary. *See* 18 C.F.R. § 380.5. FERC is also responsible for determining whether a State has waived its right to issue a certification under section 401 of the Clean Water Act. *See infra* Point I(A).

C. Clean Water Act

The Clean Water Act reflects a federal policy of preserving the states' primary right and responsibility to prevent, reduce, and eliminate water pollution, and to plan the development and use of water resources. 33 U.S.C. § 1251(b), (g). Under the Clean Water Act, States have primary responsibility and authority to protect the waters within their borders. 33 U.S.C. § 1370.

Section 401 of the Clean Water Act mandates that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply" with applicable water quality requirements. 33 U.S.C. § 1341(a)(1). "No license or permit shall be granted if the certification has been denied by the State[.]" *Id.* A State responsible for certifying projects under Section 401 "shall establish procedures for public notice in the case of all applications for certification by it." *Id.* If granted, the section 401 certification may set forth any conditions "necessary to assure that any applicant for a Federal license or permit will comply" with the Clean Water Act "and with any other appropriate requirement of State law." *Id.* § 1341(d). A State that "fails or refuses to act on a request for a certification" within a reasonable period of time, not to exceed one year, "after receipt of such request," may be deemed to have waived the certification requirements. *Id.* § 1341(a)(1).

The Natural Gas Act expressly provides that "nothing in this Act affects the rights of States" under the Clean Water Act. *See* 15 U.S.C. § 717b(d)(3).

STATEMENT OF THE CASE

A. The Pipeline

Millennium wants to build and operate a new 7.8-mile, 16-inch diameter natural gas pipeline connecting its existing pipeline system to an electric-power generator in the Town of Wawayanda, New York. J.A.__ (FERC Certificate Application, Resource Report 1, at 1-1 (November 2015)). Following a pre-filing process, FERC announced its intent to prepare an environmental assessment of the project's environmental impacts pursuant to NEPA. J.A.__ (Notice of Intent to Complete Environmental Assessment (July 6, 2015)).

Millennium applied to FERC in November 2015 for a Certificate of Public Convenience and Necessity authorizing the project. J.A.__ (Resource Report 1, at 1-1). Shortly thereafter, Millennium submitted a Joint Application to the Department seeking a Clean Water Act section 401 certification, as well as related state permits required by the project. J.A.__, __ (Joint Application Cover Letter and Form (Received November 23, 2015)).

B. The First Notice of Incomplete Application

On December 7, 2015, the Department sent a Notice of Incomplete Application to Millennium. The notice stated that Millennium's

application for a section 401 certification would be deemed incomplete until FERC issued "an Environmental Assessment or Draft Environmental Impact Statement" of the project. J.A.__ (First Notice of Incomplete Application at 1 (December 7, 2015)). The Department further stated that its review of the Joint Application would continue in the meantime, and that "site specific comments" would "identify any additional information that must be submitted." *Id.* Millennium made no objection to the Department's position.

Thereafter, the Department submitted comments on the project to FERC. Among other things, the Department informed FERC that it "intend[ed] to rely upon the federal environmental review prepared pursuant to [NEPA] to determine if the Project will comply with the applicable New York State standards." J.A.__ (Department Comments to FERC at 2 (December 21, 2015)). The Department identified several additional areas in which further information was required, including a request that impacts to freshwater wetlands adjacent areas "be quantified and mitigation measures proposed" and that potential impacts to threatened and endangered species such as Indiana bats and bog turtles be quantified and mitigated. J.A.__ (*Id.* at 3-5).

Millennium requested an update on "estimated review time" for the project's various permit applications. J.A.__ (Libby Email (March 3, 2016)). The Department's Project Manager reiterated that the timeframe would "likely be contingent on the issuance of the FERC [environmental assessment]." J.A.__ (Gaidasz Email (March 3, 2016)). Again, Millennium voiced no objection to the Department's view that the environmental assessment was necessary to the Department's review of the Joint Application.

C. FERC's Review and Environmental Assessment

In February 2016, FERC established a schedule for its own environmental review and the submission of "federal authorizations." J.A.___ (Notice of Schedule for Environmental Review (Feb. 19, 2016)). According to FERC, the environmental assessment would be completed on May 9, 2016 and "agencies issuing federal authorizations" would be required to "complete all necessary reviews and to reach a final decision on a request for a federal authorization" within 90 days, or by August 7, 2016. J.A.__ (*Id.*)

The Department's administrative review of the Joint Application continued while FERC completed the environmental assessment. In

January 2016, Millennium submitted supplemental information to FERC that responded to some of the Department's concerns. J.A.__ (Response to FERC Data Request (Jan. 26, 2016)). The Department submitted another comment letter to FERC identifying further information that Millennium needed to provide for the Department's permitting process. J.A.__ (Comments on Response Letter (March 8, 2016)). Among other things, the Department noted that Millennium had not yet submitted information on impacts to freshwater wetlands adjacent areas or state and federal threatened and endangered species. J.A.__-__ (*Id.* at 4-5). The Department also requested additional information on Millennium's proposed wetland-crossing methods. J.A.__ (*Id.* at 4).

Millennium and the Department met in early April 2016 to discuss the Department's comments. J.A.__ (Crounse Email (March 14, 2016)). At the Department's request, *see* J.A.__,__ (Crounse Emails (March 15, 2016)), Millennium submitted a draft response to the Department's second FERC comment letter on March 28, 2016. J.A.__ (Zimmer Email (March 28, 2016)). Following discussions with the Department, Millennium submitted a final response document on April 22, 2016. J.A.__ (Millennium Response to Department Comments (April 22, 2016)).

FERC issued its environmental assessment of the project on May 9, 2016. J.A.__ (Notice of Availability of Environmental Assessment (May 9, 2016)). FERC included an overview of the Project's potential impacts to water quality. J.A.__-__ (Environmental Assessment at 35-48). Among other things, FERC noted that the proposed pipeline would cross 12 waterbodies and access roads would cross 5 additional waterbodies. J.A.__ (*Id.* at 39). Roughly two acres of wetlands would also be impacted by the Project. J.A.__ (*Id.* at 45). FERC detailed the negative effects on water quality that could be caused by the pipeline and access roads crossing streams and wetlands. J.A.__-__, __ (*Id.* at 41-42, 46). The mitigation methods described by FERC included using "trenchless" techniques to drill under, rather than dig through, six waterbodies and roughly 650 feet of wetlands. J.A.__ (*Id.* at 46, Appendix D). Even these techniques posed some risk to water quality, however, because drilling fluids could inadvertently be released into the waterbodies. J.A.__-__, __ (*Id.* at 41-42, 46). Ultimately, FERC concluded that the project "would not constitute a major federal action significantly affecting the quality of the human environment" so long as Millennium complied with various mitigation procedures and environmental conditions. J.A.__ (*Id.* at 125).

The Department reviewed FERC's environmental assessment and offered comments in June 2016. J.A.__ (Department Comment Letter (June 8, 2016)).

D. The Second Notice of Incomplete Application

On June 17, 2016, after reviewing FERC's environmental assessment, the Department sent Millennium a second Notice of Incomplete Application which raised some of the same concerns noted in the FERC comments. J.A.__ (Second Notice of Incomplete Application (June 17, 2016)). The Department sought information relating to potential water quality impacts, including details relating to the trenchless crossing techniques and right-of-way maintenance, impacts to freshwater wetland adjacent areas, further evaluation of horizontal directional drilling[1] crossing techniques at one stream crossing, and technical details relating to excavation required by the project. J.A.__-__ (*Id.* at 4-5). The Department also sought additional information on

[1] Horizontal directional drilling, sometimes referred to in the Record as HDD, is a method of drilling under streams, wetlands, or other surface features without using trenched excavation, a more disruptive technique which requires diverting the flow of the stream while digging a trench through it. *See* J.A.__-__ (Environmental Assessment at 16-18).

impacts to Indiana bats and bog turtles, which are endangered or threatened species. J.A.__-__ (*Id.* at 2-4).

On August 5, 2016, Millennium submitted supplemental information to FERC responding to the Department's comments on the environmental assessment. J.A.__ (Response to Comments (Aug. 5, 2016)). Millennium also submitted additional information in response to the Department's Second Notice of Incomplete Application on August 16, 2016. J.A.__ (Response to 2d Notice of Incomplete Application (Aug. 16, 2016)). Following a conference call with the Department, Millennium submitted further information responding to the Second Notice of Incomplete Application on August 31, 2016. J.A.__ (Supp. Response to 2d Notice of Incomplete Application (Aug. 31, 2016)). At no point in these responses did Millennium object to the propriety of the Department's Second of Notice of Incomplete Application or allege that the Department's time to act on the Joint Application had expired with FERC's August 7, 2016 deadline for federal authorizations. To the contrary, more than two months later on November 2, 2016, Millennium submitted additional changes to the Joint Application regarding

waterbody crossing methods and construction techniques. J.A.__ (Joint Permit Application Supplement (Nov. 2, 2016)).

E. FERC's Conditional Certificate

FERC issued a Certificate of Public Convenience and Necessity on November 9, 2016. J.A.__. The certificate was expressly conditioned on Millennium obtaining "all authorizations required under federal law (or evidence of waiver thereof)." J.A.__ (Order Denying Motion to Dismiss and Issuing Certificate at 56 (Nov. 9, 2016)). The certificate specifically required the project to "comply with mitigation requirements and conditions contained" in Millennium's Clean Water Act section 401 certification, which the Department had not yet issued. J.A.__ (*Id.* at 45). FERC nowhere expressed the view that, as Millennium now argues, the Department had previously waived its right to issue a section 401 certification by not issuing a section 401 certification by the August 7, 2016 deadline for federal authorizations.

F. Millennium Makes a New Submission and the Department Continues its Review

On November 15, 2016, Millennium submitted a letter, an accompanying affidavit from one of its employees and 16 supporting exhibits, arguing that the Department should grant a Section 401

certification for the Project "without delay." J.A.__,__ (Letter to Department (Nov. 15, 2016); Zimmer Aff. (Nov. 15, 2016)). Although much of Millennium's letter and supporting affidavit amounted to legal argument, Millennium made no mention of waiver or the Department's supposed failure to meet FERC's August 7, 2016 deadline for federal authorizations. J.A.__-__,__-__ (Letter at 1-7; Zimmer Aff. 1-13).

In response, the Department informed Millennium that the Department was "continu[ing] its review" of the Joint Application "to determine if a valid request for a [water quality certification] has been submitted." J.A.__ (Corrected Berkman Letter (Nov. 18, 2016)). The Department observed that Clean Water Act section 401(a)(1) afforded it up to one year after the submission of a complete application to grant, condition, or deny the section 401 certification. J.A.__ (*Id.* at 2 & n.1).

The Department explained that its time to act under Clean Water Act section 401 "must necessarily be triggered by completeness" because section 401(a)(1) required it to establish procedures for public notice, which in turn were triggered by the submission of a complete application. J.A.__ (*Id.* at 2 n.1). Additionally, the Department noted that it could not be required to make a decision on an application until it had a reasonable

period of time, not to exceed one year, to review the *complete* application: "otherwise applicants could frustrate the State's mandate to make [a section 401 certification] determination by completing an application 364 days after submitting an incomplete and deficient application." J.A.__ (*Id.*).

G. Millennium's Petition

Millennium commenced this proceeding on December 5, 2016 by filing a petition for review of the Department's alleged failure to act. (Pet. for Review, ECF No. 1649377.) In a brief submitted the same day, Millennium argued for the first time that the Department should have acted by August 7, 2016. (Pet. Br. 24-25, ECF No. 1649407.)[2]

SUMMARY OF ARGUMENT

The petition fails at the outset because Millennium's waiver argument should be addressed to FERC in the first instance. Millennium

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[2] Additionally, CPV Valley, an energy company in the process of building a power plant that would be supplied with natural gas from the Project, intervened and filed a brief in support of Millennium. (Corrected CPV Valley Brief, ECF No. 1651187.) CPV Valley's Brief attached an outside-the-record affidavit and cited a variety of irrelevant or outside-the-record facts, which the Department moved to strike. (Motion to Strike, ECF No. 1651386.) That motion has been fully briefed and will not be addressed further here.

also lacks standing because it has failed to establish that it is injured by the Department's ongoing review of the section 401 application. *See Weaver's Cove Energy, LLC v. Rhode Island Dep't of Envt'l Mgmt.*, 524 F.3d 1330, 1333-34 (D.C. Cir. 2008).

Even if Millennium's petition were properly before this Court, the Department has not delayed unlawfully. FERC's schedule does not apply to the Department's section 401 review because the Clean Water Act establishes a separate period for the Department to act: a reasonable period of up to one year. As the Department reasonably concluded, that time frame is not triggered until the Department has received a complete application. The Department appropriately determined that Millennium's application was incomplete because it failed to include necessary information regarding potential impacts to water quality and mitigation methods to reduce those impacts. The Department's review was active and is ongoing, and the Department has not delayed unreasonably. Even assuming that Millennium's last response to the Department's requests for additional information completed its application, the Department's one-year period for review under section 401 of the Clean Water Act would not expire until August 31, 2017.

Finally, even if Millennium were entitled to relief (which it is not), that relief would be limited to an order remanding the matter to the Department for action according to a reasonable schedule. There is no legal basis for this Court to take over the Department's function and require it to certify that a project meets state water quality standards, as Millennium requests.

STANDARD OF REVIEW

Courts have applied the Administrative Procedure Act's standard of review to a state's determination to issue or deny a section 401 certification for a natural gas project. *See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envt'l. Protection*, 833 F.3d 360, 377 (3d Cir. 2016); *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 727 (4th Cir. 2009); *Islander East Pipeline Co. v. McCarthy*, 525 F.3d 141, 143 (2d Cir. 2008), *cert denied* 555 U.S. 1046 (2008) (*Islander East II*).

First, the Court reviews *de novo* whether the state agency complied with the relevant federal law. *See Del. Riverkeeper Network*, 833 F.3d at 377; *Islander East Pipeline Co. v. Conn. Dep't of Envt'l. Protection*, 482 F.3d 79, 94 (2d Cir. 2006) (*Islander East I*). Second, if no illegality is

found, a Court may set aside agency action[3] only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Del. Riverkeeper Network*, 833 F.3d at 377; *Islander East I*, 482 F.3d at 94.

Contrary to Millennium's argument that the Department's alleged failure to act "is a question of federal law that this Court reviews de novo" (Pet.Br. 20-21), this Court has previously applied the "arbitrary and capricious" standard to a state agency's alleged failure to act under the Natural Gas Act. *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 243 (D.C. Cir. 2013). Under that standard, the scope of judicial review is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins.*, 463 U.S. 29, 43 (1983).

Further, deference to the Department's interpretation of ambiguous terms of Clean Water Act section 401 is appropriate under *Chevron, U.S.A., Inc. v. Natural Resource Defense Council*, 467 U.S. 837 (1984). This is not a case in which a state agency is interpreting a federal

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[3] Under the Administrative Procedure Act, "agency action" includes a "failure to act." 5 U.S.C. §§ 551(13), 701(b)(2).

statute that Congress intended only federal agencies to enforce. *Cf., e.g., Building Trades Employers' Educational Ass'n v. McGowan*, 311 F.3d 501, 507 (2d Cir. 2002) (no deference to state agency's interpretation of National Labor Relations Act because Congress did not "entrust[] enforcement" of that Act to state agency). Rather, Clean Water Act section 401 contemplates a joint federal-state program, in which the Department is tasked with determining whether a proposed project complies with federal discharge restrictions under the Clean Water Act, state water quality standards approved by the EPA, and "other appropriate requirement[s]" of state law. 33 U.S.C. §§ 1341(a)(1), (d); *see PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 712-713 (1994).

In the analogous circumstance of Medicaid implementation, the Second Circuit has afforded *Chevron* deference to a state agency's interpretation of a federal statute. *See Perry v. Dowling*, 95 F.3d 231, 236 (2d Cir. 1996). Likewise, the First Circuit has deferred to a State agency's decision to enter into consent decree under the federal Comprehensive Environmental Response Compensation and Liability Act, noting that federal courts "generally defer to a state agency's interpretation of those

statutes it is charged with enforcing." *City of Bangor v. Citizens Communications Co.*, 532 F.3d 70, 94 (1st Cir. 2008). Accordingly, if Clean Water Act section 401 is "silent or ambiguous with respect to the specific issue" of the applicable waiver period, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc.*, 467 U.S. at 843.

ARGUMENT

POINT I

THE ISSUE OF WAIVER IS NOT PROPERLY BEFORE THIS COURT

A. Whether the Department Waived its Rights under Section 401 of the Clean Water Act Must Be Determined by the Federal Licensing Authority in the First Instance

The petition should be dismissed because FERC, and not this Court, is the proper forum to consider in the first instance Millennium's claim that the Department waived its right to deny or conditionally grant the section 401 application. As this Court explained in *Weaver's Cove*, an applicant for a delayed state section 401 certification should raise the waiver issue with the federal permitting authority first, and then sue the federal permitting authority if it declines to find waiver. *Weaver's Cove*, 524 F.3d at 1333; *see, e.g., Alcoa Power Generating, Inc. v. Fed. Energy*

Reg. Comm'n, 643 F.3d 963, 965 (D.C. Cir. 2011) (upholding FERC's "interpretation of Section 401 in ruling that there was no waiver by the State"); *AES Sparrows*, 589 F.3d at 730 (finding no basis "to disturb the [Army] Corps' determination" that state did not waive rights under Section 401); *accord* 18 C.F.R § 4.34(b)(5)(iii) (providing circumstances in which section 401 certification will be "deemed" waived in FERC licensing proceedings); 33 C.F.R. § 325.2(b)(1)(ii) (providing factors for Army Corps to consider "[i]n determining whether or not a waiver period has commenced or waiver has occurred"); 40 C.F.R § 121.16(b) (for EPA to find waiver, federal licensing or permitting agency must provide notice of state agency's failure to act within a reasonable period of time).

Indeed, FERC has provided a route for Millennium to argue that the Department has waived its section 401 review. FERC's conditional certificate provides that Millennium must submit "all authorizations required under federal law (*or evidence of waiver thereof*)" before commencing construction. J.A.__ (FERC Conditional Certificate at 56) (emphasis added). Accordingly, FERC is the proper forum for the initial consideration of claims that the Department has waived its right to provide a section 401 certification. *See Am. Rivers Inc. v. Fed. Energy Reg.*

Comm'n, 129 F.3d 99, 110-111 (2d Cir. 1997) (noting that FERC may determine "whether a state has issued a certification within the prescribed period").

B. Millennium Lacks Standing to Sue

The Petition should also and independently be dismissed because Millennium lacks standing to challenge the Department's alleged failure to act. "The 'irreducible constitutional minimum of standing contains three elements': (1) injury-in-fact, (2) causation, and (3) redressability." *Sierra Club v. Environmental Protection Agency*, 292 F.3d 895, 898 (D.C. Cir. 2002), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Under the rule established by *Weaver's Cove*, Millennium has not been injured by the Department's alleged delay because (1) Millennium claims that the agency inaction entitles it to receive the subject permit, and (2) Millennium is still waiting for other state and federal authorizations.

In *Weaver's Cove*, an applicant for section 401 certifications from two state agencies for a proposed liquid natural gas facility sued the agencies for failing to reach a final decision on the certifications within the required timeframe. 524 F.3d at 1331-32. The applicant alleged that

"the agencies, by failing to issue timely rulings on [the] applications, waived their rights to deny the certifications." *Id.* at 1333. This Court *sua sponte* dismissed the petition, holding that the applicant failed to allege that the state's inaction had injured it; rather the applicant's "theory of the case [was] that it benefited from the agencies' inaction" by operation of the statutory waiver. *Id.* The Court also noted that the applicant was still waiting for a federal permit from the U.S. Army Corps, and the record indicated that a waiver declaration "would not alter the Army Corps' timetable" for acting on the permit. *Id.* at 1334.

Like the applicant in *Weaver's Cove*, Millennium asks this Court to declare that the Department has waived its right to deny or condition the certification, and thus must grant it. Pet.Br. 30. Also, Millennium is still waiting for coverage under the Army Corps' Nationwide Clean Water Act section 404 permit, a formal consultation with U.S. Fish and Wildlife Service, and various state permits issued by the Department. *See* J.A.__ (Environmental Assessment at 26) (listing necessary permits and approvals); J.A.__ (Conditional Certificate at 57) (requiring consultation with U.S. Fish and Wildlife Service prior to construction). Accordingly,

under the rule established in *Weaver's Cove*, Millennium lacks standing. *Weaver's Cove*, 524 F.3d at 1333-34.[4]

POINT II

THE DEPARTMENT DID NOT UNLAWFULLY DELAY ITS REVIEW OF MILLENNIUM'S APPLICATION

A. The Timeframe for the Department's Review Is Established by the Clean Water Act, Not by FERC

Millennium is wrong to argue that the Department's section 401 certification is governed by the August 7, 2016 deadline for "federal authorizations" set by FERC. (Pet.Br. 21-23; *see* J.A.__ (Notice of Schedule for Environmental Review (Feb. 26, 2016)). The Clean Water Act establishes the only applicable deadline for the Department's review: "a reasonable period of time (which shall not exceed one year)." 33 U.S.C. § 1341(a)(1).

When setting a schedule for federal authorizations under the Natural Gas Act, FERC must "comply with applicable schedules

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[4] Because CPV Valley moved to intervene, but did not file a separate petition for review, it is precluded from prosecuting this proceeding in the place of Millennium, even assuming it has independent standing. *See Process Gas Consumers Group v. Fed. Energy Reg. Comm'n*, 912 F.2d 511, 514 (D.C. Cir. 1990); Fed. R. App. P. 15(a)(1) (review of an agency order is "commenced by filing . . . a petition for review").

established by Federal law." 15 U.S.C. § 717n(c)(1)(B). FERC's own regulations provide that federal authorizations are "due no later than 90 days after [FERC] issues its final environmental document, *unless a schedule is otherwise established by Federal law*." 18 C.F.R. § 157.22 (emphasis added). When FERC promulgated this regulation, it specifically recognized that a section 401 certification is an authorization "for which a schedule for agency action is established by federal law" and that the regulation would not alter that schedule. FERC, Regulations Implementing the Energy Policy Act of 2005, 71 Fed. Reg. 62,912, 62,915 n.18 (Oct. 27, 2006).[5] Because the FERC schedule does not apply to the Department's section 401 review, the Department's failure to make a determination on the application by August 7, 2016 was not "inconsistent with Federal law" under 15 U.S.C. § 717r(d)(2).

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[5] The Army Corps likewise acknowledges that the schedule for section 401 certifications under the Clean Water Act is "established by other Federal law[]" and not the Natural Gas Act. Army Corps, Regulatory Guidance Letter No. 07-03, at ¶3(3)(e) n.3 (Sept. 19, 2007), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl07-03.pdf (last viewed January 13, 2017).

B. The Department Has Not Exceeded the Clean Water Act's One-Year Deadline or Delayed Unreasonably

1. The Department Reasonably Interpreted Section 401 As Requiring a Complete Application

A state agency's timeframe for issuing or denying a section 401 certification commences "after receipt of such request [for certification]." 33 U.S.C. § 1341(a)(1). The Clean Water Act does not indicate what form a "request for certification" must take to trigger the waiver period; rather, the Act "is ambiguous regarding whether an invalid as opposed to only a valid request for a water quality certification will trigger" the waiver period. *AES Sparrows*, 589 F.3d at 729. In light of section 401's structure and its interpretation by the Army Corps, the Department reasonably interpreted Section 401 as requiring a complete application to trigger the waiver period. *See id.* Completeness cannot occur before an applicant has submitted sufficient information for the Department to review the request.

The Department reasoned that, for it to comply with section 401's public notice requirements, "the time to act must necessarily be triggered by completeness." J.A.__ (Berkman Letter at 2 n.1 (Nov. 18, 2016)). Section 401 provides that certifying state agencies "shall establish

procedures for public notice in the case of all applications for certifications" and procedures for public hearings for certain applications. 33 U.S.C. § 1341(a)(1). A state agency not only must enact public notice procedures, but also must comply with them: failure to provide public notice on an application may result in the federal licensing agency's rejection of a section 401 certification. *See City of Tacoma v. Fed. Energy Reg. Comm'n*, 460 F.3d 53, 67-68 (D.C. Cir. 2006).

For meaningful public comment to be obtained, the public must be able to evaluate a complete application. *See, e.g., Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 674 F.Supp.2d 783, 800-02 (S.D.W.Va. 2010) (noting that "[c]ompletion and public notice are inextricably linked" and rejecting public notice and comment process undertaken on incomplete application). Accordingly, the Department's regulations for public notice and comment on permit applications are triggered "[i]mmediately upon determining that an application is complete." N.Y. ECL § 70-0109(2)(a); *accord* N.Y.C.R.R. tit. 6, § 621.7(a) (major project); *id.* 621.7(f) (minor project). After public notice, the Department must take time to receive and review any public comments to determine whether a public hearing is required, *id.* § 621.8(a), to

prepare a document responding to the comments, *id.* § 621.10(e), and ultimately to decide whether the application should be granted or denied, *id.* § 621.10(a).

If the Department were required to act within one year of receiving an *incomplete* application for a section 401 certification, it could be forced to act on an application before the public notice process has concluded or even commenced. In this case, for example, the Department would have been required to act on the section 401 certification by November 23, 2016, even though no notice of complete application had been issued and therefore no public notice had been provided. FERC would then have been entitled to reject the certification for failing to comply with section 401's public notice requirements. *See City of Tacoma*, 460 F.3d at 67-68.

As the Department recognized, a complete application is also necessary to commence the waiver period because otherwise, "applicants could frustrate the State's mandate to make [section 401] determination[s] by completing an application 364 days after submitting an incomplete and deficient application." J.A.__ (Berkman Letter at 2 n.1). Under Millennium's interpretation of Section 401, the waiver period would commence upon an agency's receipt of *any* request for a section 401

certification, however perfunctory. An applicant could then force an agency to into a premature decision by delaying its submittal of supplemental materials or by submitting materials just before the one-year waiver period expires. Indeed, in this case, Millennium submitted a letter and affidavit demanding that the section 401 certification be granted, along with more than 200 pages of exhibits, a mere eight days before the one-year anniversary of its initial application submittal. *See* J.A.__-__ (Zimmer Aff. (Nov. 15, 2016)).

Tying the waiver period to the receipt of a complete application avoids this result, allowing the Department time to assess and respond to submissions in a meaningful way. Although the Department could have denied Millennium's application as incomplete (*see* CPV Br. 12), the Department reasonably gave Millennium the opportunity to provide supplemental information instead. The Department should not be penalized now for attempting to work cooperatively with Millennium to ensure that the application contains all the necessary information.

The Department's interpretation of the waiver period is consistent with the interpretation adopted by the Army Corps. The Army Corps' regulations provide that "[i]n determining whether or not a waiver period

has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a *valid* request for certification." 33 C.F.R. § 325.2(b)(1)(ii) (emphasis added). When promulgating this regulation, the Army Corps noted that generally "valid requests for certification must be made in accordance with State laws[.]" *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41,206, 41,211 (Nov. 13, 1986). The Fourth Circuit has held that the Army Corps' regulation requiring a "valid request" for a certification "as determined by the Corps" is entitled to deference and "is permissible in light of the statutory text and is reasonable." *AES Sparrows*, 589 F.3d at 729. Consistent with the Army Corps' interpretation, the Department requires a complete application pursuant to state laws and regulations, *see* Point II.B.2, *infra*, a permissible and reasonable interpretation of section 401.

Petitioner's attempt to rely on FERC's regulatory interpretation of the waiver period (Pet.Br. 26) is misguided. "FERC is not charged in any manner with administering the Clean Water Act," and this Court owes no deference to its interpretation of section 401. *AES Sparrows*, 589 F.3d at 730; *see also Alabama Rivers Alliance v. Fed. Energy Reg. Comm'n*,

325 F.3d 290, 297 (D.C. Cir. 2003). To the extent Millennium believes FERC would conclude that the Department waived its review under section 401, it should raise that argument with FERC, not this Court. *See* Point I.A, *supra*.

2. The Department's Two Determinations That the Application Was Incomplete Were Not Arbitrary and Capricious

The Department appropriately determined on two separate occasions that Millennium's application for a section 401 certification was incomplete.

The first determination took place in December 2015, when the Department notified Millennium that the application would be "deemed incomplete" until FERC issued "an Environmental Assessment or Draft Environmental Impact Statement" on the Project. J.A.__ (First Notice of Incomplete Application at 1 (December 7, 2015)). An environmental assessment or draft environmental impact statement is necessary to assess the project's environmental impacts and feasible mitigation methods under NEPA. *See* 42 U.S.C. § 4332(C). As the Department noted on several occasions (without objection from Millennium), the Department relies on this analysis as a baseline for its more searching

assessment of a project's impact on state water quality. *See* J.A.__,__, __-__ (Department Comments to FERC at 2 (December 21, 2015); Gaidasz Email (March 3, 2016); Department Comments on Response Letter at 1-2 (March 8, 2016)).

FERC's environmental review is particularly important in Natural Gas Act proceedings because State environmental review statutes are preempted. *See generally National Fuel Gas Supply Corp. v. Public Service Comm'n of N.Y.*, 894 F.2d 571, 579 (2d Cir. 1990), *cert denied*, 497 U.S. 1004 (1990). Typically, an applicant for a New York State permit would be required to conduct a review of environmental impacts and mitigation methods under SEQRA. *See* ECL § 8-0109(2); N.Y.C.R.R. tit. 6, § 617.3. A permit application would not be considered complete until this environmental review had concluded. *See* ECL § 70-0105(2); N.Y.C.R.R. tit. 6, § 621.3(a)(7). Because the Natural Gas Act prevents the Department from requiring a SEQRA review, *see Matter of East End Property Co. No. 1, LLC v. Kessel*, 46 A.D.3d 817, 823 (2d Dep't 2007), *lv. denied*, 10 N.Y.3d 926 (2008), the Department must rely on FERC's federal environmental review to obtain the same information, which it

can then use when reviewing the Project's consistency with state water quality standards and requirements.

Contrary to Millennium's suggestion that the Department did nothing between December 2015 and May 2016 (Pet.Br. 13), the Department continued reviewing Millennium's application while awaiting FERC's environmental assessment. The Department identified a number of areas in which further information was required, and submitted comments to FERC seeking further information on the identification of affected wetlands, impacts to freshwater wetland adjacent areas and associated mitigation techniques, and impacts to endangered or threatened species. J.A.__ (Department Comments to FERC, at 3-5 (December 21, 2015)).

After Millennium submitted some responsive information to FERC (*see* J.A.__ (Response to FERC Data Request (Jan. 26, 2016))), the Department made further comments. J.A.__ (Comments on Response Letter (March 8, 2016)). The Department noted that Millennium had not adequately addressed some of its original comments, including questions concerning the impacts on freshwater wetlands adjacent areas, techniques to mitigate those impacts, and the impacts on threatened or

endangered species. J.A.__-__ (*Id.* at 4-5). The Department also sought additional information on Millennium's proposed wetland-crossing techniques and identified an error in Millennium's FERC application relating to the number of wetlands the Project would cross. *Id.* at 4 (J.A.__). The Department arranged a meeting with Millennium to discuss the Department's concerns and review draft responses to the March 8, 2016 comments. J.A.__,__,__ (Crounse Emails (March 14-15, 2016); Draft Response to March 8, 2016 Comments); *see also* J.A.__ (Response to Comments (April 22, 2016)).

In short, the Department appropriately deemed the application incomplete pending receipt of the federal environmental assessment, while at the same time working with Millennium to identify and resolve other issues relevant to water quality impacts.

Contrary to Millennium's claim that the second Notice of Incomplete Application related to new issues that that could have been raised earlier (Pet.Br. 28), that request related directly to information set forth in the May 9, 2016 environmental assessment or in recent submissions by Millennium. *See* J.A.__ (Second Notice of Incomplete Application (June 17, 2016)). The Department sought details on the

trenchless crossing techniques proposed by Millennium, J.A.__-__ (*id.* at 4-5), which the environmental assessment acknowledged could affect water quality. J.A.__-__,__ (Environmental Assessment at 41-42, 46). Following up on Millennium's April 22, 2016 response, the Department sought further information regarding effects on wetland-adjacent areas and noted that Millennium still had not updated its application to reflect the correct number of wetlands crossed by the Project. J.A.__-__ (Second Notice of Incomplete Application at 4-5). The Department also sought details relating to project construction and mitigation of the effects on wetlands and other waterbodies. J.A.__ (*Id.*).

The Department additionally sought – again in response to Millennium's April 22, 2016 submission and the Environmental Assessment – information about the project's effects on the Indiana bat and the bog turtle. J.A.__-__ (Second Notice of Incomplete Application at 2-4). The Department observed that one wetland near the Project had been "identified as potential bog turtle habitat by the Applicant" and that the entire contiguous wetland complex should be considered wetland habitat, including a wetland that would be crossed by the pipeline. J.A.__ (*Id.* at 3). Therefore, "to meet the requirements of a complete application,"

the Department asked Millennium to "provide measures that will be taken both during construction and operation of the pipeline to avoid impacts to bog turtles." J.A.__-__ (*Id.* at 3-4).

Indiana bats are listed as endangered under federal and New York State law, while bog turtles are listed as threatened under federal law and as endangered under New York State law. J.A.__ (Department Comments to FERC at 4 (Dec. 12, 2015)). Notwithstanding CPV Valley's argument to the contrary (CPV Br. 11), Preserving wetland habitats for endangered species is a prerogative of state law, ECL § 24-0105(1); N.Y.C.R.R. tit. 6, § 664.3(b)(2), and is therefore an "appropriate requirement of State law" relevant to the Department's decision whether to grant, condition, or deny a section 401 certification. 33 U.S.C. § 1341(d); *see* EPA, *Clean Water Act Section 401 Water Quality Certification*, at 21 (April 2010), *available at* https://www.epa.gov/cwa-404/clean-water-act-401-handbook-2010 (a "relevant consideration when determining if granting 401 certification would be appropriate is the existence of state or tribal laws protecting threatened and endangered species").

In sum, both Notices of Incomplete Application were grounded in the Department's regulations and sought information directly relevant to the Project's compliance with state water quality standards and other appropriate requirements of state law. Because the application was not complete until, at the earliest, August 31, 2016, the Department's one-year deadline to act under section 401 has not yet expired.

Contrary to Millennium's fears (Pet.Br. 26-28; *see also* CPV Br. 5, 11, 14), the Department's power to determine whether an application is complete is not unbridled. The Department's regulations contain restrictions on the timing, format, and content of notices of incomplete application. *See* N.Y.C.R.R. tit. 6, § 621.6(c), (d), (h). The Department's compliance with the timeframe for review established by section 401 also remains subject to FERC oversight, and Millennium is free to submit "evidence of waiver" to FERC at any time. *See Am. Rivers Inc.*, 129 F.3d at 110-111; Point I.A, *supra*.

Millennium is also wrong to suggest that the Department is conflating the completeness of Millennium's application with the completeness of the Department's review of that application. *See* Pet.Br. 25 n.9. The Department regulations describe specific information that

must be furnished in support of specific permits, but also provide that "[s]upplemental information that the department determines is necessary to review the application may be requested at any time." N.Y.C.R.R. tit. 6, § 621.4.[6] The notice of complete application is tied to the commencement of public notice and comment and, to offer meaningful feedback, the public needs a full picture of the project and its effects. *See Ohio Valley Envt'l Coalition*, 674 F.Supp.2d. at 802 (finding that federal agency "unreasonably found the applications were complete and issued public notices that plainly did not contain sufficient information to allow for meaningful public comment").

Accordingly, the Department appropriately determined that information related to basic issues in Millennium's application – such as the project's effect on wetlands adjacent areas and threatened and endangered species, trenchless crossing plans and techniques, and details of excavation methods – was required before the application could

[6] Although a notice of complete application triggers public notice and comment, the Department may continue to seek additional information after that notice is issued. N.Y.C.R.R. tit. 6, §§ 621.6(d), 621.14(b).

be considered complete. *See* J.A.___ (Second Notice of Incomplete Application).

CPV Valley's objection to measuring the waiver period from the publication of a notice of complete application (CPV Br. 5, 12) misunderstands the Department's position. The Department has made clear that if it determines the application as presently submitted is complete, the waiver period will be tied to Millennium's final response to the second notice of incomplete application, and thus will commence on August 31, 2016. *See* J.A.__ (Corrected Berkman Letter at 2).

3. The Department Did Not Delay Unreasonably

The Department has not delayed unreasonably. As set forth in the Statement of the Case and in Point II.B.2, *supra*, the Department has diligently pursued its review of the application, seeking additional information from Millennium as needed.[7] As recently as November 2016,

[7] Although Millennium complains about a roughly three-week delay in executing a non-disclosure agreement relating to Indiana Bat roost locations (Pet.Br. 14-15), the Record is clear that the delay was due to the fact that the agreement needed to be signed by "a Department signatory with the proper delegated authority" who happened to be on vacation when Millennium sent the executed agreement to the Department. *See* J.A.__ (Crounse Email (June 28, 2016)).

Millennium submitted new information relating to trenchless crossings and the project's potential impacts on bog turtles. J.A.__,__ (Additional Trenchless Crossing Information (Nov. 2, 2016); Phase I Bog Turtle Survey Addendum (Nov. 18, 2016)). Also in November 2016, Millennium submitted a new letter and affidavit in support of its application, along with supporting exhibits. J.A.__ (Zimmer Aff. (Nov. 15, 2016)). The Department is in the process of reviewing these recent submissions, as well as Millennium's numerous prior submissions. *See* J.A.__ (Berkman Letter (Nov. 18, 2016)).[8]

Interpreting a "reasonable period of time" under section 401 to correspond with the schedule set by FERC, as suggested by Millennium (Pet.Br. 24-25), has no basis in the Clean Water Act and would inappropriately bind the state's authority to make section 401 certification decisions to FERC's administrative process. *See Keating v. Fed. Energy Reg. Comm'n*, 927 F.2d 616, 624 (D.C. Cir. 1991) ("the state,

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[8] There is no basis for concluding, as Millennium suggests (Pet. Br. 24), that the pre-filing process engaged in by Millennium and the Department should shorten the period of the Department's authorized review. Section 401's period for review is triggered by the "receipt" of an application**,** not by informal communications between an applicant and the Department. *See* 33 U.S.C. § 1341(a)(1).

alone, decides whether to certify under section 401(a)(1)"). Requiring the State to act within 90 days of the issuance of an environmental evaluation, *see* 18 C.F.R. § 157.22, would hamper the efforts of state agencies to seek additional necessary information and provide the meaningful public notice required by section 401 in order to obtain public comment. *See City of Tacoma*, 460 F.3d at 67-68 (FERC's role in reviewing section 401 certifications is limited to ensuring the state agency complied with section 401 itself, not second-guessing the agency's compliance with state administrative laws).

For the same reason, CPV Valley's argument that the Department cannot exercise a "veto" over FERC's conditional certificate is unavailing. CPV Br. 13-14. Nothing in the Natural Gas Act "affects the rights of States" under the Clean Water Act. 15 U.S.C. § 717b(d)(3). Clean Water Act Section 401 explicitly provides that "[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived." 33 U.S.C. § 1341(a)(1). Courts have thus recognized that States have the power to block Natural Gas Act projects by withholding section 401 certifications, even if the project has been

licensed by FERC. *See Islander East II*, 525 F.3d at 164; *AES Sparrows*, 589 F.3d at 733-734.

Finally, the reasonableness of the Department's timeframe for review is further supported by the fact that federal agencies – including the Army Corps and the Fish and Wildlife Service – still have not granted necessary federal authorizations, despite being subject to the August 7, 2016 deadline set forth in FERC's scheduling order. *See* Point I.B, *supra*; Millennium Reply in Support of Schedule at 2-3 (ECF No. 1650457) (conceding that other permits are outstanding).

POINT III

IF THE DEPARTMENT HAD UNLAWFULLY DELAYED ITS REVIEW, THE APPROPRIATE REMEDY WOULD BE REMAND TO THE DEPARTMENT FOR ACTION WITHIN A REASONABLE TIME, NOT SUBSTITUTE ACTION BY THIS COURT

Even assuming Millennium were properly before this Court (which it is not) and the Department unlawfully delayed in its review of the section 401 certification (which it did not), Millennium would not be entitled to an order compelling the Department to grant the section 401 certification, as it requests. (*See* Pet.Br. 29-31.) "[W]hen an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency

to act, but has no power to specify what the action must be." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004); *accord Kaufman v. Mukasey*, 524 F.3d 1334, 1338 (D.C. Cir. 2008).

Here, nothing in the Natural Gas Act or Clean Water Act requires the Department to grant a section 401 certification. Under the Natural Gas Act, if a Court finds that agency action is "inconsistent with the Federal law governing such permit and would prevent the construction, expansion or operation of the facility" it "shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court." 15 U.S.C. § 717r(d)(3). If the Court remands, "the Court shall set a reasonable schedule and deadline for the agency to act on remand." *Id.* Accordingly, even if this Court were to agree with Millennium on the merits, it should remand to the Department for agency action pursuant to a "reasonable schedule and deadline." There is no authority under the Natural Gas Act for a remand directing the Department to grant a section 401 certification.

Contrary to Millennium's argument (Pet.Br. 30), the effect of the Department's failure to conduct its review in a reasonable time under Clean Water Act section 401 would not be to force the Department to

grant the application. *See Puerto Rico Sun Oil Co. v. U.S. Envt'l Protection Agency*, 8 F.3d 73, 79-80 (1st Cir. 1993). The Department could still grant the section 401 certification with conditions or deny the section 401 certification, and FERC would have discretion to consider the conditions or denial. *See Weaver's Cove*, 524 F.3d at 1334; *Ackels v. U.S. Envt'l Protection Agency*, 7 F.3d 862, 867 (9th Cir. 1993); *Airport Communities Coalition v. Graves*, 280 F. Supp. 2d 1207, 1217 (W.D. Wa. 2003).[9] Therefore, even if this Court concludes that the Department improperly failed to exercise its authority under section 401, it should remand the matter to the Department with a reasonable deadline to act on the application. *See, e.g., Dominion Transmission, Inc.*, 723 F.3d at 245.

[9] In contrast, if the Department did not improperly fail to exercise its review authority, any denial or conditions imposed by the Department would bind FERC. *See Am. Rivers Inc.*, 129 F.3d at 107-08.

CONCLUSION

For the reasons set forth above, the Petition should be denied and dismissed.

Dated: January 17, 2017
Albany, New York

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 17, 2017, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, which effected service upon counsel of record through the Court's system.

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