No. 17-3770

IN THE

United States Court of Appeals for the Second Circuit

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

SARAH E. BURNS, AMANDA KING, MELODY BRUNN, BRUNN LIVING TRUST, PRAMILLA MALICK, and PROTECT ORANGE COUNTY,

Intervenors,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

MILLENNIUM PIPELINE COMPANY, L.L.C. and CPV VALLEY, L.L.C.,

Intervenors.

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

BRIEF FOR MILLENNIUM PIPELINE COMPANY AND CPV VALLEY

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CORPORATE DISCLOSURE STATEMENT

Millennium Pipeline Company, L.L.C. is a limited liability company that operates an interstate natural-gas pipeline system extending across southern New York. Millennium Pipeline Company, L.L.C. is owned by the following entities, whose ownership interests collectively total 100 percent: Columbia Gas Transmission Corporation, 47.5 percent; National Grid Millennium, LLC, 26.25 percent; and DTE Millennium Company, 26.25 percent.

CPV Valley is a wholly owned, direct subsidiary of CPV Valley Holdings, LLC ("CPV Valley Holdings"). CPV Power Holdings, LP ("CPV Power Holdings") directly owns 50% of the membership interests in CPV Valley Holdings. CPV Power Holdings is wholly owned by GIP II CPV Intermediate Holdings Partnership, L.P., which itself is indirectly and wholly owned by Global Infrastructure Partners II-B Feeder Fund, L.P., Global Infrastructure Partners II-A, L.P., Global Infrastructure Partners II-C, L.P., GIP II-C Eagle AIV, L.P., Global Infrastructure Partners II-D1, L.P., and GIP II Friends & Family Fund, L.P. (collectively, the "GIP II Funds"). CPV Power Holdings develops environmentally friendly and highly efficient natural gas-fired electric generation facilities throughout the United States. CPV Power Holdings is an affiliate of Competitive Power Ventures, Inc. ("CPV Inc."), which is an electric power generation development and asset management company headquartered in Silver

Spring, Maryland, with offices in Braintree, Massachusetts and San Francisco, California. No publicly-held company has a 10% or greater interest in CPV Power Holdings, the GIP II Funds, or CPV Inc.

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

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JURISDICTIONAL STATEMENT

The Federal Energy Regulatory Commission denied the New York State Department of Environmental Conservation's timely application for rehearing on November 15, 2017. JA793; 15 U.S.C. § 717r(a). The Department timely petitioned for review in this Court on November 17, 2017. JA840-841; 15 U.S.C. § 717r(b). Protect Orange County and several individual land owners near

Millennium Pipeline Company, L.L.C.'s Valley Lateral Project (collectively, "Protect Orange County") intervened in support of the Department. But most of their arguments are not within the Court's jurisdiction because they were not raised on rehearing before the Commission. *See infra* pp. 35-39.

ISSUES PRESENTED

Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), provides that if a State "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived." The Department did not purport to deny Millennium's Section 401 certification application until over a year and nine months after it was first received. The questions presented are:

1. Whether Section 401 unambiguously required the Department to act within (at most) one year of receiving Millennium's application.

2. Whether, if Section 401 is ambiguous, the Court must defer to the Department's interpretation that Section 401 requires a "complete" application before the one-year clock begins to run.

3. Whether Protect Orange County's additional complaints about FERC's waiver orders—that Millennium's project is outside of FERC's jurisdiction, that a Section 401 waiver cannot apply to a conditioned certificate such as Millennium's, and that the Department "acted" on Millennium's

application without approving, denying it, or conditioning it—are properly before the Court, and if so, whether they have any merit.

STATEMENT OF THE CASE

Legal Background. The Natural Gas Act "confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988). The Natural Gas Act preserves, however, States' authority to issue water-quality certifications under Section 401 of the Clean Water Act. *See* 15 U.S.C. § 717b(d). Section 401 requires an "applicant for a Federal license or permit to conduct any activity . . . which may result in discharge into the navigable waters" to obtain a certification from the State where the construction is to occur that the project will comply with the Clean Water Act's substantive requirements and appropriate provisions of state law. 33 U.S.C. § 1341(a)(1).

Under Section 401, "[i]f the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived." *Id.* If a State fails to act on a certification request within that "reasonable period of time (which shall not exceed one year)," the Commission can declare that the State's Section 401 authority has been waived. *See Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 701 (D.C. Cir. 2017).

Millennium's Valley Lateral Project. The Valley Energy Center, owned by intervenor CPV Valley, LLC, is an electric power generation facility under construction in the Town of Wawayanda in Orange County, New York. JA539. New York State authorities have approved the Valley Energy Center; it is expected to commence commercial operation in February or March of this year. *See* JA801. The Valley Energy Center could save New York ratepayers more than $400 million a year in reduced electricity costs and is expected to reduce greenhouse-gas emissions by nearly half-a-million tons a year. JA10-11.

CPV contracted with Millennium to build the Valley Lateral Project, a 7.8-mile-long pipeline and associated facilities. The Valley Lateral Project will connect CPV's Valley Energy Center to Millennium's existing interstate mainline natural-gas pipeline, which runs through Orange County. JA539. Millennium's facilities, including the Valley Lateral Project when it is complete, carry gas that originates at points outside of New York. JA544. Millennium's facilities also feed into other pipelines that deliver gas to points outside New York. JA546.

In November 2015, Millennium applied to FERC for a certificate of public convenience and necessity for the Project, as the Natural Gas Act requires. JA1. The next week, Millennium submitted an application supported by approximately 1,200 pages of exhibits to the Department for authorization for the Project under Section 401 of the Clean Water Act. JA29-127. The Department acknowledged

that "[o]n November 23, 2015," it "received an application for a federal Clean Water Act (CWA) § 401 Water Quality Certificate." JA128.

In December 2015, the Department notified Millennium that the application was purportedly "incomplete," not because of anything Millennium had included or failed to include, but because FERC had not yet completed its assessment under the National Environmental Policy Act (NEPA). JA128. But the Department's regulations do not require a NEPA environmental assessment to be included with a project sponsor's application or allow the Department to deem an application incomplete for not providing one. *See* N.Y. Comp. Codes R. & Regs. tit. 6 §§ 621.3, 621.4. Still, for the next five months, Millennium heard nothing from the Department about its application.

Meanwhile, the Department intervened in the FERC certificate proceeding and commented on Millennium's certificate application. JA130-134. The Department's comments addressed the potential impact of construction on, among other things, streams, wetlands, and endangered wildlife. *Id.*

In May 2016, FERC issued its environmental assessment, which addressed each issue raised by the Department along with a host of others. JA221-362. For example, the Commission found that as long as Millennium adhered to the recommended procedures, "Millennium would minimize and mitigate impacts on surface waters and these impacts would not be significant." JA273. FERC also

extensively catalogued the methods proposed to use to minimize the impact to freshwater wetlands during construction and operation of the Valley Lateral Project. JA275-279. Many of those methods are the same as those the Department suggests it would have imposed. *See* JA557. With those measures in place, the Commission determined that "wetland impacts associated with the construction and operation of the [Valley Lateral] Project would not be significant and would be in compliance with applicable permit conditions." JA279. This conclusion as to wetlands impacts mirrored FERC's overall conclusion that the Project would not significantly affect the environment. JA356.

In June 2016, about a month after FERC issued its environmental assessment, the Department issued Millennium a *second* notice of "incomplete" application. JA401-405. This time, the Department sought yet more information about water resources and three protected species. *Id*. Millennium promptly provided the requested information, and subsequently held a conference call with the Department, during which the Department requested yet more information. JA472. Millennium provided that information by August 31, 2016. *Id.* Separately, the Department submitted comments to FERC on the Commission's environmental assessment, raising similar issues. JA393. Millennium also promptly responded to those concerns. JA407.

In November 2016, FERC issued a certificate approving the Valley Lateral Project. JA538. The certificate, however, did not authorize Millennium to begin construction immediately. JA590-595 (listing various conditions that had to be satisfied prior to construction). In the certificate, FERC responded to the Department's comments. *See* JA557, 564-567, 569-570, 572-574, 580. It also recognized that Millennium had voluntarily modified its construction plans to address the Department's concerns. JA557.

The certificate also included six pages of environmental conditions that Millennium must comply with before, during, and after construction, including those Millennium voluntarily adopted in response to the Department's comments. JA590-595. The conditions require Millennium to take the mitigation steps described in the application and certificate and subject Millennium to regular oversight throughout construction. JA590-592. FERC has statutory authority to seek enforcement in district court if it concludes that Millennium is violating a condition imposed by the certificate order. *See* 15 U.S.C. § 717s(a).

FERC's certificate also did not presume that Millennium would obtain a Clean Water Act Section 401 certification, nor was the certificate conditioned on that certification. Rather, the FERC certificate order stated that construction could proceed *either* when Millennium obtained the certification *or* provided proof that the State had waived its authority to issue one. JA593.

The Department's Continued Delays. Shortly after FERC issued the certificate order, Millennium requested that the Department expeditiously issue its Section 401 certification, which had now been pending before the Department for just under a year. JA597.[1] The Department stated that, while Millennium had "fully responded to" the second notice of incomplete application, the Department would "continue its review of the Application, as supplemented, to determine if a valid request for a [certification] has been submitted." JA618. As the Department saw it, it had "at a minimum . . . until August 30, 2017," but perhaps even longer, "to either approve or deny" Millennium's request. *Id.*

Millennium petitioned the D.C. Circuit for review of the Department's refusal to act on the Section 401 application. *See* 15 U.S.C. § 717r(d)(2) (supplying jurisdiction in that court over a state agency's failure to act on a pipeline's permit application). Although the court dismissed Millennium's petition for lack of standing, it held that Millennium could obtain an order from FERC that the Department had waived its Section 401 authority, highlighting the Department's oral-argument concession that a FERC certificate "would [be] all the

[1] The Department observes (Br. 32-33) that this letter included "more than 200 pages of exhibits," but fails to mention that the only *new* documents were a 12-page affidavit from a Millennium engineer, which itself is largely a recitation of past filings and contacts with the Department, and two sets of site photographs. *See* JA604-616. The remaining documents were duplicates of documents already in the Department's possession. *See id.*

authority [Millennium] needs to begin construction." *Millennium Pipeline*, 860 F.3d at 701. Following the D.C. Circuit's suggestion, Millennium asked FERC to declare that the Department had waived its Section 401 authority by failing to act within the required one-year period. *See* JA649.

FERC did so, declaring that the Department, "by failing to act within the one-year timeframe required by the [Clean Water Act], waived its authority to issue or deny a water quality certification." JA753. For this conclusion, FERC relied on Section 401's plain language, which states that the deadline runs—at the outside—one year "*after receipt of such request*." JA757 (quoting 33 U.S.C. § 1341(a)(1)). FERC noted that the ordinary dictionary meaning of "receipt" is "the act or process of receiving." *Id.* "Giving effect to th[is] plain text," FERC determined that the relevant date for purposes of assessing waiver is "the day the agency receives a certification application"—in Millennium's case, November 23, 2015—"as opposed to when the agency considers the application to be complete." *Id.* FERC further found that even if there were some ambiguity in Section 401, its interpretation was consistent with Congress's intent "that sheer inactivity by the State . . . will not frustrate the Federal application." JA758 (quoting H.R. Rep. No. 91-940 (1970) (Conf. Rep.)).

The Department also purported to "deem[ ] denied" Millennium's Section 401 application, not on water quality-related grounds, but because, in the

Department's view, FERC's greenhouse-gas analysis for the Project was inadequate. JA736-737.[2] The Department's denial does not even mention water quality.

The Department and Protect Orange County sought rehearing of FERC's waiver determination. JA763; SA1-43. While rehearing was pending, FERC issued a "notice to proceed," authorizing Millennium to start construction. JA783. The notice confirmed that Millennium has "all federal authorizations necessary" and concluded that no further environmental analysis was required. JA783-784. Almost immediately after FERC issued the notice to proceed, the Department again sought a stay from the Commission, *see* JA785, and simultaneously sought an emergency stay from this Court.

FERC denied a stay and also denied rehearing. JA802-814. The Commission reaffirmed its waiver finding and held that Section 401's one-year clock unambiguously begins to run upon an agency's receipt of an application and, in the alternative, that FERC could construe any ambiguity in favor of the one-year period beginning at receipt of an application. *Id.*

[2] Millennium also obtained a preliminary injunction in the Northern District of New York declaring that certain state-law water quality permits, which the Department also "deemed denied" were preempted as applied to the Valley Lateral Project. *Millennium Pipeline Co. v. Seggos*, No 1:17-cv-1197 (MAD/CFH), 2017 WL 6397742, at *1 (N.D.N.Y. Dec. 13, 2017). The Department has not appealed that decision, it is not at issue in this petition, and the Department has had the case effectively placed in abeyance until this Court decides this appeal.

Two days after FERC's denial of rehearing, the Department filed this petition for review. Shortly thereafter, Protect Orange County sought and received this Court's approval to intervene, and filed its own motion for an emergency stay. After expedited briefing and oral argument, the Court denied the stay requests.[3]

STANDARD OF REVIEW

This Court reviews a FERC order under the familiar arbitrary-and-capricious standard. *Green Island Power Auth. v. FERC*, 577 F.3d 148, 158 (2d Cir. 2009). Arbitrary-and-capricious review is a "narrow one." *Id.* (citation omitted). A FERC order "must be upheld" unless the Commission "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it], or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* (citation omitted).

SUMMARY OF ARGUMENT

I. The Commission correctly held that the Section 401 waiver clock starts when a state agency receives an application requesting a Section 401

[3] Shortly after the Court denied the stay, Protect Orange County filed another petition for review, primarily challenging the underlying certificate order, coupled with another emergency stay motion. *See Protect Orange Cty. v. FERC*, No. 17-3966 (2d Cir.). The Court denied that stay request without oral argument. Protect Orange County's challenge to the certificate order is not before the Court on this petition.

certification, not when the state agency declares the application to be complete. Under Section 401, an applicant submits a "request for certification" to the state agency and the state agency has "a reasonable period of time (which shall not exceed one year) after receipt of such request" to act on it. 31 U.S.C. § 1341(a)(1). The statutory text is thus unambiguous: The waiver clock begins when the state agency receives an application. The Department's contrary reading requires adding the word "complete" to the statute where it does not exist.

At bottom, the Department's ambiguity argument is based on Congress's requirement that Section 401 certification requests involve public participation and that public participation requires a "complete" application. But as FERC pointed out—and as the Department ultimately concedes—state agencies can simply deny an application if it is not complete in time to comply with both the public-notice and one-year-deadline requirements. A plain-language application of Section 401 has none of the pitfalls that Department claims, and prevents state agencies from repeatedly citing "incompleteness" to slow-walk Section 401 applications, contrary to Congress's intent.

If the Court concludes Section 401 is ambiguous, however, it should not defer to the Department's reading. Both the case law and the Natural Gas Act suggest that the Court should defer to the Commission's interpretation as the agency responsible for issuing certificates for natural-gas infrastructure. And even

if the Court concludes that the Commission should not receive deference, it should interpret the statute itself de novo and hold that it does not require a complete application to trigger the Section 401 waiver clock. State agencies do not receive deference in their interpretation of federal statutes, except (perhaps) when the federal agency has blessed the state agency's reading, which has not occurred here.

Finally, the Department's interpretation is untenable because it is contrary to its past practice and its own regulations. In past cases, the Department negotiated accommodations to keep the one-year deadline from running based on the *receipt* of an application at its offices—even in circumstances where the Department claimed the application was incomplete. And the Department's own regulations contemplate that an application can be "complete" while still requiring supplementation.

Under any reading of Section 401, the Commission's waiver determination was correct.

II. Protect Orange County argues, in the alternative, that (1) FERC does not have jurisdiction over the Valley Lateral Project; (2) FERC lacked the authority to declare the Department's Section 401 authority waived because there was no pending federal "application" before it; and (3) even under FERC's interpretation of Section 401, the Department "acted" on Millennium's request

within one year because it sought additional information about the application. None of these arguments is properly before this Court, and each is meritless.

Protect Orange County's argument regarding FERC's jurisdiction is an effort to attack a *different* FERC order—the order granting Millennium's certificate, which is not the subject of this petition. Protect Orange County has a petition for review of the certificate order pending before this Court right now. That petition is the proper vehicle for addressing FERC's jurisdiction. Protect Orange County's remaining alternative arguments are jurisdictionally barred because they were not adequately raised in its application for rehearing before FERC. And all three alternative arguments are barred because they raise issues beyond the scope of the original petition in this case, which is limited to whether FERC correctly calculated the trigger date for Section 401's one-year timeline.

Each of Protect Orange County's arguments is also meritless. *First*, FERC has exclusive jurisdiction over the transportation of natural gas in interstate commerce. The Valley Lateral Project will carry gas originating outside of New York in interstate commerce, and will be fully integrated with, and enhance Millennium's ability to use, its existing interstate-pipeline facilities to better serve its interstate customers.

Second, Section 401 does not specify whether a federal application must remain pending for federal agencies to declare that a State has waived its

certification authority. But even if it did, the relevant application, according to the plain text of Section 401, is an application to engage in construction activities that may result in discharges into navigable waters. Because FERC had not yet issued the notice authorizing construction of the Valley Lateral Project to begin at the time it declared the Department's Section 401 authority waived, that application *was* still pending when FERC issued the waiver order.

Third, Section 401 requires a State to act on a certification application on the merits within one year—that is, it requires the State to act in a way that will allow the federal permitting authority to proceed with licensing. If States could satisfy Section 401's requirement that they "act" by asking the applicant for more information, Congress's goal of ensuring that States do not frustrate federal applications would be entirely undermined. Because the Department did not act on Millennium's Section 401 request for well over a year, FERC's finding of waiver was correct.

ARGUMENT

I. THE SECTION 401 CLOCK STARTS WHEN THE DEPARTMENT RECEIVES AN APPLICATION, NOT WHEN THE DEPARTMENT DEEMS THE APPLICATION COMPLETE.

A. Section 401 Is Unambiguous.

The Commission correctly found that Section 401 unambiguously starts the waiver clock when the Department receives an application, not when it declares the

application complete. JA757 (waiver order); JA809-811 (rehearing order). To briefly review: Under Section 401, an "applicant for a Federal license or permit to conduct any activity" which may result in any discharge into navigable waters "shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply" with the Clean Water Act. 33 U.S.C. § 1341(a)(1). The applicant obtains a certification from the State by submitting a "request for certification." *Id.* And "[i]f the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of [the Clean Water Act] shall be waived with respect to such Federal application." *Id.*

In this case, the "applicant" is Millennium, the "licensing or permitting agency" is FERC, and the "State" acts through the Department. Section 401 is thus unambiguous as to when the waiver clock began—when the Department received a request for certification from Millennium. As FERC noted, the plain-meaning, dictionary definition of "receipt" is "the act or process of receiving." JA757 (citing *Merriam-Webster*); *see also Succo v. First Reliance Standard Life Ins. Co.*, 16 F. App'x 53, 55 (2d Cir. 2001) ("A non-legal dictionary can supply the everyday, common meaning" of a word). Thus, in Section 401, "the plain meaning of 'after receipt of the request' is the day the agency receives a certification application, as opposed to when the agency considers the application to be

complete." JA757. And when the language of a statute is unambiguous, the "judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

All agree that the Department received Millennium's joint application for a Section 401 certification with 1,200 pages of exhibits on November 23, 2015. JA128; JA754. Under the plain language of Section 401, the Department waived its right to certify the Valley Lateral Project on November 24, 2016, when more than one year had passed without the Department approving, denying, or conditioning Millennium's request for certification—just as the Commission held. JA757; JA809-811.

The Department nonetheless insists that the phrase "request for certification" is ambiguous because it does not specify whether the request for certification must be declared "complete" by the state agency before the waiver clock starts. Department Br. 35. But the word "complete" appears nowhere in the statute. And the Court "cannot add to the statute what congress did not provide." *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993); *see also Dean v. United States*, 556 U.S. 568, 572 (2009) (courts "ordinarily resist reading words . . . into a statute that do not appear on its face") (citation omitted). A statute is not ambiguous "any time [it] does not expressly *negate* the existence of a claimed administrative power." *Railway Labor Execs.' Ass'n v. National Mediation Bd.*,

29 F.3d 655, 671 (D.C. Cir. 1994) (en banc). Section 401's omission of the word "complete" is not an ambiguity that the Department can fill; it is a confirmation that Section 401 does not contain the proviso that the Department would prefer.

Indeed, when Congress wants an environmental-permitting clock to start upon receipt of a complete application, it says so. In the Clean Air Act, Congress directed that a "permitting authority shall approve or disapprove a *completed* application . . . within 18 months after the date of receipt thereof." 42 U.S.C. § 7661b(c) (emphasis added). In the Clean Water Act, however, Congress chose a different approach, and its choice to do so was unambiguous.

The Department contends that it is the *Commission's* textual interpretation that is strained because "request for certification" must mean something different than the "applications for certification" referred to in the preceding sentence. *See* Department Br. 34-35. But there is no "canon of interpretation that forbids interpreting different words used in different parts of the same statute to mean roughly the same thing." *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 540 (2013); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (statutes "often . . . use different words to denote the same concept"). And even if "request for certification" means something marginally different than "applications for certification," Millennium's submission qualifies as a "request for certification" under the Department's own definition.

According to the Department, a "request" is "asking . . . formally for something." Department Br. 35 (quoting *Oxford Living Dictionaries*). "Asking formally" for a Section 401 certification is a less demanding requirement than submitting an "application[] for certification," so it is unclear what the Department thinks its alternative definition gets it. But in all events, Millennium's submission of a "Joint Application Form" with the "401 Water Quality Certification" box checked (JA29-30), together with 1,200 pages of exhibits, constituted Millennium "asking formally" for a Section 401 certification. The one-year clock began upon the Department's receipt of the application in November 2015.

The Department next argues that the Fourth Circuit's decision in *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721 (4th Cir. 2009) proves that Section 401's trigger is ambiguous. Department Br. 35-36. But FERC explained why *AES Sparrows* was distinguishable. JA803-806. *AES Sparrows* deferred to a regulation that called on the Army Corps of Engineers—not the state environmental agency—to determine when the one-year clock began. 589 F.3d at 729 (citing 33 C.F.R. § 325.2(b)(1)(ii)). That regulation has no application here.

To the extent *AES Sparrows* applies, it is unpersuasive. The Fourth Circuit panel's ambiguity finding, in full, was this: "Indeed, the statute is ambiguous on the issue." *Id.* That bare conclusion does not apply any of the "traditional tools of statutory construction" that this Court uses to determine whether a statute, in

context, is ambiguous. *Bell v. Reno*, 218 F.3d 86, 90 (2d Cir. 2000) (citation omitted).

The Department also argues that Section 401 is ambiguous because—supposedly—other agencies have interpreted it differently in the past. Department Br. 37-38. Of course, a text is not ambiguous just because people disagree about its meaning. *See AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 728 (2d Cir. 2010) (so holding as to contracts). And the Department misconstrues the other agencies' regulations it cites. The Department cites the Army Corps of Engineers' regulation that the waiver clock commences on receipt of a "valid" Section 401 application. Department Br. 37 (citing 33 C.F.R. § 325.2(b)(1)(ii)). But nothing in the regulation equates a "valid" application with a "complete" application. *AES Sparrows* drew that conclusion from how the Corps treated the particular application in that case. 589 F.3d at 725. But in this case, the Corps stated that it would abide by whatever decision the Court reached. *See* SA44; *see also* JA805 (discussing the Corps letter). The Corps, in other words, found nothing in FERC's waiver order that would be objectionable under its regulations. And this Court gives broad deference to the Corps' interpretation of its own regulations, even when expressed in letters like the one here. *See Encarnacion ex rel. George v. Barnhart*, 331 F.3d 78, 86 (2d Cir. 2003) ("[W]e recognize that an agency's interpretation of its own regulations is entitled to

considerable deference, irrespective of the formality of the procedures used in formulating the interpretation."); *accord Encarnacion ex rel. George v. Astrue*, 568 F.3d 72, 78 (2d Cir. 2009) (same).

The Department's reliance on the Environmental Protection Agency's regulations is equally misguided. Contrary to the Department's reading (Br. 37), EPA does not start the one-year clock upon transmitting its draft permit to the state permitting agency. Rather, EPA's regulations state that "[i]f State certification has not been received by the time the draft permit is prepared," then "the State will be deemed to have waived its right to certify unless that right is exercised within a specific reasonable time not to exceed 60 days from the date the draft permit is mailed to the certifying State agency unless" EPA "finds that unusual circumstances require a longer time." 40 C.F.R. §§ 124.53(c)(3). In other words, EPA's regulations govern how long is a "reasonable time" for a state agency to act under Section 401—60 days from the date EPA's draft permit is mailed. But the regulation does not purport to—nor can it—change the legislatively determined one-year-after-receipt outer limit for a state agency's action. *See Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73, 79 (1st Cir. 1993) (explaining that Section 401's one-year-at-the-outside and EPA's 60-days-from-issuance-of-a-draft-permit deadlines are separate constraints on state permitting authorities).

Finally, FERC's previous, thirty-plus-years-old hydroelectric-license rule requiring a complete Section 401 application to start the waiver clock, which FERC later changed through notice-and-comment rulemaking, does not prove that Section 401 is ambiguous. *Cf.* Department Br. 37-38. FERC explained in promulgating its current hydroelectric rule that its previous interpretation of Section 401 "fail[ed] to enforce the clear text of the [Clean Water Act] and subject[ed] a license applicant to the possibility that a section 401 certification proceeding may be protracted beyond one year, in contravention of the statutory objective of preventing such delay." 52 Fed. Reg. 5446, 5447 (Feb. 23, 1987). The Commission's new regulation was not resolving an ambiguity; it was bringing FERC in line with Section 401's "clear text."

Out of textual hooks to anchor its arguments, the Department appeals to the "intent" of Section 401. Department Br. 29-33. But the "legislative purpose is expressed by the ordinary meaning of the words used." *United States v. Martinez-Santos*, 184 F.3d 196, 204 (2d Cir. 1999) (quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)). The ordinary meaning of Section 401 is that the waiver clock begins on receipt of the request for certification. *Supra* pp. 15-17. No further search into Congress's intent is necessary. *See Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007) (if a statute's "language is unambiguous, no further inquiry is necessary").

The Department's intent argument is built on a false dichotomy, anyhow. To hear the Department tell it, unless the waiver clock begins when an agency declares an application complete, state agencies could be forced to make up-or-down decisions on bare-bones certification requests without adequate time for public notice and comment, which, in turn, could cause FERC to reject its Section 401 certifications for lack of public participation. *See* Department Br. 29-33.

To begin with, it strains credulity that sophisticated pipeline operators would gamble their multi-million-dollar projects on the gamesmanship that the Department hypothesizes in its brief. *See* JA814 (explaining that an applicant providing an incomplete application "would place [it] at serious risk of having its application denied on the basis of failing to provide necessary information"). But more fundamentally, the Department has a ready remedy for these perceived problems: deny applications that are truly incomplete. JA760; JA811-812. If the Department believes that an application is not sufficiently supported to allow thorough public comment or agency analysis, it can deny the request for certification and tell the applicant to return when it has its paperwork more in order. Such a denial would satisfy Section 401(a)(1)'s command that a certification request be adjudicated within a reasonable period of time, but no longer than one year. Indeed, this Court ultimately affirmed the Department's denial of a pipeline's Section 401 certification application because it found

Constitution had not submitted sufficient information to support the application. *Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation*, 868 F.3d 87, 102 (2d Cir. 2017).

The Department's position, moreover, has its own absurdities that are not so easily remedied. Section 401(a)(1)'s purpose is plain: to prevent States from miring projects in needless delay. *See Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) ("Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request. This is clear from the plain text."); *see also* JA811 (quoting *Alcoa Power Generating*, 643 F.3d at 972). That problem is particularly acute in natural-gas projects: "[T]he primary impediment to timely development of natural gas infrastructure projects, historically, has been delay at the state level." Joan M. Darby, et al., *The Role of FERC and the States in Approving and Siting Interstate Natural Gas Facilities and LNG Terminals After the Energy Policy Act of 2005 — Consultation, Preemption, and Cooperative Federalism*, 6 Tex. J. Oil. Gas & Energy L. 335, 384 (2011). Under the Department's approach, a state agency could drag out a permitting process by asking for more and different materials from a project sponsor seriatim, each time withholding the pronouncement that the sponsor's application is "complete," indefinitely preventing the one-year clock from starting and thwarting Congress's

goal in mandating the deadline in the first place. And that is, in fact, what happened here: The Department offered ever-evolving views on what was required before it considered Millennium's application "complete," such that even at the time of the D.C. Circuit litigation, the Department was unwilling to commit to a time limit to make its determination. *See* JA618 (maintaining that the Department had "*at a minimum* . . . until August 30, 2017," to act on Millennium's application) (emphasis added).

The Department eventually concedes that it could deny incomplete applications if it wanted, but contends that it would lead to "premature judicial review" or prevent the Department from working cooperatively with applicants by seeking supplemental information. Department Br. 31, 33. Neither is true. As the Commission explained, "[d]enying an incomplete application does not prevent the state from working with an applicant; a denial can be issued without prejudice to an applicant's refiling in accordance with the state agency's requirements." JA814. Furthermore, "[p]roviding insufficient information or explanation to the state agency would place an applicant at serious risk of having its application denied" for "failing to provide necessary information, a conclusion that—assuming that the requested material was truly necessary to support a state decision—likely would prove difficult to challenge on appeal." *Id.*

Section 401 already anticipates some give-and-take might occur. After all, Section 401 calls for the process to take a reasonable period of time, with one year as the maximum. *See* 33 U.S.C. §1341(a). And the Corps and EPA, agencies with "reasonable time" regulations, require a state agency to finish its review in 60 or 90 days, absent exceptional circumstances—which may include the need to obtain more information from an applicant or conduct a public proceeding. *See* 40 C.F.R. §§ 124.53(c)(3), (d) (EPA); 33 C.F.R. § 325.2(b)(1)(ii) (Corps). The one-year-at-the-outside limit in Section 401 already gives state agencies some wiggle room. They cannot extend the statutory deadline further by citing the need to work cooperatively with applicants. *See* JA814 ("Holding an agency to a statutorily-imposed deadline in no way nullifies the state's authority to act in a timely manner.")

In the end, the Department's ambiguity argument is that Section 401 should be read to allow for a flexible system of cooperative federalism and that a hard one-year deadline from receipt of an application denies the Department maximum flexibility. But "no law pursues its purpose at all costs," and there is "no reason to think that the Clean Water Act is an exception." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 514 (2d Cir. 2017) (citation omitted). That is particularly true in a provision like Section 401, which balances a grant of

authority to the States with a firm deadline to keep States from abusing their power. Nothing in Section 401's purpose makes it ambiguous.

B. If Section 401 Is Ambiguous, The Court Should Defer To FERC Or Resolve The Ambiguity Itself.

Unable to argue that Section 401 unambiguously includes a "completeness" requirement, the Department contends that the Court should defer to its, and not FERC's, reading of the statute. Department Br. 26-27. But because Section 401 unambiguously starts the clock on receipt of a Section 401 certification application (*supra* pp. 15-26), the Court does not need to defer to anyone. The Court only defers when a statute is ambiguous, and Section 401 is not. *See Lawrence + Memorial Hosp. v. Burwell*, 812 F.3d 257, 267 (2d Cir. 2016) (declining to defer to an agency's interpretation because "we find the statutory language to be plain and unambiguous").

If, however, Court concludes that the start of the Section 401 clock is ambiguous it should not defer to the Department; "[a] state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes." *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997); *accord DeCambre v. Brookline Hous. Auth.*, 826 F.3d 1, 19 (1st Cir. 2016); *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 586 (6th Cir. 2002); *GTE S., Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999); *AMISUB (PSL), Inc. v. Colorado Dep't of Soc. Servs.*, 879 F.2d 789, 796 (10th Cir. 1989).

For good reason: *Chevron* deference is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). *Chevron* deference is also justified by "the expertise and familiarity of the federal agency with the subject matter of its mandate and the need for coherent and uniform construction of federal law nationwide." *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989) (per curiam). Neither justification is present here. The Department cannot credibly claim that Congress delegated to *it* the duty to interpret Section 401(a)(1). And deferring to the Department risks national disuniformity on the trigger for the Clean Water Act's waiver clock. One state agency could interpret it as running from receipt; another from completion; a third from some other time; and all could claim deference under the Department's theory.

Perry v. Dowling, 95 F.3d 231, 236 (2d Cir. 1996) and *City of Bangor v. Citizens Communications Co.*, 532 F.3d 70, 94 (1st Cir. 2008) are not to the contrary. *Cf.* Department Br. 27. In *Perry*, the responsible federal agency affirmatively approved the state's implementation of the federal program at issue and agreed with its interpretation of the statute. *Id.* at 236-237. Here, by contrast, the Environmental Protection Agency has not approved of the Department's Section 401 approval process, nor has it weighed in on the timing question

presented. *See* JA802-803. And in *City of Bangor*, the First Circuit did not give the state agency involved "the same amount of deference [it] would accord the EPA," and ultimately did not resolve the issue because it would have held for the state agency without any deference. 532 F.3d at 94. Neither case takes Section 401 outside of the general rule that federal courts do not defer to state agencies on questions of federal law.

The Department again invokes *AES Sparrows*, arguing that it confirms that the Corps agrees with the Department's interpretation. Department Br. 33-34. But to the extent that *AES Sparrows* has anything to say about this case at all, it supports deference for FERC. The Fourth Circuit in *AES Sparrows* did not defer to the Corps because it has special expertise in interpreting Section *401*; EPA administers that part of the Clean Water Act. *See* 33 U.S.C. § 1341(a)(1); *American Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) ("Congress delegated administration of the [Clean Water Act] to the EPA alone"). Rather, the Fourth Circuit deferred to the Corps because of its expertise in administering Section *404* of the Clean Water Act, the section governing the dredge-and-fill permit that AES Sparrows had applied for and that AES Sparrows required a Section 401 water-quality certification from the State to obtain. *See AES Sparrows*, 589 F.3d at 729 (granting deference "[b]ecause the Corps is charged with determining whether to issue AES a § 404 permit for the Project").

Analogizing here, Millennium applied to FERC under the Natural Gas Act for a certificate of public convenience and necessity and notice to proceed and requires the Section 401 water-quality certification from the Department (or waiver thereof) to obtain both. Under *AES Sparrows*, therefore, "[b]ecause [FERC] is charged with determining whether to issue [Millennium] a [certificate and notice to proceed] for the Project, if the Clean Water Act is ambiguous . . . the [Commission's] interpretation . . . is entitled to *Chevron* deference." 589 F.3d at 729 (internal citations omitted). As the Commission explained, *AES Sparrows* suggests a reviewing court defers to the federal permitting agency's interpretation of the Section 401 clock, not the state certifying agency's interpretation. *See* JA804-806.

To be sure, FERC does not receive deference in its interpretation of the Clean Water Act writ large. *See*, *e.g.*, *American Rivers*, 129 F.3d at 107. But EPA's regulations and the Natural Gas Act support extending deference to the Commission in these particular circumstances. EPA's regulations, which do carry weight in interpreting the Clean Water Act, state that the federal licensing authority—here, the Commission—has the power to declare that waiver has occurred. 40 C.F.R. § 121.16(b). Moreover, as the Commission pointed out (JA809), the Natural Gas Act assigns to FERC a particular role in ensuring that state permitting agencies make timely decisions on federal permits for natural-gas

infrastructure. *See* 15 U.S.C. § 717n(b), (c)(1); *Millennium Pipeline*, 860 F.3d at 701 (explaining that "Millennium can go directly to FERC and present evidence of the Department's waiver"). Although that scheduling power does not override the Clean Water Act's more-specific deadlines, it suggests that Congress intended that FERC supervise the timeliness of state agencies' permitting decisions for federal permits for natural-gas infrastructure. JA809. If there is deference to be given, it should be to FERC, not the Department.

Should the Court conclude that FERC's interpretation is not entitled to deference, however, it *still* should not defer to the Department; it should interpret Section 401 de novo. *See American Rivers*, 129 F.3d at 107. For all the reasons set out above, the Commission's reading of Section 401 is the better one. It hews closer to the statutory language, does not add extra words to the statute, balances Section 401's desire to allow States a role in water-quality certification decisions while forestalling foot-dragging by state agencies, and still allows a mechanism for States confronted with incomplete applications to preserve their rights. *See supra* pp. 15-26. The Court should therefore resolve any ambiguity in favor of the Commission's reading and uphold the waiver orders.

C. The Department's Current Interpretation Is Inconsistent With Its Past Practices And Own Regulations.

Finally, the Department's interpretation of Section 401 is untenable because it conflicts with the Department's past practices and its own regulations. As the

Commission pointed out, the Department "appears to apply its interpretation of section 401 unevenly." JA807. In one case, involving Constitution Pipeline Company, the Department demanded that Constitution withdraw and resubmit its application to extend the one-year deadline under Section 401 in the face of an allegedly incomplete application; if Constitution did not do so, the Department "would have likely denied the Section 401 Certification." *Id.* (citation omitted). That course shows that the Department—contrary to its arguments here—understood the one-year waiver period to be running from receipt, even in the case of an application that required supplementation. *See id.*

In a different case involving National Fuel Gas Supply Corporation, the Department and National Fuel agreed that, although National Fuel submitted an allegedly incomplete application in February 2016, "the application would be deemed received on April 8, 2016." JA808 (quoting the Department's appellate brief). If the Department truly believed that the Section 401 clock did not start until it had a complete application in hand, there would not have been any need for the agreement with National Fuel. *Id.* And even more tellingly, the Department's agreement referred to when it "*received*" the application, not when the application was *completed*. The focus on completion and the difference between applications and requests that the Department has debuted in this case were nowhere to be seen.

The Department dismisses all of this as its prerogative to enter into case-by-case arrangements to mitigate what it sees as the ambiguities in Section 401. Department Br. 28 n.3. But the Department cannot brush aside its past practices so easily. As the Commission explained, the Department's past views suggest that its current interpretation of Section 401 is nothing more than a litigating position cooked up for the first time in this case rather than the Department's considered views. JA807. And "[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988); *see also Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 244 n.3 (D.C. Cir. 2013) (declining to defer to a supposed longstanding agency interpretation expressed only in a single letter).

Finally, under the Department's own regulations, it should have deemed Millennium's application "complete" on receipt in November 2015. JA806. Under New York's regulations, a "complete application" is one that "is in an approved form and is determined by the department to be complete *for the purpose of commencing review* of the application *but which may need to be supplemented* during the course of review." N.Y. Comp. Codes R. & Regs. tit. 6, § 621.2(f) (emphases added). That describes Millennium's application perfectly. It was submitted on the approved joint application form and was sufficiently complete

that the Department staff could begin to review it—and in fact did begin to review it—even though it supposedly required additional supplementation. Even under the Department's atextual approach to Section 401, Millennium's application was "complete" and should have started the clock.

The Department responds that a "complete application" requires a complete environmental assessment or a draft environmental impact statement. *See* Department Br. 41 (citing N.Y. Comp. Codes R. & Regs. tit. 6, § 621.3(a)(7)). But that regulation applies only "[i]f a project is subject to the provisions of article 8 of" New York's Environmental Conservation Law, which the Department concedes the Valley Lateral Project is not. Department Br. 41-42; *see also* JA640 (Department's notice of complete application explaining that the Valley Lateral Project "is not subject to" article 8 of New York's Environmental Conservation Law). The Department contends that it requires a federal environmental assessment or draft environmental impact statement in its place (Br. 42), but does not cite any provision of New York law saying so. Millennium's application had everything that was required under New York law in November 2015; it should have been deemed complete—and the Section 401 waiver clock should have started—even if the Court were to somehow agree with the Department's reading of the statute.

II. PROTECT ORANGE COUNTY'S ADDITIONAL ARGUMENTS ARE JURISDICTIONALLY FORFEIT AND MERITLESS BESIDES.

Protect Orange County also presents a grab bag of alternative arguments—arguments the Department tellingly does not join. Protect Orange County claims that FERC lacks jurisdiction over the Valley Lateral Project; that FERC did not have the power to issue a Section 401 waiver order because there was no "application" pending before it; and that, even by FERC's interpretation of Section 401, the Department *did* "act" on the request within one year. None of these arguments is properly before this Court in this case. And even if the Court disagrees the arguments are not forfeit, they are plainly incorrect.

A. Protect Orange County's Additional Arguments Also Are Not Properly Before This Court.

1. *Protect Orange County cannot raise its argument regarding FERC's jurisdiction over the Valley Lateral Project in this petition.*

Protect Orange County's argument regarding FERC's jurisdiction suffers from a fatal threshold flaw: It is not properly raised in a petition to review FERC's waiver orders. Where agencies deal with issues across multiple orders, Federal Rule of Appellate Procedure 15(a) requires the petitioner "properly to designate the order to be challenged." *City of Benton v. Nuclear Reg. Comm'n*, 136 F.3d 824, 826 (D.C. Cir. 1998) (per curiam). Failure to name the correct order is grounds for

dismissal. *Id.*; *see also John D. Copanos & Sons, Inc. v. FDA*, 854 F.2d 510, 527 (D.C. Cir. 1988).

The only FERC orders that the Department, as petitioner, named are FERC's waiver order and the order denying rehearing of the waiver order. Those are also the only orders that Protect Orange County purports to challenge in this case. Protect Orange County Br. 3. But they are *not* the orders in which FERC addressed its jurisdiction over the Valley Lateral Project. FERC addressed that issue in its certificate order, JA541-549, and denied rehearing in a separate order from the ones that are the subject of this petition, *see Millennium Pipeline Co.*, 161 FERC ¶ 61,194 (Nov. 16, 2017). As Protect Orange County concedes (Br. 38), it has another petition for review pending before this Court right now challenging the orders that address its jurisdictional argument. *See Protect Orange County v. FERC*, No. 17-3966 (filed Dec. 8, 2017). The jurisdictional issue is properly addressed through that petition, not this one.

In any event, "[a]n intervening party may join issue only on a matter that has been brought before the Court by another party." *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990) (citing *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944)); *accord New York v. Atlantic States Marine Fisheries Comm'n*, 609 F.3d 524, 529 n.4 (2d Cir. 2010). This rule ensures that parties cannot circumvent the time for filing a petition for review, and applies even when

the proposed additional issues involve generally the same subject matter as the original petition. *Illinois Bell*, 911 F.2d at 786.

The Department has not challenged FERC's jurisdiction over the Valley Lateral Project. *See* Department Br. 4 (listing, as the sole "issue presented," the question "[w]hether the Department . . . reasonably interpreted [Section 401] as requiring a complete application in order to commence the one-year time period for the Department's review."). This Court "could grant [the Department] the full relief it seeks while rejecting all of" Protect Orange County's jurisdictional arguments, "and vice versa." *Illinois Bell*, 911 F.2d at 786. "It is clear, therefore, that" Protect Orange County is asking this Court "to expand this review proceeding by resolving an issue not raised in the petition[ ] for review." *Id.* This Court should therefore decline to address in this case the issue of FERC's jurisdiction over the Project.

2. *Protect Orange County's remaining arguments are jurisdictionally forfeit.*

Before a party may raise an issue in a petition for review from FERC, it must first raise those objections with the Commission in an application for rehearing that "enables the Commission to correct its own errors, which might obviate judicial review, or to explain why in its expert judgment the party's objection is not well taken, which facilitates judicial review." *Central Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 106 (2d Cir. 2015) (quoting *Save Our*

Sebasticook v. FERC, 431 F.3d 379, 381 (D.C. Cir. 2005)).[4] "Thus, to preserve an objection for judicial review, a party must raise it in a request for FERC rehearing 'with specificity.' " *Id.* (quoting *Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006)). This "jurisdictional requirement" is to be "strictly construe[d]." *Wisconsin Power & Light Co. v. FERC*, 363 F.3d 453, 459 (D.C. Cir. 2004). "[B]roadly charg[ing]" a similar error is not enough. *Office of the Consumers' Counsel v. FERC*, 914 F.2d 290, 295 (D.C. Cir. 1990).

In its rehearing application, Protect Orange County did not argue that FERC lacked the authority to declare the Department's Section 401 authority waived because there was no pending "application." SA1-43. It is therefore forfeit in this Court. *See Central Hudson*, 783 F.3d at 106.

Nor did Protect Orange County sufficiently preserve its contention that the Department in fact "acted" on the application in time by asking for more information. The argument, such as it was, spanned (charitably) two sentences at the end of a paragraph under a heading about the correctness of the Commission's timeline determination. SA22. Protect Orange County did not cite the statutory text, or any case law, or otherwise indicate that it was making an independent

[4] *Central Hudson* arose under the Federal Power Act, but the Federal Power Act and the Natural Gas Act have "identical provision[s] for judicial review." *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 58 (D.C. Cir. 2015); *accord Central Hudson*, 783 F.3d at 106.

argument about the meaning of "act." *See id.* Such a cursory treatment cannot "enable[ ] the Commission to correct its own errors" and thereby "obviate judicial review, or to explain why in its expert judgment the party's objection is not well taken." *Central Hudson*, 783 F.3d at 106 (citation omitted). This Court therefore lacks jurisdiction over Protect Orange County's claim that the Department "acted" within the one-year clock.

Even if, however, this Court were to find that Protect Orange County sufficiently put forth one or both of these arguments, they are beyond the scope of the single issue raised by the Dpartment—whether FERC correctly calculated the start date for the one-year clock. Department Br. 4. They are therefore not properly before this Court for that independent reason as well. *See Illinois Bell*, 911 F.2d at 786.

B. Protect Orange County's Additional Arguments Are Meritless.

Even if the Court were to find that Protect Orange County's additional arguments are properly raised, it should reject them as meritless.

1. *FERC has jurisdiction over the Valley Lateral Project.*

First, Protect Orange County argues that the Valley Lateral Project does not fall within FERC's jurisdiction because it is "simply a 7.8 mile local distribution facility to a sole end user, not the wholesale market, within the State of New York." Protect Orange County Br. 38. This simplistic description, focusing only

on the new infrastructure to be constructed, overlooks the Project's nexus to interstate natural-gas transportation.

Congress has entrusted FERC with exclusive jurisdiction over, among other things, "the transportation of natural gas in interstate commerce." 15 U.S.C. § 717(b). Even where all the physical infrastructure of a project lies within the boundaries of a single State, FERC has jurisdiction if the facility will be used to transport "gas commingled with other gas indisputably flowing in interstate commerce." *Oklahoma Nat. Gas Co. v. FERC*, 28 F.3d 1281, 1285 (D.C. Cir. 1994). This Court defers to FERC's interpretations of its statutory jurisdiction so long as those interpretations are reasonable. *See New York v. FERC*, 783 F.3d 946, 953 (2d Cir. 2015) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

As FERC explained in the certificate order, it has jurisdiction over the Valley Lateral Project. JA544-549. The Project will transport gas "from upstream interconnections with, among others, the interstate pipeline systems operated by National Fuel and Tennessee Gas Pipeline Company . . . , which receive gas at points outside New York." JA544. And "Millennium's construction of the lateral will enable it . . . to provide displacement service for shippers that tender their gas at mainline receipt points that are downstream of their delivery points." JA547.

The Commission therefore reasonably determined that it had jurisdiction. *See Oklahoma Nat. Gas*, 28 F.3d at 1285, 1287.

2. *There was an "application" pending before FERC when the waiver order issued.*

Protect Orange County also argues that "the plain reading of Section 401" precludes FERC from declaring a State's Section 401 authority to be waived after it issues a certificate—even if the certificate remains conditioned on the acquisition of additional permits—because FERC only possesses the waiver power when there is a "Federal application" pending before it. Protect Orange County Br. 15-17. This argument is doubly flawed.

First, it rests on an implausible premise: that Congress sought to impose an implicit temporal limit on FERC's Section 401 waiver authority simply by using the word "application." The Clean Water Act does not specify whether it is referring to an application that is still pending or one that has already been acted upon. *See* 33 U.S.C. § 1341(a)(1). Nor has Protect Orange County pointed to any indication—textual or otherwise—suggesting that Congress was focused on *when* FERC would exercise its waiver authority. If anything, Protect Orange County's interpretation is at odds with Congress's stated intent of ensuring that States could not thwart federal applications through unnecessary delay. *See* H.R. Conf. Rep. No. 91-940. And if Congress was attempting to impose a temporal limit on the

waiver power, it would surely have done so with clearer language. *Cf. NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 939 (2017).

But even accepting Protect Orange County's implausible premise, its conclusion does not follow. That is because, as the D.C. Circuit recently explained, the word "application" as it is used in Section 401 does not necessarily refer to an application for a certificate; rather, the relevant "application" is for "the construction or operation of facilities, which may result in any discharge into the navigable waters." *See Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 393 (D.C. Cir. 2017) (quoting 33 U.S.C. § 1341(a)(1)). When FERC issues a certificate order that is conditioned on the acquisition of additional permits, as it did here, FERC has not yet authorized "such discharge." *Id.* (citation omitted). It has merely taken "a first step . . . in the complex procedure to actually obtaining construction approval." *Id.* at 398. In this case, Millennium was not authorized to begin construction until FERC issued the notice to proceed—over a month *after* it issued the waiver order. JA753, 783-784. Thus, the relevant "application" was still pending when FERC issued its waiver order.

3. *The Department did not "act" on Millennium's application within one year.*

Finally, Protect Orange County argues (Br. 34-37) that even if FERC and Millennium are correct that the one-year clock began to run in November 2015, the Department "acted" within the meaning of Section 401 because it "acted many

times [to] gather information needed to process Millennium's Section 401 certificate request" during the ensuing year. Not even the Department makes that argument, and for good reason. The "act" required by Section 401 is to approve, deny, or condition the request for certification.

The "deadline . . . established by section 401 of the [Clean Water] Act . . . requires a State to *grant or deny* the certificate 'within a reasonable period of time (which shall not exceed one year).' " *Millennium Pipeline*, 860 F.3d at 698 (emphasis added and citation omitted). Through the one-year deadline, "Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request." *Alcoa Power*, 643 F.3d at 972. "This is clear from the plain text," and reinforced by the Conference Report, which "states that the time limitation was meant to ensure that 'sheer inactivity by the State . . . will not frustrate the federal application.' " *Id.* (quoting H.R. Conf. Rep. 91-940, at 56 (1970)). In light of this express congressional purpose, the only plausible interpretation of "act" under Section 401 is that an up-or-down (or conditioned) decision on the merits is required—one that "would allow the Commission to proceed with licensing." *Id.* Reading the statute to bless "incomplete action," and thus permit a recalcitrant agency to re-start the one-year clock every time it took *any* "action" relating to the

pending application, no matter how ministerial, would result in precisely the "frustration" that Congress sought to forestall. *Id.*

The sole authority that Protect Orange County offers is *Kokajko v. FERC*, 837 F.2d 524 (1st Cir. 1988). According to Protect Orange County, that case suggests that "act" "does not necessarily connote a final ruling on the merits." Protect Orange County Br. 34. *Kokajko* is distinguishable for several reasons.

First and foremost, *Kokajko* dealt with what it means for FERC to act within 30 days of a rehearing application. *See* 837 F.2d at 525. It held that, in addition to issuing a final decision on the merits, the statutory requirement that FERC "act" on a rehearing motion within 30 days also authorized it to issue "tolling orders" to extend its time to consider the motion. *See id.*

Section 401 is critically different from the rehearing procedures at issue in *Kokajko*, because Congress intended that Section 401's deadline be strictly enforced. *See Millennium Pipeline*, 860 F.3d at 698-699. That concern is reflected both in the text of the Natural Gas Act—which authorizes a party to petition the D.C. Circuit for review in the event of agency delay, *see* 15 U.S.C. § 717r(d)(2)—and the Clean Water Act's legislative history—which stated Congress's intent "that sheer inactivity by the State" cannot be allowed to "frustrate the Federal application," H.R. Conf. Rep. 91-940. By contrast, there is no statutory mechanism to enforce FERC's 30-day rehearing deadline; mandamus is the only

remedy. *Kokajko*, 837 F.2d at 526. And, because Section 401 already affords States as much as a full year to reach a decision, the *Kokajko* court's concern that an agency pressed by a 30-day turnaround have the "time . . . it needs to review more fully the arguments raised in the application for rehearing" does not have nearly the same force in Section 401's accommodating context. *See id.*

Even if the Court were to import *Kokajko*'s reading of "act," however, the Department's actions would fall short of that definition. *Kokajko* recognized only that a tolling order extending FERC's time to respond to an application for rehearing qualified as an "act." *Id.* at 525. It did not recognize that the intermediate and equivocal actions highlighted by Protect Orange County here—simply requesting more information without purporting to extend the time to consider the application—would measure up. *Id.* Protect Orange County's reliance on *Kokajko* is therefore doubly misplaced and their argument that the Department "acted" within one-year should be rejected (if, again, it is reached at all).

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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I certify that on January 11, 2018, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

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