UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Millennium Pipeline Company, LLC **Docket No. CP16-17-000**

REQUEST FOR REHEARING AND STAY

Pursuant to Section 717r of the Natural Gas Act ("NGA")[1] and Rules 713 and 716 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission[2] ("FERC" or "Commission"), the New York State Department of Environmental Conservation ("NYSDEC" or "Department") respectfully makes this Request for Rehearing and Stay ("Request") of the September 15, 2017 Declaratory Order Finding Waiver Under Section 401 of the Clean Water Act ("Declaratory Order"), finding that the Department waived its jurisdiction under Section 401 of the federal Clean Water Act ("CWA") with respect to the Valley Lateral project ("Project") (FERC Docket No. CP16-17).

I. Statement of Issues

1. The Commission erred in its finding that the Department has waived its jurisdiction under Section 401 of the CWA. Specifically, the Commission erred in finding that the one-year timeframe in which the Department must act on an application for a CWA, Section 401 Water Quality Certificate ("WQC") commences as of receipt of an application, regardless of the completeness of such application.

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[1] 15 U.S.C. § 717r

[2] 18 C.F.R. §§ 385.713 and 385.716

2. To prevent potential irreparable harm to the State's environment, including potential harm derived from the Department's lack of oversight and enforcement authority on the Project, the Commission should stay the Declaratory Order, as well as refrain from issuing any Notices to Proceed with respect to the Project, during the pendency of review of this Request, including any appeal thereof. *See* 18 C.F.R. § 385.713(e).

II. Factual Background

The Project, as proposed by Millennium Pipeline Company, LLC ("Applicant"), includes approximately 7.8 miles of new natural gas pipeline that will extend from the Applicant's existing main pipeline north to the new CPV Valley Energy Center in the Town of Wawayanda, Orange County, New York, which is currently under construction, and for ancillary aboveground facilities. On November 13, 2015, the Applicant filed an application with FERC seeking a certificate of public convenience and necessity pursuant to Section 7(c) of the NGA to construct and operate the Project. The Commission, pursuant to the NGA and the National Environmental Policy Act ("NEPA") conducted an environmental review of the Project, as proposed by the Applicant, and on May 9, 2016, issued an Environmental Assessment ("EA"). On November 9, 2016, the Commission issued the Order granting the requested certificate of public convenience and necessity, which incorporated the findings of the EA therein and was subject to various conditions, including that the Applicant obtain certain authorizations from the Department, including (but not limited to) a WQC pursuant to Section 401 of the CWA. In the event that the Applicant does not obtain a WQC from the Department, all conditions of the Order cannot be satisfied and, accordingly, the Applicant would be foreclosed from commencement of the Project in any capacity.

On November 23, 2015, the Applicant submitted to the Department a Joint Application for a WQC, as well as permits under Articles 15 and 24 of the Environmental Conservation Law ("ECL") for the Project, all of which are required pursuant to Federal law, either as expressly stated in the CWA or as authorizations required by FERC in the Order under the NGA.[3]

The Joint Application was inadequate and incomplete. By letter dated December 7, 2015, the Department found the Joint Application to be incomplete for multiple reasons, including the lack of an environmental review, which was concurrently being conducted by FERC.[4] In addition to the lack of an environmental review, the Department also sought additional information from the Applicant, which was necessary in order to deem the application complete as a matter of New York law for purposes of review and determination. Indeed, after reviewing the EA, on June 17, 2016, the Department sent Millennium a second Notice of Incomplete Application seeking just such information from the Applicant. As of August 31, 2016, the Applicant had fully responded to all of the Department's additional information requests.

[3] The NGA (i) expressly authorizes FERC to require such conditions as necessary (15 U.S.C. § 717f(e) (FERC may attach to its certificates "such reasonable terms and conditions as the public convenience and necessity may require")) and (ii) broadly defines the other required authorizations for a Certificate to include "any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law." 15 U.S.C. §§ 717n(a)(1), (2).

[4] By Motion for Reopening and Stay or, in the Alternative, Request for Rehearing and Stay, dated August 30, 2017, the Department has asserted that FERC's EA is deficient in that it does not include any quantification of downstream greenhouse gas emissions. This Motion remains outstanding before FERC and will address the issues raises therein under a separate order. Declaratory Order at fn 13.

III. Argument

a. A Complete Application Is Required to Trigger the One-Year Period Under the Clean Water Act.

Contrary to FERC's finding, the Department did not waive its jurisdiction under the CWA because Millennium did not submit a complete WQC application to the Department until August 31, 2016. The CWA does not indicate what form a "request for certification" must take to trigger the one-year waiver period; rather, it "is ambiguous regarding whether an invalid as opposed to only a valid request for a water quality certification will trigger" the waiver period. *AES Sparrows Point LNG, LLC, et al. v. Wilson, et al.*, 589 F.3d 721,729 (4th Cir) (citing 33 U.S.C. § 1341(a)(1)). Given the CWA's plain language and the holding in *AES Sparrows*, the Department interpreted Section 401 to require a complete application to trigger the waiver timeframe, *see id.*, and, therefore, FERC erred in finding a waiver based on Millennium's initial request date.

Under FERC's erroneous interpretation of Section 401, the waiver period would commence upon the Department's receipt of *any* request for a WQC, however perfunctory. However, a complete application is necessary to commence the waiver period because otherwise "applicants could frustrate the State's mandate to make [Section 401] determination[s] by completing an application 364 days after submitting an incomplete and deficient application." Letter from Thomas S. Berkman, NYSDEC Deputy Commissioner and General Counsel to Millennium Pipeline Company, LLC, dated November 17, 2016, at 2 n.1 (FERC Docket No. 2016117-5080). Indeed, in this case, Millennium submitted a letter and affidavit demanding that the WQC be granted, along with more than 200 pages of exhibits, a mere eight days before the one-year anniversary of its initial application submittal.

Tying the waiver period to the receipt of a complete application avoids this result, allowing the Department time to assess and respond to submissions in a meaningful way, as prescribed in

the CWA. 33 U.S.C. § 1341(a)(1) (the Department "shall establish procedures for public notice in the case of all applications for [WQCs] by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications."). The Department not only must enact public notice procedures, but also must comply with them; failure to provide public notice on an application may result in the federal licensing agency's rejection of a section 401 certification. *See City of Tacoma v. Fed. Energy Reg. Comm'n*, 460 F.3d 53, 67-68 (D.C. Cir. 2006). Under Title 6 of the New York Codes, Rules and Regulations ("NYCRR") § 621.7, the Department's public notice procedure for all applications, including for WQCs, is triggered by a complete application.

Although the Department arguably could have denied Millennium's application as incomplete prior to August 31, 2016 (*see* Declaratory Order at p. 8), the Department reasonably required a complete application before rendering any decision thereon. The Department's process is consistent with, and required by the State's procedural regulation (i.e., 6 NYCRR Part 621). If the Department were to take the position of denying incomplete applications, as suggested by FERC in the Declaratory Order, it would unnecessarily limit the options for the Department and applicants when applications require additional information. Such a position would be inefficient and penalize both the Department and an applicant by foreclosing the opportunity to work cooperatively to ensure that a given application contains all the necessary information for a Department to render a decision on the merits.

The Department's interpretation of the waiver period is consistent with the interpretation adopted by the United States Army Corps of Engineers ("USACE"), which was upheld by the United States Court of Appeals for the Fourth Circuit. *AES Sparrows*, 589 F.3d at 721. USACE's regulations provide that "[i]n determining whether or not a waiver period has commenced or

waiver has occurred, the district engineer will verify that the certifying agency has received a *valid* request for certification." 33 C.F.R. § 325.2(b)(1)(ii) (emphasis added). When promulgating this regulation, the USACE noted that generally "valid requests for certification must be made in accordance with State laws[.]" *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41,206, 41,211 (Nov. 13, 1986). The Fourth Circuit has held USACE's regulation requiring a "valid request" for a certification "as determined by the Corps" is entitled to *Chevron* deference and "is permissible in light of the statutory text and is reasonable." *AES Sparrows*, 589 F.3d at 729 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

In fact, the Commission's own reasoning belies its conclusion that Section 401 is unambiguous as to the event that triggers the waiver period. The Declaratory Order held that "the plain meaning of 'after receipt of the request' is the day the agency receives a certification application" (Declaratory Order at 5), but that interpretation reads additional words into the statute by interpreting "request" to mean "written certification application." Nobody contends that receipt of a *verbal* request for a WQC would trigger the waiver period, but that interpretation – however unreasonable – is not ruled out by FERC's arbitrary interpretation of the term "request."

Consistent with USACE's interpretation, the Department interprets Section 401 to require a complete application. Because the Department is charged with determining whether to issue a WQC for the Project, it – not FERC – is the appropriate agency to interpret any ambiguous terms of the CWA. *Alabama Rivers Alliance, et al. v FERC,* 325 F.3d 290, 297 (2003 D.C. Cir); *see also AES Sparrow Point*, 589 F.3d at 729. Thus, as applied in this instance, FERC must defer to the Department's interpretation of the triggering event for the CWA's one-year waiver period.

IV. Conclusion

For the foregoing reasons, NYSDEC respectfully requests that the Commission grant rehearing of the Declaratory Order and, in either instance of a grant or denial of rehearing, and in order to prevent any potential irreparable environmental harm to the State of New York, grant a stay of the Declaratory Order pending any and all appeals thereof.

Dated: Albany, New York
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Respectfully submitted,

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Document Content(s)