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, PRAMILA MALICK, AND PROTECT ORANGE COUNTY,
Intervenors,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

MILLENNIUM PIPELINE COMPANY, LLC,
Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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January 11, 2018

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GLOSSARY

Advocates	*Amici* Appalachian Mountain Advocates, Inc., Catskill Mountainkeeper, Natural Resources Defense Council, Riverkeeper, Inc., Sierra Club, and Waterkeeper Alliance, Inc.
Advocates Br.	Brief of *amici* Advocates
Br.	Opening brief of Petitioner
Certificate Order	*Millennium Pipeline Co., L.L.C.*, 157 FERC ¶ 61,096 (Nov. 9, 2016), JA 538
Certificate Rehearing Order	*Millennium Pipeline Co., L.L.C.*, 161 FERC ¶ 61,194 (Nov. 16, 2017), JA 818
Commission or FERC	Federal Energy Regulatory Commission
Department	Petitioner New York State Department of Environmental Conservation
Intervenors	Sarah E. Burns, Amanda King, Melody Brunn, Brunn Living Trust, Pramila Malick, and Protect Orange County
Int. Br.	Opening brief of Intervenors
JA	Joint Appendix
Millennium	Millennium Pipeline Co., L.L.C.
Millennium Add.	Supplemental Addendum to Millennium's brief, filed January 11, 2018
NGA	Natural Gas Act
P	Paragraph number in a Commission order
Project	Millennium's Valley Lateral Project
R.	Record item in the certified index to the record

Waiver Order	*Millennium Pipeline Co., L.L.C.*, 160 FERC ¶ 61,065 (Sept. 15, 2017), JA 753
Waiver Rehearing Order	*Millennium Pipeline Co., L.L.C.*, 161 FERC ¶ 61,186 (Nov. 15, 2017), JA 793

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STATEMENT OF THE ISSUES

Following extensive environmental review, including multiple opportunities for public comment, the Federal Energy Regulatory Commission ("FERC" or "Commission") approved an application to construct and operate a new natural gas pipeline in New York, subject to compliance with dozens of environmental and regulatory conditions, as necessary to serve the natural gas needs of the region. The pipeline company also requested, from Petitioner New York State Department of Environmental Conservation ("Department"), a water quality certification under

section 401 of the Clean Water Act. The Act provides a one-year period "after receipt of such request" for the Department to act on the certification application. 33 U.S.C. § 1341(a)(1). Failure to act in such time period results in waiver of the certification requirement of the Act. *Id*.

In the orders on review, the Commission found that the Department had waived its certification authority for the pipeline, because it did not act within one year of receipt of the request. The questions presented on review are:

1) Whether the one-year period for the Department to review a request for water quality certification under the Clean Water Act is triggered when the Department receives a request for certification, without regard to whether the request (in the Department's opinion) is complete; and
2) Whether the Intervenors may raise their jurisdictional argument challenging federal regulation of the pipeline, and, if so, whether the Commission appropriately accepted and reviewed the pipeline company's application as subject to the Commission's exclusive jurisdiction over interstate natural gas transportation under the Natural Gas Act.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF THE CASE

I. INTRODUCTION

This case concerns Millennium Pipeline Company, L.L.C.'s Valley Lateral Project ("Project"), which consists of 7.8 miles of pipeline and related facilities in Orange County, New York. The Project is designed to deliver 127,200 dekatherms per day of natural gas to a new natural gas-fueled generator, the Valley Energy Center, in Wawayanda, New York. As required by the Natural Gas Act, Millennium sought and received the Federal Energy Regulatory Commission's authorization for the Project, based on the Commission's finding that construction and operation of the Project is consistent with the "public convenience and necessity" under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c). *See Millennium Pipeline Co., L.L.C.*, 157 FERC ¶ 61,096 P 1 (Nov. 9, 2016) (Certificate Order), JA 538, *on reh'g*, 161 FERC ¶ 61,194 (Nov. 16, 2017) (Certificate Rehearing Order), JA 818. Those orders are not on review here.[1]

Because the Project would traverse several streams in southern New York, Millennium was also required to apply to the Department for a water quality certificate under the Clean Water Act. *See Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 698 (D.C. Cir. 2017). To this end, the Commission's Certificate Order

[1] Intervenors have filed a petition for review of the Certificate Orders in this Court. *See Protect Orange Cty., et al. v. FERC*, No. 17-3966 (2d Cir., filed Dec. 8, 2017). That case is not consolidated with this expedited case.

required Millennium to document that it had received all required authorizations under federal law, or "evidence of waiver thereof," including the water quality certification under the Clean Water Act. Certificate Order at App. B, Envtl. Condition 9, JA 593.

Section 401 of the Act provides that a State waives its authority if it does not "act on a request for certification" within one year "after receipt of such request." 33 U.S.C. § 1341(a)(1). Here, the Department received Millennium's 1200-page application for water quality certification on November 23, 2015. But it did not deny the application until August 30, 2017, well outside the one-year limitation.

In the orders on review here, the Commission found that the Department waived its authority under section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), with regard to the Project. *See Millennium Pipeline Co., L.L.C.*, 160 FERC ¶ 61,065 (Sept. 15, 2017) (Waiver Order), JA 753, *reh'g denied*, 161 FERC ¶ 61,186 (Nov. 15, 2017) (Waiver Rehearing Order), JA 793. The Commission determined that, under the plain meaning of the statutory phrase "receipt of such request," the one-year period began the day the Department received Millennium's certification application—not when the Department deemed the application to be complete. Waiver Order P 13, JA 757; Waiver Rehearing Order P 38, JA 809.

Thereafter, on October 27, 2017, the Commission authorized Millennium to proceed with construction of the Project. In subsequent orders, the Commission

denied timely-filed requests for rehearing of the Certificate Order filed by other parties, including Intervenors here, and dismissed the Department's late-filed request for rehearing as jurisdictionally-barred. *See* Certificate Rehearing Order PP 1, 10-14, JA 818, 820-23.

On December 7, 2017, this Court denied the Department's request to stay construction of the Project pending the Court's review of the Waiver Orders. Intervenors subsequently requested a similar stay, in both this case and the separately-docketed appeal of the Certificate Orders (No. 17-3966). The Court denied those stay requests on December 15, 2017.

II. STATEMENT OF THE FACTS

A. Statutory And Regulatory Background

1. Natural Gas Act

The principal purpose of the Natural Gas Act ("NGA") is "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices." *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)). Natural Gas Act sections 1(b) and (c) grant the Commission exclusive jurisdiction over the transportation and/or wholesale sale of natural gas in interstate commerce, and natural gas companies engaged in such transportations or sales. 15 U.S.C. §§ 717(b), (c). The Commission's jurisdiction does not apply to any other transportation or sale, to the

local distribution of natural gas, or to the facilities used for such local distribution. *Id.*

Before a company may construct a facility that transports natural gas in interstate commerce, it must obtain from the Commission a "certificate of public convenience and necessity" under NGA section 7(c), 15 U.S.C. § 717f(c), and "comply with all other federal, state, and local regulations not preempted by the NGA." *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013) (reviewing state failure to act under the Clean Air Act).

Under Natural Gas Act section 7(e), the Commission "shall" issue a certificate to any qualified applicant upon finding that the proposed construction and operation of the pipeline facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). The Act empowers the Commission to "attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require." *Id.*; *see*, *e.g.*, *Atl. Refining Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391-92 (1959) (noting the Commission's broad discretion to attach conditions to certificates as necessary). Section 7(h) of the NGA, 15 U.S.C. § 717f(h), delegates to the holder of a certificate of public convenience and necessity the "right of eminent domain" to obtain the "necessary right-of-way to construct, operate, and maintain" the pipeline. *Id.*; *see also, e.g.*, *Alliance Pipeline L.P. v. 4.360 Acres of Land, More or*

Less, 746 F.3d 362 (8th Cir. 2014) (rejecting several challenges to condemnation action brought by pipeline).

Applicants seeking certification from FERC must comply with extensive application requirements, including public notice and comment and environmental review proceedings. *See generally* 18 C.F.R. §§ 157.5, 157.6. In 2002, the Commission developed and implemented, through a FERC staff guidance document, a new pre-filing process for developers of interstate natural gas projects. *See Guidance: FERC Staff NEPA Pre-Filing Involvement in Natural Gas Projects* (Oct. 23, 2002). The Pre-Filing Guidance encourages pipeline project sponsors "to engage in early project-development involvement with the public and agencies, as contemplated by the National Environmental Policy Act (NEPA)." *Id*. at 1.

2. Clean Water Act

The Natural Gas Act contemplates that other federal authorizations, in addition to the Commission's certificate of public convenience and necessity, can be required for an interstate pipeline. *See* 15 U.S.C. §§ 717n(a)-(b) (addressing coordination of federal authorizations, designating the Commission as the "lead agency" and requiring other agencies to "cooperate with the Commission and comply" with applicable deadlines).

As relevant here, section 401(a)(1) of the Clean Water Act requires that an applicant for a federal license or permit for an activity that "may result in any

discharge" into navigable waters provide the permitting agency, here the Commission, with a water quality certification from the State where the discharge will originate. 33 U.S.C. § 1341(a)(1). Or the federal applicant must present evidence that the State has waived the certification requirement. *Id.* The certification attests that the discharge will comply with applicable provisions of the Clean Water Act, and relevant state water quality standards. *See S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 374 & n.1 (2006); *Pub. Util. Dist. No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 703 (1994). A validly issued state water quality certification "shall become a condition on any Federal license or permit" for which it is issued. 33 U.S.C. § 1341(d). "Through [the section 401 certification] requirement, Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval." *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991).

To prevent state agencies from indefinitely delaying issuance of a federal permit, Congress gave the States no more than one year to act on a "request for certification" under the Clean Water Act. *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (quoting 33 U.S.C. § 1341(a)(1)). Specifically, section 401 of the Act requires a State to grant or deny the certificate "within a reasonable period of time (which shall not exceed one year) after receipt of [a]

request." *Id*. If the State does not act within that period, the Act's certification requirement is deemed "waived," such that the licensing or permitting agency may authorize the activity in question without state certification. *Id*. A State may also, before the expiration of the one-year period, deny a request for water quality certification. *See Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conserv.*, 868 F.3d 87, 100-03 (2d Cir. 2017) (affirming state decision denying water quality certification application); *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141 (2d Cir. 2008) (same).

B. Factual Background

1. Millennium's Valley Lateral Project

On November 13, 2015, Millennium filed an application, pursuant to section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), requesting certificate authorization to construct and operate 7.8 miles of 16-inch-diameter lateral pipeline and related facilities in Orange County, New York ("Valley Lateral Project or Project"). The Project would provide transportation service to the Valley Energy Center in Wawayanda, New York.

The Valley Energy Center is a new natural gas combined-cycle electric power generator. It is anticipated to commence service in February, 2018. The Center is not subject to FERC jurisdiction. Certificate Order P 119, JA 580.

Rather, the New York Public Service Commission approved the Valley Energy Center on May 9, 2014. *Id*.

The Town of Wawayanda prepared a draft and final environmental impact statement for the Center, as required by the New York State Environmental Quality Review Act. *Id*. P 122, JA 581; *see also id*. P 130, JA 584 (noting the Town's comprehensive greenhouse gas emissions analysis of the Valley Energy Center). In addition, the Department issued an air quality permit for the Center in 2013. *See* Waiver Rehearing Order P 22 n.34, JA 801.

Millennium operates an existing interstate natural gas pipeline system extending across southern New York. That system transports natural gas from an interconnection with National Fuel Gas Supply Corporation in Independence, New York, to an interconnection with Algonquin Gas Transmission, LLC in Ramapo, New York. *See* Certificate Order P 18, JA 546. Millennium's Valley Lateral Project will provide 127,200 dekatherms per day of natural gas transportation service from an interconnection with Millennium's mainline in Orange County, New York, to a new meter station at the Valley Energy Center. The Project will include construction of the following facilities: (i) approximately 7.8 miles of new 16-inch-diameter pipeline; (ii) a delivery meter station and associated piping at the proposed Valley Energy Center; (iii) a launcher facility; and (iv) a receiver facility at the proposed Valley Energy Center. *Id.* P 3, JA 539.

The developer of the Valley Energy Center, CPV Valley, LLC, has entered into a precedent agreement with Millennium for the full 127,200 dekatherms per day of transportation service created by the Project. *Id.* P 4, JA 539. The proposed pipeline facilities will cost approximately $39 million. *Id.* P 5, JA 539.

2. The Commission's Environmental Review

The Commission initiated its environmental review of the Project on May 19, 2015 using its pre-filing process. During that process, the Commission received 13 comments letters from individuals and interested federal and state agencies, including the Department. *See* Certificate Order P 44, JA 556.

On July 6, 2015, the Commission announced its intent to prepare an environmental assessment for the Project. *Id*. P 43, JA 556. The Notice was published in the Federal Register and mailed to 188 interested entities. *Id*. P 43, JA 556. The U.S. Environmental Protection Agency and the New York State Department of Agriculture and Markets participated as cooperating agencies in the environmental assessment's preparation. *See* Envtl. Assessment at 1, R.53, JA 232.

On May 9, 2016, the Commission issued its Environmental Assessment for the Project, published it in the Federal Register, and requested public comments. Certificate Order PP 50-51, JA 557. The Environmental Assessment addressed a broad range of issues, including the Project's purpose and need, alternatives to the

Project, the impacts of the Valley Energy Center, and segmentation under the National Environmental Policy Act. *Id*. P 52, JA 558. It also analyzed the Project's direct, indirect, and cumulative impacts on the following resources: groundwater; surface water; wetlands; vegetation; wildlife; threatened and endangered species; socioeconomic impacts, including property values; greenhouse gas emissions; safety; cultural resources; and environmental justice. *Id*. The Environmental Assessment concluded that, with the implementation of mitigation measures proposed by Millennium and additional measures recommended by Commission staff, approval of the Project would not constitute a major federal action significantly affecting the quality of the human environment. Envtl. Assessment at 125, JA 356.

The Project analyzed in the Environmental Assessment reflects modifications to the original proposal, resulting from comments from the Department and other New York state agencies. *See* Waiver Rehearing Order P 20, JA 799 (the Department's "participation in the Commission's environmental review of the Project resulted in significant Project modifications") (citing Certificate Order P 48, JA 557). Because of those comments, Millennium:

- Changed the crossing method for Department-regulated forested wetland and streams;
- Altered its environmental construction standards to clarify how it would, among other things, conduct stream bank stabilization, protect

agricultural soils, and use the seed mix preferred by the Department for revegetation; and

- Verified wetland classifications and endangered species within the vicinity of the Project, in consultation with Department staff.

Waiver Rehearing Order n.28, JA 799; Certificate Order PP 48-49, JA 557; Envtl. Assessment at 45, 60, JA 276, 291.

The Commission also required Millennium to consult further with the Department and other New York state agencies regarding:

- Surveying potential bog turtle habitats before beginning construction;
- Specifying fishery classifications and timing windows for construction through fisheries; and
- The use of any non-vegetative materials for stream stabilization.

Certificate Order, App. B, Condition 14, JA 594; Envtl. Assessment at 15, 54, 64, JA 246, 285, 295.

3. The Certificate Orders

On November 9, 2016, the Commission issued an order under section 7(c) of the Natural Gas Act, conditionally authorizing Millennium to construct and operate the Project subject to extensive environmental and operating conditions. *See* Certificate Order P 1, Ordering Para. (B) & App. B (listing 17 environmental conditions), JA 538, 586, 590-95.

On December 9, 2016, Sarah Burns, Amanda King, Melody S. Brunn, and Pramilla Malick (together, Intervenors[2]) timely requested rehearing of the Certificate Order, raising concerns regarding the Commission's jurisdiction over the Project, the need for the Project, and aspects of the Commission's environmental review. *See* Certificate Rehearing Order PP 1, 3-5, JA 818, 819 (summarizing rehearing requests). Later, following other proceedings on the Department's water quality certification (discussed below), the Department filed a late motion to reopen the record and stay of, or, in the alternative, rehearing and stay of, the Certificate Order. *See* Certificate Rehearing Order PP 1, 10-13, JA 818, 820-22.

The Commission denied timely-filed requests for rehearing of the Certificate Order filed by other parties, and dismissed the Department's late-filed request as jurisdictionally-barred. *See* Certificate Rehearing Order PP 1, 10-14, JA 818, 820-24.

The Commission found that it has jurisdiction over the Project. *See* Certificate Rehearing Order P 16, JA 823 (citing Certificate Order PP 18-23, JA 546-48). Although the Project, like the rest of Millennium's system, would be located only in New York, the Commission found that it has authority over the Project because it is an integrated part of Millennium's existing interstate pipeline

[2] Protect Orange County did not seek rehearing of the Certificate Order, but has joined with the Intervenors here.

system. Certificate Order P 21, JA 548. The Project would receive gas that had been transported in interstate commerce from Millennium's mainline, through Millennium's interconnections with other interstate pipelines. *Id.* P 19, JA 547. And the Project would add capacity to Millennium's interstate system, allowing Millennium to more fully meet the needs of interstate shippers. *Id.*

In granting the certificate, the Commission balanced the public benefits of the Project against the potential adverse consequences. *See* Certificate Rehearing Order P 19, JA 824. The Commission found a strong need for the Project because CPV Valley, the developer of the Valley Energy Center generating plant, has committed to use the Lateral's full capacity. *Id.*

The Commission found that the benefits of serving this demand outweigh the minimal adverse consequences, which largely would be mitigated by the environmental and operating conditions. *Id*. The Commission thus determined that the Project, constructed and operated in accordance with these conditions, would not significantly affect the quality of the human environment. *Id*. P 133, JA 586. The Commission required Millennium, before commencing construction, to document that it has received all required federal authorizations or "evidence of waiver thereof," including a water quality certification under the Clean Water Act. Certificate Order at App. B, Envtl. Condition 9, JA 593.

The Intervenors have filed a petition for review of the Certificate Order and Certificate Rehearing Order in this Court. *Protect Orange Cty., et al. v. FERC*, No. 17-3966 (2d Cir., filed Dec. 8, 2017). Those orders are not at issue in this appeal. *See also* Br. 20 (agreeing that the Certificate Orders are not at issue here).

4. The Department's Water Quality Certification Proceeding

The Department received Millennium's 1200-page application for a Water Quality Certificate on November 23, 2015. *See* Waiver Order P 5, JA 754. On December 7, 2015, the Department issued a Notice deeming Millennium's application incomplete, pending issuance of the Commission's Environmental Assessment. *Id*. Following the May 9, 2016 issuance of the Environmental Assessment, the Department issued a Second Notice of Incomplete Application, raising additional issues. *Id*. On August 16 and 31, 2016, Millennium provided a response and a supplemental response to the second Notice. *Id*. After the Commission issued the November 9, 2016 Certificate Order, the Department acknowledged that Millennium had fully responded to the Second Notice of Incomplete Application and stated that it would continue its review of the application "to determine if a valid request for a [Water Quality Certificate] had been submitted." Department Letter to Millennium at 2 (Nov. 18, 2016), R.84, JA 618 ("November 18, 2016 Letter"); *see also* Waiver Rehearing Order P 6, JA 795. "Regardless of any such determination," the Department stated that it had,

"at a minimum, until August 30, 2017 to either approve or deny the application." November 18, 2016 Letter at 2, JA 618.

Millennium then petitioned the D.C. Circuit to compel the Department to act on the certification application. *See Millennium Pipeline Co., LLC v. Seggos*, 860 F.3d 696, 699 (D.C. Cir. 2017). On June 23, 2017, the court dismissed the petition, finding that Millennium was not aggrieved by the Department's delay because any unlawful delay would trigger the waiver provisions of the Clean Water Act and permit construction to go forward without state certification. *Id*. at 700. Millennium's remedy for the delay was to present evidence of waiver to the Commission. *Id*. at 701; *see also id*. at 698 ("For any company desiring to construct a natural gas pipeline, all roads lead to FERC.").

So, on July 21, 2017, Millennium requested that the Commission find that the Department had waived its Clean Water Act authority, and allow Millennium to proceed with construction. *See* Request to Proceed with Construction, R.127, JA 646. While that request was pending, on August 30, 2017, the Department denied Millennium's water certification application. Waiver Order P 10, JA 756; Notice of Decision, R.144, JA 736. The Department based its denial on its view that the Commission's environmental assessment, under the National Environmental Policy Act, was required to evaluate the potential environmental impacts of greenhouse gas emissions from both the Project and the Valley Energy

Center. Notice of Decision at 2, JA 737. Millennium petitioned this Court for review of the Department's Notice of Decision, and that case is in abeyance pending the outcome of the instant appeal (No. 17-3770). *See Millennium Pipeline Co. v. N.Y. Dep't of Envtl. Conserv.*, No. 17-3465 (2d Cir., filed Oct. 26, 2017).

5. The Waiver Orders On Review

On September 15, 2017, the Commission found that the Department's delay constituted waiver of the Department's authority under the Clean Water Act. Waiver Order P 2, JA 753. The Department and, separately, the Intervenors sought rehearing of the Waiver Order, which the Commission denied on November 15, 2017. Waiver Rehearing Order P 1, JA 793.

Under section 401 of the Act, a certification is waived when the certifying agency "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." Waiver Order P 13, JA 757 (quoting 33 U.S.C. § 1341). The Commission determined that, under the plain meaning of the statutory phrase "receipt of such request," the one-year period began the day the Department received Millennium's certificate application, not when the Department deemed the application to be complete. Waiver Order P 13, JA 757; Waiver Rehearing Order P 38, JA 809-11. As the Commission explained, agency and court precedent supports the conclusion that the triggering event is the date of receipt of the certification request. Waiver

Order PP 15-17, JA 758-60; Waiver Rehearing Order P 41, JA 812-13.

In the alternative, the Commission explained that, "[t]o the extent there is any ambiguity in the statutory text," the Commission's "interpretation is consistent with Congress's intent." Waiver Order P 14, JA 758; Waiver Rehearing Order PP 38-39, JA 809-11 (addressing Department's argument that statute is ambiguous). Here, the Commission noted that the one-year review period was established to "ensure that sheer inactivity by the State . . . will not frustrate the federal application." Waiver Order P 14, JA 758 (citing Clean Water Act Conference Report, H.R. Conf. Rep. 91-940 (1970), reprinted in 1970 U.S.C.C.A.N 2691, 2741).

Finally, the Commission explained that, under the plain language of the statute, if the Department is presented with an incomplete or otherwise invalid application, it retains the option to deny the application. Waiver Order P 18, JA 760; Waiver Rehearing Order PP 40-42, JA 811-13. Thus, the Commission's construction fully supports the Congressionally-established role of the States under the Clean Water Act.

On October 27, 2017, the Commission issued the Notice to Proceed with Construction. Notice to Proceed, R.174, JA 783.

6. Subsequent Proceedings

While the Department's request for agency rehearing of the Waiver Order was pending, the Department filed with this Court, on October 30, 2017, an emergency petition for a writ of prohibition to stay the effectiveness of the Notice to Proceed pending Commission action on rehearing. *See In re N.Y. State Dep't of Envtl. Conserv.*, No. 17-3503 (2d Cir.). After the Commission issued the Waiver Rehearing Order, the Department filed this appeal—a petition for review (No. 17-3770) of the Waiver Rehearing Order and the Waiver Order—as well as an emergency motion for stay of construction pending the Court's review of the Waiver Orders. On December 7, 2017, following briefing and oral argument, this Court denied the Department's emergency motion for stay of construction. *N.Y. Dep't of Envtl. Conserv. v. FERC*, No. 17-3770 (2d Cir. Dec. 7, 2017)

Intervenors subsequently requested a similar stay, in both this case and the separately-docketed appeal of the Certificate Orders (No. 17-3966). The Court denied those stay requests on December 15, 2017. *N.Y. Dep't of Envtl. Conserv.*, No. 17-3770 (2d Cir. Dec. 15, 2017); *Protect Orange Cty. v. FERC*, No. 17-3966 (2d Cir. Dec. 15, 2017).

On November 1, 2017, Millennium informed the Commission and the other relevant federal agency, the U.S. Fish and Wildlife Service, that tree clearing, grading, and pipeline installation would occur within the vicinity of an identified,

uninhabited bald eagle nest. *See* Millennium's Letter Requesting Concurrence Regarding the Bald and Golden Eagle Protection Act at 2, FERC Docket No. CP16-17 (filed Nov. 1, 2017) (noting that no blasting, drilling, or boring activity is anticipated within a half mile of the nest). Because project construction is within the U.S. Fish and Wildlife Service's recommended 660-foot minimum buffer for bald eagle nests, Millennium was obligated to undertake certain impact avoidance and mitigation measures. *Id.* at 2-3 (restricting tree clearing and other construction activities to outside the nesting season; halting construction if nest is confirmed as occupied; requiring Millennium to notify, consult, and/or seek approval from Fish and Wildlife Service for certain actions).

Prior to construction, Millennium's bald eagle biologist periodically inspected the nest. *See* Millennium Bi-Weekly Project Status Report, FERC Docket No. CP16-17 (filed Dec. 22, 2017). The biologist was on site throughout construction, and did not observe nesting or breeding activities. *Id.* On December 15, 2017, the Commission sent an environmental inspector to confirm that the nest was uninhabited. *See* FERC Opp'n to Mot. to Stay at 4, No. 17-3770 (2d Cir., filed Dec. 14, 2017). Following the Court's denial of Intervenors' request to stay the Project, Millennium completed construction activities surrounding the unoccupied nest on December 29, 2017. *See* Millennium Bi-Weekly Project Status Report, FERC Docket No. CP16-17 (filed Jan. 5, 2018). As of January 3, tree

felling for the Project was complete. *Id.*

On December 13, 2017, Millennium obtained a preliminary injunction from the Northern District of New York, preventing the Department from enforcing the stream disturbance permit and freshwater wetlands permit against Millennium to prevent Millennium from constructing the Project. *See Millennium Pipeline Co. v. Seggos*, No. 17-cv-1197, 2017 WL 6397742, at *11 (N.D.N.Y. Dec. 13, 2017).

SUMMARY OF ARGUMENT

The Clean Water Act, by design, reflects an integration of federal and state authority. States are granted authority to approve or deny certain federally-authorized activities. But this authority is not unlimited. This case concerns one such limitation on state authority—the obligation to act on a Clean Water Act application in a timely manner. Section 401 of that Act governs this case: "If 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." 33 U.S.C. § 1341(a)(1).

In the orders on review, the Commission determined that the Department, though it had been an active participant in the public process for the Commission's review of Millennium's Valley Lateral Project, had exceeded this one-year time limit and had therefore waived its authority to issue a water quality certification for

the Project. The Department waited more than one year, following Millennium's November 23, 2015 application, to act on (deny) Millennium's application. The Commission's decision rested on the plain language of the Act, which provides that the one-year review period begins with the filing of a request or application. The Department contends that only a "complete" or "valid" application triggers the start of the statutory time period, but this is inconsistent with the statutory text.

The Commission views the language of the Clean Water Act as plain, and has for decades followed the approach of treating receipt of a water quality certification application as the triggering event, including in recent decisions acknowledged by the Department. But the Commission's interpretation also finds firm support in the intent of Congress, as articulated in both the text and the legislative history of the Act: To prevent indefinite delay, Congress gave States one year to act. The Commission's interpretation does not shorten the time allowed. But it does provide clarity and uniformity in the application of a federal statute.

The Department's contrary interpretation is unreasonable. The Department's pursuit of a "complete" application may stretch into the indefinite delay Congress plainly intended to prohibit. The Department relies heavily on the Army Corps of Engineers' regulation, which allows for verification of a "valid request" for a Clean Water Act certification. But neither the Department nor the

Commission—the agencies involved here—has such a regulation. The Fourth Circuit did affirm the Corps' interpretation, and held—in a single sentence—that the text of section 401 is ambiguous. But no party asserts that the decision is binding on this Court, and the opinion offers little guidance to this Court in deciding this case. By comparison, other court precedent, closer on point, demonstrates congressional intent to prevent indefinite delay.

The Department foresees practical or policy problems with the Commission's interpretation of the statutory language. But the solution is both obvious and effective. The Department can, without prejudice (if it so chooses), deny any incomplete or invalid application until it has the information it requires to act on the merits. But it cannot indefinitely hold applications in abeyance. The Commission's interpretation both maintains the state role contemplated by, and assures timely state action intended by, the Clean Water Act.

The Intervenors' argument regarding the Commission's jurisdiction under the Natural Gas Act fares no better. For starters, the Intervenors lack standing to raise the issue in the present case on review of the Waiver Orders that did not address the NGA jurisdictional issue. They may only do so on review of the Commission's Certificate Orders, a separate appeal they have brought to this Court in Case No. 17-3966. The Intervenors do not specify any "extraordinary circumstances" that would allow them to make this claim here; otherwise, it is

barred as outside the scope of the Clean Water Act arguments raised by the Department.

Even if the Court does consider Intervenors' jurisdictional claim, the Commission reasonably interpreted the Natural Gas Act as providing jurisdiction over the Project. The Intervenors make no effort to confront the explanation offered by the Commission in its Certificate Orders. The Project is an integrated part of Millennium's interstate pipeline system. It will transport gas that has travelled in interstate commerce. And it will increase the overall capacity of Millennium's system, allowing Millennium to better serve interstate customers. The Commission's interpretation of its jurisdiction, based on its review of agency and court precedent that Intervenors do not address, is entitled to this Court's respect.

ARGUMENT

I. STANDARD OF REVIEW

Where a court is called upon to review an agency's construction of a statute it administers, such as the Commission's administration of the Natural Gas Act, well-settled principles apply. If Congress has directly spoken to the precise question at issue, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). If the statute is silent or ambiguous on the question at issue, then the court must decide whether the agency's decision is based on a permissible construction of the statute. If it is, courts defer to the agency's construction. *City of Arlington v. FCC*, 569 U.S. 290, 296-97 (2014); *see also Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1305 (D.C. Cir. 2014) (applying "the two-step analytical framework" of *Chevron* to FERC's Natural Gas Act-certification decision). This includes the scope of the agency's jurisdiction. *City of Arlington*, 569 U.S. at 296-97; *New York v. FERC*, 783 F.3d 946, 953 (2d Cir. 2015).

The Commission's interpretation of other statutory authority, including the Clean Water Act, is reviewed *de novo*. *See Constitution Pipeline*, 868 F.3d at 100; *Am. Rivers v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997); *see also Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (finding the

Commission's interpretation of section 401 of the Clean Water Act "consistent with the plain text and statutory purpose of the provision").

While *de novo* review is appropriate, the Commission's special statutory role in coordinating agency actions and in setting and enforcing deadlines under the Natural Gas Act, as well as in carrying out the procedural requirements of section 401 of the Clean Water Act, warrants consideration. *See* Waiver Rehearing Order P 37, JA 809 (recognizing the specific statutory deadline in section 401 of the Clean Water Act and discussing the Natural Gas Act requirement that "[e]ach Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission," 15 U.S.C. § 717n(b)(2)); *see also id*. P 32 n.55, JA 806 (collecting cases concerning FERC's procedural role under section 401). Moreover, the D.C. Circuit held that Millennium's presentation of its waiver claim must be made first to the Commission. *See Millennium*, 860 F.3d at 701 (suggesting Millennium could return to the Commission to "present evidence of the Department's waiver")); *see also* 15 U.S.C. § 717n(b) (FERC is the "lead agency" for the purpose of securing necessary approvals from, and coordinating with, other agencies).

By comparison, the Department errs in claiming outright deference for its interpretation of the Clean Water Act. Br. 26-27; *see also* Int. Br. 21. This Court

reviews the Department's "interpretation of federal law *de novo*." *Constitution Pipeline*, 868 F.3d at 100 (concerning interpretation of same statutory provision); *see also* Waiver Rehearing Order P 27, JA 802 (citing *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989)); *Perry v. Dowling*, 95 F.3d 231, 236 (2d Cir. 1996) ("When the federal-statute interpretation is that of a state agency and 'no federal agency is involved,' deference is not appropriate.") (quoting *Turner*, 869 F.2d at 141). The Department's citation to *City of Bangor v. Citizens Commc'ns Co.*, 532 F.3d 70, 94 (1st Cir. 2008), is inapposite because no federal agency was involved. *Id.* Moreover, the First Circuit recognized that "[f]ederal 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." *Id.*; *see also Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 297 (D.C. Cir. 2003) (noting that the Environmental Protection Agency is charged with administering the Clean Water Act).

The Court reviews the substance of Commission actions under the Administrative Procedure Act, overturning the disputed orders only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The "scope of review under the 'arbitrary and capricious' standard is narrow." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut.*

Auto. Ins. Co., 463 U.S. 29, 43 (1983)); *see also Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1553 (2d Cir. 1992) (A court evaluates "whether the decision was based on a 'consideration of the relevant factors and whether there has been a clear error of judgment.'") (quoting *Allegheny Elec. Coop. Inc. v. FERC*, 922 F.2d 73, 80 (2d Cir. 1990)).

The Commission's findings of fact, if supported by substantial evidence, are conclusive. Natural Gas Act § 19(b), 15 U.S.C. § 717r(b); *Friends of the Ompompanoosuc*, 968 F.2d at 1554 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). Because substantial evidence is something less than a preponderance, if different conclusions may be drawn from the same evidence an agency's finding may still be supported by substantial evidence. *See Fund for Animals v. Kempthorne*, 538 F.3d 124, 132 (2d Cir. 2008) (when an agency makes a decision in the face of disputed technical facts, a court must be reluctant to alter the results).

II. THE DEPARTMENT WAIVED ITS CLEAN WATER ACT AUTHORITY

The Department received Millennium's 1200-page certification application on November 23, 2015, but did not deny the application until August 30, 2017. Waiver Order PP 5 & n.5, 10 & n.13, JA 754, 756. The Commission reasonably held that, whether the statute is plain or ambiguous, the Department has waived certification here, where it did not act to deny the application within the one-year

period allowed by the Clean Water Act. Waiver Order PP 11-18, JA 756-60; Waiver Rehearing Order PP 27-43, JA 802-14.

A. The Statute Allows One-Year From Receipt Of An Application For A State To Act

The "starting point for interpreting a statute is the language of the statute itself." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987), *cited in* Waiver Order P 13, JA 757. The relevant provision of the Clean Water Act states, in full:

> If the State, interstate agency, or Administrator, as the case may be, 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 with respect to such Federal application.

33 U.S.C. § 1341(a)(1) (emphasis added). As the Commission explained, the case turns on identification of the "triggering event that began the one-year review process." Waiver Order P 12, JA 757. Under the statute, that review period is triggered by the "receipt" of "such request." *Id*. Receipt "is the act or process of receiving." *Id*. P 13, JA 757 (citing Definition of Receipt, https://www.merriam-webster.com/dictionary/receipt); *see also United States v. Ramos*, 685 F.3d 120, 131 (2d Cir. 2012) (receipt ordinarily refers to taking possession or delivery).

"[S]uch request" refers to "a request for certification," within the same sentence. Waiver Rehearing Order P 38, JA 809-10. A preceding sentence, in turn, uses the phrase "applications for certification." *Id*. (citing 33 U.S.C.

§ 1341(a)(1)). In this "context, the word 'application' is most reasonably interpreted as 'a form used in making a request.'" *Id*. (citing Definition of Application, https://www.merriam-webster.com/dictionary/application) (listing "request, petition" as definitions of application)); *see also Mallard v. U.S. Dist. Ct. for the S.D. of Iowa*, 490 U.S. 296, 301 (1989) (interpreting request to mean ask, petition or entreat).

The Department attempts to divine a difference between "request" and "application," Br. 35, but there is no support for such a distinction in the statute (or legislative history). Congress is surely entitled to use synonyms, and this does not render the text ambiguous. *See McNeil v. United States*, 508 U.S. 106, 111-12 (1993) (finding statutory language clear where Congress used "institute" and "begin" as synonyms). And here, Congress had a plausible reason to use the synonym "request." The sentence at issue concludes with a reference to "such Federal application," here the pipeline's Natural Gas Act certificate application. Two uses of "application" in the same sentence could reasonably cause confusion.

No further interpretation is needed to discern Congress's intent: the one-year period commences upon the Department's receipt of a request for water quality certification—here, Millennium's November 23, 2015 application. The Court's analysis can and should, in this case, end here with the plain language of the Act. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (holding that

where statutory language is plain, the "judicial inquiry is complete"); *see also, e.g.*, *Greenery Rehab. Grp., Inc. v. Hammon*, 150 F.3d 226, 231 (2d Cir. 1998) ("If the statutory terms are unambiguous, our review generally ends and the statute is construed according to the plain meaning of its words.").

B. The Commission's Interpretation Is Consistent With Congressional Intent

The Commission's interpretation is also compatible with supporting methods of statutory interpretation. Reading the statute as requiring state action within one year of receipt of an application is both "[t]he most natural language," *Gwaltney of Smithfield*, 484 U.S. at 57, and consistent with Congressional intent. Waiver Order P 16, JA 759; Waiver Rehearing Order P 40, JA 811-12. In determining the meaning of a statute, the Court looks "'not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'" *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)). Further, this Court has recognized that, if the statute is ambiguous, the Court can "look to legislative history as a means of determining congressional intent." *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 197 (2d Cir. 2002). *See* Waiver Order P 14, JA 758 ("To the extent there is any ambiguity in the statutory text," the Commission's "interpretation is consistent with Congress's intent . . . .").

By imposing a one-year review period, Congress plainly intended to limit the possibility of indefinite delay. The "Conference Report on Section 401 states that the time limitation was meant to ensure that 'sheer inactivity by the State . . . will not frustrate the Federal application.'" *Alcoa*, 643 F.3d at 972 (quoting H.R. Conf. Rep. No. 91-940 at 56, *supra* p.19). "Such frustration would occur if the State's inaction, or incomplete action, were to cause the federal agency to delay its licensing proceeding." *Id*.; *see also, e.g.*, *Millennium Pipeline*, 860 F.3d at 698 ("To prevent state agencies from indefinitely delaying issuance of a federal permit, Congress gave States only one year to act on a 'request for certification' under the Clean Water Act."). The Commission's interpretation does not shorten the time allowed by statute. But it does provide "clarity and certainty to all parties" and "avoid[s] undue delay associated with open-ended certification deadlines." Waiver Rehearing Order P 41, JA 812-13.

By contrast, the Department's interpretation would permit a state agency to request supplemental information indefinitely, "holding both the applicant and the Commission proceeding in limbo." *Id*. P 40, JA 811-12. The Department does not deny that an unlimited delay is possible. It instead suggests that compliance with its own regulations is the only applicable limit. *See* Br. 39-40. Yet the Department's regulations do not address waiver or define receipt, and provide no

limit on the time for the Department's action. Waiver Rehearing Order P 33, JA 806.

Nor is the Department, as it suggests, Br. 29-34, prejudiced by the Commission's interpretation. *See also* Advocates Br. 23-24. The Commission's consistent interpretation requires waiver in this case. But in other cases, involving different facts, the Commission has denied requests for waiver. *See Constitution Pipeline, L.L.C.*, 162 FERC ¶ 61,014 (2018) (denying pipeline applicant's request for declaration of waiver); *see also Alcoa*, 643 F.3d at 972-75 (affirming FERC's determination that the State did not waive its certification authority). In particular, the Commission recently rejected a pipeline applicant's request for declaration of waiver where the applicant withdrew and refiled its application with the Department. *See Constitution Pipeline*, 162 FERC ¶ 61,014 P 23. There, as here, the Commission "consistently interpreted the triggering date for the waiver provision to be the date an application is filed with the certifying agency." *Id*.

Moreover, the Commission's interpretation of section 401 does not permit applicants to force an agency into a premature decision by delaying submission of supplemental materials. Waiver Rehearing Order P 42, JA 813-14. States remain free to fashion procedural regulations they deem appropriate and to deny applications for failure to meet such regulations. *Id*. PP 41-42, JA 812-13. Denying an incomplete application does not prevent the State from working with

an applicant, *see* Br. 31; a denial can be issued without prejudice to an applicant's refiling in accordance with the State's requirements. Waiver Rehearing Order P 42, JA 813-14. And, as is demonstrated by the Constitution pipeline proceeding, an applicant's withdrawal and refiling of its application restarts the one-year waiver period under the Act. *See Constitution Pipeline*, 162 FERC ¶ 61,014 P 23.

The Department fails to explain how such a process—denying an application without prejudice to refiling—undermines its statutory role. Indeed, here, where the Department ultimately denied Millennium's water quality certification on August 30, 2017, it did not preclude Millennium from refiling a complete application. *See* Notice of Decision, JA 736-37; *see also* Department's Mot. to Reopen the Record at 6, JA 751 (urging FERC to complete a supplemental environmental analysis so that the Department can complete its review). Further, in the Constitution pipeline proceeding, *see supra* p.34, the Department contemplated denying an incomplete application in this manner. *See* Waiver Rehearing Order P 34, JA 807. Specifically, with the Constitution Pipeline, addressed in *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conserv.*, 868 F.3d 87 (2d Cir. 2017), the Department explained that the pipeline company withdrew and refiled its application as a means to effectively re-start the one-year time period. If it had not, the Department represented to the Court that "'[g]iven the incomplete nature of the application at that time, if Constitution had refused to

re-submit the application materials, [the Department] would likely have denied the Section 401 Certification." Waiver Rehearing Order P 34, JA 807 (citing Brief for Respondent Department at 19, *Constitution Pipeline*, No. 16-1568 (2d Cir., filed Oct. 21, 2016)).

C. The Commission's Interpretation Is Consistent With Court And Commission Precedent

The Commission's analysis is likewise consistent with applicable precedent. Other courts have found the same waiver language unambiguous. In 1987, the Commission revised its hydropower licensing regulations to provide that the one-year period commences when the certifying agency receives a written request for certification, rather than when that agency finds the application acceptable for processing. Waiver Order P 16, JA 759 (citing 18 C.F.R. § 4.34(b)(5)(iii)). On judicial review, the Ninth Circuit held that the new regulation was "fully consistent with the letter and the intent of [section] 401(a)(1) of the [Clean Water Act]." *Cal. ex rel. State Water Res. Control Bd. v. FERC*, 966 F.2d 1541, 1554 (9th Cir. 1992). *See* Waiver Order P 16 & n.31, JA 759-60; Waiver Rehearing Order P 39 & n.86, JA 811 (citing *Cal.*, 966 F.2d at 1553-54).

The D.C. Circuit has similarly recognized that the relevant language of the Clean Water Act is plain. On review of a Commission hydroelectric licensing matter, the court considered the same language at issue here and explained that "[i]n imposing a one-year time limit on States to 'act,' 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." *Alcoa*, 643 F.3d at 972 (reviewing Commission orders finding that a state had not waived certification by taking action with a conditional effective date). *See also, e.g.*, *Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73, 80 (1st Cir. 1993) (finding that "[t]he Clean Water Act required [the State] to provide its certificate, or announce a decision not to certify, within a reasonable time not to exceed one year after the application").

The Commission has no natural gas pipeline certificate regulation that is analogous to its hydroelectric licensing regulation. Nevertheless, as the Department acknowledges, Br. 37, the Commission "has clearly held, in two pipeline cases, that a state's one-year review period begins with receipt of an application, not when a state considers an application to be complete." Waiver Rehearing Order P 41, JA 812-13 (citing *Ga. Strait Crossing Pipeline LP*, 107 FERC ¶ 61,065 P 7, *on reh'g*, 108 FERC ¶ 61,053 (2004); *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245 PP 61-63 (2009)); *see* also Waiver Order P 15, JA 758.

The Department responds that the Commission's interpretation of the waiver provision is inconsistent with regulations promulgated by the U.S. Environmental Protection Agency ("EPA"). Br. 37. But the regulation cited by the Department,

40 C.F.R. § 124.53(c), governs coordination between the EPA, when it is acting on a permit under section 402 of the Clean Water Act, 33 U.S.C. § 1342 (the National Pollutant Discharge Elimination System), and a certifying state agency under section 401. In those circumstances, EPA provides the certifying state agency with "a specified reasonable time *not to exceed 60 days* from the date the draft permit is mailed to the certifying State agency." 40 C.F.R. § 124.53(c) (emphasis added). The Department does not assert FERC should adopt this approach. And the EPA regulation itself offers no construction of section 401 to inform this Court.

D. The Department's Alternative Interpretation Is Unreasonable

The Department strains to find ambiguity in the Act, arguing that the request or application must be "complete" or "valid" to trigger the one-year review period. In the Department's view, this interpretation is "not precluded" by the plain language. Br. 34. But there is no need to seek out ambiguity where the plain language of the statute's requirement for state action within one year of receipt of an application is readily discernible, logical, and consistent with congressional intent and applicable precedent.

The Department asserts the terms "such request" and "request for certification" are ambiguous, arguing that the statute "does not indicate what form a 'request for certification' must take to trigger the waiver period." Br. 28; *see also* Br. 34-35. But the Department's interpretation requires adding the term

"complete" or "valid" to the statutory language. *See, e.g., Alcoa*, 643 F.3d at 974 (rejecting statutory interpretation of section 401 of the Clean Water Act that "would require adding terms to the statute that Congress has not included"). Standard rules of statutory construction do not permit the addition of words in order to find ambiguity. *See Prudential S.S. Corp. v. United States*, 220 F.2d 655, 657 (2d Cir. 1955) ("As the words of the section are plain, we are not at liberty to add or alter them to effect a purpose which does not appear on its face or from its legislative history"). By contrast, in the Clean Air Act, 42 U.S.C. § 7661b(c), Congress required that the relevant permitting authority act on "a completed application" within "18 months after the date of receipt thereof." *See, e.g., Tenn. Gas Pipeline Co. v. Paul*, 692 F. App'x 3, 4-5 (D.C. Cir. 2017) (addressing what constitutes a "completed application" under the Clean Air Act). No similar modifier in section 401 of the Clean Water Act requires a "complete" request for certification.

In support of its argument that the statute is ambiguous, the Department relies heavily (Br. 34-36) on *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721 (4th Cir. 2009). But that case concerned a request for a water quality certification in connection with an Army Corps of Engineers dredge and fill permit under section 404 of the Clean Water Act, 33 U.S.C. § 1344; *see* Waiver Rehearing Order P 39, JA 811. There the court considered a Corps regulation providing that,

in determining whether the waiver period has started, the district engineer "will verify that the certifying agency has received a valid request for certification." *See AES Sparrows Point*, 589 F.3d at 729 (quoting 33 C.F.R. § 325.2(b)(1)(ii)). In a single sentence, the court held that "the statute is ambiguous on the issue" of whether only a "valid request for water quality certification will trigger § 401(a)(1)'s one-year waiver period in connection with a § 404 permit application." *Id*. at 729. The court then held that the Corps' interpretation, set forth in its regulation, was "permissible in light of the statutory text" and explained that it "must defer" to that interpretation under *Chevron*. *Id*.

Here, in contrast, Millennium was not required to obtain a dredge and fill permit; therefore, the referenced regulation of the Army Corps of Engineers is inapplicable. *Cf.* Br. 33-34. *AES Sparrows Point* offers no guidance to this Court on the central question of how to interpret section 401(a)(1) in this context, nor any insight into the court's view that the statute is ambiguous. *See* Waiver Order P 15 n.25, JA 758; Waiver Rehearing Order P 31, JA 804-05. Indeed, Advocates overstate the holding of *AES Sparrows Point*, claiming that the court held it would be unreasonable to start the one-year clock before an application is complete. Br. 22-23. In fact, the court simply stated that such "an interpretation [is] directly at odds with" the Corps' regulation to which it ultimately deferred. *Id*. at 729; *see*

also id. at 730 (declining to address FERC's hydroelectric licensing regulation, under the Federal Power Act).

Moreover, this Court would not have reached the same result as the Fourth Circuit in *AES Sparrows Point*. As this Court has recognized, a "failure-to-act claim is one over which the District of Columbia Circuit would have 'exclusive' jurisdiction," and the Fourth Circuit may have acted beyond its jurisdiction in ruling on the waiver issue presented to it. *Constitution Pipeline*, 868 F.3d at 100 (citing NGA § 19(d)(2), 15 U.S.C. § 717r(d)(2)). And finally, the Corps has confirmed by letter that it takes no position on the statutory construction issue presented here, and that it will "'abide by whatever final determination the Federal Courts make in this case.'" Waiver Rehearing Order P 31 & n.54, JA 804-05 (quoting Corps Letter, FERC Docket No. CP16-17 (filed Oct. 16, 2017), Millennium Add. SA44).

Further, the Department suggests that the review period must be triggered by a "complete" application in order to maintain consistency with its procedural regulations and usual practice. *See* Br. 30-31. As the Commission explained, however, the Department can always deny an incomplete application where appropriate and necessary, including to allow adequate time for public notice and comment. *See* Waiver Rehearing Order PP 41-42, JA 812-14. Moreover, even if

there were a conflict between the Department's regulations[3] and the federal statute, the statutory text would be determinative. *See Chevron*, 467 U.S. at 843 n.9 (noting that courts "reject administrative constructions which are contrary to clear congressional intent").

Taking a different approach, Intervenors offer new arguments based on statutory text not addressed by the Department or considered by the Commission. First, they contend that the reference to "such Federal application" in the relevant sentence of section 401 means that the Waiver Order is a nullity and the Certificate Order must be vacated. Int. Br. 15-18. As discussed with regard to Intervenors' jurisdiction argument, *see infra* pp.46-49, arguments directed to the Certificate Order may be raised only on review of the Certificate Order. Moreover, to the extent Intervenors argue that the "such Federal application" language nullifies the Waiver Order, they failed to preserve that argument for judicial review—or allow the Commission the opportunity to respond—by failing to raise it to the agency. *See* 15 U.S.C. § 717r(b) (limiting court's jurisdiction to objections that are preserved on rehearing, "unless there is reasonable ground for failure to do so");

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[3] The Commission agrees with the Department that, for purposes of this case, it is not necessary for the Court to address whether the Department complied with its regulations concerning complete applications and public notice. *See* Br. 41 (asserting that such issues are "legally irrelevant"); *see also* Waiver Rehearing Order P 33, JA 806 (responding to the Department's arguments concerning its regulations).

see also Cent. Hudson Gas & Elec. Corp. v. FERC, 783 F.3d 92, 107 (2d Cir. 2015) (rejecting argument not set forth with "specificity" in the petitioner's request for agency rehearing); Intervenors' Req. for Rehearing at 18-21, R.164, Millennium Add. SA18-21 (arguing only that conditional certificate violated Clean Water Act).

In any event, the claim that issuance of the 2016 Certificate Order before the 2017 Waiver Order means that there is no longer a pending "Federal application" is simply incorrect. Intervenors' argument assumes that the Commission's issuance of a conditional Certificate Order was required to come after the Department's action on the request for water quality certification. But, for the reasons explained by the D.C. Circuit in *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 397 (D.C. Cir. 2017), Intervenors are mistaken. Like the conditional authorization in that case, the Certificate Order here "did not authorize any activity which might result in a discharge in navigable waters." *Id*. ("On its face, section 401(a)(1) does not prohibit all 'license[s] or permit[s]' issued without state certification, only those that allow the licensee or permittee 'to conduct any activity . . . which may result in any discharge into the navigable waters.' 33 U.S.C. § 1341(a)(1).") (quoting *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 279 (D.C. Cir. 2015) (Rogers, J., dissenting in part and concurring in the judgment)).

Second, Intervenors argue that the term "act" in the phrase "fails or refuses to act" is ambiguous, and claim that the Department indeed "acted" on Millennium's application. Br. 34-37. As with the preceding argument, this claim was not preserved for judicial review. And, in any event, while the Commission does not question the Department's diligence in pursuing additional information from Millennium, Intervenors point to no specific action taken by the Department on which the Commission could rely to assess compliance with the certificate condition (Condition 9, *see* JA 593) requiring either receipt of all federal authorizations or evidence of waiver thereof. *See Alcoa*, 643 F.3d at 972-75 (affirming FERC's determination that State's action, though conditionally effective, was an adequate "act" under the statute).

E. The Commission's Certificate Orders Fully Considered All Issues

Contrary to the Intervenors' claim, the Commission's conditional authorization, in the Certificate Orders, is not inadequate now that the Department has waived the water quality certification. *See* Int. Br. 13, 20-21. Indeed, the Certificate Order contemplated the possibility that the Department could waive the water quality certification. *See* Certificate Order, App. B, Envtl. Condition 9, JA 593 (requiring Millennium to submit "all authorizations required under federal law (or evidence of waiver thereof)"). Beyond that procedural provision, the Commission's certificate authorization fully took into account all public comments

on the Project, including those of the Department and Intervenors. *See*, *e.g.*, Certificate Order PP 44-52, 72, 86, 94-95, JA 556-58, 565, 569, 572-73 (summarizing and responding to comments). In response to the Department's comments, in particular, Millennium modified certain stream- and wetland-crossing methods, and revised its stream bank stabilization methods and revegetation methods for wetlands. *See* Certificate Order P 48, JA 557.

Further, with only one exception, the Department has identified no deficiency in the Commission's certificate authorization and the attendant conditions. The exception is the Department's claim that FERC's environmental assessment was required to further evaluate the potential environmental impacts of downstream greenhouse gas emissions from the Project, including greenhouse gas emissions from the Valley Energy Center. *See* Br. 19 (citing Notice of Decision, JA 737). But the Commission did model the downstream greenhouse gas emissions of the Project, and also relied on a greenhouse gas emissions analysis for the Valley Energy Center prepared pursuant to New York State's Environmental Quality Review Act. *See* Certificate Order PP 102-04, JA 574-75; Certificate Rehearing Order PP 12-13, JA 821-22; *see also* Waiver Rehearing Order P 22 n.34, JA 801 (noting Center's receipt of air permit from the Department and authorization from the New York Public Service Commission).

The Commission's interpretation preserves, and does not undermine, the State's role in protecting water quality. *Cf.* Br. 25. Here the Department and other state agencies played an important role in the environmental review of the Project, including the development of conditions to mitigate environmental impacts. *See supra* pp.12-13 (citing changes to Project based on input of state agencies).

III. THE COMMISSION REASONABLY FOUND THAT IT HAD AUTHORITY TO ISSUE A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE MILLENNIUM PROJECT

The Intervenors wrongly raise the issue of the Commission's jurisdiction to issue a certificate for the Project. Nevertheless, the Commission reasonably exercised its authority over the Millennium Valley Lateral, consistent with the Natural Gas Act and longstanding precedent.

A. The Intervenors' Jurisdictional Argument Is Not Properly Before This Court

The Intervenors lack standing to argue that the Commission does not have jurisdiction over the Project –because the Petitioner (the Department) did not raise the issue. *See Petro Star Inc. v. FERC*, 835 F.3d 97, 110 (D.C. Cir. 2016) (intervenors "may only argue issues that have been raised by the principal parties; they simply lack standing to expand the scope of the case to matters not addressed by petitioners in their request for review"); *Ill. Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990) (an "intervening party may join issue only on a matter that

has been brought before the court by another party"); *accord Arapahoe Cty. Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1217 n.4 (10th Cir. 2001) (same).

Courts may prudentially grant standing to consider a new argument raised by an intervenor where: (1) the intervenor does not have an incentive to bring its own petition; and (2) the issue raised is an "essential predicate" to those raised by the petitioner. *See, e.g.*, *In re Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 146 (D.C. Cir. 2010). But those "extraordinary circumstances" do not exist here. *Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1126 (D.C. Cir. 2002); *see New York v. Atl. States Marine Fisheries Comm'n*, 609 F.3d 524, 529 n.4 (2d Cir. 2010) (noting that the "general rule" of "prudential restraint" is that an "intervening party may join issue only on a matter that has been brought before the court" by the petitioner "[e]xcept in extraordinary cases") (collecting cases); *see also Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 674 (D.C. Cir. 2013) (same).

The Intervenors here not only had an incentive to petition for review, they have already done so (in case No. 17-3966). *See Core Commc'ns*, 592 F.3d at 1456 (holding that the exception to considering a new argument raised by an intervenor did not apply where the intervenor separately petitioned for review); *see also U.S. Tel. Ass'n v. FCC*, 188 F.3d 521, 531 (D.C. Cir. 1999) (finding that intervenor "present[ed] no reason why it could not have petitioned in its own right"). Compared to the Department's petition for review, which raises only a

Clean Water Act issue, the Intervenors' jurisdictional claim presents a separate issue under a separate statute (the Natural Gas Act). It "bear[s] no substantive connection" to the issue of the Department's Clean Water Act waiver. *Core Commc'ns*, 592 F.3d at 1146. The Commission's Natural Gas Act jurisdiction has no bearing on whether the Department waived its Clean Water Act authority. *See Arapahoe Cty.*, 242 F.3d at 1217 n.4 (declining jurisdiction over intervenors' separate arguments raising supposed "prudential jurisdictional deficiencies," because those arguments were not "essential predicates" or "substantively connected to the issues" raised by the petitioner).

The Commission does not contend that the issue of the Commission's authority should not be addressed at all. Rather, the issue should be considered with the Intervenors' petition for review (Case No. 17-3966). That petition is the only vehicle for challenging the Commission's Certificate Orders. It was in those orders where the Commission considered (and rejected) the Intervenors' jurisdictional argument. *See* Certificate Rehearing Order P 16, JA 823; Certificate Order PP 18-23, JA 546-48. Those orders are not on review in this separate, expedited matter concerning different Commission orders (the Waiver Orders) regarding the Department's Clean Water Act waiver. *See Cal. Dep't of Water Res.*, 306 F.3d at 1127 (if an issue concerning the Natural Gas Act is not raised by a petitioner, the intervenor must bring that claim as a separate petition that satisfies

the requirements of the Natural Gas Act, 15 U.S.C. § 717r); *see also Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999) (intervenors must seek direct review to raise additional issues).

B. The Commission Reasonably Found That It Has Jurisdiction Over The Millennium Valley Lateral Project

If the Court decides to reach the issue of the Commission's jurisdiction in this proceeding, it should affirm the Commission's reasonable determination that it has jurisdiction over the Project under section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b). *See* Certificate Rehearing Order P 16, JA 823 (citing Certificate Order PP 18-23, JA 546-48); *see generally City of Arlington*, 569 U.S. at 296-97 (courts defer to an agency's reasonable interpretation of any statutory ambiguity concerning the scope of the agency's jurisdiction); *Myersville*, 783 F.3d at 1305 ("[I]n evaluating the Commission's authority to issue the challenged certificate of public convenience and necessity," the court applies "the two-step analytical framework" of *Chevron*.).

1. The Commission Has Jurisdiction Over An Integrated, Interstate Pipeline

Natural Gas Act section 7(c)(1)(A), 15 U.S.C. § 717f(c)(1)(A), prohibits the construction or operation of any pipeline that is subject to the Commission's jurisdiction without the Commission's authorization. Section 1(b) of that Act provides that the Commission has plenary authority over:

- The transportation of natural gas in interstate commerce,
- The sale of natural gas in interstate commerce for resale, and
- Natural-gas companies engaged in such transportation or sale.

Id. § 717(b); *see FPC v. E. Ohio Gas Co.*, 338 U.S. 464, 466-68 (1950) (in holding that an in-state pipeline was subject to federal regulation because it transported gas that was in interstate commerce, the Court found that the transportation of natural gas in interstate commerce, its sale in interstate commerce for resale, and natural gas companies engaged in such activities are distinct bases for jurisdiction); *see also United Gas Pipe Line Co. v. FPC*, 385 U.S. 83, 89 (1966) (the NGA "gives the Commission jurisdiction over interstate transportation of natural gas as a separate and distinct" matter); *Int'l Paper Co. v. FPC*, 438 F.2d 1349, 1353 (2d Cir. 1971) (same). The Commission's jurisdiction does not apply to any other transportation or sale, to the local distribution of natural gas, or to the facilities used for such local distribution. 15 U.S.C. § 717(b). *But see Mich. Consol. Gas Co. v. Panhandle E. Pipe Line Co.*, 887 F.2d 1295, 1300 (6th Cir. 1989) ("declin[ing]" an attempt to "enlarge the exceptions for state jurisdiction in section 1(b)" to "include their 'functional equivalents'").

Natural "[g]as crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey." *Mich. Consol. Gas*, 887 F.2d at 1299 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 755

(1981)). The Commission's jurisdiction attaches to any facility "constructed by an interstate pipeline and used as part of [that pipeline's] integrated system." Certificate Rehearing Order P 16 & n.16, JA 823 (collecting cases); *accord Gulf S. Pipeline Co.*, 154 FERC ¶ 61,219, n.58 (2016) (same) (citing *Okla. Natural Gas Co. v. FERC*, 28 F.3d 1281, 1287 (D.C. Cir. 1994)). This includes jurisdiction over the construction of pipeline facilities that will deliver gas directly to end-users in a single state. *See* Certificate Order P 15 & n.30, JA 544 (collecting cases); *see also Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1420-21 (10th Cir. 1992) (affirming federal jurisdiction over an interstate pipeline's construction of in-state facilities to deliver gas to two customers, because state-jurisdictional local distribution involves both the retail sale of natural gas and its local delivery).

In *Oklahoma Natural Gas*, the D.C. Circuit affirmed the Commission's jurisdiction over an interstate pipeline company's construction of a lateral off its mainline—even though the lateral would be solely located in Oklahoma, and transporting gas that never left Oklahoma. 28 F.3d at 1283; *accord* Certificate Order P 16, JA 545. On these facts, the Court found that the Commission had jurisdiction because the lateral was an integrated part of the pipeline company's interstate system. *Okla. Natural Gas*, 28 F.3d at 1287.

The lateral transported gas in interstate commerce—as gas that flowed into the lateral would be mixed with other gas that was in interstate commerce. *See id.*

at 1284-85. Gas "commingled with other gas indisputably flowing in interstate commerce becomes itself interstate gas," even though "the gas in question leaves the interstate stream before it crosses any state border." *Id.*; *see California v. Southland Royalty Co.*, 436 U.S. 519, 524 (1978) ("Gas which flows across state lines for resale is dedicated to interstate commerce . . . ."); *see also FPC v. Fla. Power & Light Co.*, 404 U.S. 453, 464 (1972) (affirming agency's finding that electricity was transmitted in interstate commerce, because it commingled with other electrons in interstate commerce).

And natural gas can flow in either direction. *Okla. Natural Gas*, 28 F.3d at 1287. So the lateral added to the company's overall storage capacity, helping it meet demand from interstate customers. *Id.*; *cf. City of Fort Morgan v. FERC*, 181 F.3d 1155, 1161-62 (10th Cir. 1999) (approving *Okla. Natural Gas's* holding that FERC jurisdiction applies to an "integrated" interstate pipeline system).

2. The Commission Reasonably Found That It Has Jurisdiction Over The Project

So too here, the Commission reasonably determined that the Millennium Project is part of an integrated interstate pipeline because it will transport natural gas in interstate commerce through its connections with other interstate pipelines. *See* Certificate Rehearing Order PP 17-18, JA 823-24.

Although Millennium's system is entirely within New York, Millennium's mainline is undisputedly an interstate pipeline. *See, e.g.*, Certificate Order P 18,

JA 546 (explaining that Millennium is a jurisdictional "natural gas company" that is "engaged in the transportation of gas in interstate commerce"). Millennium's mainline receives gas from upstream interconnections with at least two other interstate pipelines that obtain gas from outside New York. *See id.* P 14 & n.36, JA 544, 546. Millennium has downstream interconnections with still more interstate pipelines. *Id.* And those pipelines interconnect with other interstate pipelines, both in and out of New York. *Id.* P 18 & n.37, JA 546; *see Cascade*, 955 F.2d at 1417 (gas crossing a state line at any stage is in interstate commerce).

The Commission reasonably found that the Millennium Lateral "is an extension of [this] larger [Millennium] pipeline" system. Certificate Rehearing Order P 17, JA 823. Although the Lateral is likewise located within New York and will initially only deliver gas to the Valley Energy Center, Certificate Order P 14, JA 544, the Lateral will receive interstate gas from the Millennium mainline. *See* Certificate Rehearing Order P 17, JA 823; Certificate Order PP 14, 21, JA 544, 548. Millennium's "construction of the [L]ateral will enable it to use its pipeline system" and "interconnections with" interstate pipelines to "provide access to many supply sources" of interstate gas that can be shipped through the Project to the Valley Energy Center. Certificate Order P 19, JA 547; *see La. Power & Light Co. v. FPC*, 483 F.2d 623, 624 (5th Cir. 1973) (finding federal jurisdiction over an in-state lateral, because the lateral received gas from the interstate pipeline's

mainline and so, by "virtue of the flow of interstate gas," became part of an integrated interstate pipeline system); *see also Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 276 (D.C. Cir. 1990) (holding that "transportation" under section 1(b) of the Natural Gas Act includes delivery to end users).

The Project also enhances Millennium's overall system capacity and ability to serve interstate customers. *See* Certificate Rehearing Order P 17, JA 824 (noting that the Project will "improve capacity on the mainline through 'backhaul'"). The Valley Energy Center is a new customer, whose shipments will increase the overall amount of gas available on Millennium's system. *See* Certificate Order P 21, JA 548. Because those shipments will mix with other gas on Millennium's mainline, Millennium can use the gas received "into the mainline for delivery to" the Valley Energy Center to meet the needs of other shippers on Millennium's mainline if needed, before delivering other (interstate) gas to the Valley Energy Center. *Id.* P 19, JA 547; *see also id.* n.40 (noting that Millennium can offer service to mainline shippers on the Project during periods that the Lateral's full capacity is not being used to deliver gas to the Valley Energy Center); *see generally Okla. Natural Gas*, 28 F.3d at 1287 (finding the fact that a single pipeline company owned both the lateral and mainline and so could access additional capacity further demonstrated that the lateral was part of an integrated interstate pipeline).

Contrary to Intervenors' contention, this is therefore not a case of the "local distribution of natural gas or [] the facilities used for such distribution." Int. Br. 41. Intervenors ignore the Commission's analysis of the interstate issue in the Certificate Orders, instead choosing to rely solely upon *Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*, 489 U.S. 493 (1989). But *Northwest Central* was not a Natural Gas Act section 7 pipeline certificate case. It addressed the state regulation of natural gas production. *Id.* at 497, 507.

The *Northwest Central* Court held that Kansas' power to regulate a natural gas field was not preempted, based upon Natural Gas Act section 1(b)'s explicit reservation of the "production or gathering" of natural gas to the States. *Id.* at 513. In so finding, the Court emphasized that its holding was based upon the States' "traditional powers to regulate rates of production"—in contrast to federal authority over interstate pipeline construction, operation, and transportation. *Id.* at 513-514; *see Cascade*, 955 F.2d at 1418 ("Exceptions to the primary grant of jurisdiction in section 1(b) are to be strictly construed.") (quoting *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 690-91 (1947)).

The Commission instead reasonably found here that, like the lateral in *Oklahoma Natural Gas*, the Project is part of Millennium's integrated, interstate pipeline system, because:

- It interconnects with, and adds benefit to, an existing interstate pipeline,

- The existing pipeline is transporting gas in interstate commerce, and
- The gas entering the Project will be mixed with other gas that travelled in interstate commerce.

See Certificate Order P 16, JA 545; *see also Okla. Natural Gas*, 28 F.3d at 1284-85 (when gas mixes with other gas that was in interstate commerce it too becomes interstate gas, even if it does not leave a state). In so holding, the Commission reasonably exercised its jurisdiction over the Project, consistent with the Natural Gas Act and precedent. *See, e.g.*, *New York*, 783 F.3d at 953 (applying *Chevron* deference to the Commission's interpretation of its authority under a statute it was entrusted to administer, and explaining that the question on review of an agency's statutory interpretation "is always, simply, whether the agency has stayed within the bounds of its statutory authority"); *see generally City of Arlington*, 569 U.S. at 296 ("Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.").

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the challenged orders should be affirmed.

Respectfully submitted,

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January 11, 2017

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a), I certify that the Brief of Respondent Federal Energy Regulatory Commission uses a proportionally spaced typeface, Times New Roman, in 14 point font, and contains 12,619 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ *Holly E. Cafer*
Holly E. Cafer
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Regulatory Commission

January 11, 2017

ADDENDUM

Statutes & Regulations

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STATUTES: **PAGE**

REGULATIONS:

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency pro-

of any such interim approval, the provisions of subsection (d)(2) of this section, and the obligation of the Administrator to promulgate a program under this subchapter for the State pursuant to subsection (d)(3) of this section, shall be suspended. Such provisions and such obligation of the Administrator shall apply after the expiration of such interim approval.

(h) Effective date

The effective date of a permit program, or partial or interim program, approved under this subchapter, shall be the effective date of approval by the Administrator. The effective date of a permit program, or partial permit program, promulgated by the Administrator shall be the date of promulgation.

(i) Administration and enforcement

(1) Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, the Administrator shall provide notice to the State and may, prior to the expiration of the 18-month period referred to in paragraph (2), in the Administrator's discretion, apply any of the sanctions specified in section 7509(b) of this title.

(2) Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, 18 months after the date of the notice under paragraph (1), the Administrator shall apply the sanctions under section 7509(b) of this title in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 7509(a) of this title.

(3) The sanctions under section 7509(b)(2) of this title shall not apply pursuant to this subsection in any area unless the failure to adequately enforce and administer the program relates to an air pollutant for which such area has been designated a nonattainment area.

(4) Whenever the Administrator has made a finding under paragraph (1) with respect to any State, unless the State has corrected such deficiency within 18 months after the date of such finding, the Administrator shall, 2 years after the date of such finding, promulgate, administer, and enforce a program under this subchapter for that State. Nothing in this paragraph shall be construed to affect the validity of a program which has been approved under this subchapter or the authority of any permitting authority acting under such program until such time as such program is promulgated by the Administrator under this paragraph.

(July 14, 1955, ch. 360, title V, § 502, as added Pub. L. 101–549, title V, § 501, Nov. 15, 1990, 104 Stat. 2635.)

§ 7661b. Permit applications

(a) Applicable date

Any source specified in section 7661a(a) of this title shall become subject to a permit program, and required to have a permit, on the later of the following dates—

(1) the effective date of a permit program or partial or interim permit program applicable to the source; or

(2) the date such source becomes subject to section 7661a(a) of this title.

(b) Compliance plan

(1) The regulations required by section 7661a(b) of this title shall include a requirement that the applicant submit with the permit application a compliance plan describing how the source will comply with all applicable requirements under this chapter. The compliance plan shall include a schedule of compliance, and a schedule under which the permittee will submit progress reports to the permitting authority no less frequently than every 6 months.

(2) The regulations shall further require the permittee to periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit, and to promptly report any deviations from permit requirements to the permitting authority.

(c) Deadline

Any person required to have a permit shall, not later than 12 months after the date on which the source becomes subject to a permit program approved or promulgated under this subchapter, or such earlier date as the permitting authority may establish, submit to the permitting authority a compliance plan and an application for a permit signed by a responsible official, who shall certify the accuracy of the information submitted. The permitting authority shall approve or disapprove a completed application (consistent with the procedures established under this subchapter for consideration of such applications), and shall issue or deny the permit, within 18 months after the date of receipt thereof, except that the permitting authority shall establish a phased schedule for acting on permit applications submitted within the first full year after the effective date of a permit program (or a partial or interim program). Any such schedule shall assure that at least one-third of such permits will be acted on by such authority annually over a period of not to exceed 3 years after such effective date. Such authority shall establish reasonable procedures to prioritize such approval or disapproval actions in the case of applications for construction or modification under the applicable requirements of this chapter.

(d) Timely and complete applications

Except for sources required to have a permit before construction or modification under the applicable requirements of this chapter, if an applicant has submitted a timely and complete application for a permit required by this subchapter (including renewals), but final action has not been taken on such application, the source's failure to have a permit shall not be a violation of this chapter, unless the delay in final action was due to the failure of the applicant timely to submit information required or requested to process the application. No source required to have a permit under this subchapter shall be in violation of section 7661a(a) of this title before the date on which the source is re-

Pub. L. 100–688, § 2001(3), which directed insertion of ''; Barataria-Terrebonne Bay estuary complex, Louisiana; Indian River Lagoon, Florida; and Peconic Bay, New York'' after ''Galveston Bay, Texas;'' was executed by making insertion after ''Galveston Bay, Texas'' as probable intent of Congress.

1987—Subsec. (a)(2)(B). Pub. L. 100–202 inserted ''Santa Monica Bay, California;''.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–303 effective Nov. 10, 1998, and Federal Water Pollution Act (33 U.S.C. 1251 et seq.) to be applied and administered on and after Nov. 27, 2002, as if amendments made by section 501(a)–(d) of Pub. L. 105–362 had not been enacted, see section 302(b) of Pub. L. 107–303, set out as a note under section 1254 of this title.

MASSACHUSETTS BAY PROTECTION; DEFINITION; FINDINGS AND PURPOSE; FUNDING SOURCES

Pub. L. 100–653, title X, §§ 1002, 1003, 1005, Nov. 14, 1988, 102 Stat. 3835, 3836, provided that:

''SEC. 1002. DEFINITION.

''For purposes of this title [amending section 1330 of this title and enacting provisions set out as notes under sections 1251 and 1330 of this title], the term 'Massachusetts Bay' includes Massachusetts Bay, Cape Cod Bay, and Boston Harbor, consisting of an area extending from Cape Ann, Massachusetts south to the northern reach of Cape Cod, Massachusetts.

''SEC. 1003. FINDINGS AND PURPOSE.

''(a) FINDINGS.—The Congress finds and declares that—

''(1) Massachusetts Bay comprises a single major estuarine and oceanographic system extending from Cape Ann, Massachusetts south to the northern reaches of Cape Cod, encompassing Boston Harbor, Massachusetts Bay, and Cape Cod Bay;

''(2) several major riverine systems, including the Charles, Neponset, and Mystic Rivers, drain the watersheds of eastern Massachusetts into the Bay;

''(3) the shorelines of Massachusetts Bay, first occupied in the middle 1600's, are home to over 4 million people and support a thriving industrial and recreational economy;

''(4) Massachusetts Bay supports important commercial fisheries, including lobsters, finfish, and shellfisheries, and is home to or frequented by several endangered species and marine mammals;

''(5) Massachusetts Bay also constitutes an important recreational resource, providing fishing, swimming, and boating opportunities to the region;

''(6) rapidly expanding coastal populations and pollution pose increasing threats to the long-term health and integrity of Massachusetts Bay;

''(7) while the cleanup of Boston Harbor will contribute significantly to improving the overall environmental quality of Massachusetts Bay, expanded efforts encompassing the entire ecosystem will be necessary to ensure its long-term health;

''(8) the concerted efforts of all levels of Government, the private sector, and the public at large will be necessary to protect and enhance the environmental integrity of Massachusetts Bay; and

''(9) the designation of Massachusetts Bay as an Estuary of National Significance and the development of a comprehensive plan for protecting and restoring the Bay may contribute significantly to its long-term health and environmental integrity.

''(b) PURPOSE.—The purpose of this title is to protect and enhance the environmental quality of Massachusetts Bay by providing for its designation as an Estuary of National Significance and by providing for the preparation of a comprehensive restoration plan for the Bay.

''SEC. 1005. FUNDING SOURCES.

''Within one year of enactment [Nov. 14, 1988], the Administrator of the United States Environmental Protection Agency and the Governor of Massachusetts shall undertake to identify and make available sources of funding to support activities pertaining to Massachusetts Bay undertaken pursuant to or authorized by section 320 of the Clean Water Act [33 U.S.C. 1330], and shall make every effort to coordinate existing research, monitoring or control efforts with such activities.''

PURPOSES AND POLICIES OF NATIONAL ESTUARY PROGRAM

Pub. L. 100–4, title III, § 317(a), Feb. 4, 1987, 101 Stat. 61, provided that:

''(1) FINDINGS.—Congress finds and declares that—

''(A) the Nation's estuaries are of great importance for fish and wildlife resources and recreation and economic opportunity;

''(B) maintaining the health and ecological integrity of these estuaries is in the national interest;

''(C) increasing coastal population, development, and other direct and indirect uses of these estuaries threaten their health and ecological integrity;

''(D) long-term planning and management will contribute to the continued productivity of these areas, and will maximize their utility to the Nation; and

''(E) better coordination among Federal and State programs affecting estuaries will increase the effectiveness and efficiency of the national effort to protect, preserve, and restore these areas.

''(2) PURPOSES.—The purposes of this section [enacting this section] are to—

''(A) identify nationally significant estuaries that are threatened by pollution, development, or overuse;

''(B) promote comprehensive planning for, and conservation and management of, nationally significant estuaries;

''(C) encourage the preparation of management plans for estuaries of national significance; and

''(D) enhance the coordination of estuarine research.''

SUBCHAPTER IV—PERMITS AND LICENSES

§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or

Administrator, as the case may be, 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 with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall,

upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

(June 30, 1948, ch. 758, title IV, § 401, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 877; amended Pub. L. 95–217, §§ 61(b), 64, Dec. 27, 1977, 91 Stat. 1598, 1599.)

AMENDMENTS

1977—Subsec. (a). Pub. L. 95–217 inserted reference to section 1313 of this title in pars. (1), (3), (4), and (5), struck out par. (6) which provided that no Federal agency be deemed an applicant for purposes of this subsection, and redesignated par. (7) as (6).

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

Subsec. (c)(1), (2). Pub. L. 95–217, § 50, substituted ''section 1314(i)(2)'' for ''section 1314(h)(2)''.

Subsec. (d)(2). Pub. L. 95–217, § 65(b), inserted provision requiring that, whenever the Administrator objects to the issuance of a permit under subsec. (d)(2) of this section, the written objection contain a statement of the reasons for the objection and the effluent limitations and conditions which the permit would include if it were issued by the Administrator.

Subsec. (d)(4). Pub. L. 95–217, § 65(a), added par. (4).

Subsec. (e). Pub. L. 95–217, § 50, substituted ''subsection (i)(2) of section 1314'' for ''subsection (h)(2) of section 1314''.

Subsec. (h). Pub. L. 95–217, § 66, substituted ''where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit,'' for ''where no State program is approved,''.

Subsec. (*l*). Pub. L. 95–217, § 33(c), added subsec. (*l*).

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

Enforcement functions of Administrator or other official of the Environmental Protection Agency under this section relating to compliance with national pollutant discharge elimination system permits with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

PERMIT REQUIREMENTS FOR DISCHARGES FROM CERTAIN VESSELS

Pub. L. 110–299, §§ 1, 2, July 31, 2008, 122 Stat. 2995, as amended by Pub. L. 111–215, § 1, July 30, 2010, 124 Stat. 2347; Pub. L. 112–213, title VII, § 703, Dec. 20, 2012, 126 Stat. 1580; Pub. L. 113–281, title VI, § 602, Dec. 18, 2014, 128 Stat. 3061, provided that:

''SECTION 1. DEFINITIONS.

''In this Act:

''(1) ADMINISTRATOR.—The term 'Administrator' means the Administrator of the Environmental Protection Agency.

''(2) COVERED VESSEL.—The term 'covered vessel' means a vessel that is—

''(A) less than 79 feet in length; or

''(B) a fishing vessel (as defined in section 2101 of title 46, United States Code), regardless of the length of the vessel.

''(3) OTHER TERMS.—The terms 'contiguous zone', 'discharge', 'ocean', and 'State' have the meanings given the terms in section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362).

''SEC. 2. DISCHARGES INCIDENTAL TO NORMAL OPERATION OF VESSELS.

''(a) NO PERMIT REQUIREMENT.—Except as provided in subsection (b), during the period beginning on the date of the enactment of this Act [July 31, 2008] and ending on December 18, 2017, the Administrator, or a State in the case of a permit program approved under section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342), shall not require a permit under that section for a covered vessel for—

''(1) any discharge of effluent from properly functioning marine engines;

''(2) any discharge of laundry, shower, and galley sink wastes; or

''(3) any other discharge incidental to the normal operation of a covered vessel.

''(b) EXCEPTIONS.—Subsection (a) shall not apply with respect to—

''(1) rubbish, trash, garbage, or other such materials discharged overboard;

''(2) other discharges when the vessel is operating in a capacity other than as a means of transportation, such as when—

''(A) used as an energy or mining facility;

''(B) used as a storage facility or a seafood processing facility;

''(C) secured to a storage facility or a seafood processing facility; or

''(D) secured to the bed of the ocean, the contiguous zone, or waters of the United States for the purpose of mineral or oil exploration or development;

''(3) any discharge of ballast water; or

''(4) any discharge in a case in which the Administrator or State, as appropriate, determines that the discharge—

''(A) contributes to a violation of a water quality standard; or

''(B) poses an unacceptable risk to human health or the environment.''

STORMWATER PERMIT REQUIREMENTS

Pub. L. 102–240, title I, § 1068, Dec. 18, 1991, 105 Stat. 2007, provided that:

''(a) GENERAL RULE.—Notwithstanding the requirements of sections 402(p)(2)(B), (C), and (D) of the Federal Water Pollution Control Act [33 U.S.C. 1342(p)(2)(B), (C), (D)], permit application deadlines for stormwater discharges associated with industrial activities from facilities that are owned or operated by a municipality shall be established by the Administrator of the Environmental Protection Agency (hereinafter in this section referred to as the 'Administrator') pursuant to the requirements of this section.

''(b) PERMIT APPLICATIONS.—

''(1) INDIVIDUAL APPLICATIONS.—The Administrator shall require individual permit applications for discharges described in subsection (a) on or before October 1, 1992; except that any municipality that has participated in a timely part I group application for an industrial activity discharging stormwater that is denied such participation in a group application or for which a group application is denied shall not be required to submit an individual application until the 180th day following the date on which the denial is made.

''(2) GROUP APPLICATIONS.—With respect to group applications for permits for discharges described in subsection (a), the Administrator shall require—

''(A) part I applications on or before September 30, 1991, except that any municipality with a population of less than 250,000 shall not be required to submit a part I application before May 18, 1992; and

''(B) part II applications on or before October 1, 1992, except that any municipality with a population of less than 250,000 shall not be required to submit a part II application before May 17, 1993.

''(c) MUNICIPALITIES WITH LESS THAN 100,000 POPULATION.—The Administrator shall not require any mu-

tion, and dispersal of pollutants or their by-products through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

(D) the persistence and permanence of the effects of disposal of pollutants;

(E) the effect of the disposal of varying rates, of particular volumes and concentrations of pollutants;

(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

(2) In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued under section 1342 of this title.

(June 30, 1948, ch. 758, title IV, § 403, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 883.)

DISCHARGES FROM POINT SOURCES IN UNITED STATES VIRGIN ISLANDS ATTRIBUTABLE TO MANUFACTURE OF RUM; EXEMPTION; CONDITIONS

Discharges from point sources in the United States Virgin Islands in existence on Aug. 5, 1983, attributable to the manufacture of rum not to be subject to the requirements of this section under certain conditions, see section 214(g) of Pub. L. 98–67, set out as a note under section 1311 of this title.

TERRITORIAL SEA AND CONTIGUOUS ZONE OF UNITED STATES

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term ''Secretary'' as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins,

§ 715*l*. Repealed. June 22, 1942, ch. 436, 56 Stat. 381

Section, acts Feb. 22, 1935, ch. 18, § 13, 49 Stat. 33; June 14, 1937, ch. 335, 50 Stat. 257; June 29, 1939, ch. 250, 53 Stat. 927, provided for expiration of this chapter on June 30, 1942.

§ 715m. Cooperation between Secretary of the Interior and Federal and State authorities

The Secretary of the Interior, in carrying out this chapter, is authorized to cooperate with Federal and State authorities.

(June 25, 1946, ch. 472, § 3, 60 Stat. 307.)

CODIFICATION

Section was not enacted as a part act Feb. 22, 1935, which comprises this chapter.

DELEGATION OF FUNCTIONS

Delegation of President's authority to Secretary of the Interior, see note set out under section 715j of this title.

CHAPTER 15B—NATURAL GAS

Sec.

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is—

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

(June 21, 1938, ch. 556, § 1, 52 Stat. 821; Mar. 27, 1954, ch. 115, 68 Stat. 36; Pub. L. 102–486, title IV, § 404(a)(1), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, § 311(a), Aug. 8, 2005, 119 Stat. 685.)

AMENDMENTS

2005—Subsec. (b). Pub. L. 109–58 inserted ''and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation,'' after ''such transportation or sale,''.

1992—Subsec. (d). Pub. L. 102–486 added subsec. (d).

1954—Subsec. (c). Act Mar. 27, 1954, added subsec. (c).

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

STATE LAWS AND REGULATIONS

Pub. L. 102–486, title IV, § 404(b), Oct. 24, 1992, 106 Stat. 2879, provided that: ''The transportation or sale of natural gas by any person who is not otherwise a public utility, within the meaning of State law—

''(1) in closed containers; or

''(2) otherwise to any person for use by such person as a fuel in a self-propelled vehicle,

shall not be considered to be a transportation or sale of natural gas within the meaning of any State law, regulation, or order in effect before January 1, 1989. This subsection shall not apply to any provision of any State law, regulation, or order to the extent that such provision has as its primary purpose the protection of public safety.''

EMERGENCY NATURAL GAS ACT OF 1977

Pub. L. 95–2, Feb. 2, 1977, 91 Stat. 4, authorized President to declare a natural gas emergency and to require emergency deliveries and transportation of natural gas until the earlier of Apr. 30, 1977, or termination of emergency by President and provided for antitrust protection, emergency purchases, adjustment in charges for local distribution companies, relationship to Natural Gas Act, effect of certain contractual obligations, administrative procedure and judicial review, enforcement, reporting to Congress, delegation of authorities, and preemption of inconsistent State or local action.

EXECUTIVE ORDER NO. 11969

Ex. Ord. No. 11969, Feb. 2, 1977, 42 F.R. 6791, as amended by Ex. Ord. No. 12038, Feb. 3, 1978, 43 F.R. 4957, which delegated to the Secretary of Energy the authority vested in the President by the Emergency Natural Gas Act of 1977 except the authority to declare and terminate a natural gas emergency, was revoked by Ex. Ord. No. 12553, Feb. 25, 1986, 51 F.R. 7237.

PROCLAMATION NO. 4485

Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, declared that a natural gas emergency existed within the meaning of section 3 of the Emergency Natural Gas Act of 1977, set out as a note above, which emergency was terminated by Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, formerly set out below.

PROCLAMATION NO. 4495

Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, terminated the natural gas emergency declared to exist by Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, formerly set out above.

§ 717a. Definitions

When used in this chapter, unless the context otherwise requires—

(1) ''Person'' includes an individual or a corporation.

(2) ''Corporation'' includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) ''Municipality'' means a city, county, or other political subdivision or agency of a State.

(4) ''State'' means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) ''Natural gas'' means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) ''Natural-gas company'' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) ''Interstate commerce'' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) ''State commission'' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) ''Commission'' and ''Commissioner'' means the Federal Power Commission, and a member thereof, respectively.

(10) ''Vehicular natural gas'' means natural gas that is ultimately used as a fuel in a self-propelled vehicle.

(11) ''LNG terminal'' includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include—

(A) waterborne vessels used to deliver natural gas to or from any such facility; or

(B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 717f of this title.

(June 21, 1938, ch. 556, § 2, 52 Stat. 821; Pub. L. 102–486, title IV, § 404(a)(2), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, § 311(b), Aug. 8, 2005, 119 Stat. 685.)

AMENDMENTS

2005—Par. (11). Pub. L. 109–58 added par. (11).

1992—Par. (10). Pub. L. 102–486 added par. (10).

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a)(1), 7291, and 7293 of Title 42, The Public Health and Welfare.

§ 717b. Exportation or importation of natural gas; LNG terminals

(a) Mandatory authorization order

After six months from June 21, 1938, no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent

with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Inventory of property; statements of costs

Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 21, 1938, ch. 556, § 6, 52 Stat. 824.)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under

oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

(June 21, 1938, ch. 556, §7, 52 Stat. 824; Feb. 7, 1942, ch. 49, 56 Stat. 83; July 25, 1947, ch. 333, 61 Stat. 459; Pub. L. 95–617, title VI, §608, Nov. 9, 1978, 92 Stat. 3173; Pub. L. 100–474, §2, Oct. 6, 1988, 102 Stat. 2302.)

AMENDMENTS

1988—Subsec. (f). Pub. L. 100–474 designated existing provisions as par. (1) and added par. (2).

1978—Subsec. (c). Pub. L. 95–617, §608(a), (b)(1), designated existing first paragraph as par. (1)(A) and existing second paragraph as par. (1)(B) and added par. (2).

Subsec. (e). Pub. L. 95–617, §608(b)(2), substituted ''subsection (c)(1)'' for ''subsection (c)''.

1947—Subsec. (h). Act July 25, 1947, added subsec. (h).

1942—Subsecs. (c) to (g). Act Feb. 7, 1942, struck out subsec. (c), and added new subsecs. (c) to (g).

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–474, §3, Oct. 6, 1988, 102 Stat. 2302, provided that: ''The provisions of this Act [amending this section and enacting provisions set out as a note under section 717w of this title] shall become effective one hundred and twenty days after the date of enactment [Oct. 6, 1988].''

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of Energy and Commission, Commissioners, or other official in Federal Energy Regulatory Commission related to compliance with certificates of public convenience and necessity issued under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(d), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out under section 719e of this title. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of this title. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of this title.

§ 717g. Accounts; records; memoranda

(a) Rules and regulations for keeping and preserving accounts, records, etc.

Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and

(d) Jurisdiction of courts of United States

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(e) Testimony of witnesses

The testimony of any witness may be taken at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition at any time after the proceeding is at issue. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it at any stage of such proceeding or investigation. Such depositions may be taken before any person authorized to administer oaths not being of counsel or attorney to either of the parties, nor interested in the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided. Such testimony shall be reduced to writing by the person taking deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(f) Deposition of witnesses in a foreign country

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(g) Witness fees

Witnesses whose depositions are taken as authorized in this chapter, and the person or officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(June 21, 1938, ch. 556, §14, 52 Stat. 828; Pub. L. 91–452, title II, §218, Oct. 15, 1970, 84 Stat. 929.)

AMENDMENTS

1970—Subsec. (h). Pub. L. 91–452 struck out subsec. (h) which related to the immunity from prosecution of any individual compelled to testify or produce evidence, documentary or otherwise, after claiming his privilege against self-incrimination.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–452 effective on sixtieth day following Oct. 15, 1970, and not to affect any immunity to which any individual is entitled under this section by reason of any testimony given before sixtieth day following Oct. 15, 1970, see section 260 of Pub. L. 91–452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

STUDY AND REPORT ON NATURAL GAS PIPELINE AND STORAGE FACILITIES IN NEW ENGLAND

Pub. L. 107–355, §26, Dec. 17, 2002, 116 Stat. 3012, provided that:

''(a) STUDY.—The Federal Energy Regulatory Commission, in consultation with the Department of Energy, shall conduct a study on the natural gas pipeline transmission network in New England and natural gas storage facilities associated with that network.

''(b) CONSIDERATION.—In carrying out the study, the Commission shall consider the ability of natural gas pipeline and storage facilities in New England to meet current and projected demand by gas-fired power generation plants and other consumers.

''(c) REPORT.—Not later than 1 year after the date of enactment of this Act [Dec. 17, 2002], the Federal Energy Regulatory Commission shall prepare and submit to the Committee on Energy and Natural Resources of the Senate and the Committee on Energy and Commerce of the House of Representatives a report containing the results of the study conducted under subsection (a), including recommendations for addressing potential natural gas transmission and storage capacity problems in New England.''

§ 717n. Process coordination; hearings; rules of procedure

(a) Definition

In this section, the term ''Federal authorization''—

(1) means any authorization required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title; and

(2) includes any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title.

(b) Designation as lead agency

(1) In general

The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of

complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Other agencies

Each Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission.

(c) Schedule

(1) Commission authority to set schedule

The Commission shall establish a schedule for all Federal authorizations. In establishing the schedule, the Commission shall—

(A) ensure expeditious completion of all such proceedings; and

(B) comply with applicable schedules established by Federal law.

(2) Failure to meet schedule

If a Federal or State administrative agency does not complete a proceeding for an approval that is required for a Federal authorization in accordance with the schedule established by the Commission, the applicant may pursue remedies under section 717r(d) of this title.

(d) Consolidated record

The Commission shall, with the cooperation of Federal and State administrative agencies and officials, maintain a complete consolidated record of all decisions made or actions taken by the Commission or by a Federal administrative agency or officer (or State administrative agency or officer acting under delegated Federal authority) with respect to any Federal authorization. Such record shall be the record for—

(1) appeals or reviews under the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), provided that the record may be supplemented as expressly provided pursuant to section 319 of that Act [16 U.S.C. 1465]; or

(2) judicial review under section 717r(d) of this title of decisions made or actions taken of Federal and State administrative agencies and officials, provided that, if the Court determines that the record does not contain sufficient information, the Court may remand the proceeding to the Commission for further development of the consolidated record.

(e) Hearings; parties

Hearings under this chapter may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(f) Procedure

All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 21, 1938, ch. 556, §15, 52 Stat. 829; Pub. L. 109–58, title III, §313(a), Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (b)(1), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), is title III of Pub. L. 89–454, as added by Pub. L. 92–583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

AMENDMENTS

2005—Pub. L. 109–58 substituted ''Process coordination; hearings; rules of procedure'' for ''Hearings; rules of procedure'' in section catchline, added subsecs. (a) to (d), and redesignated former subsecs. (a) and (b) as (e) and (f), respectively.

§ 717*o*. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 21, 1938, ch. 556, §16, 52 Stat. 830.)

§ 717p. Joint boards

(a) Reference of matters to joint boards; composition and power

The Commission may refer any matter arising in the administration of this chapter to a board to be composed of a member or members, as determined by the Commission, from the State or

each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The Board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Conference with State commissions regarding rate structure, costs, etc.

The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Information and reports available to State commissions

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 21, 1938, ch. 556, §17, 52 Stat. 830.)

§ 717q. Appointment of officers and employees

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 21, 1938, ch. 556, §18, 52 Stat. 831; Oct. 28, 1949, ch. 782, title XI, §1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States'' are omitted as obsolete and superseded.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed by Pub. L. 89–554, Sept. 6, 1966, §8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

Such appointments are now subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, §1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, §8, 80 Stat. 632, 655.

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as ''permit'') required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

(June 21, 1938, ch. 556, § 19, 52 Stat. 831; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 19, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title III, § 313(b), Aug. 8, 2005, 119 Stat. 689.)

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), (2), is title III of Pub. L. 89–454, as added by Pub. L. 92–583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§ 1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amend-

will accept an application for exemption of that project from licensing only if the exemption applicant is the licensee.

(2) *Pending license applications.* If an accepted license application for a project was submitted by a permittee before the preliminary permit expired, the Commission will not accept an application for exemption of that project from licensing submitted by a person other than the former permittee.

(3) *Submitted by qualified exemption applicant.* If the first accepted license application for a project was filed by a qualified exemption applicant, the applicant may request that its license application be treated initially as an application for exemption from licensing by so notifying the Commission in writing and, unless only rights to use or occupy Federal lands would be necessary to develop and operate the project, by submitting documentary evidence showing that the applicant holds the real property interests required under §4.31. Such notice and documentation must be submitted not later than the last date for filing protests or motions to intervene prescribed in the public notice issued for its license application under §4.32(d)(2).

(e) *Priority of exemption applicant's earlier permit or license application.* Any accepted preliminary permit or license application submitted by a person who later applies for exemption of the project from licensing will retain its validity and priority under this subpart until the preliminary permit or license application is withdrawn or the project is exempted from licensing.

[Order 413, 50 FR 11680, Mar. 25, 1985, as amended by Order 499, 53 FR 27002, July 18, 1988; Order 2002, 68 FR 51116, Aug. 25, 2003; Order 699, 72 FR 45324, Aug. 14, 2007]

§4.34 Hearings on applications; consultation on terms and conditions; motions to intervene; alternative procedures.

(a) *Trial-type hearing.* The Commission may order a trial-type hearing on an application for a preliminary permit, a license, or an exemption from licensing upon either its own motion or the motion of any interested party of record. Any trial-type hearing will be limited to the issues prescribed by order of the Commission. In all other cases the hearings will be conducted by notice and comment procedures.

(b) *Notice and comment hearings.* All comments (including mandatory and recommended terms and conditions or prescriptions) on an application for exemption or license must be filed with the Commission no later than 60 days after issuance by the Commission of public notice declaring that the application is ready for environmental analysis. All reply comments must be filed within 105 days of that notice. All comments and reply comments and all other filings described in this section must be served on all persons listed in the service list prepared by the Commission, in accordance with the requirements of §385.2010 of this chapter. If a party or interceder (as defined in §385.2201 of this Chapter) submits any written material to the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, the party or interceder must also serve a copy of the submission on this resource agency. The Commission may allow for longer comment or reply comment periods if appropriate. A commenter or reply commenter may obtain an extension of time from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with §385.2008 of this chapter. Late-filed fish and wildlife recommendations will not be subject to the requirements of paragraphs (e), (f)(1)(ii), and (f)(3) of this section, and late-filed terms and conditions or prescriptions will not be subject to the requirements of paragraphs (f)(1)(iv), (f)(1)(v), and (f)(2) of this section. Late-filed fish and wildlife recommendations, terms and conditions, or prescriptions will be considered by the Commission under section 10(a) of the Federal Power Act if such consideration would not delay or disrupt the proceeding.

(1) *Agencies responsible for mandatory terms and conditions and presentations.* Any agency responsible for mandatory terms and conditions or prescriptions for licenses or exemptions, pursuant to sections 4(e), 18, and 30(c) of the Federal Power Act and section 405(d) of the Public Utility Regulatory Policies Act

of 1978, as amended, must provide these terms and conditions or prescriptions in its initial comments filed with the Commission pursuant to paragraph (b) of this section. In those comments, the agency must specifically identify and explain the mandatory terms and conditions or prescriptions and their evidentiary and legal basis. In the case of an application prepared other than pursuant to part 5 of this chapter, if ongoing agency proceedings to determine the terms and conditions or prescriptions are not completed by the date specified, the agency must submit to the Commission by the due date:

(i) Preliminary terms and conditions or prescriptions and a schedule showing the status of the agency proceedings and when the terms and conditions or prescriptions are expected to become final; or

(ii) A statement waiving the agency's right to file the terms and conditions or prescriptions or indicating the agency does not intend to file terms and conditions or prescriptions.

(2) *Fish and Wildlife agencies and Indian tribes.* All fish and wildlife agencies must set forth any recommended terms and conditions for the protection, mitigation of damages to, or enhancement of fish and wildlife, pursuant to the Fish and Wildlife Coordination Act and section 10(j) of the Federal Power Act, in their initial comments filed with the Commission by the date specified in paragraph (b) of this section. All Indian tribes must submit recommendations (including fish and wildlife recommendations) by the same date. In those comments, a fish and wildlife agency or Indian tribe must discuss its understanding of the resource issues presented by the proposed facilities and the evidentiary basis for the recommended terms and conditions.

(3) *Other Government agencies and members of the public.* Resource agencies, other governmental units, and members of the public must file their recommendations in their initial comments by the date specified in paragraph (b) of this section. The comments must clearly identify all recommendations and present their evidentiary basis.

(4) *Submittal of modified recommendations, terms and conditions or prescriptions.* (i) If the information and analysis (including reasonable alternatives) presented in a draft environmental document, issued for comment by the Commission, indicate a need to modify the recommendations or terms and conditions or prescriptions previously submitted to the Commission pursuant to paragraphs (b)(1), (b)(2), or (b)(3) of this section, the agency, Indian tribe, or member of the public must file with the Commission any modified recommendations or terms and conditions or prescriptions on the proposed project (and reasonable alternatives) no later than the due date for comments on the draft environmental impact statement. Modified recommendations or terms and conditions or prescriptions must be clearly distinguished from comments on the draft document.

(ii) If an applicant files an amendment to its application that would materially change the project's proposed plans of development, as provided in § 4.35, an agency, Indian tribe or member of the public may modify the recommendations or terms and conditions or prescriptions it previously submitted to the Commission pursuant to paragraphs (b)(1), (b)(2), or (b)(3) of this section no later than the due date specified by the Commission for comments on the amendment.

(5)(i) With regard to certification requirements for a license applicant under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), an applicant shall file within 60 days from the date of issuance of the notice of ready for environmental analysis:

(A) A copy of the water quality certification;

(B) A copy of the request for certification, including proof of the date on which the certifying agency received the request; or

(C) Evidence of waiver of water quality certification as described in paragraph (b)(5)(ii) of this section.

(ii) In the case of an application process using the alternative procedures of paragraph 4.34(i), the filing requirement of paragraph (b)(5)(i) shall apply

upon issuance of notice the Commission has accepted the application as provided for in paragraph 4.32(d) of this part.

(iii) A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

(c) *Additional procedures.* If necessary or appropriate the Commission may require additional procedures (*e.g.*, a prehearing conference, further notice and comment on specific issues or oral argument). A party may request additional procedures in a motion that clearly and specifically sets forth the procedures requested and the basis for the request. Replies to such requests may be filed within 15 days of the request.

(d) *Consultation procedures.* Pursuant to the Federal Power Act and the Public Utility Regulatory Policies Act of 1978, as amended, the Commission will coordinate as appropriate with other government agencies responsible for mandatory terms and conditions for exemptions and licenses for hydropower projects. Pursuant to the Federal Power Act and the Fish and Wildlife Coordination Act, the Commission will consult with fish and wildlife agencies concerning the impact of a hydropower proposal on fish and wildlife and appropriate terms and conditions for license to adequately and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat). Pursuant to the Federal Power Act and the Endangered Species Act, the Commission will consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, concerning the impact of a hydropower proposal on endangered or threatened species and their critical habitat.

(e) *Consultation on recommended fish and wildlife conditions; Section 10(j) process.* (1) In connection with its environmental review of an application for license, the Commission will analyze all terms and conditions timely recommended by fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act for the protection, mitigation of damages to, and enhancement of fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the proposed project. Submission of such recommendations marks the beginning of the process under section 10(j) of the Federal Power Act.

(2) The agency must specifically identify and explain the recommendations and the relevant resource goals and objectives and their evidentiary or legal basis. The Commission may seek clarification of any recommendation from the appropriate fish and wildlife agency. If the Commission's request for clarification is communicated in writing, copies of the request will be sent by the Commission to all parties, affected resource agencies, and Indian tribes, which may file a response to the request for clarification within the time period specified by the Commission. If the Commission believes any fish and wildlife recommendation may be inconsistent with the Federal Power Act or other applicable law, the Commission will make a preliminary determination of inconsistency in the draft environmental document or, if none, the environmental assessment. The preliminary determination, for any recommendations believed to be inconsistent, shall include an explanation why the Commission believes the recommendation is inconsistent with the Federal Power Act or other applicable law, including any supporting analysis and conclusions, and an explanation of how the measures recommended in the environmental document would adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project.

(3) Any party, affected resource agency, or Indian tribe may file comments in response to the preliminary determination of inconsistency, including any modified recommendations, within the time frame allotted for comments

Subpart C [Reserved]

Subpart D—Exemption of Natural Gas Service for Drilling, Testing, or Purging from Certificate Requirements

Subpart E [Reserved]

Subpart F—Interstate Pipeline Blanket Certificates and Authorization Under Section 7 of the Natural Gas Act for Certain Transactions and Abandonment

Subpart G—Natural Gas Producer Blanket Authorization for Sales and Abandonment [Reserved]

AUTHORITY: 15 U.S.C. 717–717z.

Subpart A—Applications for Certificates of Public Convenience and Necessity and for Orders Permitting and Approving Abandonment under Section 7 of the Natural Gas Act, as Amended, Concerning Any Operation, Sales, Service, Construction, Extension, Acquisition or Abandonment

§ 157.1 Definitions.

For the purposes of this part—

For the purposes of § 157.21 of this part, *Director* means the Director of the Commission's Office of Energy Projects.

Indian tribe means, in reference to a proposal or application for a certificate or abandonment, an Indian tribe which is recognized by treaty with the United States, by federal statute, or by the U.S. Department of the Interior in its periodic listing of tribal governments in the FEDERAL REGISTER in accordance with 25 CFR 83.6(b), and whose legal rights as a tribe may be affected by the proposed construction, operation or abandonment of facilities or services (as where the construction or operation of the proposed facilities could interfere with the tribe's hunting or fishing rights or where the proposed facilities would be located within the tribe's reservation).

Resource agency means a Federal, state, or interstate agency exercising administration over the areas of recreation, fish and wildlife, water resource management, or cultural or other relevant resources of the state or states in which the facilities or services for which a certificate or abandonment is proposed are or will be located.

[Order 608, 64 FR 51220, Sept. 22, 1999, as amended by Order 665, 70 FR 60440, Oct. 18, 2005]

§ 157.5 Purpose and intent of rules.

(a) Applications under section 7 of the Natural Gas Act shall set forth all information necessary to advise the

Commission fully concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested or the abandonment for which permission and approval is requested. Some applications may be of such character that an abbreviated application may be justified under the provisions of §157.7. Applications for permission and approval to abandon pursuant to section 7(b) of the Act shall conform to §157.18 and to such other requirements of this part as may be pertinent. However, every applicant shall file all pertinent data and information necessary for a full and complete understanding of the proposed project, including its effect upon applicant's present and future operations and whether, and at what docket, applicant has previously applied for authorization to serve any portion of the market contemplated by the proposed project and the nature and disposition of such other project.

(b) Every requirement of this part shall be considered as a forthright obligation of the applicant which can only be avoided by a definite and positive showing that the information or data called for by the applicable rules is not necessary for the consideration and ultimate determination of the application.

(c) This part will be strictly applied to all applications as submitted and the burden of adequate presentation in intelligible form as well as justification for omitted data or information rests with the applicant.

[17 FR 7386, Aug. 14, 1952, as amended by Order 280, 29 FR 4876, Apr. 7, 1964]

§157.6 Applications; general requirements.

(a) *Applicable rules*—(1) *Submission required to be furnished by applicant under this subpart.* Applications, amendments thereto, and all exhibits and other submissions required to be furnished by an applicant to the Commission under this subpart must be submitted in an original and 7 conformed copies. To the extent that data required under this subpart has been provided to the Commission, this data need not be duplicated. The applicant must, however, include a statement identifying the forms and records containing the required information and when that form or record was submitted.

(2) *Maps and diagrams.* An applicant required to submit a map or diagram under this subpart must submit one paper copy of the map or diagram.

(3) The following must be submitted in electronic format as prescribed by the Commission:

(i) Applications filed under this part 157 and all attached exhibits;

(ii) Applications covering acquisitions and all attached exhibits;

(iii) Applications for temporary certificates and all attached exhibits;

(iv) Applications to abandon facilities or services and all attached exhibits;

(v) The progress reports required under §157.20(c) and (d);

(vi) Applications submitted under subpart E of this part and all attached exhibits;

(vii) Applications submitted under subpart F of this part and all attached exhibits;

(viii) Requests for authorization under the notice procedures established in §157.205 and all attached exhibits;

(ix) The annual report required by §157.207;

(x) The report required under §157.214 when storage capacity is increased;

(xi) Amendments to any of the foregoing.

(4) All filings must be signed in compliance with the following.

(i) The signature on a filing constitutes a certification that: The signer has read the filing signed and knows the contents of the paper copies and electronic filing; the paper copies contain the same information as contained in the electronic filing; the contents as stated in the copies and in the electronic filing are true to the best knowledge and belief of the signer; and the signer possesses full power and authority to sign the filing.

(ii) A filing must be signed by one of the following:

(A) The person on behalf of whom the filing is made;

(B) An officer, agent, or employee of the governmental authority, agency, or instrumentality on behalf of which the filing is made; or,

(C) A representative qualified to practice before the Commission under

of the required environmental documentation.

(f) *Fees.* Fees are required for permits under section 404 of the Clean Water Act, section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and sections 9 and 10 of the Rivers and Harbors Act of 1899. A fee of $100.00 will be charged when the planned or ultimate purpose of the project is commercial or industrial in nature and is in support of operations that charge for the production, distribution or sale of goods or services. A $10.00 fee will be charged for permit applications when the proposed work is non-commercial in nature and would provide personal benefits that have no connection with a commercial enterprise. The final decision as to the basis for a fee (commercial vs. non-commercial) shall be solely the responsibility of the district engineer. No fee will be charged if the applicant withdraws the application at any time prior to issuance of the permit or if the permit is denied. Collection of the fee will be deferred until the proposed activity has been determined to be not contrary to the public interest. Multiple fees are not to be charged if more than one law is applicable. Any modification significant enough to require publication of a public notice will also require a fee. No fee will be assessed when a permit is transferred from one property owner to another. No fees will be charged for time extensions, general permits or letters of permission. Agencies or instrumentalities of federal, state or local governments will not be required to pay any fee in connection with permits.

[51 FR 41236, Nov. 13, 1986, as amended at 73 FR 19670, Apr. 10, 2008]

§ 325.2 Processing of applications.

(a) *Standard procedures.* (1) When an application for a permit is received the district engineer shall immediately assign it a number for identification, acknowledge receipt thereof, and advise the applicant of the number assigned to it. He shall review the application for completeness, and if the application is incomplete, request from the applicant within 15 days of receipt of the application any additional information necessary for further processing.

(2) Within 15 days of receipt of an application the district engineer will either determine that the application is complete (see 33 CFR 325.1(d)(9) and issue a public notice as described in § 325.3 of this part, unless specifically exempted by other provisions of this regulation or that it is incomplete and notify the applicant of the information necessary for a complete application. The district engineer will issue a supplemental, revised, or corrected public notice if in his view there is a change in the application data that would affect the public's review of the proposal.

(3) The district engineer will consider all comments received in response to the public notice in his subsequent actions on the permit application. Receipt of the comments will be acknowledged, if appropriate, and they will be made a part of the administrative record of the application. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition. If comments relate to matters within the special expertise of another federal agency, the district engineer may seek the advice of that agency. If the district engineer determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination, the applicant will be given the opportunity to furnish his views on such issue to the district engineer (see § 325.2(d)(5)). At the earliest practicable time other substantive comments will be furnished to the applicant for his information and any views he may wish to offer. A summary of the comments, the actual letters or portions thereof, or representative comment letters may be furnished to the applicant. The applicant may voluntarily elect to contact objectors in an attempt to resolve objections but will not be required to do so. District engineers will ensure that all parties are informed that the Corps alone is responsible for reaching a decision on the merits of any application. The district engineer may also offer Corps regulatory staff to be present at meetings between applicants and objectors, where appropriate, to provide information on the process, to

brief description of activity involved. It will also note that relevant environmental documents and the SOF's or ROD's are available upon written request and, where applicable, upon the payment of administrative fees. This list will be distributed to all persons who may have an interest in any of the public notices listed.

(9) Copies of permits will be furnished to other agencies in appropriate cases as follows:

(i) If the activity involves the construction of artificial islands, installations or other devices on the outer continental shelf, to the Director, Defense Mapping Agency, Hydrographic Center, Washington, DC 20390 Attention, Code NS12, and to the National Ocean Service, Office of Coast Survey, N/CS261, 1315 East West Highway, Silver Spring, Maryland 20910–3282.

(ii) If the activity involves the construction of structures to enhance fish propagation (e.g., fishing reefs) along the coasts of the United States, to the Defense Mapping Agency, Hydrographic Center and National Ocean Service as in paragraph (a)(9)(i) of this section and to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, DC 20235.

(iii) If the activity involves the erection of an aerial transmission line, submerged cable, or submerged pipeline across a navigable water of the United States, to the National Ocean Service, Office of Coast Survey, N/CS261, 1315 East West Highway, Silver Spring, Maryland 20910–3282.

(iv) If the activity is listed in paragraphs (a)(9) (i), (ii), or (iii) of this section, or involves the transportation of dredged material for the purpose of dumping it in ocean waters, to the appropriate District Commander, U.S. Coast Guard.

(b) *Procedures for particular types of permit situations*—(1) *Section 401 Water Quality Certification*. If the district engineer determines that water quality certification for the proposed activity is necessary under the provisions of section 401 of the Clean Water Act, he shall so notify the applicant and obtain from him or the certifying agency a copy of such certification.

(i) The public notice for such activity, which will contain a statement on certification requirements (see § 325.3(a)(8)), will serve as the notification to the Administrator of the Environmental Protection Agency (EPA) pursuant to section 401(a)(2) of the Clean Water Act. If EPA determines that the proposed discharge may affect the quality of the waters of any state other than the state in which the discharge will originate, it will so notify such other state, the district engineer, and the applicant. If such notice or a request for supplemental information is not received within 30 days of issuance of the public notice, the district engineer will assume EPA has made a negative determination with respect to section 401(a)(2). If EPA determines another state's waters may be affected, such state has 60 days from receipt of EPA's notice to determine if the proposed discharge will affect the quality of its waters so as to violate any water quality requirement in such state, to notify EPA and the district engineer in writing of its objection to permit issuance, and to request a public hearing. If such occurs, the district engineer will hold a public hearing in the objecting state. Except as stated below, the hearing will be conducted in accordance with 33 CFR part 327. The issues to be considered at the public hearing will be limited to water quality impacts. EPA will submit its evaluation and recommendations at the hearing with respect to the state's objection to permit issuance. Based upon the recommendations of the objecting state, EPA, and any additional evidence presented at the hearing, the district engineer will condition the permit, if issued, in such a manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot, in the district engineer's opinion, insure such compliance, he will deny the permit.

(ii) No permit will be granted until required certification has been obtained or has been waived. A waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt

of such a request unless the district engineer determines a shorter or longer period is reasonable for the state to act. In determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a valid request for certification. If, however, special circumstances identified by the district engineer require that action on an application be taken within a more limited period of time, the district engineer shall determine a reasonable lesser period of time, advise the certifying agency of the need for action by a particular date, and that, if certification is not received by that date, it will be considered that the requirement for certification has been waived. Similarly, if it appears that circumstances may reasonably require a period of time longer than sixty days, the district engineer, based on information provided by the certifying agency, will determine a longer reasonable period of time, not to exceed one year, at which time a waiver will be deemed to occur.

(2) *Coastal Zone Management consistency*. If the proposed activity is to be undertaken in a state operating under a coastal zone management program approved by the Secretary of Commerce pursuant to the Coastal Zone Management (CZM) Act (see 33 CFR 320.3(b)), the district engineer shall proceed as follows:

(i) If the applicant is a federal agency, and the application involves a federal activity in or affecting the coastal zone, the district engineer shall forward a copy of the public notice to the agency of the state responsible for reviewing the consistency of federal activities. The federal agency applicant shall be responsible for complying with the CZM Act's directive for ensuring that federal agency activities are undertaken in a manner which is consistent, to the maximum extent practicable, with approved CZM Programs. (See 15 CFR part 930.) If the state coastal zone agency objects to the proposed federal activity on the basis of its inconsistency with the state's approved CZM Program, the district engineer shall not make a final decision on the application until the disagreeing parties have had an opportunity to utilize the procedures specified by the CZM Act for resolving such disagreements.

(ii) If the applicant is not a federal agency and the application involves an activity affecting the coastal zone, the district engineer shall obtain from the applicant a certification that his proposed activity complies with and will be conducted in a manner that is consistent with the approved state CZM Program. Upon receipt of the certification, the district engineer will forward a copy of the public notice (which will include the applicant's certification statement) to the state coastal zone agency and request its concurrence or objection. If the state agency objects to the certification or issues a decision indicating that the proposed activity requires further review, the district engineer shall not issue the permit until the state concurs with the certification statement or the Secretary of Commerce determines that the proposed activity is consistent with the purposes of the CZM Act or is necessary in the interest of national security. If the state agency fails to concur or object to a certification statement within six months of the state agency's receipt of the certification statement, state agency concurrence with the certification statement shall be conclusively presumed. District engineers will seek agreements with state CZM agencies that the agency's failure to provide comments during the public notice comment period will be considered as a concurrence with the certification or waiver of the right to concur or non-concur.

(iii) If the applicant is requesting a permit for work on Indian reservation lands which are in the coastal zone, the district engineer shall treat the application in the same manner as prescribed for a Federal applicant in paragraph (b)(2)(i) of this section. However, if the applicant is requesting a permit on non-trust Indian lands, and the state CZM agency has decided to assert jurisdiction over such lands, the district engineer shall treat the application in the same manner as prescribed for a non-Federal applicant in paragraph (b)(2)(ii) of this section.

(3) *Historic properties*. If the proposed activity would involve any property

§ 124.52 Permits required on a case-by-case basis.

(a) Various sections of part 122, subpart B allow the Director to determine, on a case-by-case basis, that certain concentrated animal feeding operations (§ 122.23), concentrated aquatic animal production facilities (§ 122.24), storm water discharges (§ 122.26), and certain other facilities covered by general permits (§ 122.28) that do not generally require an individual permit may be required to obtain an individual permit because of their contributions to water pollution.

(b) Whenever the Regional Administrator decides that an individual permit is required under this section, except as provided in paragraph (c) of this section, the Regional Administrator shall notify the discharger in writing of that decision and the reasons for it, and shall send an application form with the notice. The discharger must apply for a permit under § 122.21 within 60 days of notice, unless permission for a later date is granted by the Regional Administrator. The question whether the designation was proper will remain open for consideration during the public comment period under § 124.11 and in any subsequent hearing.

(c) Prior to a case-by-case determination that an individual permit is required for a storm water discharge under this section (see § 122.26(a)(1)(v), (c)(1)(v), and (a)(9)(iii) of this chapter), the Regional Administrator may require the discharger to submit a permit application or other information regarding the discharge under section 308 of the CWA. In requiring such information, the Regional Administrator shall notify the discharger in writing and shall send an application form with the notice. The discharger must apply for a permit within 180 days of notice, unless permission for a later date is granted by the Regional Administrator. The question whether the initial designation was proper will remain open for consideration during the public comment period under § 124.11 and in any subsequent hearing.

[55 FR 48075, Nov. 16, 1990, as amended at 60 FR 17957, Apr. 7, 1995; 60 FR 19464, Apr. 18, 1995; 60 FR 40235, Aug. 7, 1995; 64 FR 68851, Dec. 8, 1999; 65 FR 30912, May 15, 2000]

§ 124.53 State certification.

(a) Under CWA section 401(a)(1), EPA may not issue a permit until a certification is granted or waived in accordance with that section by the State in which the discharge originates or will originate.

(b) Applications received without a State certification shall be forwarded by the Regional Administrator to the certifying State agency with a request that certification be granted or denied.

(c) If State certification has not been received by the time the draft permit is prepared, the Regional Administrator shall send the certifying State agency:

(1) A copy of a draft permit;

(2) A statement that EPA cannot issue or deny the permit until the certifying State agency has granted or denied certification under § 124.55, or waived its right to certify; and

(3) A statement that the State will be deemed to have waived its right to certify unless that right is exercised within a specified reasonable time not to exceed 60 days from the date the draft permit is mailed to the certifying State agency unless the Regional Administrator finds that unusual circumstances require a longer time.

(d) State certification shall be granted or denied within the reasonable time specified under paragraph (c)(3) of this section. The State shall send a notice of its action, including a copy of any certification, to the applicant and the Regional Administrator.

(e) State certification shall be in writing and shall include:

(1) Conditions which are necessary to assure compliance with the applicable provisions of CWA sections 208(e), 301, 302, 303, 306, and 307 and with appropriate requirements of State law;

(2) When the State certifies a draft permit instead of a permit application, any conditions more stringent than those in the draft permit which the State finds necessary to meet the requirements listed in paragraph (e)(1) of this section. For each more stringent condition, the certifying State agency shall cite the CWA or State law references upon which that condition is based. Failure to provide such a citation waives the right to certify with respect to that condition; and

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and Circuit Rule 25.1(h), I hereby certify that I have, this 11th day of January 2018, filed the foregoing via the Court's CM/ECF System and served it upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

/s/ Holly E. Cafer
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