167 FERC ¶ 61,007
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

National Fuel Gas Supply Corporation Docket No. CP15-115-004
Empire Pipeline, Inc.

ORDER DENYING REHEARING

(Issued April 2, 2019)

1. On August 6, 2018, the Commission determined that New York State Department of Environmental Conservation (New York DEC) waived its authority, under section 401 of the Clean Water Act,[1] to issue or deny a water quality certification for the Northern Access 2016 Project sponsored by National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (collectively, National Fuel),[2] by failing to act within a year from when it received the application for water quality certification.[3]

[1] 33 U.S.C. § 1341(a)(1) (2012).

[2] 164 FERC ¶ 61,084 (2018) (Waiver Order). These proceedings began on March 17, 2015, when National Fuel applied for a certificate of public convenience and necessity to construct and operate the Northern Access 2016 Project. The project includes approximately 99 miles of pipeline, new and modified compression facilities, and ancillary facilities in Pennsylvania and New York. *Nat'l Fuel Gas Supply Corp.,* 158 FERC ¶ 61,145, at P 1 (2017) (Certificate Order), *reh'g denied,* Waiver Order, 164 FERC ¶ 61,084. For a more detailed description of the Northern Access 2016 Project, *see* Certificate Order, 158 FERC ¶ 61,145 at PP 6-17, and July 27, 2016 Environmental Assessment at 5-10.

[3] Waiver Order, 164 FERC ¶ 61,084 at P 42.

2. On August 14, 2018, New York DEC requested rehearing of the Waiver Order. New York DEC argues that its April 7, 2017 denial of the water quality certification was timely because National Fuel agreed to extend the one-year deadline.[4] New York DEC also seeks a stay of the Waiver Order.[5]

3. On September 5, 2018, Sierra Club also requested rehearing. Sierra Club argues the Commission irrationally interpreted section 401 and allowed National Fuel to flout an agreement with New York DEC.[6]

I. Background

4. New York DEC received National Fuel's application for water quality certification on March 2, 2016.[7] On January 20, 2017, National Fuel and New York DEC agreed to revise "the date, to the mutual benefit of both parties, on which the Application was deemed received by [New York DEC] to April 8, 2016."[8] Thus, the agreement attempted to extend the date for New York DEC to make a "final determination on the application until April 7, 2017."[9] New York DEC denied National Fuel's application on April 7, 2017.[10]

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[4] New York DEC Rehearing Request at 2.

[5] *Id.* at 2-3.

[6] Sierra Club Rehearing Request at 1.

[7] Waiver Order, 164 FERC ¶ 61,084 at P 35. *See* New York DEC Rehearing Request at 4.

[8] *See* New York DEC Rehearing Request, Exhibit A.

[9] *See id.*

[10] Waiver Order, 164 FERC ¶ 61,084 at P 35. *See* New York DEC Rehearing Request at 3. A copy of New York DEC's April 7, 2017 denial is attached to its rehearing request. *See id*., Exhibit B. On February 5, 2019, the United States Court of Appeals for the Second Circuit vacated and remanded this denial to give New York DEC an "opportunity to explain more clearly – should it choose to do so – the basis for its decision." *Nat'l Fuel Gas Supply Corp. v. N.Y. State Dep't of Envtl. Conservation*, No. 17-1164, 2019 WL 446990 (2d Cir. Feb. 5, 2019).

5. Based on these facts, the Waiver Order determined that Clean Water Act section 401 required New York DEC to act by March 2, 2017, despite the agreement to alter the receipt date. Accordingly, the Waiver Order determined that New York DEC waived its authority to issue a water quality certification.[11]

6. National Fuel filed an answer to New York DEC's rehearing request and motion for stay on August 29, 2018, and an answer to Sierra Club's rehearing request and motion for stay on September 20, 2018. Our rules permit answers to motions,[12] but do not permit answers to requests for rehearing, unless otherwise ordered by the decisional authority.[13] Accordingly, we accept the answers to the motions for stay, but reject the answers to the rehearing requests.

II. Analysis

A. Statutory Interpretation

7. "Section 401 of the CWA requires an applicant for a federal permit to conduct any activity that 'may result in any discharge into the navigable waters' of the United States to obtain 'a certification from the State in which the discharge ... will originate ... that any such discharge will comply with,' *inter alia*, the state's water quality standards."[14] Section 401 provides that if a state "fails or refuses to act on a request for certification within a reasonable period of time (not to exceed one year) after receipt of such request," then the certification requirement is waived.[15]

8. The Commission has long interpreted section 401 as meaning "that a certifying agency waives the certification requirements of section 401 if the certifying agency does not act within one year after the date that the certifying agency receives a request for a certification."[16] We base this interpretation on giving plain meaning to the words "after

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[11] Waiver Order, 164 FERC ¶ 61,084 at P 42.

[12] 18 C.F.R. § 385.213(d) (2018).

[13] *Id.* § 385.213(a)(2); *id.* § 385.713(d)(1).

[14] *Constitution Pipeline Co. v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 99 (2d Cir. 2017) (quoting 33 U.S.C. § 1341(a)(1)).

[15] 33 U.S.C. § 1341(a)(1).

[16] Waiver Order, 164 FERC ¶ 61,084 at P 41. *See Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014, at P 16 (tracing this interpretation back to 1987), *order denying*

receipt of such request."[17] The Commission explained in the Waiver Order that our determination here is consistent with our order in *Central Vermont Public Service Corporation*, holding that section 401 "contains no provision authorizing either the Commission or the parties to extend the statutory deadline" and that "private agreements . . . cannot operate to amend the Clean Water Act, nor are they in any way binding on the Commission."[18]

9. On rehearing, New York DEC states that the Commission erroneously applied principles of statutory construction in the Waiver Order when it found that the section 401 deadline cannot be altered by agreement.[19] Citing the general principle that statutory rights are waivable, New York DEC argues that when it acted on National Fuel's application on April 7, 2017, it had acted within one year from the receipt of the application as established by agreement.[20] Rather than address *Central Vermont Public Service*, New York DEC states that section 401 contains no provision explicitly prohibiting waiver, and emphasizes cases demonstrating that statutory rights are waivable unless Congress affirmatively provides they are not.[21] New York DEC's arguments fail because they support an interpretation of section 401 that would run counter to the statutory intent of preventing delay.

10. Two of the cases cited by New York DEC address waiver of rights by persons in criminal proceedings.[22] The outcomes in these cases depended on whether permitting

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reh'g, 164 FERC ¶ 61,029 (2018).

[17] 33 U.S.C. § 1341(a)(1). *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018) (holding that the "plain language of Section 401" requires states to grant or deny an application within one year of receiving the application, not the date the agency deems the application to be complete).

[18] 113 FERC ¶ 61,167, at P 16 (2005). *See* Waiver Order, 164 FERC ¶ 61,084 at P 43.

[19] New York DEC Rehearing Request at 2.

[20] *Id.* at 4-6.

[21] New York DEC Rehearing Request at 5-6 (citing *Price v. U.S. Department of Justice*, 865 F.3d 676 (D.C. Cir. 2017); *United States v. Mezzanatto*, 513 U.S. 196 (1995); and *U.S. Department of Labor v. Preston*, 873 F.3d 877 (11th Cir. 2017)).

[22] *See Price*, 865 F.3d 676 (holding that a plea agreement waiving rights under the Freedom of Information Act (FOIA) is unenforceable because the government did not, in that case, identify a legitimate criminal-justice interest in honoring the waiver); and

waiver advances a legitimate criminal-justice interest. Another case cited by New York DEC, *U.S. Department of Labor v. Preston*,[23] holds that an Employee Retirement Income Security Act statute of repose was subject to waiver. The court in *Preston* reasoned in part that disallowing waiver would be contrary to the "overarching purpose" of ERISA.[24]

11. By contrast to the statutory schemes at issue in the cases cited by New York DEC, the section 401 deadline cannot be waived by agreement. In *Hoopa Valley Tribe v. FERC*,[25] the court considered whether waiver occurs when there is a "written agreement with the reviewing states to delay water quality certification."[26] The court concluded that such an agreement constituted a failure and a refusal to act under section 401.[27] The events in *Hoopa Valley Tribe* and these proceedings share the same salient facts, i.e. an agreement was reached to delay the state agency's action on a water quality certification application. *Hoopa Valley Tribe* held that such an agreement results in a refusal and failure to act. Similarly, we find that the lack of action by the March 2, 2017 deadline here constituted a failure and refusal to act as contemplated by section 401. Therefore, New York DEC waived its authority to issue a water quality certification.

12. The language of section 401 that reflects a Congressional intent to establish a statutory policy of preventing delay distinguishes it from the cases cited by New York DEC. *Hoopa Valley Tribe* determined that a "deliberate and contractual idleness" not only usurps the Commission's "control over whether and when a federal [authorization] will issue," but would contravene section 401's intended purpose, i.e. to prevent a state's "dalliance or unreasonable delay."[28] By contrast to the statutory schemes addressed in the cases cited by New York DEC, accommodating extension of the deadline here would

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United States v. Mezzanatto, 513 U.S. 196 (holding that a criminal defendant can waive evidentiary and procedural rules designed to protect plea discussion statements as inadmissible). Neither of these cases involve statutory deadlines.

[23] 873 F.3d 877.

[24] *Id.* at 885.

[25] 913 F.3d 1099 (D.C. Cir. 2019) (*Hoopa Valley Tribe*).

[26] *Id.* at 1104.

[27] *Id.*

[28] *Id.* at 1104-05 (quoting 115 Cong. Rec. 9264 (1969) (quotation omitted)).

contravene the statutory purpose of encouraging timely action on water quality certification applications.

13. Sierra Club claims that *Constitution Pipeline Co. v. New York State Department of Environmental Conservation*[29] and *New York State Department of Environmental Conservation v. FERC*[30] demonstrate that "courts . . . concluded Section 401 allows the parties to move the date an application is 'received.'"[31] In neither case did the court hold that the state and an applicant could agree to move the date an application is "received." In *Constitution Pipeline Co. v. New York State Department of Environmental Conservation*, the court found that it lacked jurisdiction to address the waiver issue and merely noted that the applicant had withdrawn and resubmitted an application for certification.[32] *New York State Department of Environmental Conservation v. FERC* addressed whether a state may defer the date of "receipt" by deeming an application "incomplete."[33] The court found such an approach contrary to the plain language of the statute. And the court further dismissed New York DEC's policy concerns by, in part, noting that a state "could also request that the applicant withdraw and resubmit the application."[34]

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[29] 868 F.3d 87, 94 (2d Cir. 2017) (finding no jurisdiction to consider Constitution Pipeline's argument that action on water quality certification application was untimely, but denying petition for review on the merits). Following the Second Circuit's decision, Constitution Pipeline sought and was denied a declaratory order from the Commission finding waiver. *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014, *reh'g denied,* 164 FERC ¶ 61,029 (2018). Constitution Pipeline petitioned for review of those orders and, following *Hoopa Valley Tribe*, the D.C. Circuit granted the Commission's motion for voluntary remand of its decision. *Constitution Pipeline Co., LLC v FERC*, D.C. Cir. No. 18-1251 (issued Feb. 28, 2018).

[30] 884 F.3d 450 (affirming the Commission's determination that the section 401 one-year review period began when New York DEC received Millennium Pipeline Company's request, not when New York DEC deemed the application complete).

[31] Sierra Club Rehearing Request at 6.

[32] 868 F.3d at 94.

[33] 884 F.3d 450 at 456.

[34] *Id*.

14. Similarly, New York DEC relies on the Commission' earlier acknowledgement that an applicant can elect to withdraw and resubmit its application.[35] But whether the "withdrawal-and-resubmission scheme" continues to be a viable procedure is in doubt after *Hoopa Valley Tribe.*[36] At a minimum, we take the reasoning in *Hoopa Valley Tribe* – disapproval of an agreement to withdraw and resubmit as a failure and refusal to act resulting in a scheme that thwarts a Congressionally-imposed statutory limit – to apply equally to the facts here.

15. New York DEC cites the Commission's practice of issuing tolling orders as a similar extension of a statutorily-designated deadline.[37] New York DEC points out that the NGA (like the Clean Water Act) requires the Commission to "act" within 30 days, and that no provision in the NGA permits the Commission to extend the time for acting.[38]

16. New York DEC's reasoning that NGA section 19 "does not contain any language expressly authorizing [the Commission] to extend the 30-day statutory deadline" is inapt because Commission tolling orders do not extend the deadline. Tolling orders comply with NGA section 19 because they reflect the Commission action required by the statute.[39] By contrast, the authority to extend the deadline for acting under Clean Water Act section 401 that New York DEC seeks to exercise by agreement with National Fuel does not fit within the language of the statute.

17. Finally, New York DEC is not without suitable recourse in the case of an incomplete application. New York DEC can deny an application with or without prejudice.[40]

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[35] New York DEC Rehearing Request at 6. *See* Waiver Order, 164 FERC ¶ 61,084 at P 45.

[36] In *New York State Dep't of Envtl. Conservation v. FERC*, the court stated that a state could "request that the applicant withdraw and resubmit the application." 884 F.3d at 455-56. However, the D.C. Circuit in *Hoopa Valley Tribe* described that statement as "dicta." 913 F.3d at 1105.

[37] New York DEC Rehearing Request at 5-6.

[38] *Id*. (citing 15 U.S.C. § 717r (2012)).

[39] *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 113 (D.C. Cir. 2018); *Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988).

[40] Wavier Order, 164 FERC ¶ 61,084 at P 45. *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d at 456 ("If a state deems an application incomplete, it

B. Policy

18. New York DEC argues that the Commission's ruling encourages the "withdraw and refile" practice and would therefore cause more delay than permitting agreements to extend the deadline.[41] According to New York DEC, delay would result for two reasons: (1) the refiling would require the agency to issue notice of the new application; and (2) the new filing would extend the deadline up to a year – in this case a much longer extension than agreed to between New York DEC and National Fuel.[42] New York DEC adds that the agreement between it and National Fuel was mutually beneficial, and disallowing the extension by agreement would not further any energy or environmental policy.[43] With respect to the pragmatic benefit of avoiding case-by-case determinations, Sierra Club states that such case-by-case determinations will be required in any event.[44] Sierra Club adds that the waiver finding is "contrary to the goals Congress established in passing the [Clean Water Act] and Section 401."[45]

19. The Clean Water Act provides for a state to issue a certification within a reasonable period of time, not to exceed one year, and includes language expressly providing for waiver in the absence of action within one-year. As discussed above, the purpose of this provision is to prevent delay.[46] The responsibility to act within a reasonable period of time, not to exceed a year, lies with New York DEC. Given New York DEC has the ability to timely act on a section 401 water quality certification request, the Commission finds it misguided to blame the Commission for not facilitating extensions of time. Congress expressly provided for projects to move forward without state water quality certification when the state waives its authority.

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can simply deny the application without prejudice – which would constitute "acting" on the request under the language of Section 401.").

[41] New York DEC Rehearing Request at 7.

[42] *Id.*

[43] *Id.*

[44] Sierra Club Rehearing Request at 7.

[45] *Id.* at 8.

[46] *See Hoopa Valley Tribe*, 913 F.3d at 1104-05.

20. We find that the statute prohibits state agencies and applicants from entering into written agreements to delay water quality certifications, an interpretation consistent with *Hoopa Valley Tribe*.[47] We have reasonably interpreted section 401 and find that the policy interests advanced by New York DEC cannot override the statute. In addition, New York DEC's policy arguments fail to recognize countervailing considerations, including the interest in providing certainty around the deadline for state action.[48] Binding calculation of the deadline to application receipt (as contemplated by the statutory language) makes determining the deadline more straightforward.

C. Agreement

21. New York DEC argues the Commission erred by disregarding the agreement.[49] In the Waiver Order, the Commission found that its construction of the Clean Water Act is not affected by a "private agreement not to raise an issue."[50]

22. Quoting *Erie Boulevard Hydropower, LP v. FERC*,[51] New York DEC states that the D.C. Circuit "has consistently required the Commission to give weight to the contracts and settlements of the parties before it."[52] New York's reliance on *Erie Boulevard* is unavailing. In *Erie Boulevard*, the D.C. Circuit affirmed Commission orders regarding headwater benefits assessments pursuant to Federal Power Act section 10(f).[53] In the underlying orders, the Commission considered a settlement between one of the headwater beneficiaries and the State of New York. Although *Erie Boulevard* gave effect to an agreement between parties while the Commission fulfilled its responsibilities under Part I of the Federal Power Act (FPA), by doing so, the

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[47] *Id.* at 1103-05.

[48] *See* Waiver Order, 164 FERC ¶ 61,084 at P 45.

[49] New York DEC Rehearing Request at 7-8.

[50] Waiver Order, 164 FERC ¶ 61,084 at P 39 n.71. *See Central Vermont Public Service*, 113 FERC ¶ 61,167 at P 19 ("However, nothing in the Clean Water Act allows a state to use procedures agreed to in a settlement to indefinitely extend the statutory deadline, nor, as we have stated, do we endorse such delay.").

[51] 878 F.3d 258, 268 (D.C. Cir. 2017) (internal quotation marks and citation omitted).

[52] New York DEC Rehearing Request at 8.

[53] 16 U.S.C. § 803(f) (2012).

Commission did not act in defiance of the statute, but instead acted consistently with its statutory authority to assess an equitable amount to compensate for headwater benefits.[54] Unlike these proceedings, *Erie Boulevard* did not involve an agreement that contravened the intent behind a statutory provision.

D. Estoppel, Waiver, and Ratification

23. New York DEC argues that waiver, estoppel, ratification, and basic contract law should bar National Fuel from challenging the agreement's legal basis.[55] Sierra Club argues that National Fuel is estopped from asserting the agreement was not valid, because New York DEC relied on the agreement.[56] New York DEC points out that National Fuel accepted the benefits of the agreement, which meant avoiding both an earlier denial of the application and the subsequent need to resubmit a new section 401 application.[57] Citing *DiRose v. PK Mgmt. Corp.*,[58] New York DEC states that when a contract is invalid, a party must act promptly to repudiate it "or he will be deemed to have waived his right to do so."

24. We disagree that contract principles change the outcome. Our interpretation of section 401 is not affected by the existence of a contract between New York DEC and National Fuel.[59] Rather, we find, consistent with *Hoopa Valley Tribe*, that National Fuel and New York DEC cannot enter into "a written agreement . . . to delay water quality certification."[60] New York DEC states that National Fuel's partial performance "is an

[54] 878 F.3d at 267-68.

[55] New York DEC Rehearing Request at 2, 8-10.

[56] Sierra Club Rehearing Request at 10-11.

[57] New York DEC Rehearing Request at 9.

[58] 691 F.2d 628, 633-34 (2d Cir. 1982).

[59] *See Central Vermont Public Service*, 113 FERC ¶ 61,167 at P 16 ("VANR's agreements with other parties are simply not relevant to the issue of whether it met the requirement of the Clean Water Act that it act on a certification application within one year, which it does not dispute it failed to do.").

[60] 913 F.3d at 1104.

unmistakable signal that one party believes there is a contract,"[61] however, the validity of a contract does not control how we view the controlling language of section 401.

E. Untimely

25. New York DEC and Sierra Club argue that National Fuel's waiver argument was untimely.[62] New York DEC states that the Commission erred by construing National Fuel's December 5, 2017 filing as a separate motion requesting a waiver determination. New York DEC explains that National Fuel knew of the waiver argument when it filed its March 3, 2017 rehearing request, yet failed to raise it then.[63] Accordingly, New York DEC believes National Fuel's December 5, 2017 filing amounts to an untimely supplement to its rehearing request, which should have been rejected.[64]

26. The Waiver Order recognized that National Fuel's December 5, 2017 filing was a "separate basis for their claim that the New York [DEC] waived authority under section 401 of the Clean Water Act to issue or deny a water quality certification for the Northern Access 2016 Project."[65] The Commission recognized that, as an expansion of its request for rehearing, the December 5, 2017 filing was "statutorily barred as outside the thirty day period for seeking rehearing;" however, the Commission, referring to *Millennium Pipeline Co., L.L.C. v. Seggos*,[66] recognized that applicants can present evidence of waiver of a water quality certification to the Commission.[67] Therefore, the Commission interpreted National Fuel's filing as "effectively" a petition for a waiver determination."[68]

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[61] New York DEC Rehearing Request at 9 (quoting *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 75-76 (2d Cir. 1984)).

[62] New York DEC Rehearing Request at 10; Sierra Club Rehearing Request at 9-11.

[63] New York DEC Rehearing Request at 9-10.

[64] *Id.* (citing *City of Tacoma, Washington*, 110 FERC ¶ 61,140 (2005); and *In Re CMS Midland, Inc.*, 56 FERC ¶ 61,177 (1991)).

[65] Waiver Order, 164 FERC ¶ 61,084 at P 6.

[66] 860 F.3d 696, 701 (D.C. Cir. 2017).

[67] Waiver Order, 164 FERC ¶ 61,084 at P 6.

[68] *Id.* P 6.

27. We deny rehearing. The Commission reasonably treated National Fuel's December 5, 2017 filing as a motion in these circumstances. The Commission's regulations do not specify the timing or form for an applicant for water quality certification to present evidence of waiver of water quality certification. As noted in the Waiver Order, a motion may be filed at any time in a proceeding.[69] Thus, the timing of National Fuel bringing the issue to the Commission's attention (or whether it did so at all) are irrelevant for purposes of the determinations made in the Waiver Order. National Fuel was not required to file its request at any particular time, and in this case National Fuel's timing did not result in its inability to seek the determination.

III. Stay Request

28. New York DEC and Sierra Club also request a stay of the Waiver Order.[70] Finding that justice did not require a stay, the Commission denied an earlier stay request in an order issued on August 31, 2017.[71]

29. The Commission grants a stay when "justice so requires."[72] In determining whether this standard has been met, the Commission considers several factors, including: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is

[69] Waiver Order, 164 FERC ¶ 61,084 at P 6 n.10 (citing 18 C.F.R. § 385.212(a) (2018)). "[T]he Commission has discretion to determine the actual nature of the filing and to treat the filing accordingly." *Alcoa Power Generating Inc.*, 152 FERC ¶ 61,040, at P 17 (2015).

[70] New York DEC Rehearing Request at 10-12; Sierra Club Rehearing Request at 11-13.

[71] 160 FERC ¶ 61,043 (2017) (Order Denying Stay).

[72] *Tennessee Gas Pipeline Co., L.L.C.*, 157 FERC ¶ 61,154, at P 4 (2016); *Algonquin Gas Transmission, LLC*, 156 FERC ¶ 61,111, at P 9 (2016); *Enable Gas Transmission*, 153 FERC ¶ 61,055, at P 118 (2015); *Transcontinental Gas Pipe Line Co.*, 150 FERC ¶ 61,183, at P 9 (2015).

in the public interest.[73] If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine other factors.[74]

30. In order to support a stay, the movant must substantiate that irreparable injury is "likely" to occur.[75] The injury must be both certain and great and it must be actual and not theoretical. Bare allegations of what is likely to occur do not suffice.[76] The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.[77] Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.[78]

31. New York DEC states that the Environmental Assessment's (EA) finding of no significant impact and the subsequent section 7 conditional certificate authority is no longer valid given the denial of the water quality certification.[79] New York DEC states that the impact of allowing the project to go forward without the New York DEC mitigation measures would be severe.[80] New York DEC explains that the EA assumed the existence of certain mitigation measures,[81] including those in a future section 401 water quality certification.[82] Sierra Club relies on the significant damage that will be

[73] Ensuring definiteness and finality in our proceedings also is important to the Commission. *See Enable*, 153 FERC ¶ 61,055 at P 118; *Millennium Pipeline Co.*, 141 FERC ¶ 61,022, at P 13 (2012).

[74] *See, e.g., Algonquin Gas Transmission*, 156 FERC ¶ 61,111 at P 9.

[75] *See Transcontinental Gas Pipe Line Co., LLC*, 150 FERC ¶ 61,183, at P 10 (2015) (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] New York DEC Rehearing Request at 11.

[80] *Id.*

[81] EA at 20 (Table A.8-1) (list of federal and Pennsylvania and New York permits, approvals, and consultations required for the project).

[82] New York DEC Rehearing Request at 11.

caused if the project moves forward in what Sierra Club calls a violation of the Clean Water Act.[83]

32. New York DEC and Sierra Club have failed to demonstrate "proof indicating that the harm is certain to occur in the near future."[84] In the EA, Commission staff examined the project's impacts on geology, soils, groundwater, surface water, wetlands, vegetation, aquatic resources, wildlife, threatened and endangered species, land use, visual resources, socioeconomics, cultural resources, air quality, noise, reliability and safety, cumulative impacts, and alternatives.[85] None of the EA's findings are now wrong as a result of New York DEC's waiver, because Commission staff did not base those findings on any forthcoming conditions from New Yok DEC.[86] Accordingly, the EA did not provide for alternative mitigation in the event that New York DEC waived water quality certification.[87]

33. When it approved the Northern Access 2016 Project, the Commission fully considered the EA prepared by Commission staff and addressed the comments of New York DEC, Allegheny Defense Project, Town of Pendleton and others in the Certificate Order's environmental discussion.[88] The Commission determined that, on balance, the Northern Access 2016 Project, if constructed and operated in accordance with the application and environmental conditions imposed by the Certificate Order, would not significantly affect the quality of the human environment and would be an environmentally acceptable action.[89] This finding did not assume conditions by New York DEC. Given this conclusion, New York DEC and Sierra Club have not demonstrated that irreparable harm is likely to occur, and we deny their motions for stay.

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[83] Sierra Club Rehearing Request at 11.

[84] *Transcontinental Gas Pipe Line*, 150 FERC ¶ 61,183 at P 10 (citing *Wisconsin Gas Co.*, 758 F.2d 669 at 674).

[85] The EA addressed issues raised by New York DEC. *See, e.g.*, EA at 55 (sensitive vegetation communities) and 57 (forest fragmentation).

[86] *See* EA at 47.

[87] *Id.*

[88] *See* Certificate Order, 158 FERC ¶ 61,145 at PP 68-197.

[89] *Id.* P 197.

The Commission orders:

(A) The requests for rehearing filed by New York DEC and Sierra Club are denied.

(B) The requests for stay filed by New York DEC and Sierra Club are denied.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)