17-3770

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, Chair of Protect Orange County, PROTECT ORANGE COUNTY, (POC) an association,

Intervenors,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

MILLENNIUM PIPELINE COMPANY, L.L.C.,

Intervenor.

PETITION FOR REVIEW FROM THE FEDERAL ENERGY REGULATORY COMMISSION, DOCKET NO. CP16-17

REPLY BRIEF FOR PETITIONER

BARBARA D. UNDERWOOD
Solicitor General
ANDREW D. BING
Deputy Solicitor General
FREDERICK A. BRODIE
Assistant Solicitor General
LISA M. BURIANEK
Deputy Bureau Chief
BRIAN LUSIGNAN
Assistant Attorney General
of Counsel

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for Petitioner
Albany, New York 12224-0341
(518) 776-2317

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PRELIMINARY STATEMENT

The Department[1] submits this Reply Brief in further support of its petition for review of FERC's orders authorizing Millennium to construct a natural gas pipeline without first obtaining a Clean Water Act section 401 certification. *See* 33 U.S.C. §1341(a)(1).

The Department reasonably interpreted section 401 as requiring a complete application before the one-year deadline for water-quality review commences. As set forth below and in the Department's Opening Brief, the FERC orders under review should be vacated because the Department did not waive its right to review the pipeline's effects on water quality.

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[1] The abbreviations and citation forms adopted in the Department's opening brief (ECF #152) ("Br.") are continued herein. FERC's brief (ECF #173) is cited as "FERC Br." The brief of respondent-intervenors Millennium and CPV Valley, LLC (together, "Millennium") (ECF#176) is cited as "Millennium Br." The brief of amici curiae Appalachian Mountain Advocates, Inc. *et al.* is cited as "Amici Br."

ARGUMENT

POINT I

THE DEPARTMENT'S INTERPRETATION OF SECTION 401 IS ENTITLED TO DEFERENCE

Although the EPA is generally tasked with interpreting the Clean Water Act, *see Alcoa Power Generating Co. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011), courts have deferred to other agencies, such as the Army Corps, that are responsible for implementing specific sections of the Clean Water Act. *See, e.g., AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 729 (4th Cir. 2009). Here, it is appropriate to defer to the Department, as the state agency responsible for implementing and enforcing section 401.

The application of water quality standards is a "primary responsibilit[y] and right[]" of the states. 33 U.S.C. §1251(b). Congress expressly declared the Clean Water Act's policy "to recognize, preserve, and protect" the states' rights to "prevent, reduce, and eliminate pollution" and "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." *Id.* As recognized in the Senate Report on the Clean Water Act, it was "an important principle of public policy" that "[t]he States shall lead the

national effort to prevent, control and abate water pollution." S. Rep. No. 92-414 (Oct. 28, 1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3669. Accordingly, "[t]he purpose of the certification mechanism provided in [section 401] is to assure that Federal licensing and permitting agencies cannot override State water quality requirements." *Id.* at 3735.

Because state agencies are responsible for enforcing water quality standards under Clean Water Act §401, the general rule that courts do not defer to state agency interpretations of federal statutes does not apply. *Cf. City of Bangor v. Citizens Commc'ns Co.*, 532 F.3d 70, 94 (1st Cir. 2008) ("Federal courts generally defer to a state agency's interpretation of those statutes it is charged with enforcing, but not to its interpretation of federal statutes *it is not charged with enforcing*." [emphasis added]). Although this might result in states adopting differing procedural, as well as substantive, requirements under section 401 (*see* Millennium Br.28), that result is consistent with the Congressional purpose underlying the Clean Water Act. Indeed, FERC concedes that "[s]tates remain free to fashion procedural regulations they deem appropriate." FERC Br.34.

In *Perry v. Dowling*, this Court held that in the context of a "joint federal-state program," deference to state agency interpretations of

federal law is appropriate. 95 F.3d 231, 236 (2d Cir. 1996). Section 401 is a classic example of a joint federal-state program, in which the states are given responsibility for enforcing federal water-quality standards in addition to their own. FERC cites *Perry* out-of-context as holding that deference is not appropriate. FERC Br.28. Millennium suggests that *Perry* is inapposite because the Department's interpretation of the waiver period has not been "expressly" approved by a federal agency. Millennium Br.28. However, the Department's interpretation is consistent with the interpretation adopted by the Army Corps, *see* 33 C.F.R. §325.2(b)(1)(ii), which has itself been accorded judicial deference. *AES Sparrows*, 589 F.3d at 729.

Although Millennium accuses the Department of developing its interpretation of section 401 as a "litigating position cooked up for the first time in this case" (Millennium Br.33), the Department expressed its understanding of section 401 to Millennium in November 2016, before any litigation over this project had commenced. J.A.617-619. Likewise, the fact that the Department historically has worked with applicants to extend the timeframe for review consensually and avoid an inadvertent waiver (Millennium Br.31-33) does not preclude the Department from adhering to its interpretation of section 401 when, as here, those methods

are unavailing. *See* Crounse Dec. in Support of Stay, ECF#7-1, ¶7 (explaining the Department's approach to developing the section 401 applications for natural gas pipelines proposed by Constitution and National Fuel Gas).

Contrary to FERC's suggestion that its interpretation of the Clean Water Act should receive special "consideration" (FERC Br.27-28) or Millennium's suggestion that FERC receive "deference" (Millennium Br.31), FERC is not charged with interpreting or enforcing the Clean Water Act and its interpretation of section 401 is owed no deference. *See Am. Rivers, Inc. v. Vermont*, 129 F.3d 99, 107 (2d Cir. 1992); *see also Alcoa Power Generating Co.*, 643 F.3d at 972 (cited at FERC Br.26-27 and Millennium Br.24, 43).

Lastly, to the extent that Millennium and FERC suggest that the Administrative Procedure Act's "arbitrary and capricious" standard of review should apply (Millennium Br.11; FERC Br.28), this case presents an issue of statutory interpretation which is governed by *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842-43 (1984), not the "arbitrary and capricious" standard. *See Florida Manufactured Housing Ass'n, Inc. v. Cisneros*, 53 F.3d 1565, 1571-72 (11th Cir. 1995).

POINT II

CLEAN WATER ACT SECTION 401 IS AMBIGUOUS AS TO WHEN THE WAIVER PERIOD COMMENCES

Section 401(a) of the Clean Water Act contains at least two facial ambiguities:

- Does a "request for certification" mean a complete request (as the Department contends), or an incomplete, bare-bones application (as FERC contends)?
- Does "receipt of such request" refer to receipt of the material necessary to make the request complete and suitable for public notice and comment (as the Department contends), or just to receipt of an incomplete, bare-bones application (as FERC contends)?

FERC and Millennium nonetheless maintain that section 401 is unambiguous regarding the commencement of the waiver period. FERC Br.30-32; Millennium Br.15-18. Their position conflicts with the holding of the only federal circuit court to consider the issue and is inconsistent with the fact that federal agencies considering the issue, including FERC itself, have interpreted the clause in varying ways.

FERC and Millennium unsuccessfully seek to minimize the Fourth Circuit's holding that section 401 "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*, 589 F.3d at 729. Contrary to FERC's suggestion (FERC Br.39-40), the Fourth Circuit's conclusion that section 401 is ambiguous was not limited to the context of an Army Corps permit. *AES Sparrows*, 589 F.3d at 729. Although the Fourth Circuit does not bind this Court (*see* FERC Br.41; Millennium Br.19-20), this Court strives to avoid circuit conflicts "lest the Supreme Court's ability to resolve conflicts among the circuits be impaired by the sheer number of such conflicts." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 580 (2d Cir. 1991), *aff'd* 505 U.S. 830 (1992).

Moreover, the Fourth Circuit's finding of ambiguity is reinforced by the disparate interpretations of section 401 adopted by federal agencies.

The Army Corps regulation at issue in *AES Sparrows* directly supports the Department's interpretation of section 401 as requiring a complete application. *See* 33 C.F.R. §325.2(b)(1)(ii). Millennium incorrectly claims that the Army Corps regulation does not equate a "valid" application with a "complete" application. Millennium Br.20. But the Army Corps regulations specifically require that an application be

"complete." *See* 33 C.F.R. §325.2(a)(2). Moreover, in enacting the waiver regulation, the Army Corps noted that "valid requests for certification must be made in accordance with State laws[.]" 51 Fed. Reg. 41,206, 41,211 (Nov. 13, 1986). New York state laws, in turn, require an applicant to submit a complete application as a prerequisite to the Department's review as well as public notice and comment on the application. ECL §§70-0105(2), 70-0109(2); 6 N.Y.C.R.R. §§621.3(a), 621.7(a). Accordingly, a "valid" application necessarily is a "complete" one.

Similarly, in the context of certain Clean Water Act permits, EPA regulations allow the agency to specify a reasonable time for states to consider section 401 applications after EPA forwards the application to the state and notifies the state of the deadline to act. *See* 40 C.F.R. §124.53(a), (b). Although FERC attempts to distinguish the EPA regulation as inapplicable to natural gas projects (FERC Br.37-38), the point is that EPA's differing interpretation of the identical language shows section 401's susceptibility to multiple readings.

FERC's hydropower regulations further illustrate section 401's ambiguity, notwithstanding Millennium's arguments to the contrary (Millennium Br.22). Until 1987, FERC required that section 401 applications be in the appropriate form for processing before the waiver

period commenced. FERC noted that "[i]f applicants for certification were able to trigger the running of the one-year waiver period by filing applications devoid of appropriate information, the states would have a difficult time acquiring the information necessary to make informed decisions on such requests." *Washington County Hydropower*, 28 FERC ¶ 61,341 (1984). Although FERC departed from that interpretation in a formal regulation, *see* 52 Fed. Reg. 5,446 (Feb. 23, 1987), the concern expressed by FERC in *Washington County* remains valid. At minimum, it demonstrates that section 401 is susceptible to more than one interpretation as to when the waiver period commences.

POINT III

THE DEPARTMENT'S INTERPRETATION OF SECTION 401 AS REQUIRING A COMPLETE APPLICATION EFFECTUATES THE STATUTE'S LANGUAGE AND PURPOSE

The Department's interpretation of section 401 requires that an applicant submit a complete request for a section 401 certification before the timeframe for the Department's review would commence. This interpretation is wholly consistent with section 401's language, furthers its goal of preserving state authority over state water quality issues,

assures that opportunities for public notice and comment are meaningful, and will not result in unreasonable delay to the permitting process.

A. The Department's Interpretation is Consistent with the Statute's Language

1. The Department Reasonably Interprets the Term "Receipt"

The Department's reading of section 401 is consistent with the definition of "receipt" tendered by both FERC and Millennium: "the act or process of receiving." FERC Br.30; Millennium Br.9, 16. The Department agrees with FERC and Millennium that "receipt" is a "process." As amici point out (Amici Br., ECF#154-2, at 11, 15), and as this case illustrates, the data necessary to evaluate a section 401 application often trickle in over time. Here, the "process of receiving" Millennium's application did not conclude until August 31, 2016, the date as of which the Department deemed the application complete.

This Court's decision in *United States v. Ramos*, 685 F.3d 120, 131 (2d Cir. 2012) (cited at FERC Br.30), is not to the contrary. That case cited the ordinary meaning of "receive" as "to knowingly accept; to take possession or delivery of; or to take in through the mind or senses." *Ramos*, 685 F.3d at 131 (internal quotation marks and citations omitted).

The Department did not "accept" Millennium's application until it was complete, and did not have "possession," "take delivery of," or "take in through the mind or senses" Millennium's application until August 31, 2016, when it was complete. *See* J.A.128, 401 (notifying Millennium that application was incomplete).

2. The Department Reasonably Interprets the Word "Request"

Millennium's argument that its November 2015 submission qualified as a "'request for certification' under the Department's own definition" (Millennium Br.18-19) is equally wrong. The Department defined "request" according to its common usage as "'a[n] act of asking politely or formally for something.'" Br.35. To ask for something "formally" means that to do so "[f]ollowing or according with established form, custom, or rule." *See* https://www.merriam-webster.com/dictionary/formal. A partial, incomplete application is not in accordance with "established form, custom, or rule."

3. The Department Has Not Added Language to the Statute

FERC and Millennium are wrong in claiming that the Department's view of when the waiver period commences would add

words to the statute. FERC Br.38-39; Millennium Br.17. The Department reasonably understands the word "request" in section 401 as referring to a complete request, not just a bare-bones form. That understanding is true of most nouns: the noun refers to the complete thing, and a modifier must be added if you intend to describe an incomplete or partial version of the noun. For example, if you say "I have an apple," that naturally is understood to mean a complete apple. If you have less than a complete apple—for example, half an apple—you would need to add descriptors to communicate that fact more precisely. Thus, it is ordinarily unnecessary to add the word "complete" when referring to a "request."

The interpretation advanced by FERC and Millennium, in contrast, itself adds new language to section 401. FERC and Millennium would require readers to replace the word "request" with the phrase "any application, however incomplete."

The Clean Air Act provision cited by FERC and Millennium as requiring a "completed application," (FERC Br.39; Millennium Br.18), is inapposite. As used in the Clean Air Act, that phrase refers to "an application for a permit signed by a responsible official, who shall certify the accuracy of the information submitted." 42 U.S.C. §7661b(c). The

word "completed" reflects that signing requirement, which is not present in Clean Water Act §401.

Further, one must consider the operative term "request" as opposed to "application." Numerous authorities refer to "incomplete requests"—the modifier being necessary because a "request," without more, is usually understood to be complete. *See, e.g.,* 15 U.S.C. §2645(d)(3) (describing procedure if deadline-deferral "request is incomplete"); 31 C.F.R. §256.14 ("What happens if I submit an incomplete request for payment?"); 22 C.F.R. §1304.4(b) (describing process for responding to "Incomplete Requests" for records); 32 C.F.R. §312.7 ("[i]ncomplete requests shall not be honored"); 5 C.F.R. §2100.7(c) (same); 49 C.F.R. §92.43(a) (describing procedure for handling "[i]ncomplete request for recovery"); *U.S. v. Henson,* 945 F.2d 430, 436 (1st Cir. 1991) ("premature and incomplete request" would not be treated as effective under Interstate Agreement on Detainers Act).

In other words, referring to a "request" alone generally implies that the request is complete; additional qualification is usually required when referring to a "request" that is *not* complete.

4. The Department's Interpretation Gives Each Word Meaning

As FERC points out (FERC Br.30-31), the word "application" appears elsewhere in section 401. *See, e.g.,* 33 U.S.C. §1341(a)(1) (scope of waiver extends "to such Federal application"); 33 U.S.C. §1341(a)(2) ("Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator[.]"). But the word "application" does *not* appear in the operative phrase describing the circumstances that trigger the waiver period. Instead, the waiver period is triggered by the receipt of a "request for certification." 33 U.S.C. §1341(a)(1).

While FERC urges that Congress is "entitled to use synonyms," (FERC Br.31), the "basic rule[] of statutory interpretation" remains that "each word" of a statute should be given "full effect and meaning." *U.S. v. Roberts*, 442 F.3d 128, 131 (2d Cir. 2006); *accord Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004). "It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words." *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003); *see Mary Jo C. v. N.Y. State & Local Retirement Sys.*, 707 F.3d 144, 156 (2d

Cir. 2013) (where "Congress uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended" [citation omitted]). Accordingly, when Congress used the word "request," it is at least reasonable for the Department to conclude that Congress meant something different from the word "application" elsewhere in the statute.

Although Millennium cites a Supreme Court case noting that different words can have roughly the same meaning (Millennium Br.18), that is true where no "language, context, purpose, or history" counsels against the result. *See Kirtsaeng v. John Wiley & Sons*, 568 U.S. 519, 540 (2013). Here, the Department has provided cogent reasons why a request should be complete before it triggers the one-year waiver deadline. *See* Br.29-34, 39-40.

5. FERC's Interpretation Does Not Avoid Confusion

FERC urges that Congress used the word "request" because "[t]wo uses of 'application' in the same sentence could reasonably cause confusion." FERC Br.31. The opposite is true in this case. If Congress had intended the one-year waiver period commence upon the filing of an application form, then using the word "application" twice would have

eliminated ambiguity. Instead, Congress drafted section 401 to start the one-year waiver period with a "request," which, as discussed above, may reasonably be understood to mean more than just a bare application form.

B. The Department's Interpretation Furthers the Policies Underlying the Clean Water Act

1. The Department's Interpretation Promotes Public Participation and the Collaborative Development of Applications

Requiring a complete application to trigger the waiver period furthers section 401's requirement of public notice and the Department's public comment requirements. *See* Br.31-33. Section 401 specifically requires states to adopt procedures for public notice of all applications and public hearings for certain applications. 33 U.S.C. §1341(a)(1). New York law, in turn, requires a complete application *before* the public notice period commences. *See* ECL §70-0109(2); 6 N.Y.C.R.R. §621.7(a). Allowing public comment to go forward without a complete application would deprive the process of meaning, because critical details about the project would be withheld from the public's consideration.

Simply denying an incomplete application without prejudice—as suggested by both FERC and Millennium (FERC Br.34-35; Millennium

Br.23, 25)—would be inconsistent with the Department's regulations, although potentially necessary if this Court upholds FERC's interpretation. When the Department receives an incomplete application, it issues a notice of incomplete application. 6 N.Y.C.R.R. §621.6(c). If an applicant fails to respond to a notice of incomplete application within one year, the application is not denied outright, but "deemed withdrawn." 6 N.Y.C.R.R. § 621.6(f). To assure that there is an opportunity for meaningful public input, the Department must deem an application complete before initiating public notice and comment. *See* 6 N.Y.C.R.R. §§621.6(g), 621.7(a). The New York regulations contemplate a final decision to grant or deny a permit only *after* an application has been deemed complete and public notice provided. *See* 6 N.Y.C.R.R. §621.10(a). The procedure urged by FERC and Millennium would result in applications being denied without providing the applicant its one-year period to provide supplemental information and without any public notice or comment.

Even if the option suggested by FERC and Millennium were available to the Department, it would not be preferred. First, it would prevent the Department from continuing its regular practice of working cooperatively with applicants when additional information is needed for

the Department to consider and decide an application. Second, it would circumvent the public's opportunity to comment on a complete application under section 401, because the Department would be making a decision on an incomplete application prior to public comment.

According to FERC, the submission of any written request for a section 401 certification—including, for example, Millennium's two-page joint application form with the box for "401 Water Quality Certification" checked (J.A.29)—is sufficient to start the clock running on the Department's time for review. *See* FERC Br.31. That position does not survive scrutiny; surely, an application must contain enough information for a state agency to render an informed decision before the Department's failure to render such decision would result in waiver.

If FERC's interpretation of section 401 were to prevail, an applicant could submit a bare-bones application asking for a section 401 certification, and then supplement that application materially at a much later date.[2] If the Department denies the application as incomplete, the applicant could then sue in federal court and argue that the necessary

[2] Moreover, a substantial portion of the Department's one-year period of review would be consumed by FERC's environmental review under NEPA.

information had been provided. While the Department would have received the necessary information late in the process, it would not have had the statutory one-year period to *review* that information for compliance with state water quality standards, or to provide public notice and solicit meaningful public comment as required by section 401 and state procedural laws. *See* Br.25, 33. As amici explain, the Department's fear of such a scenario is well-founded, as applications for section 401 certifications often require development through supplemental submissions over a prolonged period of time. *See* Amici Br.8-16.

Further, to avoid the risk of sandbagging by applicants, the Department would not only need to deny an incomplete application without prejudice; it would also have to do so *immediately*, cutting off the applicant's ability to supplement the submission. Such a practice would be inimical to collaboration between the Department and applicants, and would leave no room for public comment.

Nor would denials without prejudice result in a shorter process. The successive denial of a series of repeated applications would require at least as much time as the Department's practice of working with applicants to develop their applications. Moreover, any denial of a section 401 application, even if issued without prejudice, could be subject to

judicial review in an appropriate court. If applicants avail themselves of such review rather than improving their applications, it would create further inefficiencies and delays in the administrative process.

2. A Section 401 Water Quality Certification Plays an Important Role in the Evaluation of Proposed Projects

Millennium's pipeline should not be constructed without a water quality certification, based solely on FERC's Certificate of Public Convenience and Necessity and its Environmental Assessment. (*See* FERC Br.13; Millennium Br.7.) The Certificate states that cumulative impacts to water resources will be minimized *provided that* Millennium complies with "mitigation requirements and conditions" contained in a section 401 certification. J.A.582. The Certificate specifically requires Millennium to obtain a section 401 certification or prove that waiver occurred. J.A.593. Similarly, the Environmental Assessment assumed that Millennium would obtain and comply with a section 401 certification in order to minimize water quality impacts from the Project. *E.g.* J.A.256-257, 336. Thus, neither FERC's Certificate nor its Environmental Assessment should be relied upon for water quality issues, because they expected those issues would be handled by the Department.

Nor is Millennium's application sufficient to take the place of a state water quality review. Although FERC and Millennium each refer to Millennium's "1,200-page application" (FERC Br.4, 16; Millennium Br.19), the submission's size is not determinative. A 1,200-page submission may still be inadequate if it fails to address a material issue. For example, with respect to "[a]nticipated [i]mpact[s]" to state and federal endangered or threatened species, Millennium's application contained the placeholder "TBD." J.A.87. The Department's two Notices of Incomplete Application and comments to FERC identified that and other issues on which further information was required, and Millennium provided information in response. J.A.128, 130, 199, 393, 401, 407, 441, 472.

C. Requiring a Complete Application Will Not Cause Indefinite Delay

FERC's concern that the Department's interpretation of section 401 would result in "indefinite[] delay[]" due to "sheer inactivity" by state agencies (FERC Br.8, 36-37) does not warrant overriding the states' statutory role in implementing the Clean Water Act. To begin with, no such delay occurred here. The Department was involved in every stage of Millennium's permitting process, including the FERC proceeding and the

separate section 401 certification review. *E.g.* J.A.130, 194, 393. The Department twice notified Millennium that its application was incomplete. J.A.128, 401. Ultimately, the Department concluded that Millennium's application was complete as of August 31, 2016. J.A.639. It solicited comments and held a public hearing on the project. J.A.661-735. The Department denied the section 401 certification on August 30, 2017, less than one year after receiving the complete application. J.A.736. Far from "sheer inactivity," the Department has been an active and engaged participant in the permitting process.

Millennium does not tell the whole story when it claims to have "heard nothing from the Department about its application" for five months after the first notice of incomplete application in December 2015. Millennium Br.5. The Department provided detailed comments on Millennium's proposed project to FERC two weeks after issuing the first notice of incomplete application, J.A.130, and provided further comments in March 2016 in response to Millennium's supplemental submissions, J.A.194. Millennium was copied on those submissions, received them through the FERC docket, and ultimately responded to them. J.A.130, 135, 194, 199. Thus, even while the Department was waiting for FERC

to issue its Environmental Assessment, it was working diligently with Millennium to develop the application.

The Department could not string out the review process indefinitely, in any event. Important checks constrain the Department's discretion to find applications incomplete.

To begin with, the Department's regulatory process on natural gas pipeline applications remains subject to FERC oversight. If an applicant believes it has submitted a complete request, it can present that argument to FERC and seek a finding that the request was indeed complete and the Department therefore waived its review. *See Millennium Pipeline v. Seggos*, 860 F.3d 696, 701 (D.C. Cir. 2017).

Further, New York statutes and the Department's regulations restrict the timing, content, and form of notices of incomplete application. *See* ECL §70-0109(1); 6 N.Y.C.R.R. §621.6(c), (d). For example, the regulations generally require the Department to issue a notice of incomplete application within 60 days of its receipt of an application for a federally-delegated permit or 15 days of its receipt of any other permit. 6 N.Y.C.R.R. §621.6(c). Failure by the Department to fulfill these requirements would result in an application being "deemed complete." 6 N.Y.C.R.R. §621.6(h). Where the Department fails to act on complete

application in a timely manner, an applicant can request a decision and the Department must respond to that request within five days, or the permit application will be deemed approved. 6 N.Y.C.R.R. §§621.10(b), (c).

Finally, in cases where the Natural Gas Act's exclusive judicial review provisions do not apply, an applicant can seek to compel agency action in state court. *See* N.Y. Civ. Prac. L. & R. 7803(1); H.R. Rep. No. 92-911, 92d Cong., 2d Sess., at 122 ("If a State refuses to give a certification [under the contemplated §401], the courts of that State are the forum in which the applicant must challenge the refusal if the applicant wishes to do so."), *reprinted in* Congressional Research Service, A Legislative History of the Water Pollution Control Act Amendments of 1972 (1973) at 809.

D. The Department Complied With Its Own Regulations

As FERC acknowledges (FERC Br.42 n.3), the issue of the Department's compliance with its own regulations is not before this Court. In any case, the Department complied with its own regulations. *See* Br.41-43.

First, the Department did not err in waiting for FERC's Environmental Assessment before deeming Millennium's application complete. *Compare* Millennium Br.5, 34. Although the Department's regulations generally require an environmental review under the state's environmental review act (SEQRA), 6 N.Y.C.R.R. §621.3(a)(7), the Department considers a federal NEPA review to take the place of a state SEQRA review in the case of permits, such as natural gas pipeline certificates, for which the state environmental review is preempted. Crounse Reply Dec. ¶5 (ECF#39-2).

The Department made its position on this point clear in its first notice of incomplete application and in its comments to FERC. J.A.128, 130, 194-195. The Department's letter denying Millennium's section 401 certification likewise described its policy of having a federal environmental review "take[] the place of an environmental review conducted under [SEQRA]." J.A.736-737. The Department's pragmatic and common-sense approach of requiring an environmental review before commencing its own water-quality review is a reasonable interpretation of its regulations. *See generally Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (courts afford "substantial deference" to an agency's interpretation of its own regulations).

Second, the Department acted appropriately when it twice determined the application to be incomplete, despite Millennium's arguments to the contrary. *See* Millennium Br.33-34. Under New York law, an application is complete only when it "is determined by the [D]epartment to be complete for the purpose of commencing review." ECL §70-0105(2); 6 N.Y.C.R.R. §621.2(f). The Department's determination of completeness triggers public notice and comment. ECL §70-0109(2); 6 N.Y.C.R.R. §621.7(a). The exact extent of information necessary for the Department to commence review and solicit meaningful public comment is necessarily a matter of regulatory judgment.

Here, the Department first determined that the application could not be considered complete until FERC's environmental review under NEPA had been conducted (J.A.130), and then concluded that the application remained incomplete because it failed to address impacts to state and federal threatened and endangered species or include other relevant information relating to water quality impacts (J.A.401-405). Those two determinations were legally and factually supported; indeed, FERC and Millennium later supplied the missing information.

Finally, the Department's position is bolstered by Millennium's argument that, under the Department's regulations, a "complete"

application still "may need to be supplemented during the course of review." Millennium Br. 33 (citing 6 N.Y.C.R.R. § 621.2(f)). The Department does not require that every scrap of data be collected before review commences. Rather, the Department reasonably requires the request to contain information that, in its judgment, is sufficient to enable the public notice and comment process to go forward. For example, in this case, the Department found Millennium's application to be complete as of August 31, 2016, when the Department received responses on the matters addressed by the second notice of incomplete application. *See* J.A.618. Millennium, however, also submitted supplemental information regarding modifications in proposed construction techniques, which did not affect the completeness of its application. *See* J.A.491.

The Department's actions, in short, have been reasonable and responsible. They have also been consistent with the Clean Water Act's policies and the Department's own regulations. FERC's finding of waiver should consequently be vacated.

CONCLUSION

For the reasons set forth above and in the Department's Opening Brief, the Petition should be granted and FERC's Waiver Order and Rehearing Order should be vacated.[3]

Dated: January 17, 2018
Albany, New York

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Petitioner

By: */s/ Brian Lusignan*
BRIAN LUSIGNAN
Assistant Attorney General
The Capitol
Albany, New York 12224
(518) 776-2399

BARBARA D. UNDERWOOD
Solicitor General
ANDREW D. BING
Deputy Solicitor General
FREDERICK A. BRODIE
Assistant Solicitor General
LISA M. BURIANEK
Deputy Bureau Chief
BRIAN LUSIGNAN
Assistant Attorney General of Counsel

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[3] Two matters referenced by FERC and Millennium are not at issue in this proceeding. First, the merits of the Department's denial of Millennium's section 401 application (*see* Millennium Br. 10), are subject to review in a separate proceeding in this Court that is being held in abeyance pending the outcome of this case. *See Millennium Pipeline Co. v. N.Y.S. Dep't of Envt'l Conserv.,* No. 17-3465 (2d Cir.). Second, Millennium's challenge in the Northern District of New York to the Department's authority to require certain state water quality permits (*see* FERC Br. 22), likewise is a separate proceeding presenting separate issues that do not affect the Court's resolution of the Department's petition here. *See Millennium Pipeline Co. v. N.Y.S. Dep't of Envt'l Conserv.,* No. 17-cv-1197 (N.D.N.Y.).

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/s/ *Brian Lusignan*
BRIAN LUSIGNAN
Assistant Attorney General
The Capitol
Albany, New York 12224
(518) 776-2399

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2018, a copy of the foregoing was filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Brian Lusignan
BRIAN LUSIGNAN
Assistant Attorney General
The Capitol
Albany, New York 12224
(518) 776-2399