UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

REQUEST FOR REHEARING OF CONSTITUTION PIPELINE COMPANY, LLC

Pursuant to Section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a) (2012), and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), 18 C.F.R. § 385.713 (2017), Constitution Pipeline Company, LLC ("Constitution") respectfully requests rehearing of the Commission's January 11, 2018 Order on Petition for Declaratory Order in the above-captioned proceeding ("Order").[1] In the Order, the Commission denied Constitution's petition for a declaratory order, which had requested the Commission to find (i) that the New York State Department of Environmental Conservation ("NYSDEC") failed to act within a reasonable period of time on Constitution's Clean Water Act Section 401[2] application, and (ii) that such failure to act constituted a waiver of the Section 401 water quality certification requirement for federal authorizations related to the New York State portion of Constitution's pipeline project.

In support of this request, Constitution respectfully states as follows:

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1 *Constitution Pipeline Company, LLC*, 162 FERC ¶ 61,014 (2018).

2 33 U.S.C. § 1341(a)(1) (2012).

I.
STATEMENT OF ISSUES AND SPECIFICATIONS OF ERRORS

Pursuant to Rules 203(a)(7), 713(c)(1), and 713(c)(2), 18 C.F.R. §§ 385.203(a)(7), 385.713(c)(1), and 385.713(c)(2), the following issues and specifications of error are addressed in this pleading:

1. The Commission erred in finding that, in all cases, "the reasonable period of time for action under Section 401 is one year after the date the certifying agency receives a request for certification."[3] This finding contradicts Congress' intent as evidenced by the plain language of the Clean Water Act requiring a state certifying agency to act within "a reasonable period of time (which shall not exceed one year)." Further, the Commission erred by finding that "a reasonable period of time" was only "suggestive, not prescriptive."[4] To the contrary, as the Commission itself acknowledged, the time for a certifying agency to act is "bounded on the outside at one year" but must be a "reasonable period of time."[5] *See also, Millennium Pipeline Co., L.L.C.*, 160 FERC ¶ 61,065, at P 13 (2017) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987)); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991); *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955); *Williams v. Taylor*, 529 U.S. 362, 404 (2000); *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, No. 16-299, 2018 WL 491526, at *13-*14 (U.S. Jan. 22, 2018); H.R. Conf. Rep. No. 91-940 (1970), reprinted in 1970 U.S.C.C.A.N. 2712, 2741; 115 Cong. Rec. 9264-65

[3] Order, P 16.

[4] Order, P 21.

[5] Order, P 15.

(Apr. 16, 1969); *State of N.C. v. Fed. Energy Regulatory Comm'n*, 112 F.3d 1175, 1184 (D.C. Cir. 1997); *Puerto Rico Sun Oil Co. v. U.S. Envtl. Prot. Agency*, 8 F.3d 73, 79 (1st Cir. 1993); *Envtl. Def. Fund, Inc. v. Alexander*, 501 F. Supp. 742, 771 (N.D. Miss. 1980); *see also* 33 C.F.R. § 325.2(b)(1)(ii); 40 C.F.R. § 121.16(b); Final Rule for Operation and Maintenance of Army Corps of Engineers Civil Works Projects Involving the Discharge of Dredged Material Into Waters of the U.S. or Ocean Waters, 53 Fed. Reg. 14902-01 (1988); NY Environmental Conservation Law § 70-0109(3)(a)(ii); 6 NYCRR § 621.10(a)(3).

2. The Commission erred by ignoring Congress' clear and unambiguous language in Section 401 of the Clean Water Act that the time period to act must be "a reasonable period of time," overriding such requirement in favor of an alternative process, impermissibly created for its own convenience, which deviates from the prescriptive statutory language.[6] *See Avenal Power Ctr., LLC v. U.S. Envtl. Prot. Agency*, 787 F. Supp. 2d 1, 4 (D.D.C. 2011).

3. The Commission erred in its interpretation of the "reasonable period of time" in this case because the mechanical application of the final submission date of April 27, 2015, wrongfully allowed NYSDEC to exceed the maximum allowable period of time under the Clean Water Act. In particular, as the Commission found, NYSDEC had requested the withdrawal and resubmission **with no changes at all to the application.**[7] In fact, NYSDEC confirmed that "[a]s requested" by NYSDEC "the applicant withdrew and subsequently resubmitted its application with no changes or

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6 Order, P 20.

7 Order, P 22; Appendix 002299-002300, Letter dated April 27, 2015 ("simultaneously withdrawing and resubmitting" Constitution's application), attached hereto as Exhibit A.

modifications" and that NYSDEC's "review of the application is ongoing . . . ."[8] The Commission effectively is allowing the state agency to act contrary to the public interest and the Clean Water Act by artificially extending the review period of a pending application to substantially greater than one year.[9] Constitution is not seeking the Commission's review of the substance of the certification application to NYSDEC; instead the Commission "has the obligation to determine whether a state has complied with the procedures required by the Clean Water Act, including whether a state has waived certification." *PacifiCorp*, 149 FERC ¶ 61,038, P 18 (2014). *See Millennium Pipeline Co., L.L.C.*, 160 FERC ¶ 61,065, at P 13 (2017) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987)); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991); *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955); *Williams v. Taylor*, 529 U.S. 362, 404 (2000); *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, No. 16-299, 2018 WL 491526, at *13-*14 (U.S. Jan. 22, 2018); H.R. Conf. Rep. No. 91-940 (1970), reprinted in 1970 U.S.C.C.A.N. 2712, 2741; 115 Cong. Rec. 9264-65 (Apr. 16, 1969); *Brock v. Pierce Cty.*, 476 U.S. 253, 259 (1986); *Dolan v. United States*, 560 U.S. 605, 610 (2010); *Avenal Power Ctr., LLC v. U.S. Envtl. Prot. Agency*, 787 F. Supp. 2d 1, 4 (D.D.C. 2011); *see also* 33 C.F.R. § 325.2(b)(1)(ii); 40 C.F.R. § 121.16(b); Final Rule for Operation and Maintenance of Army Corps of Engineers Civil Works Projects Involving the Discharge of Dredged Material Into Waters of the U.S. or Ocean Waters, 53 Fed. Reg. 14902-01 (1988); NY Environmental Conservation Law § 70-0109(3)(a)(ii); 6 NYCRR § 621.10(a)(3).

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8 *See* Appendix 002306-002307, NYSDEC Press Release, attached hereto as Exhibit B, and compare to incorrect quote at Order, P 22.

9 Order, P 23.

4. The Commission erred in failing to find that the withdrawal and resubmission on April 27, 2015, was a "fiction" that should not be allowed to extend the review time of the same application that had been pending since May 9, 2014. NYSDEC improperly and artificially asserted that a new review period had begun even though NYSDEC expressly acknowledged that there were no changes to the resubmitted application which it was already reviewing. This strategy by NYSDEC, which the Commission's Order has allowed to occur, is contrary to long-standing precedent that parties cannot postpone or change a jurisdictional statutory deadline.[10] *See Brock v. Pierce Cty.*, 476 U.S. 253, 259 (1986); *Dolan v. United States*, 560 U.S. 605, 610 (2010); *Avenal Power Ctr., LLC v. U.S. Envtl. Prot. Agency*, 787 F. Supp. 2d 1, 4 (D.D.C. 2011); *cf. Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013).

5. The Commission erred in finding that it will not entertain case-by-case basis challenges to the timeliness of a certifying agency's processing of a water quality certification, in general, and by not entertaining Constitution's particular challenges in this case.[11] *See Millennium Pipeline Co., L.L.C.*, 160 FERC ¶ 61,065, at P 13 (2017) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987)); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991); *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955); *Williams v. Taylor*, 529 U.S. 362, 404 (2000); *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, No. 16-299, 2018 WL 491526, at *13-*14 (U.S. Jan. 22, 2018); H.R. Conf. Rep. No. 91-940 (1970), reprinted in 1970 U.S.C.C.A.N. 2712, 2741; 115 Cong. Rec. 9264-65 (Apr. 16, 1969);

[10] Order, P 23.

[11] Order, P 20.

State of N.C. v. Fed. Energy Regulatory Comm'n, 112 F.3d 1175, 1184 (D.C. Cir. 1997); *Puerto Rico Sun Oil Co. v. U.S. Envtl. Prot. Agency*, 8 F.3d 73, 79 (1st Cir. 1993); *Envtl. Def. Fund, Inc. v. Alexander*, 501 F. Supp. 742, 771 (N.D. Miss. 1980); *see also* 33 C.F.R. § 325.2(b)(1)(ii); 40 C.F.R. § 121.16(b); Final Rule for Operation and Maintenance of Army Corps of Engineers Civil Works Projects Involving the Discharge of Dredged Material Into Waters of the U.S. or Ocean Waters, 53 Fed. Reg. 14902-01 (1988); NY Environmental Conservation Law § 70-0109(3)(a)(ii); 6 NYCRR § 621.10(a)(3).

6. The Commission erred in finding that Constitution only requested that the Commission determine a reasonable period of time to be less than one year in this case.[12] Constitution advanced multiple grounds for waiver:

- Constitution contended that the "reasonable period of time" for review of Constitution's application is less than one year after resubmission on April 27, 2015 because the application had been pending for almost two years.
- Constitution also contended that NYSDEC circumvented the reasonable period for review, which cannot exceed one year, by artificially treating the withdrawal and resubmission of a pending application as the filing of an entirely new application, in order to extend its review time to more than one year. *See Millennium Pipeline Co., L.L.C.*, 160 FERC ¶ 61,065, at P 13 (2017) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987)); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991); *Duncan v. Walker*, 533 U.S. 167, 174 (2001);

[12] Order, P 20.

United States v. Menasche, 348 U.S. 528, 538–39 (1955); *Williams v. Taylor*, 529 U.S. 362, 404 (2000); *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, No. 16-299, 2018 WL 491526, at *13-*14 (U.S. Jan. 22, 2018); H.R. Conf. Rep. No. 91-940 (1970), reprinted in 1970 U.S.C.C.A.N. 2712, 2741; 115 Cong. Rec. 9264-65 (Apr. 16, 1969); *Brock v. Pierce Cty.*, 476 U.S. 253, 259 (1986); *Dolan v. United States*, 560 U.S. 605, 610 (2010); *Avenal Power Ctr., LLC v. U.S. Envtl. Prot. Agency*, 787 F. Supp. 2d 1, 4 (D.D.C. 2011); *see also* 33 C.F.R. § 325.2(b)(1)(ii); 40 C.F.R. § 121.16(b); Final Rule for Operation and Maintenance of Army Corps of Engineers Civil Works Projects Involving the Discharge of Dredged Material Into Waters of the U.S. or Ocean Waters, 53 Fed. Reg. 14902-01 (1988); NY Environmental Conservation Law § 70-0109(3)(a)(ii); 6 NYCRR § 621.10(a)(3).

7. The Commission's Order should have recognized that NYSDEC did not seek rehearing of the Commission's December 2, 2014 order granting Constitution's application for a Certificate of Public Convenience and Necessity.[13] By failing to request rehearing in that proceeding, the Commission's Certificate Order is final as to NYSDEC.[14] *See Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010); *Williams Natural Gas Co. v. City of Okla. City*, 890 F.2d 255, 266 (10th Cir. 1989).

13 *Constitution Pipeline Co., LLC, et al.*, 149 FERC ¶ 61,199 (2014).

14 Order, PP 1-2.

II.
BACKGROUND

The relevant facts, including the chronology of Constitution's Section 401 application process, are set forth in Constitution's petition for declaratory order filed on October 11, 2017.[15] For ease of reference, Constitution cites to the same Appendix and Exhibits submitted with Constitution's petition for declaratory order, and, accordingly, is not reproducing or resubmitting them with this request for rehearing, except for two documents from the Appendix which are attached hereto as Exhibits A and B. The names, titles, addresses, and telephone numbers of the persons to whom correspondence and communications concerning Constitution's petition, including this request for rehearing, should be addressed are:

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[15] *See* 18 C.F.R. § 385.203(a)(6) (requiring that pleadings before the Commission include the facts relevant to the proceeding if those have not been set forth in a previously filed document).

III.
EXECUTIVE SUMMARY

Section 401 of the Clean Water Act provides that the certification requirements are waived if the state agency fails or refuses to act within "a reasonable period of time" and sets an outer boundary of "one year."[16] The test for waiver is unambiguous and prescriptive, and must be applied by the Commission as the lead federal agency. The Commission erred by adopting a "one-year" rule that, as applied in this case, violates the plain language and requirements of the Clean Water Act. Section 401 requires the Commission, as the lead federal agency, to determine whether the state agency, here NYSDEC, acted within "a reasonable period of time (which shall not exceed one year)."[17] Therefore, Section 401 **obligates** the Commission to consider case-by-case challenges to the timeliness of a state agency's certification review on a case-by-case basis. In this case, the history of NYSDEC's handling of the administrative proceedings shows disregard for the spirit and the letter of Section 401's waiver provision. The Commission's Order fails to account for these case-specific factors.

The facts in this case illustrate that the Commission should not simply apply the sparse precedents which are not factually similar to this situation.[18] Rote application of an inflexible rule can lead to an outcome inconsistent with the statute, as in this case. The Commission's Order enables NYSDEC to extend the jurisdictional deadline in Section 401's waiver provision beyond a reasonable period and well beyond the one-year outer limit for state action. Such an extension is not only improper, but is prohibited because such a statutory deadline cannot be extended by actions or agreement of the parties.

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16 33 U.S.C. § 1341(a)(1).

17 *See id.*

18 *See* Order, P 16.

In issuing a Certificate of Public Convenience and Necessity for Constitution's pipeline project, the Commission determined that the project serves the public interest. The need for this critical pipeline infrastructure has become painfully apparent. New England has been paying the world's highest prices for natural gas.[19] Despite abundant supplies of domestically-sourced natural gas, the lack of necessary pipeline infrastructure in the Northeast has deprived New England of access to this gas and led New England to source natural gas from Russia.[20] The Commission should not tolerate NYSDEC's dilatory tactics and disregard of the Clean Water Act's requirements at the expense of the public's interest in and need for this critical pipeline infrastructure.

For these and other reasons as set forth herein, the Commission should grant rehearing and find that the certification requirement under Section 401 was waived by NYSDEC.

IV.
ARGUMENT

A. The Test for Waiver Under Section 401 Is Whether an Agency Fails to Act Within "A Reasonable Period of Time"

The Section 401 state certification requirement is waived if, after "a reasonable period of time (which shall not exceed one year)," a state agency fails or refuses to act on

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19 *See* David Blackmon, *Amid Deep Freeze, New Englanders Can 'Thank' N.Y. Gov. Cuomo For Their High Energy Bills*, FORBES (Jan. 3, 2018), https://www.forbes.com/sites/davidblackmon/2018/01/03/governor-andrew-cuomos-pipeline-obstruction-is-costing-new-englanders-dearly/#256f448023bb; Naureen S. Malik, *Blizzard Triggers a 60-Fold Surge in Prices for U.S. Natural Gas*, BLOOMBERG (Jan. 4, 2018), https://www.bloomberg.com/news/articles/2018-01-04/natural-gas-in-u-s-soars-to-world-s-priciest-as-snow-slams-east.

20 *See* Jon Chesto, *Russian LNG is unloaded in Everett; the supplier (but not gas) faces US sanctions*, BOSTON GLOBE (Jan. 30, 2018), https://www.bostonglobe.com/business/2018/01/29/tanker-unloads-lng-everett-terminal-that-contains-russian-gas/rewj1wKjajaKtLp79irzTI/story.html.

an application or unreasonably delays such action.[21] The waiver test is prescriptive, and the touchstone is whether an agency fails to act "within a reasonable period of time."[22] As the Commission acknowledged, the time for a certifying agency to act is "bounded on the outside at one year," but such action must occur within a "reasonable period of time."[23]

However, the Commission failed to apply the plain language of the statute, finding instead that, in all cases, "the reasonable period of time for action under Section 401 is one year after the date the certifying agency receives a request for certification."[24] The Commission's ruling abandons the essential and unambiguous "reasonable period of time" inquiry in favor of a bright line rule of one year without examination of the underlying circumstances in each case. The Commission attempts to justify its ruling with a discussion of the "benefits" of establishing a bright line rule for waiver.[25] However, that is "no basis to depart from the statute's plain language."[26] "It is axiomatic that an act of Congress that is patently clear and unambiguous . . . cannot be overridden by a regulatory process created for the convenience of an Administrator . . . ."[27] The test Congress established clearly requires that the Commission must determine what constitutes "a reasonable period of time" in each case. The Commission, therefore, erred in ruling that it will not consider the circumstances presented, and the challenges raised, in any particular case. Additionally, the Commission erred in finding that a mechanical withdrawal and resubmission of a pending application with no changes while the state

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21 33 U.S.C. § 1341(a)(1).

22 *Id.*

23 Order, P 15.

24 Order, P 16.

25 Order, PP 16-17, 20-21.

26 *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, No. 16-299, 2018 WL 491526, at *14 (U.S. Jan. 22, 2018).

27 *Avenal Power Ctr., LLC v. U.S. Envtl. Prot. Agency*, 787 F. Supp. 2d 1, 4 (D.D.C. 2011) (discussing Clean Air Act).

agency continued to review the application does not "violate[] the letter of the statute,"[28] and, in doing so, impermissibly allowed NYSDEC to extend its review time to more than one year.

1. Section 401 Expressly Contemplates That a Period of Less Than One Year Can Be Unreasonable

The starting point for interpreting Section 401 is "the language of the statute itself."[29] When considering this language, the Commission must "giv[e] effect to each word and mak[e] every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."[30] The "cardinal principle of statutory construction [requires] that [courts] must 'give effect, if possible, to every clause and word of a statute.'"[31] Moreover, "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[32] Additionally, an agency may not "override Congress' considered choice by rewriting the words of the statute."[33] Based on these accepted canons of statutory interpretation, the plain language of Section 401 requires that the state agency act within "a reasonable period of time" after receipt of the

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28 Order, P 23.

29 *See Millennium Pipeline Co., L.L.C.*, 160 FERC ¶ 61,065, at P 13 (2017) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987)).

30 *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991).

31 *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)); *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001).

32 *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) (internal quotation marks omitted); *see also Menasche*, 348 U.S. at 538–39 ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))); *Duncan*, 533 U.S. at 174 ("We are . . . 'reluctant to treat statutory terms as surplusage' in any setting." (quoting *Babbitt v. Sweet Home Chapter Of Communities For A Great Ore.*, 515 U.S. 687, 698 (1995))).

33 *Nat'l Ass'n of Mfrs.*, 2018 WL 491526, at *13.

application, subject to a one-year outer limit.[34] Therefore, Section 401 provides that a failure to act, and a resulting waiver, can occur in less than a year. Any other interpretation would necessarily ignore the plain meaning of Section 401 and its requirement that an agency act within "a reasonable period of time." The Commission may not employ a different interpretation to override the plain language of Section 401 in favor of a regulatory process that it has created for its own convenience.[35]

The Commission erred and overstepped in concluding that the statutory limit of "a reasonable period of time" was only "suggestive."[36] The legislative history of the Clean Water Act stands in stark contrast to that conclusion and clearly supports Constitution's reading of Section 401. When Congress approved the amendment to Section 401 to insert the waiver language, Representative Edmondson explained that while states are not pressured by the amendment to Section 401 to grant certification, they are "put in the position with this amendment to do away with dalliance or unreasonable delay and to require a 'yes' or 'no'" within the period of time deemed reasonable under the circumstances by the federal licensing agency.[37] "The failure by the State to act in one way or the other within the prescribed time would constitute a waiver of the certification

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[34] Congress made clear that the one-year limit was just that, an outer bound after which no action by the state could be deemed "reasonable." The Conference Report provides:

> In order to insure that **sheer inactivity** by the State … will not frustrate the Federal application, a requirement, similar to that contained in the House bill is contained in the conference substitute that **if within a reasonable period, which cannot exceed one year**, after it has received a request to certify, the State … fails or refuses to act on the request for certification, then the certification requirement is waived.

H.R. Conf. Rep. No. 91-940 (1970), reprinted in 1970 U.S.C.C.A.N. 2712, 2741 (emphasis added).

[35] *See Avenal Power Ctr.*, 787 F. Supp. 2d at 4 (rejecting agency arguments to extend a one-year statutory deadline to act on a permit application; "an act of Congress that is patently clear and unambiguous . . . cannot be overridden by a regulatory process created for the convenience of an [agency]").

[36] *See* Order, P 21.

[37] 115 Cong. Rec. 9264 (Apr. 16, 1969).

required as to that State."[38] Representative Holifield, speaking in favor of the amendment to Section 401, said that "this amendment guards against a situation where the [state agency] . . . simply sits on its hands and does nothing . . . it has to take affirmative action to consider the matter and to decide to withhold the certificate if it wants to defeat a proposed project."[39] The addition of the one-year outer limit was merely a clarification that the discretion of the licensing agency to determine the length of time that qualifies as a "reasonable period" could in no instance exceed one year and was in no way intended to transform the reasonableness test into a strict one-year rule.

In light of the statutory language, which sets the outer limit at one year but makes the required test "a reasonable period of time," there is no credible basis to find that waiver only occurs when a state takes more than one year to act on a Section 401 application. To the contrary, as the Commission itself found, the time for a certifying agency to act is "bounded on the outside at one year" but is a "reasonable period of time."[40]

Other authorities provide helpful guidance as to what would have been a "reasonable" period of time for NYSDEC to act on Constitution's application. The word "reasonable" means "fair, proper, or moderate under the circumstances,"[41] indicating that the Commission has some latitude to determine what a reasonable time would have

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38 *Id.*

39 *Id.* at 9265.

40 Order, P 15. *See State of N.C. v. Fed. Energy Regulatory Comm'n*, 112 F.3d 1175, 1184 (D.C. Cir. 1997) ("Only after a request has been made can a state waive its certification right, and then only by refusing to respond to the request **within a reasonable period of time**.") (emphasis added); *Puerto Rico Sun Oil Co. v. U.S. Envtl. Prot. Agency*, 8 F.3d 73, 79 (1st Cir. 1993) ("The statute … provides that the state must act **within a reasonable period**, not to exceed a year, or the certification requirement will be deemed waived.'") (quotations omitted) (emphasis added); *Envtl. Def. Fund, Inc. v. Alexander*, 501 F. Supp. 742, 771 (N.D. Miss. 1980) ("If [a state] fails to certify **within a reasonable time**, waiver is automatic.") (emphasis added).

41 *See, e.g.*, *Definition of Reasonable*, Black's Law Dictionary 1379 (9th ed. 2009).

been.[42] Keeping in mind that states and their agencies do not have authority to dictate what a reasonable period of time would be under Section 401, New York State's own law, and NYSDEC's own regulations, provide solid guidance: "[i]t is the **intent of the [New York State] legislature** to establish **reasonable time periods** for administrative agency action on permits," and, "[i]n the case of an application for a permit for which a public hearing has been held, the department shall mail its decision to the applicant . . . on or before **sixty calendar days** after receipt by the department of a complete record . . ." (emphasis added).[43]

Consideration of waiver on a case-by-case basis is particularly important where, as here, state agency inaction unduly delays a project that the Commission had already deemed to be in the public interest. Here, NYSDEC's denial occurred 507 days **after** the Commission's issuance of a Certificate of Public Convenience and Necessity to Constitution. Further, NYSDEC participated as a party in the Commission's Certificate proceedings, and failed to seek rehearing of the Commission's findings, including the route of the pipeline, which are findings that are now final and conclusive as to NYSDEC

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42 Moreover, the courts will be obliged to defer to the Commission to decide what is reasonable. *See Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) (the Supreme Court affords "great deference" to the Commission's interpretation of what is "just and reasonable," because those terms are "obviously incapable of precise judicial definition"), cited in *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016).

43 NY Environmental Conservation Law § 70-0109(3)(a)(ii); *see also* 6 NYCRR § 621.10(a)(3); 33 C.F.R. § 325.2(b)(1)(ii) (regulations of the United States Army Corps of Engineers stating that 60 days of inaction can result in waiver); 40 C.F.R. § 121.16(b) (regulations of the United States Environmental Protection Agency stating that a reasonable period of time shall generally be considered to be six months); Final Rule for Operation and Maintenance of Army Corps of Engineers Civil Works Projects Involving the Discharge of Dredged Material Into Waters of the U.S. or Ocean Waters, 53 Fed. Reg. 14902-01 (1988) (action within two months, and within six months as a maximum period of time, is reasonable).

and could not be challenged in a collateral attack through the Section 401 certification process.[44]

2. Parties Cannot Extend Section 401's Jurisdictional Deadline Beyond the Outer Boundary of One Year

The Commission's Order allows NYSDEC to exceed the maximum one-year waiver deadline under Section 401. Where a statute "expressly requires an agency . . . to act within a particular time period" (here, no longer than one year) "*and* specifies a consequence for failure to comply with the provision" (here, waiver of the certification requirements) the agency "lose[s] jurisdiction" after the deadline passes.[45] The parties cannot waive the statutory consequence of the loss of jurisdiction by the agency.[46] The Commission erred in finding that NYSDEC's demand for the withdrawal and resubmission of an identical application extended the jurisdictional deadline in Section 401's waiver provision.

B. NYSDEC Violated the Cooperative Federalism Contemplated by the Clean Water Act and NYSDEC Waived the Section 401 Requirement by Failing to Act Within "A Reasonable Period of Time"

The Commission erred in finding that it will not entertain on a case-by-case basis challenges to the timeliness of a certifying agency's processing of a water quality certification, in general, and by not entertaining Constitution's particular challenges in this case.[47] The Commission should find that on several occasions during the processing of Constitution's application NYSDEC exceeded a reasonable period of time under

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44 *Am. Energy Corp.*, 622 F.3d at 605; *Williams Natural Gas Co.*, 890 F.2d at 266.

45 *Brock v. Pierce Cty.*, 476 U.S. 253, 259 (1986) (quotations omitted).

46 *Dolan v. United States*, 560 U.S. 605, 610 (2010); *see, e.g.*, *Avenal Power Ctr.*, 787 F. Supp. 2d at 4 (rejecting agency arguments to extend a one-year statutory deadline to act on a permit application; "an act of Congress that is patently clear and unambiguous… cannot be overridden by a regulatory process created for the convenience of an [agency]").

47 Order, P 20.

Section 401. As the Commission found, and as NYSDEC admitted in its public statements, at NYSDEC's request "the applicant withdrew and subsequently resubmitted its application with no changes or modifications" and NYSDEC's "review of the application is ongoing . . . ."[48] With little choice, and faced with a denial (as NYSDEC admitted in its answer to the Petition),[49] or a potential for a permit in less time than another year, since NYSDEC also represented that the withdrawal and resubmission would not "unduly delay" NYSDEC's actions, Constitution accommodated NYSDEC's request. However, despite Constitution's attempt to accommodate NYSDEC's request, the statute cannot be waived by the parties. Therefore, the Commission should find that the reasonable period of time allowed under Section 401 expired, at the very latest, on May 9, 2015, one year after the first re-filing of Constitution's Section 401 application.

Constitution's request does not require the Commission in this case to review the substance of the application as it was pending at the time NYSDEC requested that Constitution withdraw and resubmit its application with no changes, though the Commission could conduct such a review.[50] In this case, the Commission can determine whether NYSDEC acted within a "reasonable period of time" simply by looking at the withdrawal and resubmission letter from Constitution, and NYSDEC's public statements.[51] "As requested . . . the applicant withdrew and subsequently resubmitted its application with no changes or modifications. DEC's review of the application is

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48 *See* Appendix 002306-002307, NYSDEC Press Release, attached hereto as Exhibit B, and compare to incorrect quote at Order, P 22.

49 *See* Notice of Intervention, Protest, and Answer in Opposition to Petition for Declaratory Order, at 11 ("While it is true the Department likely would have denied those WQC applications . . . .").

50 Constitution is not arguing that the application process is "static" (Order, P 23), and in fact filed a detailed chronology of its interactions with and submissions to NYSDEC, as well as the record of decision. *See* Chronology, Exhibit A to Constitution's Petition, and the Appendix.

51 *See* Appendix 002299-002300, Letter dated April 27, 2015 ("simultaneously withdrawing and resubmitting" Constitution's application), attached hereto as Exhibit A.

ongoing, and the applicant's withdrawal and resubmission is not expected to unduly delay the agency's final determination."[52] NYSDEC acknowledged that it was using the withdrawal and resubmission of the application as an artificial and unwarranted fiction to extend the time for review of the application beyond the time allowed by any interpretation of the Clean Water Act's waiver provision.

The Clean Water Act is predicated on the concept of "cooperative federalism." Both federal and state agencies are charged with enumerated affirmative responsibilities in furtherance of the Clean Water Act's objectives. In the instant proceeding, NYSDEC has effectively disabled the cooperative interplay between federal and state agencies by crafting an ad hoc certification review process that has resulted in Constitution resubmitting the same application multiple times. The Commission has recognized that the legislative intent behind the time limit in Section 401 was "to prevent a state from dragging its feet to stall a federal permit or license."[53] Yet NYSDEC has succeeded in delaying and frustrating the certification review process by claiming that Constitution's serial submissions entitle the agency to successive year-long review periods. It falls to the Commission to curb this abuse of legal process.

Rather than granting or denying Constitution's certification request, NYSDEC pressured Constitution to refile its certification application. The Commission has unequivocally panned this approach to requests for certification under the Clean Water Act. "[T]he process of repeatedly filing and withdrawing water quality certification applications is a 'scheme developed by [the state agency] and other parties, and [is]

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52 Appendix 002306-002307, NYSDEC Press Release, attached hereto as Exhibit B; compare to incorrect quote at Order, P 22.

53 *Central Vermont Public Service Corp.*, 113 FERC ¶ 61,167 at P 18 (2005).

neither suggested, nor approved of, by the Commission."[54] Moreover, the Commission has held that "[i]ndefinite delays in licensing proceedings do not comport with at least the spirit of the Clean Water Act and have the effect of preventing [the Commission] from issuing new licenses that are best adapted to a current comprehensive plan for improving or developing a waterway in the public interest."[55] Indeed, NYSDEC has contravened both the spirit and the plain language of Section 401 of the Clean Water Act by claiming that a resubmission of a certification request gives NYSDEC license to continually extend its review process. NYSDEC should not be allowed to perpetuate its legalistic gamesmanship to evade its responsibilities under the Clean Water Act. Because it failed to rule on Constitution's Section 401 certification application within the statutory year-long period, the Commission should find that NYSDEC has waived agency review.

Certainly, under any impartial analysis, a reasonable time for NYSDEC was less than the two-year and eight-month period after the initial submittal of Constitution's Section 401 application, the almost two-year period following the first requested resubmittal, and the 361-day period that it took to act on the second requested re-submission, which made no changes to Constitution's existing application, as discussed in Constitution's petition for declaratory order.[56]

In particular, the Commission can and should find that waiver occurred no later than May 9, 2015, one year after the first re-filing of Constitution's Section 401 application. Constitution's second withdrawal and resubmission on April 27, 2015, was done **at the express request of NYSDEC for additional time to complete the**

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54 Order at n. 50 (citing *Central Vermont*, 113 FERC ¶ 61,167 at P 16).

55 *PacifiCorp*, 147 FERC ¶ 61,216 at P 16 (2014).

56 Petition at 18-21.

certification, based on NYSDEC's explicit statements that the resubmission (i) would entail no change to the application, and (ii) would not "unduly delay" NYSDEC's final determination.[57] NYSDEC's own press release of April 29, 2015, stated that it had requested the second withdrawal and refiling, and that Constitution had resubmitted the "application **with no changes or modifications**."[58]

This interpretation is supported by the record of decision, because notwithstanding its own regulation requiring its information requests to be made in writing, NYSDEC made only a handful of formal written requests to Constitution for information after Constitution initially submitted its Section 401 application in 2013. Constitution complied with all of those requests, as well as with all of NYSDEC's numerous informal data requests. NYSDEC staff repeatedly assured Constitution in 2015 that NYSDEC required no further information, and that a decision on the Section 401 application would be forthcoming in a timely manner.[59] Despite these assurances, NYSDEC failed to act for two years and eight months after Constitution submitted its application. Ignoring the conduct and inaction of a state agency following submission of a Section 401 Certification request would contravene Congress' purpose in enacting the waiver provision: to do away with dalliance and purposeful delay. Thus, the Commission should determine that a waiver occurred and, by doing so, enforce the importance of the

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57 Silliman Declaration, ¶ 13; Appendix 002306 – 002307; DEC Announces Public Comment Period on Proposed Constitution Pipeline Until May 14 (Apr. 29, 2015), http://www.dec.ny.gov/press/101519.html. At that time, NYSDEC had physically visited substantially all of the proposed stream crossings with Constitution staff and staff from the Corps. All of NYSDEC's field visits to streams and wetlands are detailed in the Chronology (Exhibit A) and Appendix. *See* Appendix 000123 – 000133, 000177 – 000183, 000531 – 000534, 001120, 001674 – 001681, 001684 – 001685, 002304 – 002305, 002309 – 002315.

58 Appendix 002306 – 002307, DEC Announces Public Comment Period on Proposed Constitution Pipeline Until May 14 (Apr. 29, 2015), http://www.dec.ny.gov/press/101519.html, attached hereto as Exhibit B (emphasis added).

59 Appendix 002306 – 002307; Silliman Declaration, ¶¶ 19-20.

timely exercise by all agencies of their authority in connection with projects under the Commission's jurisdiction.

By its own admission, NYSDEC indicated that only upon a denial would the application be considered a new application that would be subject to a new completeness determination and public review and comment.[60] In light of the legislative history of Section 401, which emphasizes the desire of Congress to avoid "sheer inactivity," NYSDEC's failure to take any action on Constitution's application within 361 days after Constitution's second refiling of the same application[61] – an application which then had already been before NYSDEC for more than 11 months – and its utter silence with respect to the application for the final eight months prior to its decision, constitute a failure to act within the reasonable period of time that Section 401 requires.

C. NYSDEC's Inaction is Contrary to the Public Interest

In *PacifiCorp*, the Commission warned that "lengthy delays in licensing proceedings are contrary to the public interest."[62] By allowing NYSDEC to far exceed the Clean Water Act's maximum one-year deadline for action, the Commission is fostering a regulatory scheme that is detrimental to the public interest. The Clean Water Act requires both federal and state policymakers to grapple with complex environmental licensing issues. The Order enables NYSDEC to abdicate its responsibilities.

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60 Appendix 002301 – 002302, 002306 – 002307.

61 Moreover, because NYSDEC could not lawfully order Constitution to refile its application in order to lengthen the state's review period, NYSDEC's threat to deny Constitution's application if Constitution did not refile the application to provide the state more time treads into the realm of coercive state action forbidden by the unconstitutional conditions doctrine. *Cf., e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (explaining why "land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits").

62 149 FERC ¶ 61,038, P 13 (2014).

Under the rule announced in this decision, state agencies like NYSDEC can skirt making hard choices by insisting that applicants "reapply" by simply resubmitting their existing application, which then extends the review process. The Commission in *PacifiCorp* warned that it "continue[s] to be concerned that states and licensees that engage in repeated withdrawal and refiling of applications for water quality certification are acting, in many cases, contrary to the public interest by delaying the issuance of new licenses . . . and that these entities are clearly violating the spirit of the Clean Water Act by failing to provide reasonably expeditious state decisions."[63] Nonetheless, the Commission in *PacifiCorp* ultimately found that the state had not waived its authority to issue a water quality certification because the petitioner withdrew its pending requests and filed new and **materially different** applications.[64] However, in this case, and as NYSDEC acknowledged, Constitution refiled the pending application with no changes. NYDSEC failed to act on the exact same application for more than a year. This clearly violates the plain language of the Clean Water Act and is harmful to the public interest.

V.
REQUEST FOR EXPEDITED ACTION

Constitution respectfully requests that the Commission act expeditiously on this request for rehearing. Constitution's proposed pipeline is critical natural gas infrastructure needed to meet the natural gas demands of the Northeast United States – the current winter supply and pricing environment in New England making this point most clear and obvious. The pipeline will provide consumers in the Northeast with direct access to Marcellus Shale gas supply, which is the most abundant and cost-

63 *Id.* at P 20.

64 *Id.*

effective gas supply source in the nation. Except for the Clean Water Act approvals, which have been unreasonably delayed, the project is federally approved and shovel-ready, and the right-of-way has been optioned or acquired. The piping and equipment for this project have now been held in storage for over three years, and the pipeline remains fully contracted with long-term commitments from established natural gas producers currently operating in Pennsylvania. Expedited action by the Commission is essential to preventing further delay.

VI.
CONCLUSION

For each of the foregoing reasons, Constitution respectfully requests that the Commission grant rehearing of the Order and find that: (1) NYSDEC failed to act within a reasonable period of time on Constitution's Clean Water Act Section 401 application; and (2) such failure to act constitutes a waiver of the Section 401 water quality certification requirement for federal authorizations related to the New York State portion of Constitution's pipeline project.

Respectfully submitted,

CONSTITUTION PIPELINE COMPANY, LLC
By Williams Pipeline Services LLC, its Operator

By: */s/ Stephen A. Hatridge*
Stephen A. Hatridge
Vice President and Assistant General Counsel
Williams Pipeline Services LLC, as Operator of
Constitution Pipeline Company, LLC
P.O. Box 1396
Houston, Texas 77251-1396
(713) 215-2312

February 12, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, in accordance with the provisions of Rule 2010 of the Commission's Rules of Practice and Procedures, the foregoing document on the official service list compiled by the Secretary in this proceeding.

Dated at Houston, Texas, this 12th day of February, 2018.

/s/ Stephen A. Hatridge

Stephen A. Hatridge
Vice President and Assistant General Counsel
Williams Pipeline Services LLC, as Operator of
Constitution Pipeline Company, LLC
P.O. Box 1396
Houston, Texas 77251-1396
(713) 215-2312

Exhibit A

CONSTITUTION PIPELINE

Constitution Pipeline Company, LLC
2800 Post Oak Boulevard (77056)
P.O. Box 1396
Houston, Texas 77251-1396
713/215-2000

April 27, 2015

Stephen Tomasik
Project Manager
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233

Re: Withdrawal and Resubmittal of Section 401 Water Quality Certification Application
Constitution Pipeline
Constitution Pipeline Company, LLC

Dear Mr. Tomasik:

Constitution Pipeline Company, LLC (Constitution) is simultaneously withdrawing and resubmitting its Section 401 Water Quality Certification (WQC) request to the New York State Department of Environmental Conservation (NYSDEC). This action is being taken in response to the NYSDEC's request for additional time to comply with the timeframes by which Constitution's certification request for the proposed Constitution Pipeline (Project) must be approved or denied as set forth in Section 401(a)(1) of the Clean Water Act (CWA), 33 U.S.C. § 1341(a)(1).

On August 23, 2013, Constitution submitted a Joint Application to the U.S. Army Corps of Engineers (USACE) for authorization under Section 404 of the CWA and to the NYSDEC to satisfy the requirements for obtaining a Section 401 WQC for the proposed Project and for purposes of review and coordination with the NYSDEC under NYS Environmental Conservation Law Article 15, Title 5 (Protection of Waters) and Article 24, Title 23 (Freshwater Wetlands). On December 24, 2014, NYSDEC issued a Notice of Complete Application. Constitution's withdrawal and resubmittal herein is expressly limited to its request for certification under Section 401 of the CWA. For purposes of NYSDEC's Uniform Procedures Act set forth at Part 621, Constitution's Joint Application, as it relates to NYSDEC's Protection of Waters and Freshwater Wetlands programs, is not being withdrawn such that the August 23, 2013 submission date for those programs is unchanged. In addition, the August 23, 2013 submission date also remains unchanged for Constitution's Joint Application to the USACE for authorization under Section 404 of the CWA.

Thank you for your continued assistance in this matter. Your expeditious processing of this application, along with Constitution's other pending applications, is greatly appreciated. Constitution looks forward to continuing to cooperate with the NYSDEC with respect to the applications associated with the Project.

CONSTITUTION

Constitution Pipeline Company, LLC
2800 Post Oak Boulevard (77056)
P.O. Box 1396
Houston, Texas 77251-1396
713/215-2000

April 27, 2015

Stephen Tomasik
Project Manager
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Albany, New York 12233

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Exhibit B

For Release: Wednesday, April 29, 2015

DEC Announces Public Comment Period on Proposed Constitution Pipeline Until May 14

The New York State Department of Environmental Conservation (DEC) today announced a new 15-day public comment period on the re-submitted Water Quality Certificate application for the proposed, federally regulated Constitution Pipeline. Public comments on the proposed project will now be accepted until close of business on Thursday, May 14. Those who submitted comments during the first comment period which ended February 27, 2015 do not need to resubmit their comments. All comments received during the previous comment period will be considered as DEC reviews the permit application.

Due to the extended winter preventing necessary field work by staff, DEC requested additional time to complete its review of any potential impacts on wetlands and water quality. As requested and to continue the substantial progress reviewing the application and supporting documents that has been made to date, the applicant withdrew and subsequently resubmitted its application with no changes or modifications. DEC's review of the application is ongoing and the applicant's withdrawal and resubmission is not expected to unduly delay the agency's final determination.

The Constitution Pipeline is a proposed interstate natural gas pipeline that would traverse through Broome, Chenango, Delaware and Schoharie counties. The Federal Energy Regulatory Commission (FERC) was responsible for conducting an environmental review of the project and has the authority to approve the pipeline route. FERC issued a final Environmental Impact Statement (FEIS) in October 2014, which can be viewed at: http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20141024-4001.

DEC maintains the authority to review applications for specific permits and approvals, including a Water Quality Certification, a Protection of Waters permit, a Water Withdrawal permit and a Freshwater Wetlands permit for state-protected wetlands and adjacent areas. This notice does not include the application for an Air Title V permit for the proposed compressor station upgrade. The U.S. Army Corps of Engineers also must issue permits for the project and its review is ongoing.

Written comments should be submitted to:

Stephen M. Tomasik
DEC - Division of Environmental Permits
625 Broadway, 4th Floor
Albany, NY 12233-1750
dec.sm.constitution@dec.ny.gov

Copies of the FEIS and DEC permit application documents can be viewed online at: http://www.constitutionpipeline.com/. Printed copies are available at:

The Broome County Public Library, 185 Court St., Binghamton
The Afton Free Library, 105A Main St., Afton
The Bainbridge Free Library, 13 N Main St., Bainbridge
The Franklin Free Library, 334 Main St., Franklin
Sidney Memorial Public Library, 8 River St., Sidney
Deposit Free Library, 159 Front St., Deposit
The Community Library, 110 Union St., Cobleskill
Schoharie Free Library, 103 Knower Ave., Schoharie
Huntington Memorial Library, 62 Chestnut St., Oneonta

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