ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

Case No. 16-1415

MILLENNIUM PIPELINE COMPANY, LLC,

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.

ON PETITION FOR REVIEW

BRIEF OF INTERVENOR CPV VALLEY, LLC IN SUPPORT OF PETITIONER

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December 12, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the District of Columbia Circuit, CPV Valley, LLC ("CPV Valley") certifies as follows:

A. Parties and Amici

This case is brought directly before this Court as required by 15 U.S.C. § 717r(d)(2). The parties before the Court in this case are petitioner Millennium Pipeline Company, LLC ("Millennium") and respondents Basil Seggos, in his official capacity as Commissioner of the New York State Department of Environmental Conservation, and the New York State Department of Environmental Conservation (the "Department"). CPV Valley filed a motion to intervene in this appeal on December 7, 2016, which was granted by the Court on December 9, 2016.

B. Rulings Under Review

Millennium's petition challenges the New York State Department of Environmental Conservation's refusal to act on Millennium's request for environmental permits necessary for Millennium's planned natural-gas infrastructure in New York. *See* 15 U.S.C. § 717r(d)(2).

C. Related Cases

There are no related cases of which undersigned counsel is aware currently pending in this Court or in any other court involving substantially the same parties and the same or similar issues.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Rules of the United States Court of Appeals for the District of Columbia Circuit, CPV Valley states as follows:

CPV Valley is building a natural gas-fired combined cycle generating station in Wawayanda, New York with a projected capacity of 650 MW ("CPV Valley Energy Center"), which it is interconnecting to the New York Independent System Operator, Inc. ("NYISO"). *See* Affidavit of Daniel R. Nugent, attached hereto as **Exhibit A**, ("Nugent Aff.") ¶¶ 3, 5. Natural gas to fuel the CPV Valley Energy Center will be transported on a pipeline lateral that will be constructed, owned and operated by Millennium, the Petitioner in this proceeding. *See* Ex. A (Nugent Aff.) ¶ 6.

CPV Valley is a wholly-owned, direct subsidiary of CPV Valley Holdings, LLC.

CPV Power Holdings, LP directly owns 50% of the membership interests in CPV Valley Holdings, LLC. CPV Power Holdings, LP is wholly owned by GIP II CPV Intermediate Holdings Partnership, LP, which itself is indirectly and wholly owned by Global Infrastructure Partners II-B Feeder Fund, LP, Global Infrastructure Partners II-A, LP, Global Infrastructure Partners II-C, LP, GIP II-C Eagle AIV, LP, Global Infrastructure Partners II-D1, LP, and GIP II Friends &

Family Fund, LP (collectively, the "GIP II Funds"). CPV Power Holdings, LP develops environmentally friendly and highly efficient natural gas-fired electric generation facilities throughout the United States. CPV Power Holdings, LP is an affiliate of Competitive Power Ventures, Inc., which is an electric power generation development and asset management company headquartered in Silver Spring, Maryland, with offices in Braintree, Massachusetts and San Francisco, California. No publicly-held company has a 10% or greater interest in CPV Power Holdings, LP, the GIP II Funds or Competitive Power Ventures, Inc.

DGC Valley, LLC directly owns the remaining 50% of CPV Valley Holdings, LLC. DGC Valley, LLC is directly owned by Diamond Generating Corporation, which is a direct, wholly owned subsidiary of Mitsubishi Corporation (Americas), which is a direct, wholly owned subsidiary of Mitsubishi Corporation. Mitsubishi Corporation's stock is publicly traded on the Tokyo Stock Exchange.

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TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS.....v

TABLE OF AUTHORITIES vii

GLOSSARY.....ix

STATUTES AND REGULATIONS.....1

STATEMENT OF THE ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....1

A. CPV Valley Energy Center 1

B. Millennium's Certificate from FERC for the Valley Lateral Project.....3

C. Millennium's Application for the 401 WQC 4

D. The Department's Failure to Act.....4

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

A. The Department Should Have Acted on Millennium's Permit by August 7, 2016, as Required by the Natural Gas Act 7

B. The Department Similarly Failed to Adhere to the Clean Water Act Deadline of November 23, 2016 9

C. The Department is Not Entitled to a Veto Right over FERC's Certification of the Valley Lateral Project.....13

D. CPV Valley Is Directly Harmed by the Department's Failure to Act 14

CONCLUSION 19

CERTIFICATE OF COMPLIANCE 21

CERTIFICATE OF FILING AND SERVICE 22

ADDENDUM OF STATUTES AND REGULATIONS… 24

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Central Hudson Gas & Electric Corporation v. FERC,
783 F.3d 92, 98 (2nd Cir. 2015) 17, 18

NAACP v. FPC,
425 U.S. 662 (1976).....14

Schneidewind v. ANR Pipeline Co.,
485 U.S. 293 (1988).....7

ADMINISTRATIVE CASES

Millennium Pipeline Company, LLC,
157 FERC ¶ 61,096 (2016).....3

FEDERAL STATUTES

15 U.S.C. § 717, *et seq.*.....3

*15 U.S.C. § 717n.....7, 8, 10

*15 U.S.C. § 717r.....9, 13

*33 U.S.C. § 1341.....1, 4, 9, 10

42 U.S.C. § 7661, *et seq.*.....2

REGULATIONS

N.Y. Comp. Codes R. & Regs. Title 6, § 621.3.....11

N.Y. Comp. Codes R. & Regs. Title 6, § 621.4.....11

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* Authorities upon which CPV Valley chiefly relies are marked with an asterisk.

OTHER AUTHORITIES

Millennium Pipeline Co., LLC, *Abbreviated Application for a Certificate of Public Convenience and Necessity for the Valley Lateral Project, Resource Report 1—General Project Description*, § 1.2 (Nov. 2015) 19

Reliability Needs Assessment, issued by New York Independent System Operator, Inc., October 2016 17

Sucato, Sabrina, "Rockland and Orange are Two Fastest-Growing Counties in New York, Census Reports," Hudson Valley Magazine, April 1, 2015……16

GLOSSARY

401 WQC	Water Quality Certification issued under Section 401 of the Clean Water Act
Certificate	Certificate of public convenience and necessity issued by the Federal Energy Regulatory Commission.
CPV Valley	CPV Valley, LLC
CPV Valley Energy Center	The 650 MW natural gas-fired combined cycle generating station being constructed by CPV Valley, LLC in Wawayanda, New York
Department	New York State Department of Environmental Conservation
FERC or the Commission	Federal Energy Regulatory Commission
First Fire	The first date that fuel is introduced to the gas turbine once all support systems have been commissioned and are ready to run continuously
GIP II Funds	Collectively, GIP II CPV Intermediate Holdings Partnership, LP; Global Infrastructure Partners II-B Feeder Fund, LP; Global Infrastructure Partners II-A, LP; Global Infrastructure Partners II-C, LP; GIP II-C Eagle AIV, LP; Global Infrastructure Partners II-D1, LP; and GIP II Friends & Family Fund, LP
J.A.	Joint Appendix
LHV	Lower Hudson Valley
Millennium	Millennium Pipeline, LLC
Valley Lateral Project	The 7.8 mile natural gas pipeline lateral being constructed by Millennium, the 401 WQC for which is at issue in this case

NYISO	New York Independent System Operator, Inc.
NYPSC	New York Public Service Commission

STATUTES AND REGULATIONS

Relevant statutes and regulations are attached as an addendum to this Intervenor Brief.

STATEMENT OF THE ISSUES PRESENTED

As noted in Millennium's Opening Brief for Petitioner, the issue presented is: Whether the Department unlawfully refused to grant, deny, or condition Millennium's application for a Water Quality Certification under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, ("401 WQC") by the August 7, 2016 deadline set by the Federal Energy Regulatory Commission ("FERC" or the "Commission") or by November 23, 2016, the one-year anniversary of the Department's receipt of Millennium's application.

STATEMENT OF THE CASE

Millennium proposes to construct an approximately 7.8 mile natural gas pipeline lateral ("Valley Lateral Project") from Petitioner's mainline interstate natural gas pipeline to the CPV Valley Energy Center. *See* Ex. A (Nugent Aff.) ¶ 6.

A. CPV Valley Energy Center

CPV Valley is building a gas-fired combined cycle generating station in Wawayanda, New York with a projected capacity of 650 MW that will use advanced and highly efficient power generation technology. *See* Ex. A (Nugent Aff.) ¶ 3. Fuel oil will serve as back-up fuel when natural gas is not available or is

more costly.[1] The CPV Valley Energy Center is approximately thirty-five (35) percent complete and is scheduled to first fire in August 2017 and commence commercial operation in December 2017. *See* Ex. A (Nugent Aff.) ¶ 5.

CPV Valley commenced development of the CPV Valley Energy Center in 2008. *See* Ex. A (Nugent Aff.) ¶ 3. Respondent, the Department, was involved in the CPV Valley Energy Center from the beginning, by participating in the review process for the Environmental Impact Statement under the New York State Environmental Quality Review Act, and, ultimately, issuing a 401 water quality certification and air permit[2] for the project.

After a lengthy review, on May 4, 2014, the New York Public Service Commission ("NYPSC") issued to CPV Valley a Certificate of Public Convenience and Necessity, authorizing the siting and approval to construct, own, and finance the CPV Valley Energy Center. J.A. __ [CPV Valley Certificate of Public Convenience and Necessity].

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[1] CPV Valley Energy Center's air permit limits its ability to use fuel oil to no more than an equivalent 720 hours per year. *See* Ex. A (Nugent Aff.) ¶ 9. Also fuel oil is much more expensive than natural gas; on all but a few days per year CPV Valley's fuel cost when operating on fuel oil would be greater than its revenues from the sale of energy. *See* Ex. A (Nugent Aff.) ¶¶ 7, 11. As such, operating the CPV Valley Energy Center using fuel oil is not a viable substitute or alternative for the natural gas that will be supplied by the Valley Lateral Project.

[2] CPV Valley received a NYSDEC Air State Facility Permit and Title IV (Phase II Acid Rain) Permit, as required under the Clean Air Act, 42 U.S.C. § 7661, *et seq*.

In its Order granting the CPV Valley Certificate, the NYPSC noted that development of the CPV Energy Center would: (i) "be consistent with the 2009 New York State Energy Plan and advance the public interest," J.A. __ [Certificate at 15]; (ii) further the objectives contained in the State's most recent State Energy Plan, "such as assuring a reliable energy system, improving the State's energy independence by developing in-state energy supply resources, addressing affordability concerns caused by rising energy bills, and improving the State's economic competitiveness," *id*.; and (iii) provide an average of $2.35 million in annual revenues to the jurisdictions in the vicinity of the project, *id.* at 16.

B. Millennium's Certificate from FERC for the Valley Lateral Project

The Valley Lateral Project will provide the natural gas necessary to fuel the CPV Valley Energy Center. On November 9, 2016, FERC issued to Millennium a Certificate of Public Convenience and Necessity ("Certificate") under Section 7 of the Natural Gas Act, 15 U.S.C. § 717, *et seq.*, to construct the Valley Lateral Project. *Millennium Pipeline Company, LLC*, 157 FERC ¶ 61,096 (2016).

In support of the Certificate, in May 2016, FERC issued its Environmental Assessment. FERC issued a schedule as lead agency, requiring all necessary ancillary permits and authorizations by August 7, 2016. J.A. __ [Notice of Schedule]. While a Certificate issued by FERC carries with it preemptive rights

over state and federal permits, the Certificate requires that the Certificate holder obtain, as relevant here, a 401 WQC.

C. Millennium's Application for the 401 WQC

On November 23, 2015, Millennium filed with the Department a Joint Permit Application, which included, among other permit requests, a formal Section 401 "request for [water quality] certification." J.A. __. Under Section 401(a)(1) of the Clean Water Act, the agency with jurisdiction to issue the 401 WQC (the Department) must make a determination on the request "within a reasonable period of time (not to exceed one year) after receipt of such request" or the certification requirements "shall be waived with respect to such Federal application." 33 U.S.C. § 1341(a)(1). FERC's scheduling order, J.A.__, required the Department to issue the 401 WQC by August 7, 2016. The absolute outside date for action on Millennium's 401 WQC application would have been no later than November 23, 2016—one year after the Department received Millennium's 401 WQC application.

D. The Department's Failure to Act

The Department did not issue a 401 WQC on August 7, 2016, and, on November 18, 2016, rather than issuing to Millennium a 401 WQC, the Department sent a letter to Millennium taking the position that the date from which the "reasonable period (not to exceed one year) after receipt of such request"

begins is not the date specified by FERC as the lead agency, or the Department's "date of receipt" of the 401 WQC application, but the date that the Department issues a "Notice of Complete Application" deeming the permit application complete, which in this case still has not happened. *See* J.A. __ [11/18/16 Letter to Ron Happach]. Accordingly, the Department takes the position (per its November 18, 2016 letter) that it has "at a minimum" one year from August 31, 2016, in which to act. J.A. __. Indeed, the Department does not say that it will act by August 30, 2017 or by any date at all.

The Department's interpretation of its permitting obligation violates its express obligations under both the Clean Water Act and the Natural Gas Act, and effectively frees the Department from any accountability for meeting FERC deadlines or issuing a decision within a reasonable time, as required by the Clean Water Act.

In this case, the Department's failure to act within a reasonable time—by August 7, 2016, or no later than November 23, 2016—to issue Millennium's 401 WQC means that Millennium cannot begin to construct and inter-connect the FERC-authorized Valley Lateral Project to the CPV Valley Energy Center. *See* Ex. A (Nugent Aff.) ¶ 7. Without the Valley Lateral Project facilities constructed and capable of delivering natural gas to the CPV Valley Energy Center, the CPV Valley Energy Center will be essentially unable to operate. *Id.*

SUMMARY OF THE ARGUMENT

Congress enacted a regulatory scheme with respect to interstate energy infrastructure that is designed to facilitate cost-effective construction on reliable and certain timelines and to prevent undue delay by the various state agencies involved in permitting such infrastructure projects. Nevertheless, and in violation of federal law, the Department has failed to act for over a year on a permit request for a 401 WQC essential to the operation of the CPV Valley Energy Center.

The Department was required by the Natural Gas Act to act on Millennium's request for a 401 WQC by August 7, 2016, the deadline established by FERC. Further, the Department's ability to deny Millennium's request for a 401 WQC permit was waived on November 23, 2016 when the Department failed to act on the application "within a reasonable time (not to exceed one year) after receipt of such request" under the Clean Water Act. The Department, however, still refuses to act and asserts that it is under no obligation to act until one year after it issues a notice stating that Millennium's permit application, which already includes all materials heretofore requested by the Department, is "complete."

The Department's delay in issuing the 401 WQC will cause substantial economic harm to CPV Valley—a six month delay is projected to cost CPV Valley $56 million. *See* Ex. A (Nugent Aff.) ¶¶ 10-11. It will also harm the ratepayers in the state of New York, who would have benefited from decreased energy prices

during the delay. Accordingly, and for the reasons set forth in detail below, CPV Valley respectfully requests that the Court remand this matter and direct the Department to grant Millennium's 401 WQC immediately upon remand.

ARGUMENT

A. The Department Should Have Acted on Millennium's Permit by August 7, 2016, as Required by the Natural Gas Act.

Under the Natural Gas Act, FERC has exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce and is authorized to issue certificates of public convenience and necessity. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988). FERC granted a Certificate to Millennium to construct, own, and operate the Valley Lateral Project to serve the CPV Valley Energy Center. J.A. __.

As the lead agency responsible for "coordinating all applicable Federal authorizations," *see* 15 U.S.C. § 717n(b)(1), and consistent with the Natural Gas Act, FERC established a deadline of August 7, 2016, for the Department to act on Millennium's 401 WQC. J.A. __ [Notice of Schedule]. State agencies, such as the Department, are expressly required by the Natural Gas Act to comply with FERC deadlines:

> Each Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission.

See 15 U.S.C. § 717n(b)(2). Section 717r(d)(2) of the Natural Gas Act goes on to provide that "[t]he failure of an agency to take action on a permit required under Federal law . . . in accordance with the Commission schedule established pursuant to Section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes" of judicial review. Accordingly, the Department was required to act by August 7, 2016, the deadline set by FERC.

The remedy for failing to follow FERC's schedule is also specified in the Natural Gas Act: "the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court [and] . . . shall set a reasonable schedule and deadline for the agency to act on remand." 15 U.S.C. § 717r(d)(3). In this case, the Court should, as requested by Millennium, remand this matter to the Department with direction to issue a 401 WQC permit immediately upon remand. Millennium Brief at 5.

An orderly, open, and transparent regulatory process is critical for development of large infrastructure projects that require Certificates (such as the Valley Lateral Project), and for those that will rely on such projects (such as CPV Valley). Entities must be able to know and understand regulatory deadlines, and reasonably rely on the fact that agencies will follow all statutory mandates and schedules, including those imposed by the Natural Gas Act.

The Natural Gas Act provides for such an orderly, open, and transparent process. Here, this process resulted in a schedule for federal and state agencies to follow, and ultimately, culminated in the issuance of the Millennium Certificate of Public Convenience. The Department's failure to act on Millennium's 401 WQC application as it should have by FERC's schedule deadline of August 7, 2016, justifies an order from this court for the Department to issue a 401 WQC.

B. The Department Similarly Failed to Adhere to the Clean Water Act Deadline of November 23, 2016.

The Clean Water Act could not be more clear. The Department is required to make a determination on a 401 WQC application "within a reasonable period of time (not to exceed one year) after receipt of such request." 33 U.S.C. § 1341(a)(1). If the Department fails to meet the deadline "the certification requirements . . . shall be waived." 33 U.S.C. § 1341(a)(1). The Department received Millennium's application on November 23, 2015. Accordingly, the Department was required to act by November 23, 2016.

After holding Millennium's application for close to one year, the Department took the position in its November 18, 2016, correspondence to Millennium that it had "at a minimum" one year from August 31, 2016, in which to act (which is really no commitment to act at all). J.A. __.

The Department's rationale flies in the face of both the express language and intent of the deadline provisions in the Clean Water Act, effectively nullifying

Congress' mandate for permitting agencies to "act on a request for [401] certification within . . . one year after receipt of such request." 33 U.S.C. § 1341. The same is true for the Natural Gas Act, in which Congress required state agencies to "comply with applicable schedules established by Federal law." 15 U.S.C. § 717n(b)(c).

If Congress intended the one-year clock to start upon receipt of a "complete application" rather than a "request for certification," it would have drafted the law to so state. Congress did not. As such, if the Department felt that Millennium's submission was still wanting as its statutory review deadline loomed, it had three choices: "issue, condition, or deny the certification." Unending delay was not, and could not, under any reasonable interpretation of Congressional intent, be a viable option.

As an initial matter, it is important to note that Section 401 of the Clean Water Act does not say that the permitting agency has one year to issue a permit—it says a "within a reasonable time (not to exceed one year) after receipt of such request." 33 U.S.C. § 1341(a)(1). The Department must issue a permit in a "reasonable time" which is bound by one year after receipt of the request. It is improper for the Department to take the position that it always has one full year in which to issue a 401 WQC. If it is reasonable, like in this case, to issue a permit in less time, then it must issue the 401 WQC in that reasonable time.

The CPV Valley Energy Center is under construction and is expected to be ready for commercial operation in December 2017, but there is no certainty as to when the Department may act on Millennium's 401 WQC application. *See* Ex. A (Nugent Aff.) ¶ 5. This fact alone illustrates that using the Department's Notice of Complete Application as the date upon which the "reasonable time (but no later than one year) after the receipt of such notice" begins is untenable. The Department's interpretation would give a single state agency (like the Department) unilateral and unchecked discretion to hamstring progress on large infrastructure projects—such as the Valley Lateral Project and the CPV Valley Energy Center—based on vague and bureaucratic interpretations of what constitutes a "complete" application. This runs counter to both the letter and the spirit of the Clean Water Act.

Indeed, the Department's ever shifting demands for supplemental application materials in this case offers an excellent illustration of this concern. The Department's pretextual requests for supplemental information (often duplicative or, as with its requests regarding the Indiana Bat and Bog Turtle, on topics entirely unrelated to its water quality jurisdiction) are inconsistent with a plain reading of its own state regulations establishing content requirements for WQC applications. *See* N.Y. Comp. Codes R. & Regs. Tit. 6, § 621.3 (general requirements); *id.* § 621.4 (requirements for specific permits). More strikingly, the

Department's November 18 correspondence admitted that Millennium had answered all of the Department's questions and had provided to the Department all relevant information in submissions dated August 16 and 31, 2016. *See* J.A. __ [11/18/16 Letter to Ron Happach]. Despite this admission, the Department has yet to issue a Notice of Complete Application, let alone commit to a date for a final decision.

The Department posits that it needs one year from the date it issues its Notice of Complete Application because "otherwise applicants could frustrate the State's mandate to make WQC determination [sic] by completing an application 364 days after submitting an incomplete and deficient application." J.A. __. The Department's rationale is no justification at all. If an entity completed an application 364 days after submitting the initial application, the Department would be justified in denying it. Any entity that does not respond to reasonable requests of the Department relating to matters within the Department's jurisdiction would risk just that fate. The Department's position, on the other hand, would allow it to never act on (by approving or denying) a 401 WQC application.

Moreover, the Department's rationale clearly does not apply here, as the Department has had more than a reasonable amount of time to act. Not only has Millennium's 401 WQC application been pending since November 23, 2015, but the Department has known for many years that Millennium would construct the

Valley Lateral Project to the CPV Valley Energy Center and formally acknowledged receipt of all requested information more than three (3) months prior to the November deadline. The Department was also active in all facets of the permitting of the CPV Valley Energy Center, where it was clear that the Valley Lateral Project would be the pipeline being certificated by FERC to provide natural gas to the CPV Valley Energy Center. J.A. __ [Published newspaper notices]. Indeed, the Department issued CPV Valley a 401 WQC and participated in CPV Valley's Certificate proceeding before the NYPSC. J.A.__ [Certificate Order].

C. The Department is Not Entitled to a Veto Right over FERC's Certification of the Valley Lateral Project.

The Department's position is not only inconsistent with the express language of the Clean Water Act, it would also frustrate the rights of the certificate holders under the Natural Gas Act and would give the Department a veto right over the Natural Gas certificate, which is a matter within the sole and exclusive jurisdiction of FERC.

Carried to its logical conclusion, the Department could determine never to issue a Notice of Complete Application, despite the fact that Millennium has met every statutory requirement and responded to every inquiry of the Department, thus giving the Department a veto right over a Federal project over which the Natural Gas Act allows it only conditioning authority. Leaving an application on file and allowing it to languish is inconsistent with the goals of the Federal Power

Act and Natural Gas Act to "encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices." *NAACP v. FPC*, 425 U.S. 662, 669-670 (1976). The veto authority created under the Department's approach is *disorderly* and *disruptive* to those relying on the Natural Gas Act process, and is clearly inconsistent with the goals of the Natural Gas Act.

D. CPV Valley Is Directly Harmed by the Department's Failure to Act.

By failing to act by November 23, 2016, and without providing any date by which it will act, Millennium—and, by extension, CPV Valley—remain in limbo. The Department's failure has real world implications that extend beyond Millennium. Although the CPV Valley Energy Center is designed so that it can use fuel oil for back-up and reliability purposes, it cannot operate for more than an equivalent 720 hours per year on oil due to air permit restrictions, and even then it can only operate at about 88% of its full capacity. *See* Ex. A (Nugent Aff.) ¶¶ 7, 9. Thus, the Department's failure to act directly affects the CPV Valley Energy Center and puts at risk CPV Valley's substantial investment in its development. But beyond Millennium and CPV Valley, the Department's failure to act also harms ratepayers and businesses that will rely on the energy and capacity produced by the CPV Valley Energy Center.

The CPV Valley Energy Center has obtained all of its permits and authorizations and is currently under construction. CPV Valley's current schedule

calls for the project to be ready to first fire in August 2017 and commence commercial operation in December 2017. *See* Ex. A (Nugent Aff.) ¶ 5. Prior to commercial operations, the facility will need to be commissioned and tested on its primary fuel, natural gas, the source of which is the Valley Lateral Project. Millennium's filings with FERC and the Department in November 2015 provided sufficient time to support a schedule that would have the Certificate and 401 WQC, issued and the Valley Lateral Project constructed in time for gas systems commencing in April 2017 and "first fire" of the CPV Valley Energy Center in August 2017. *See* Ex. A (Nugent Aff.) ¶¶ 5, 8.

Millennium has told CPV Valley that it will take approximately five months to construct the Valley Lateral Project, but that Millennium may not clear trees, one of the first steps in the pipeline construction sequence, between April 1 and mid-November in order to protect bat habitat. *See* Ex. A (Nugent Aff.) ¶ 8. Thus, the Department's failure to act is not just an issue of a month to month delay. If the 401 WQC is not issued such that tree clearing of the Valley Lateral Project right of way can be completed before April 2017, the construction will be delayed until at least the following November, which will in turn significantly delay the operation of the CPV Valley Energy Center. *See* Ex. A (Nugent Aff.) ¶ 8.

Further, delay in the construction of the Valley Lateral Project will not only financially harm the stakeholders in the CPV Valley Energy Center, but it will also

harm ratepayers and may slow the region's economic development. The CPV Valley Energy Center is located in Orange County, New York, which, for the last several years, has been one of New York's fastest growing counties.[3] In particular, Orange County has had significant growth in the health industry with the construction of new medical facilities throughout the region. These facilities are large consumers of electricity and require a reliable supply of energy. Orange County Hospital in Middletown is a new facility that is already contemplating expansion. Regional job growth has benefited from these high paying skilled employment opportunities and the County continues to experience positive economic growth.

Orange County and the lower Hudson Valley region of New York are attracting other large businesses, such as the potential siting of a children's theme park, LegoLand, in the town of Goshen and the casino that will be built in Sullivan County. These businesses rely on access to low cost reliable energy. The CPV Valley Energy Center is located within the region and the electricity generated will not only provide employment opportunities to the area, but will help support the electrical system with its low cost, reliable and efficient generation. J.A.__ [Certificate Order]. These new businesses and the jobs that they create need the

[3] *See* Sucato, Sabrina, "Rockland and Orange are Two Fastest-Growing Counties in New York, Census Reports," Hudson Valley Magazine, April 1, 2015.

CPV Valley Energy Center to be on line so that additional, low-cost power is available in this growing region. A delay in the CPV Valley Energy Center may delay the plans of other businesses which are relying on the energy in their planning.

The NYISO is relying on this project because it will increase transfer capability and reduce congestion across portions of the bulk transmission system.[4] New York ratepayers will be negatively impacted by any delay in the commencement of operation of the CPV Valley Energy Center—caused by the delay in the receipt of the 401 WQC from the Department and the resulting delay in the construction of the Valley Lateral Project—through both decreased capacity and increased energy prices.

The NYISO maintains operational control over the New York State bulk transmission system and is responsible for maintaining reliable and economic electric service for the state of New York. One of the services the NYISO provides is administering a "capacity market" for wholesale electric power. As the Second Circuit described in *Central Hudson Gas & Electric Corporation v. FERC*:

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[4] Reliability Needs Assessment, issued by New York Independent System Operator, Inc., October 2016, at p. 36. The RNA can be found at: http://www.nyiso.com/public/webdocs/markets_operations/services/planning/Planning_Studies/Reliability_Planning_Studies/Reliability_Assessment_Documents/2016RNA_Final_Oct18_2016.pdf.

> Capacity markets are a tool that some RTOs and ISOs use to help ensure that there is a reliable and adequate supply of electric power. In a capacity market, suppliers sell a commitment to produce electric energy if called upon to do so during a specified future time period, rather than electric energy itself. NYISO's capacity market is implemented chiefly through monthly mandatory spot auctions, which are conducted a short time in advance of the month for which capacity is being supplied.

783 F.3d 92, 98 (2nd Cir. 2015). The NYISO capacity market is divided into zones. The capacity needs of a zone are determined administratively using a NYISO-developed demand curve. The point where the supply curve intersects with the demand curve constitutes the market clearing price. *Central Hudson*, 783 F.3d at 98. A supplier that clears the market is paid the market clearing price.

In 2014, the NYISO created a new capacity zone, referred to as the Lower Hudson Valley ("LHV") zone. *See Central Hudson*, *supra*. The effect of the new capacity zone was to incentivize construction of new generation within the zone to alleviate transmission congestion and address reliability concerns within the LHV region. The CPV Valley Energy Center is located within this LHV capacity zone. In the short term, capacity prices are expected to rise until new capacity enters the market. Entry of a new generator—like the CPV Valley Energy Center—will ultimately reduce capacity prices.

The benefits to the LHV capacity zone resulting from the CPV Valley Energy Center entering the market as a capacity resource will be reduced if the Valley Lateral Project is delayed and the CPV Valley Energy Center is limited to

using oil as its fuel with its air permit limitation. The addition of this new generation capacity from natural gas would increase the amount of supply available to meet the demand within the state, thereby reducing the capacity price paid by the ratepayers. Ratepayers, who are projected to save more than $400 million per year as a result of the operation of the CPV Valley Energy Center, will not begin to receive those benefits until the CPV Valley Energy Center is operational and will not recoup any savings lost to them due to delay. *See* Millennium Pipeline Co., LLC, *Abbreviated Application for a Certificate of Public Convenience and Necessity for the Valley Lateral Project, Resource Report 1—General Project Description*, Section 1.2 (Nov. 2015).[5]

CONCLUSION

For all of the foregoing reasons, CPV Valley respectfully requests that the Court remand this matter and direct the Department to approve Millennium's permit request.

[5] *Available at* https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14044371.

Dated: December 12, 2016
Washington, DC

Respectfully submitted,

/s/ Elizabeth W. Whittle

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(e)(2)(C) of the Rules of the United States Court of Appeals for the District of Columbia Circuit and Federal Rule of Appellate Procedure 32(a)(5), (6) and (7)(C), I hereby certify that the Brief of Intervenor CPV Valley, LLC in Support of Petitioner has been prepared in a proportionally spaced typeface (using Microsoft Word 2010 in 14-point Times New Roman font) and contains 4,479 words, not including the corporate disclosure statement, tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

/s/ Elizabeth W. Whittle

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CERTIFICATE OF FILING AND SERVICE

In accordance with Federal Rule of Appellate Procedure 25(d) and Rule 25 of the Rules of the United States Court of Appeals for the District of Columbia Circuit, I hereby certify that I have, this 12th day of December 2016, filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system, which will, on the same day, generate and transmit a Notice of Docket Activity effecting service on all registered users.

I further certify that I caused copies of the foregoing to be delivered via email to the following:

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ADDENDUM OF STATUTES AND REGULATIONS

TABLE OF CONTENTS

FEDERAL STATUTES

15 U.S.C. § 717n A-1

15 U.S.C. § 717r A-4

33 U.S.C. § 1341 ..... A-7

REGULATIONS

N.Y. Comp. Codes R. & Regs. Title 6, § 621.3 ..... A-10

N.Y. Comp. Codes R. & Regs. Title 6, § 621.4 ..... A-14

United States Code Annotated
Title 15. Commerce and Trade
Chapter 15B. Natural Gas (Refs & Annos)

15 U.S.C.A. § 717n

§ 717n. Process coordination; hearings; rules of procedure

Effective: August 8, 2005
Currentness

(a) Definition

In this section, the term "Federal authorization"--

(1) means any authorization required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title; and

(2) includes any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title.

(b) Designation as lead agency

(1) In general

The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Other agencies

Each Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission.

(c) Schedule

(1) Commission authority to set schedule

The Commission shall establish a schedule for all Federal authorizations. In establishing the schedule, the Commission shall--

(A) ensure expeditious completion of all such proceedings; and

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(B) comply with applicable schedules established by Federal law.

(2) Failure to meet schedule

If a Federal or State administrative agency does not complete a proceeding for an approval that is required for a Federal authorization in accordance with the schedule established by the Commission, the applicant may pursue remedies under section 717r(d) of this title.

(d) Consolidated record

The Commission shall, with the cooperation of Federal and State administrative agencies and officials, maintain a complete consolidated record of all decisions made or actions taken by the Commission or by a Federal administrative agency or officer (or State administrative agency or officer acting under delegated Federal authority) with respect to any Federal authorization. Such record shall be the record for--

(1) appeals or reviews under the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), provided that the record may be supplemented as expressly provided pursuant to section 319 of that Act; or

(2) judicial review under section 717r(d) of this title of decisions made or actions taken of Federal and State administrative agencies and officials, provided that, if the Court determines that the record does not contain sufficient information, the Court may remand the proceeding to the Commission for further development of the consolidated record.

(e) Hearings; parties

Hearings under this chapter may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(f) Procedure

All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

CREDIT(S)

(June 21, 1938, c. 556, § 15, 52 Stat. 829; Aug. 8, 2005, Pub.L. 109-58, Title III, § 313(a), 119 Stat. 688.)

15 U.S.C.A. § 717n, 15 USCA § 717n

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United States Code Annotated
Title 15. Commerce and Trade
Chapter 15B. Natural Gas (Refs & Annos)

15 U.S.C.A. § 717r

§ 717r. Rehearing and review

Effective: August 8, 2005
Currentness

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting

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aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title , the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

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(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

CREDIT(S)

(June 21, 1938, c. 556, § 19, 52 Stat. 831; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 19, 72 Stat. 947; Aug. 8, 2005, Pub.L. 109-58, Title III, § 313(b), 119 Stat. 689.)

15 U.S.C.A. § 717r, 15 USCA § 717r
Current through P.L. 114-248.

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United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter IV. Permits and Licenses (Refs & Annos)

33 U.S.C.A. § 1341

§ 1341. Certification

Currentness

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) 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, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. 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. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

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(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or

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requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

CREDIT(S)

(June 30, 1948, c. 758, Title IV, § 401, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 877; amended Dec. 27, 1977, Pub.L. 95-217, §§ 61(b), 64, 91 Stat. 1598, 1599.)

33 U.S.C.A. § 1341, 33 USCA § 1341
Current through P.L. 114-244.

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Compilation of Codes, Rules and Regulations of the State of New York Currentness
Title 6. Department of Environmental Conservation
Chapter VI. General Regulations
Part 621. Uniform Procedures
Permit Application Procedures.

6 NYCRR 621.3

Section 621.3. General requirements for applications

Following are general requirements for all applications for permits covered by this Part. Additional specific requirements for individual permits are given in section 621.4 of this Part. Copies of forms, regulations and guidelines referred to in this Part are available from the department's regional permit administrators at the locations listed in section 621.19 of this Part and on the internet at http://www.dec.state.ny.us.

(a) General requirements for complete application. In order to be determined complete for the purpose of commencing department review, the application for a permit listed in section 621.1 of this Part must meet the requirements specifically listed in section 621.4 of this Part as well as the following criteria:

(1) The application must include a properly completed department application form, supporting documentation, and supplemental information as required by the specific program implementing regulations and this Part. Engineers certifying documents must be licensed in New York State.

(2) The department may request information concerning the applicant which is reasonably necessary to determine who may be a legally responsible party for compliance with the conditions of the permit, the ECL, other applicable laws administered by the department, or for remediation of any environmental degradation and in order to help determine the appropriate financial security which may be required. Any false written statements knowingly made are punishable pursuant to Penal Law, section 210.45.

(3) The department may require that the applicant prepare a public participation plan for additional public outreach. Such additional public outreach may include, but is not limited to, the distribution or posting of information about the proposed project in the area in which the proposed project is to be located, conduct of public information meetings, translation of notices for non-English speaking communities and the establishment of document repositories in the area in which the proposed project is to be located.

(4) If a project requires more than one department permit, the applicant must simultaneously submit all the necessary applications, or demonstrate to the department's satisfaction that there is good cause not to do so.

(5) If variances from permit standards are sought and are specifically provided for in a permit program's implementing regulations, then the application must include a request and justification for such variances as outlined in the program's implementing regulations.

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(6) When a project also requires related permits from any other agency or government, the department application must include a list of such permits which the applicant knows to be required, and a statement of the status of approval and SEQR review of each at the time of filing the department applications.

(7) If a project is subject to the provisions of article 8 of the ECL (SEQR), the department must satisfy the requirements of Part 617 of this Title. An application is not complete until a properly completed environmental assessment form has been submitted and:

(i) a lead agency has been established pursuant to article 8 of the ECL; and

(ii) a negative declaration, or conditioned negative declaration has been filed pursuant to article 8 of the ECL; or

(iii) if it has been determined that the project may have a significant impact on the environment, a draft environmental impact statement (DEIS) has been accepted by the lead agency; and

(iv) where the department is the lead agency and requires the preparation of a DEIS by an applicant, the application is not complete until the department determines that the scope, content and accuracy of the DEIS prepared by the applicant are acceptable for public review. If the department determines that public comment may be helpful in identifying the scope of the DEIS, the department may solicit written public comment, conduct a public meeting, or take other actions that may be appropriate for a particular project to determine the range of issues that must be addressed in the DEIS. Where public scoping is necessary, it must commence within 30 calendar days following the SEQR determination of significance. If an applicant provides the department with a draft scope of the DEIS, the department must provide the applicant with a final written scope within 60 calendar days of receipt of the draft scope.

(8) When an action requires a determination by the Office of Parks, Recreation and Historic Preservation pursuant to section 14.09 of the Parks, Recreation and Historic Preservation Law (New York State Historic Preservation Act of 1980), the application is not complete until the Office of Parks, Recreation and Historic Preservation has made a determination whether:

(i) any historic, architectural, archeological or cultural resources present in the project impact area are significant (listed on or eligible for listing on the State or National Register of Historic Places); and

(ii) the project may have any impacts on such significant resources.

(9) If a project is a Type I or Unlisted action pursuant to SEQR and is located in a coastal area designated according to article 42 of the Executive Law and 19 NYCRR Part 600, the application is not complete until sufficient information has been provided to enable the department to complete a coastal assessment form as prescribed by the Secretary of State.

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(10) A project located within the Adirondack Park requiring a department permit may also require permits from the Adirondack Park Agency, or the New York State Department of Health or both. In such a case, the application for a department permit is not complete until the applicant has submitted complete applications to all agencies for all required permits, and SEQR requirements of all other agencies are fulfilled, or until the applicant demonstrates good cause not to do so.

(11) For further information concerning completeness, see section 621.6 of this Part; and for further completeness criteria for specific permits covered by this Part, see section 621.4 of this Part.

(b) Minor Projects.

(1) The department has identified certain activities as minor, as listed in section 621.4 of this Part. Minor projects usually have an insignificant environmental impact. However, it is necessary to regulate such activities due to the potential for abuse of natural resources, the necessity for monitoring related activities, and the possible cumulative effect of minor actions which individually are environmentally insignificant.

(2) Minor projects are not normally subject to the public notice requirements of section 621.7 of this Part, and may be processed faster than major projects as explained in section 621.10 of this Part.

(3) If the department determines that a minor project requires public notice, may have a significant impact on the environment under SEQR or requires a public hearing, the project will thereafter be processed as a major project for purposes of this Part.

(4) When a project involves simultaneous permit application for both major and minor activities, all are processed as major for purposes of this Part.

(5) When a project involves simultaneous permit applications for multiple activities, all of which are minor, all are processed as minor for purposes of this Part unless it is determined that the project may have a significant impact under SEQR, requires public notice, or a public hearing pursuant to paragraph (3) of this subdivision.

(c) Where a project involves permits both subject and not subject to this Part, the department reserves the right to process all such applications pursuant to this Part.

(d) Joint proceedings. In some instances, government agencies other than the department may have concurrent jurisdiction over an application for a permit under this Part. The commissioner may enter into agreements with such agencies for joint processing of the application, including provision for joint notices and hearings. The department may require the applicant to provide a copy of the permit application directly to another government agency to facilitate joint processing.

(e) Enforcement actions. Processing and review of an application may be suspended by written notice to the applicant if an enforcement action has been or is commenced against the applicant for alleged violations of the ECL or other

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environmental laws administered by the department at the facility or site that is the subject of the application. The alleged violations may be related to the activity for which the permit is sought or to other provisions of law administered by the department.

(1) Such suspension of processing and review may remain in effect pending final resolution of the enforcement actions.

(2) This provision does not relieve the department from the requirement to make a final decision on title V facility permit applications within 18 months of the date that the application was complete pursuant to title V of the CAA (see section 200.9 of this Title) and this Part.

Credits

Sec. filed Nov. 1, 1977; repealed, new filed July 31, 1981; amds. filed: Nov. 1, 1988; Sept. 21, 1993; Sept. 13, 1994; June 7, 1996 eff. 30 days after filing. Amended (e)-(f); amd. eff. Sept. 6, 2006.

Current with amendments included in the New York State Register, XXXVIII, Issue 49 dated December 7, 2016.

6 NYCRR 621.3, 6 NY ADC 621.3

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Compilation of Codes, Rules and Regulations of the State of New York Currentness
Title 6. Department of Environmental Conservation
Chapter VI. General Regulations
Part 621. Uniform Procedures
Permit Application Procedures.

6 NYCRR 621.4

Section 621.4. Requirements for specific permit applications

The requirements in this section for specific permits include additional information to be furnished for the department to determine that the application is complete. Supplemental information that the department determines is necessary to review the application may be requested at any time. Procedures to be followed when reviewing an application for a permit depend upon whether a project is considered major or minor. A list of specific actions considered either major or minor is included in this section for each permit type. For each permit type where a maximum permit term is established by statute or regulation the maximum permit term is provided at the end of the relevant subdivision of this section. Implementing regulations have been promulgated by the department for most activities; in some cases interpretive guidelines have also been issued. Regulations cited in the subdivisions below should be consulted for supplemental requirements when preparing a permit application. They are available from the regional permit administrators at the locations listed in section 621.19 of this Part, or from the department's Internet website at: http://www.dec.state.ny.us.

(a) Use and Protection of Waters, Permits under Part 608 of this Title, article 15, title 5 of the ECL

(1) Disturbance of the bed or banks of a protected stream.

(i) A complete application must include a properly completed joint application for permit form, plan and profile sketches of the proposed project and a map at a scale of 1# = 2,000' (1 cm = 240 m) or larger showing its location.

(ii) Minor stream bed or bank disturbance actions include the following: repair or in-kind replacement of existing structures; disturbances of less than 100 linear feet (30.48 linear meters) along any 1,000 feet (304.8 meters) of watercourse.

(2) Construction, reconstruction, repair, removal or breach of a dam.

(i) A complete application must include a properly completed joint application for permit and supplemental forms and information specified in Part 608 of this Title.

(ii) Ordinary maintenance, as defined in section 608.1(v) of this Title, is exempt from permitting requirements.

(iii) Minor dam projects include only repairs of existing dams inventoried by the department and for which an engineering assessment pursuant to Part 673 of this Title is on file with the department.

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(3) Construction, reconstruction and expansion of piers, wharfs, platforms, breakwaters, docking facilities and the placement of moorings.

(i) A complete application must include a properly completed joint application for permit and supplemental forms, plan and profile sketches of the proposed project, and a map at a scale of 1# = 2,000' (1 cm = 240 m) or larger showing the project location. For docking or mooring facilities the applicant must submit a plan drawn to scale depicting structures, and where appropriate, delineated facility perimeters that include a reference point to a permanent structure or significant natural feature.

(ii) Minor dock and mooring projects include:

(*a*) construction or installation of docks, piers, wharfs or other structures used solely as a landing place, providing dockage for 10 or fewer boats and encompassing within a facility perimeter an area of 8,000 square feet or less;

(*b*) the in-kind replacement of a structure on open supports; and

(*c*) establishing a mooring facility for 20 or fewer boats.

(4) Excavation or placement of fill in navigable waters.

(i) A complete application must include a properly completed joint application for permit form, plan and profile sketches of the proposed project, a map at a scale of 1# = 2,000' (1 cm = 240 m) or larger showing its location, and must identify the means and location of dredged material disposal.

(ii) Minor excavation or placement of fill projects include: fill of less than 100 cubic yards; maintenance dredging occurring at least once every 10 years; excavation or placement of fill of 5,000 square feet or less; riprap of less than 100 linear feet for each parcel of land; repair or replacement in-kind and in-place of existing structures.

(b) Water Withdrawals and Long Island Wells, permits under Parts 601 and 602 of this Title, article 15 title 15 of the ECL.

(1) A complete application must include a properly completed joint application for permit and supplemental forms and all exhibits listed in Part 601 of this Title.

(2) Minor water withdrawal projects include:

(i) with respect to a public water supply, the extension of a water district or other service area to an existing facility, or a proposed facility having all required approvals from involved regulatory entities where present sources of supply are adequate to serve the proposed extension area and where the additional area does not exceed 50 percent of the size of the previously approved area;

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(ii) replacement of a well with an equivalent well in the same aquifer having a capacity not more than 110 percent of the original;

(iii) changes in ownership of a water withdrawal system, including acquisitions of private systems by a town or county water district;

(iv) enlargement of existing facilities involving an increase of not more than 45 gallons per minute for groundwater sources and not more than 150 gallons per minute for surface sources, or 10 percent of the original capacity, whichever is greater; and

(v) applications for initial permits pursuant to article 15, title 15 of the ECL and section 601.7 of this Part:

(3) Minor Long Island well projects include:

(i) a well used solely for cooling purposes where all water pumped will be recharged within 50 vertical feet of the taking point, and no SPDES permit is required;

(ii) temporary dewatering systems withdrawing less than one million gallons per day;

(iii) permanent dewatering systems, providing all water pumped is completely recharged within 50 vertical feet of the taking point and no SPDES permit is required;

(iv) a well with a permanently installed pump, to be used for fire protection purposes only; and

(v) replacement of a well with an equivalent well in the same aquifer having a capacity not more than 110 percent of the original.

(4) Permit terms. The maximum permit term for permits identified in this subdivision is 10 years.

(c) Transportation of water by vessel, permits under article 15 of title 15 of the ECL.

(1) A complete application must be accompanied by any supplemental information which the department notifies the applicant is necessary to review the application. Details are available from department staff at the locations listed in Appendix 1 of this Title, infra.

(2) There are no minor water transport projects.

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(d) Wild, scenic and recreational rivers, (except river areas on private land in the Adirondack Park which are subject to 9 NYCRR Part 577), permits under 6 NYCRR Part 666 of this Title, article 15 title 27 of the ECL.

(1) A complete application must include a properly completed joint application for permit and supplemental forms, a map at a scale of 1# = 2,000' (1 cm = 240 m) or larger showing the project location and the boundary of the river area, and upon notification by the department, any other supplemental information that the department determines is necessary to review the application.

(2) Minor rivers system projects include: subdivisions creating not more than two lots; construction of single-family dwellings in subdivisions approved pursuant to Part 666 of this Title or on lots that otherwise conform to the restrictions of Part 666 of this Title; and construction of accessory structures or signs.

(3) Permit term. The maximum permit term for permits identified in this subdivision is five years.

(e) Water quality certifications in accordance with section 401 of the Clean Water Act, (see section 608.9(c) of this Title) and Part 608 of this Title.

(1) A complete application for a Water Quality Certification must include either:

(i) a written request for the Water Quality Certification; or

(ii) a properly completed joint application for permit form.

(2) The department may also request a properly completed application and supporting documentation for any required federal permits or licenses.

(3) If permits are required from the department for the activity the application must include properly completed applications.

(4) Minor 401 certification projects include those which will not exceed the minor project thresholds established in this Part for protection of waters, freshwater wetlands or tidal wetlands, and which do not involve the approval of construction and operation of hydroelectric generating facilities.

(5) Permit term. The maximum permit term will be concurrent with the permit term for the accompanying permit issued pursuant to any program administered under this Part or the term of a license or other authorization issued by a Federal agency.

(f) State Pollutant Discharge Elimination System (SPDES), permits under Part 750 of this Title, article 17 titles 7 and 8 of the ECL.

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(1) A complete application must include properly completed application forms, a location map or plan at a scale of 1# = 2,000' (1 cm = 240 m) or larger showing the point of discharge into the receiving waters, and any other supplemental information that the department determines is necessary to review the application.

(2) Minor SPDES projects include:

(i) discharges of less than 10,000 gallons per day of sewage effluent, without the admixture of industrial wastes or other wastes, to groundwaters; and

(ii) ballast discharges.

(3) Permit term. For delegated permits a maximum of five years. For non-delegated permits a maximum of 10 years.

(g) Air pollution control, permits under Parts 201, 215 and 231 of this Title, article 19 of the ECL.

(1) A complete application must include information specified in Part 201 of this Title, and other applicable air pollution control regulations.

(2) The types of projects described in subparagraphs (i)-(ix) of this paragraph that follow, are major; all others are minor:

(i) projects subject to the Title V facility permit requirements under Part 201 of this Title including: initial permitting of subject facilities, permit renewals and significant permit modifications;

(ii) projects involving any preconstruction permit for construction and initial operation of new emission sources at Title V permitted facilities that are defined as significant permit modifications pursuant to Section 201-6.7(d) of this Title;

(iii) projects subject to major new source preconstruction permitting under Part 231 of this title;

(iv) projects requiring emission reduction credits;

(v) projects requiring the use of a federally enforceable emission cap;

(*a*) to avoid major stationary source classification as defined in Part 201 of this Title; or

(*b*) to avoid more stringent emission controls that would otherwise be required for projects described under subparagraph (ii) of this paragraph;

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(vi) projects involving the emission sources subject to National Emission Standards for Hazardous Air Pollutants under 40 CFR 61, except for emission sources subject to 40 CFR part 61 subpart M - National Emission Standards for Hazardous Air Pollutants for Asbestos, section 61.145, Standards for Demolition and Renovation (see Table 3 in Part 200 of this Title);

(vii) projects involving the construction of new facilities with emission sources subject to National Emission Standards for Hazardous Air Pollutants under 40 CFR Part 63 (See Table 4 in Part 200 of this Title); and

(viii) projects subject to title IV requirements under the CAA (see section 200 of this Title).

(3) Permit term. The maximum permit term for permits identified in this subdivision:

(i) five years for title V and title IV facility permits;

(ii) an indefinite term for State facility permits, except for new or modified State facility permits, which shall receive a permit term not to exceed 10 years as provided for in section 201-5.3(a) of this Title.

(h) Liquefied natural gas and petroleum gas facilities (LNG/LPG), permits under article 23 title 17 of the ECL.

(1) There are no minor LNG/LPG projects.

(2) Permit term. The maximum permit term for permits identified in this subdivision is 10 years.

(i) Mined land reclamation, permits under Parts 420-425 of this Title, and article 23 title 27 of the ECL.

(1) A complete application must include a:

(i) complete mining permit application;

(ii) complete organizational report;

(iii) mined land-use plan;

(iv) statement by the applicant that mining is not prohibited at that location; and

(v) such additional information as the department may require.

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(2) Minor mining projects are those which meet all of the following criteria:

(i) total acreage affected by mining for entire mining site is less than five acres regardless of length of mining period;

(ii) total depth of mine from floor to top of mine face is less than 20 feet;

(iii) any on-site processing of mining products consists of only those activities that are exempt from air contamination source permits pursuant to section 201-3.2(c)(28) and (29) of this Title;

(iv) there is no mining within 100 feet of any surface waters;

(v) there is no mining of consolidated minerals;

(vi) there is no mining within 500 feet of any dwelling; and

(vii) there is no mining below the water table at the mine site.

(3) Permit term. The maximum permit term for permits identified in this subdivision is five years.

(j) Freshwater wetlands, permits under Part 663 of this Title, and article 24 of the ECL.

(1) A complete application must include a properly completed joint application for permit form, plans and profile sketches of the proposed project, and a map at a scale of 1#= 2,000' (1 cm = 240 m) or larger showing the project's location and, if determined necessary, a wetland delineation approved by the department.

(2) Minor freshwater wetlands projects include:

(i) in-kind and in-place replacement of existing functional bulkheads and similar structures;

(ii) restoring, reconstructing, or modifying existing functional structures or facilities, excluding drainage ditches, that involves a temporary disturbance of less than 50 square meters (approximately 540 square feet) of ground surface;

(iii) removing or breaching a nuisance beaver dam, in conjunction with a nuisance beaver permit issued pursuant to article 11 of the ECL, in order to restore water levels in a wetland. The beaver dam must have been constructed within the current growing season;

(iv) constructing a driveway in the adjacent area of a wetland to an existing residence;

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(v) filling for dikes or berms, excavations or other activities associated with a wetland or riparian restoration project authorized, designed or undertaken by the USDA Natural Resources Conservation Service, USDI Fish and Wildlife Service, US Army Corps of Engineers or the department;

(vi) filling for dikes or berms, excavations and other activities associated with an approved wetland mitigation project required by the US Army Corps of Engineers, the USDA Natural Resources Conservation Service, or the department;

(vii) cutting but not elimination or destruction of vegetation, such that the functions and benefits of the wetland are not significantly adversely affected;

(viii) dredging less than 523 cubic yards (400 cubic meters) to maintain present navigational channels;

(ix) drilling a water well to serve an individual residence;

(x) drilling test wells for sampling and scientific studies but not for mineral exploration;

(xi) installing a dock, pier, wharf or other structure built on floats or open-work supports and having a top surface area of approximately 200 square feet (20 square meters) or less;

(xii) installing electric, telephone or other utilities from an existing utility distribution facility to a structure, where no major modifications or construction activities in the wetland are necessary;

(xiii) building a deck adjoining an existing dwelling within an adjacent area;

(xiv) routine beach regrading and cleaning;

(xv) intensive, organized and repetitive use of all-terrain vehicles, air and motor boats, and snowmobiles in the adjacent area;

(xvi) clear cutting timber in the adjacent area;

(xvii) installing utility service to an individual residence;

(xviii) application of a pesticide in an adjacent area conducted pursuant to a permit issued under article 15 of the ECL and Parts 327, 328 and 329 of this Title;

(xix) application of a pesticide to the grounds of a private residence by the owner;

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(xx) installation of fencing in an adjacent area;

(xxi) constructing, in an adjacent area, farm ponds that do not require a permit pursuant to Part 608 of this Title;

(xxii) permanent filling of amounts of material not to exceed 1,150 cubic feet, associated with the restoration of an existing functional structure in the adjacent area of a wetland;

(xxiii) placing a non-commercial structure, no larger than 576 square feet (53.51 square meters) gross floor area and no closer than 25 feet (7.62 meters) from the wetland boundary, approximate to an existing single family residence in the adjacent area of a wetland.

(k) Tidal wetlands, permits under Part 661 of this Title and article 25 of the ECL.

(1) A complete application must include:

(i) properly completed joint application for permit form;

(ii) plan and profile sketches of the proposed project;

(iii) a map at a scale of 1# = 2,000' or larger showing its location;

(iv) project plans at a scale of 1# = 100' (1 cm = 12 m) with a contour interval of two feet (.609 meter) and showing the mean high water line (if the project is in the water) and/or the tidal wetlands boundary as delineated at the site by department staff or an environmental consultant, or an accurate representation of the tidal wetland boundary as taken from the official tidal wetlands maps;

(v) a description of the project including its proposed use;

(vi) the names of adjacent landowners;

(vii) a statement of feasible alternatives; and

(viii) a statement of methods to mitigate or eliminate adverse impacts to tidal wetlands.

(2) Minor tidal wetland projects include any activity given a designation of GCp—Generally Compatible Use —Permit Required in Part 661 of this Title.

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(3) Permit term. The maximum permit term for permits identified in this subdivision is 10 years.

(l) Waste transporter and low level radioactive waste (LLRW) transporter, permits under Parts 364 and 381 of this title, and article 27 title 3 of the ECL.

(1) A complete application for industrial and low level radioactive waste collection must include details of specific waste characteristics and other supplemental information which the department notifies the applicant is necessary to review the application.

(2) All transportation projects are minor.

(3) Permit term. The maximum permit term for permits identified in this subdivision is one year.

(m) Solid waste management facilities (SWMF), permits under Part 360 of this Title, and article 27 title 7 of the ECL.

(1) A complete application for a solid waste management facility permit must include properly completed application forms, a map at a scale of 1# = 2,000' (1 cm = 240 m) or larger showing the project location, plans, reports and other supporting information required by Part 360 of this Title. If the facility is to be constructed in stages, the initial application must contain the conceptual design for the entire facility and detailed construction plans for the initial stage.

(2) Minor solid waste management facility projects include:

(i) landfills used exclusively for disposal of construction and demolition debris that are three acres or less in size;

(ii) yard waste composting facilities;

(iii) transfer stations receiving less than 50,000 cubic yards or 12,500 tons of solid waste annually; and

(iv) construction of subsequent stages of a solid waste management facility, when:

(*a*) the facility was previously approved to be constructed in stages; and

(*b*) the environmental impacts associated with the entire facility including the specific proposed stage, were previously addressed in accordance with SEQR.

(3) Permit term. The maximum permit term for permits identified in this subdivision is 10 years.

(n) Hazardous waste management facilities (HWMF), permits under Part 373 of this Title, and article 27 title 9 of the ECL.

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(1) A complete application for construction or operation or construction and operation of a hazardous waste management facility must include:

(i) properly completed application forms;

(ii) plans, reports and supporting information required by Part 373 of this title;

(iii) other supplemental information which the department notifies the applicant is necessary to review the application; and

(iv) expanded public participation documentation, in compliance with Subpart 373-1 of this Title, for new hazardous waste management units or major modifications of existing permits.

(2) There are no minor hazardous waste management facility projects.

(3) Permit term. The maximum permit term:

(i) not to exceed five years for land disposal and incinerators; or

(ii) not to exceed 10 years for all other hazardous waste facilities.

(o) Siting of industrial hazardous waste facilities, permits under Part 361 of this Title, and article 27 title 11 of the ECL.

(1) A Part 361 application accompanies a hazardous waste management facility application (Part 373 application) and in order to be complete must include plans, report, draft environmental impact statement and supporting information required by Part 361 of this Title, as well as any supplemental information which the department notifies the applicant is necessary to review the application.

(2) There are no minor projects under Part 361 of this Title.

(p) Coastal erosion management, permits under Part 505 of this Title, and article 34 of the ECL.

(1) A complete application must include a properly completed joint application for permit form, be accompanied by plans, supporting documentation required by Part 505 of this Title and any other supplemental information which the department notifies the applicant is necessary to review the application.

(2) At the request of an applicant, the department shall coordinate and consolidate its application review procedures with any other such procedures required by any other federal, state or local agency into a single, comprehensive review and hearing procedure to the extent practicable to comply with ECL Section 34-0107(6).

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(3) The following are minor projects: excavation, grading, mining, filling or dredging of less than 100 cubic yards; construction or modification of docks, piers, or wharves not on fill; construction or modification of erosion protection structures not exceeding 100 linear feet.

(q) Radiation control, permits under 6 NYCRR Part 380 and articles 1, 3, 17, 19, and 27 of the ECL.

(1) A complete application for a Part 380 permit must include information specified in section 380-3.2 of this Title.

(2) The following types of projects are minor; all others are major:

(i) the discharge of licensed radioactive material to the environment in effluents to the air or water at concentrations less than the effluent concentration values listed in Table II of section 380-11.7 of this Title;

(ii) the discharge of licensed radioactive material to the environment in effluents to the air or water at concentrations greater than the effluent concentration values listed in Table II of section 380-11.7 of this Title and for which the potential total effective dose equivalent to any individual member of the public does not exceed 10 millirem per year; and

(iii) the use of licensed radioactive material in the environment to conduct an environmental study for which the potential total effective dose equivalent to an individual member of the public does not exceed 10 millirem per year.

(3) Permit term. The maximum permit term for permits identified in this subdivision is five years.

Credits

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