168 FERC ¶ 61,129
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Constitution Pipeline Company, LLC — Docket Nos. CP18-5-000
CP18-5-001
CP18-5-002

ORDER ON VOLUNTARY REMAND

(Issued August 28, 2019)

1. This case, involving a petition for declaratory order filed by Constitution Pipeline Company, LLC (Constitution), is before the Commission on voluntary remand from the United States Court of Appeals for the District of Columbia Circuit.[1] At issue is the question whether, in light of the D.C. Circuit's recent decision in *Hoopa Valley Tribe v. FERC*,[2] the New York State Department of Environmental Conservation (New York DEC) waived its authority under section 401 of the Clean Water Act to issue or deny a water quality certification for the proposed Constitution Pipeline Project. As discussed below, we reverse the determination in the Declaratory Order issued in these proceedings on January 11, 2018, and conclude that New York DEC waived its authority.

I. Background

2. On June 13, 2013, Constitution applied to the Commission for a certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act (NGA) to

[1] *Constitution Pipeline Co., LLC v. FERC*, D.C. Cir. No. 18-1251 (challenging the Commission's order on petition for declaratory order in *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 (Declaratory Order), *reh'g denied*, 164 FERC ¶ 61,029 (2018) (Declaratory Rehearing Order).

[2] 913 F.3d 1099 (D.C. Cir. 2019).

construct and operate the 125-mile-long Constitution Pipeline Project from Pennsylvania into New York.[3]

3. Section 401(a)(1) of the Clean Water Act requires that an applicant for a federal license or permit to conduct activities that may result in a discharge into the navigable waters of the United States, such as the Constitution Pipeline Project, must provide to the licensing or permitting agency a water quality certification from the state in which the discharge originates.[4] 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," then certification is waived.[5] Section 401(d) of the CWA provides that a certification and the conditions contained therein shall become a condition of any federal license that is issued.[6]

4. On August 22, 2013, Constitution submitted an application to New York DEC to obtain a water quality certification for the Constitution Pipeline Project, for which New York DEC acknowledged receipt on the same day. On May 9, 2014, Constitution sent a two-page letter to New York DEC "simultaneously withdrawing and resubmitting" its application.[7]

5. The Commission issued a certificate to Constitution on December 2, 2014, upon finding that the Constitution Pipeline Project is required by the public convenience and necessity.[8] The certificate requires that before Constitution may commence construction it must file documentation that it has received all applicable authorizations required under

[3] Constitution, Application, Docket No. CP13-499-000 (filed June 13, 2013).

[4] 33 U.S.C. § 1341(a)(1) (2012).

[5] *Id*.

[6] *Id*. § 1341(d). *See City of Tacoma, Washington v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

[7] Constitution October 11, 2017 Petition for Declaratory Order at 12-13 (Constitution Petition for Declaratory Order); *id*. app. at 000540-41 (reproducing letter).

[8] *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199, at PP 29, 33, 73, 146 (2014) (Certificate Order); *order denying reh'g*, 154 FERC ¶ 61,046 (2016) (Certificate Rehearing Order).

federal law, including a section 401 water quality certification, "or evidence of waiver thereof."[9]

6. On December 24, 2014, New York DEC issued a Notice of Complete Application and opened a public comment period.[10] On April 27, 2015, Constitution sent a second two-page letter to New York DEC—identical to the May 9, 2014 letter—"simultaneously withdrawing and resubmitting" its application.[11] New York DEC issued a second Notice of Complete Application on April 27, 2015, and a press release on April 29, 2015, announcing a second public comment period.[12] On April 22, 2016, New York DEC denied Constitution's application.

Table of Relevant Dates

August 22, 2013	New York DEC receives Constitution's application for a water quality certification
May 9, 2014	Constitution submits a letter to New York DEC to "simultaneously withdraw and resubmit" its application.
April 27, 2015	Constitution submits a letter to New York DEC to "simultaneously withdraw and resubmit" its application.
April 22, 2016	New York DEC denies Constitution's application for certification.

7. Constitution petitioned for review of New York DEC's denial at the U.S. Court of Appeals for the Second Circuit. The court concluded that it lacked jurisdiction to address Constitution's claim that New York DEC had waived its authority under section

[9] Certificate Order, 149 FERC ¶ 61,199, app. envtl. condition 8.

[10] Constitution Petition for Declaratory Order, app. at 001759-001766 (reproducing notice).

[11] *Id*. at 14; *id*. app. at 002299-0022300 (reproducing letter).

[12] Constitution Petition for Declaratory Order, app. at 002301 to 002302 (reproducing notice dated April 27, 2015); *id*. app. at 002306-002307 (reproducing press release dated April 29, 2015).

401 through delay.[13] However, the court upheld New York DEC's denial on the merits based on its finding that Constitution had not provided relevant information requested by New York DEC.[14]

8. Constitution then petitioned the Commission for a declaratory order finding that New York DEC had waived its authority under section 401 through delay. In its January 11, 2018 declaratory order, the Commission noted that repeated withdrawal and refiling of applications for water quality certifications is contrary to the public interest and to the spirit of the Clean Water Act,[15] but we ultimately denied the petition based on the Commission's longstanding interpretation that "once an application for a Section 401 water quality certification is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under Section 401(a)(1)."[16] The Commission found that the record did not show that New York DEC in any instance failed to act on an application that was before it for more than one year from the date that New York DEC received a resubmitted application.[17] The Commission affirmed its determination on rehearing.[18]

9. Constitution sought review before the U.S. Court of Appeals for the District of Columbia Circuit.[19]

10. On January 25, 2019, the D.C. Circuit decided *Hoopa Valley Tribe v. FERC* (*Hoopa Valley*),[20] answering in the affirmative the question "whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an

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[13] *Constitution Pipeline Co., LLC, v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 99-100 (2d Cir. 2017) (concluding that the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction over a failure-to-act claim).

[14] *Id*. at 100-103.

[15] Declaratory Order, 162 FERC ¶ 61,014 at P 23; Declaratory Rehearing Order, 164 FERC ¶ 61,029 at P 17.

[16] Declaratory Order, 162 FERC ¶ 61,014 at PP 22-23.

[17] *Id*. at PP 13-21.

[18] Declaratory Rehearing Order, 164 FERC ¶ 61,029 at PP 13-19.

[19] *Constitution Pipeline Co., LLC v. FERC*, D.C. Cir. No. 18-1251.

[20] 913 F.3d 1099.

applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year."[21]

11. On February 25, 2019, the Commission filed an unopposed motion with the D.C. Circuit for voluntary remand of the *Constitution* proceedings so that the Commission may consider the implications of the D.C. Circuit's decision in *Hoopa Valley*.[22] The court granted this motion three days later.[23]

12. On March 11, 2019, the Commission issued a notice affording an opportunity for parties to file supplemental pleadings and record materials by April 1, 2019, on the significance of the *Hoopa Valley* decision, and responsive pleadings by May 1, 2019.[24]

13. The Commission received supplemental pleadings from Constitution; Energy Transfer LP; the Holleran Family; Iroquois Gas Transmission System, L.P. (Iroquois); New York DEC; Catskill Mountainkeeper, Riverkeeper, Inc., and Sierra Club (collectively Sierra Club); Stop the Pipeline; and WaterkeeperAlliance, Inc. The Commission received responsive pleadings from Constitution; New York DEC; Sierra Club; Stop the Pipeline; and the Waterkeeper Alliance. New York DEC's supplemental pleading on April 1, 2019, included a motion requesting that the Commission stay the effect of its decision if the Commission finds waiver.[25]

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[21] *Id*. at 1103.

[22] *Constitution Pipeline Co., LLC v. FERC*, Unopposed Motion of Respondent Federal Energy Regulatory Commission for Voluntary Remand, No. 18-1251 (D.C. Cir. Feb. 25, 2019).

[23] *Constitution Pipeline Co., LLC v. FERC*, Order, No. 18-1251 (D.C. Cir. Feb. 28, 2019).

[24] 84 Fed. Reg. 10,305 (Mar. 20, 2019).

[25] New York DEC April 2, 2019 Supplemental Answer and Protest Opposing Petition for Declaratory Order 32-38 (New York DEC Supplemental Pleading).

II. Discussion

A. Preliminary Issues

14. Stop the Pipeline asserts that the Commission has no jurisdiction to decide the issue of waiver.[26] The Commission explained in the Declaratory Order that the question of waiver is correctly before the Commission.[27]

15. Because Stop the Pipeline did not file a rehearing request of the Declaratory Order suggesting that the Commission lacked authority to address waiver, its challenge to the Commission's jurisdictional authority to determine waiver is barred as an untimely collateral attack on the Declaratory Order.[28] In any event, we note that section 19(d)(2) of the NGA places original and exclusive jurisdiction with the D.C. Circuit to review alleged failures to act by a state administrative agency that holds authority act pursuant to federal law. But the D.C. Circuit explained in *Millennium Pipeline Co., L.L.C. v. Seggos* that because the Clean Water Act has a built-in remedy for state inaction, i.e., waiver, the applicant has no injury to confer standing for direct appellate review.[29] Rather, an applicant "can present evidence of waiver directly to FERC to obtain the agency's go-ahead to begin construction."[30] Stop the Pipeline attempts to limit *Millennium Pipeline*'s discussion of standing to situations where the state has not yet rendered a final decision on the application.[31] There is no support for this distinction, which illogically suggests that unlawful delay ending in denial cannot injure a project sponsor.

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[26] Stop the Pipeline April 1, 2019 Supplemental Opposition to Petition for Declaratory Order at 18-20 (Stop the Pipeline Supplemental Pleading); *see also* New York DEC Supplemental Pleading at 14-15 (objecting that Constitution did not avail itself of the NGA's avenue for review of agency inaction).

[27] Declaratory Order, 162 FERC ¶ 61,014 at P 12; *see also* Declaratory Rehearing Order, 164 FERC ¶ 61,029 at P 9 (explaining that Congress left it to federal licensing and permitting agencies, here the Commission, to determine the reasonable period of time for action by a state certifying agency).

[28] *See, e.g., Tenn. Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,013, at P 37 (2018).

[29] *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 700-701 (D.C. Cir. 2017).

[30] *Id.* at 700.

[31] Stop the Pipeline Supplemental Pleading at 19-20.

16. New York DEC, the Holleran Family, and Waterkeeper Alliance assert that because Constitution did not previously challenge the legal validity of withdrawal-and-resubmission to restart section 401's one-year period of review, Constitution cannot now rely on *Hoopa Valley* to do so.[32]

17. This argument is misplaced. In Constitution's petition for declaratory order, Constitution did challenge the validity of the second purported withdrawal-and-resubmission because it was identical to the first and so was "merely a continuation of New York DEC's review" that could not restart the statutory period of review.[33] Even absent any previous argument by Constitution, and regardless of the Commission's previous interpretation of section 401, having requested a voluntary remand, the Commission is obligated to discuss in this order how the court's interpretation and application of section 401 in *Hoopa Valley* bears on the question of waiver here.

18. Stop the Pipeline urges the Commission not to apply *Hoopa Valley* here, based on a theory of equitable tolling.[34] Similarly, Waterkeeper Alliance asks that we find that Constitution is equitably estopped from now asserting waiver.[35] At bottom, both Stop the Pipeline's and Waterkeeper Alliance's equitable arguments are based on the claim that the Commission should not apply *Hoopa Valley* retroactively to decide this case because *Hoopa Valley* was based on a narrow set of facts under the Federal Power Act rather than the NGA.[36]

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[32] New York DEC Supplemental Pleading at 3, 14-15, 19, 20, 24; Holleran Family March 25, 2019 Comments at 54-6 (Holleran Comments); Waterkeeper Alliance April 2, 2019 Comments at 5-6 (Waterkeeper Alliance Comments); Sierra Club April 1, 2019 Motion to Extend Deadline to Respond and to Uphold Denial for Declaratory Order at 12 (Sierra Club Supplemental Pleading).

[33] Constitution Petition for Declaratory Review at 19-20.

[34] Stop the Pipeline Supplemental Pleading at 15-18.

[35] Waterkeeper Alliance Comments at 4-5.

[36] Stop the Pipeline Supplemental Pleading at 14-18; Waterkeeper Alliance May 2, 2019 Response at 1-5 (Waterkeeper Alliance Response).

19. The *Hoopa Valley* court did not in any way indicate that its ruling was limited solely to the case before it, and the court in fact denied petitions for rehearing asking that the section 401 deadline be equitably tolled and that the ruling apply only prospectively.[37]

20. Stop the Pipeline also contends that *Hoopa Valley* should be limited to the Commission's jurisdiction under the Federal Power Act over hydroelectric projects, arguing that hydroelectric licensees engaged in a relicensing proceeding realize a benefit from delay in 401 certification that natural gas project sponsors do not because hydroelectric licensees may continue to operate their projects under annual licenses during the period of delay.[38] Stop the Pipeline emphasizes that in *Hoopa Valley*, PacifiCorp had a strong financial incentive to strike a deal with Oregon and California to indefinitely delay new burdensome requirements at its existing hydroelectric project that would be added through the relicensing proceeding.[39] But Stop the Pipeline speculates that natural gas pipelines, including Constitution, have a strong financial incentive to quickly complete regulatory review of their not-yet-existing pipelines and that Constitution accommodated New York DEC's requests based on the parties' underlying motivations to gather needed information and to move the section 401 determination forward.[40]

21. Section 401 applies to discharges from activities under "a Federal license or permit," with no distinction between the many covered federal regimes.[41] As we stated in our motion for voluntary remand, we believe it is appropriate to reconsider the Declaratory Order in light of *Hoopa Valley*, and will do so here.

22. The Commission also received comments from several individuals and organizations reproducing their letters or testimony submitted in 2015 to New York DEC

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[37] Brief of California Water Resources Control Board as Amicus Curiae at 10-13, *Hoopa Valley Tribe v. FERC*, No. 14-1271 (D.C. Cir. Mar. 19, 2019) (equitable tolling); Petition for Panel Rehearing or Rehearing En Banc at 15-16, *Hoopa Valley Tribe v. FERC*, No. 14-1271 (D.C. Cir. Mar. 11, 2019) (prospective application); Order, *Hoopa Valley Tribe v. FERC*, No. 14-1271 (Apr. 26, 2019) (denying petition for panel rehearing); Order, *Hoopa Valley Tribe v. FERC*, No. 14-1271 (Apr. 26, 2019) (denying petition for rehearing en banc).

[38] Stop the Pipeline Supplemental Pleading at 3-6.

[39] *Id*. at 3.

[40] *Id*. at 4, 6.

[41] 33 U.S.C. § 1341(a)(1) (2012).

to allege deficiencies in Constitution's proposed waterbody crossing methods and in Constitution's submitted information about environmental impacts. These allegations, the commenters contend, show that New York DEC appropriately denied Constitution's water quality certification. The merits of New York DEC's eventual denial are not in question before the Commission so we will not address these comments.

B. Substantive Matters

23. As noted above, under section 401 of the Clean Water Act, if a state 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, the certification requirements of [section 401] shall be waived with respect to such Federal application."[42]

24. *Hoopa Valley* involved a long-pending relicensing proceeding.[43] Negotiations among the state certifying agencies, the licensee, and other stakeholders yielded a settlement agreement that required, among other conditions, that the licensee withdraw and resubmit its section 401 applications to Oregon and California each year to avoid waiver during an interim period when the licensee was to satisfy agreed-upon environmental measures and funding obligations, to lead ultimately to the removal of several dams.[44] The "coordinated withdrawal-and-resubmission scheme" persisted for more than a decade.[45]

25. In *New York DEC v. FERC*, the U.S. Court of Appeals for the Second Circuit explained that section 401's "plain language . . . outlines a bright-line rule regarding the beginning of review: the timeline for a state's action regarding a request for certification 'shall not exceed one year' after 'receipt of such request.'"[46] The *Hoopa Valley* court held that the prescribed time limit "applies to a *specific* request" and "cannot be reasonably interpreted to mean that the period of review for one request affects that of any other request."[47] The court did not "determine how different a request must be "to constitute a 'new request' such that it restarts the one-year clock."[48]

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[42] 33 U.S.C. § 1341(a)(1) (2012).

[43] *Hoopa Valley*, 913 F.3d at 1101.

[44] *Id*. at 1101-1102.

[45] *Id.* at 1104-1105.

[47] *Hoopa Valley*, 913 F.3d at 1104 (emphasis added).

[48] *Id*.

26. The *Hoopa Valley* court faulted the Commission for arbitrarily and capriciously concluding that although the licensee's resubmissions "involved the same [p]roject, each resubmission was an independent request, subject to a new period of review."[49] The court concluded that the licensee's annual submission of an identical letter withdrawing and resubmitting its certification request pursuant to an agreement with the states did not constitute a "new request" and did not restart the clock.[50] The court explained that "[s]uch an arrangement does not exploit a statutory loophole; it serves to circumvent [FERC's] congressionally granted authority over the licensing, conditioning, and developing of a hydropower project."[51] The arrangement let "the states usurp FERC's control over whether and when a federal license will issue . . . [and] could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters."[52] The court concluded that the states' efforts pursuant to its agreement with the applicant constituted "failure to act" or "refusal to act" within the plain meaning of those phrases in section 401.[53] As a result the states had waived their section 401 authority with regard to the project.[54]

27. Constitution contends that the record before the Commission mirrors *Hoopa Valley* because New York DEC requested that Constitution withdraw and resubmit its application to enable the state to delay action for more than one year after Constitution filed its first request and more than one year after New York DEC deemed the application complete.[55]

28. New York DEC interprets *Hoopa Valley* to be limited to a written contract between the states and an applicant that "explicitly required abeyance of all state

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[50] *Id*.

[51] *Id*.

[52] *Id*.

[53] *Id*.

[54] *Id*. at 1105.

[55] Constitution April 1, 2019 Supplemental Pleading on the Significance of the Hoopa Valley Decision at 8-12 (Constitution Supplemental Pleading); Constitution May 1, 2015, Response to Supplemental Pleadings on the Significance of the Hoopa Valley Decision at 3-4 (Constitution Responsive Pleading).

permitting reviews."[56] New York DEC points to the court's statements that "California and Oregon's deliberate and contractual idleness defies" section 401's requirement of state action within one year and that "the [settlement agreement] makes clear that the applicant never intended to submit a new request."[57] New York DEC contends that "*Hoopa Valley* does not apply where the state agency asks the applicant to make a new request in order to ensure a full and fair review of the voluminous materials submitted by the applicant, and the applicant voluntarily makes a new request based on an apparent business decision that doing so will improve its chances of obtaining a Section 401 certification."[58] New York DEC further argues that Constitution made two new requests for certification in the context of an active and ongoing administrative review by New York DEC and that each new request restarted the one-year limit.[59]

29. Sierra Club argues that the *Hoopa Valley* decision rested on the inequity to the petitioner tribe of the specific "coordinated withdrawal-and-resubmission scheme."[60] Sierra Club emphasizes that the written agreement allowed California and Oregon to indefinitely avoid acting on water quality certification requests that "ha[d] been complete and ready for review for more than a decade" to effectively shut out the tribe from the entire process.[61] Unlike the tribe, which played no role in the delay, Sierra Club explains that Constitution was not excluded from the federal and state proceedings for its pipeline project and that Constitution itself delayed New York DEC's otherwise active review by failing to provide necessary information to New York DEC.[62] Waterkeeper Alliance similarly emphasizes that the petitioner tribe was not a party to the agreement to withdraw and resubmit section 401 applications. Waterkeeper Alliance distinguishes Constitution as a sophisticated pipeline company that "voluntarily chose" to withdraw

[56] New York DEC Supplemental Pleading at 22 (quoting *Hoopa Valley*, 913 F.3d at 1101).

[57] *Id*. (quoting *Hoopa Valley*, 913 F.3d at 1104).

[58] *Id*. at 25.

[59] *Id*. at 24.

[60] Sierra Club Supplemental Pleading at 8-9, 10-12 (quoting *Hoopa Valley*, 913 F.3d at 1105).

[61] *Id*. at 8-9 (quoting *Hoopa Valley*, 913 F.3d at 1105).

[62] Sierra Club Supplemental Pleading at 8, 11-13.

and resubmit its applications with the "clear understanding" that this would restart the one-year clock rather than Constitution risking a denial and undertaking judicial review.

30. The Commission recently addressed a similar argument in *Placer County Water Agency*, which granted a request for a declaratory order and determined that a state had waived its section 401 authority by working to ensure that withdrawal and resubmission would take place each year as part of an ongoing agreement with the licensee.[63] The Commission explained that nothing in *Hoopa Valley* rested on the identity of the party that brought the case. Instead, the *Hoopa Valley* decision interpreted the legal requirements of the Clean Water Act, which should not differ based on the identity of the litigants.[64]

31. The Commission interprets *Hoopa Valley* to stand for the general principle that where an applicant withdraws and resubmits a request for water quality certification for the purpose of avoiding section 401's one-year time limit, and the state does not act within one year of the receipt of an application, the state has failed or refused to act under section 401 and, thus, has waived its section 401 authority.

32. New York DEC objects that in *Hoopa Valley* the states and the applicant entered a written agreement which required the applicant to submit a "one-page form letter" each year purporting to withdraw and resubmit its application to indefinitely delay the states' review.[65] New York DEC emphasizes that the states "had no intention of taking any action on the moribund application" and that the applicant had no intention of obtaining a water quality certification.[66] Sierra Club asserts that *Hoopa Valley*'s holding is limited to a deliberate, formal, written agreement between the states and applicant to indefinitely shelve the water quality certification application.[67] New York DEC explains that it entered no such agreement with Constitution, written or otherwise.[68] New York DEC states that "Constitution voluntarily submitted new requests for a water quality certification because [New York DEC] indicated that more time was necessary to obtain

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[63] 167 FERC ¶ 61,056, at PP 12, 16 (2019).

[64] *Id* at P 14.

[65] New York DEC Supplemental Pleading at 2-3, 24

[66] *Id*. at 2; New York DEC Responsive Pleading at 2-3.

[67] Sierra Club Responsive Pleading at 2-3.

[68] New York DEC Supplemental Pleading at 3, 24; New York DEC Responsive Pleading at 2, 3 (New York DEC Responsive Pleading).

relevant materials and to review Constitution's lengthy submissions."[69] According to New York DEC, each withdrawal and resubmission represented Constitution's good faith pursuit of a water quality certification[70] and after each withdrawal and resubmission the agency's evaluation continued apace.[71]

33. The absence of a formal agreement between the state and the applicant does not distinguish *Hoopa Valley*. The record here indicates that the state encouraged Constitution's withdrawal and resubmission of its application for the purpose of avoiding the waiver period. Those actions and New York DEC's failure to act on the application within one year from the date it was filed result in waiver of the state's section 401 authority, as discussed below. According to New York DEC, after Constitution's withdrawal and resubmission on May 9, 2014, and New York DEC's Notice of Complete Application on December 14, 2014, New York DEC staff realized as the one-year deadline approached that they "needed more time to make an informed determination" given the "tens of thousands of pages of prior submissions from Constitution, and the 15,000 written public comments"[72] New York DEC implies that Constitution's application "would most likely be denied"[73] if Constitution did not withdraw, however, New York DEC does not point to record evidence to support this claim.[74] Although

[69] New York DEC Supplemental Pleading at 3; see *id*. 25; New York DEC Responsive Pleading at 2.

[70] New York DEC Supplemental Pleading at 26.

[71] *Id*. at 3, 9-17, 25-26, 28-30.

[72] New York DEC Supplemental Pleading at 14 (citing Hogan Aff. ¶ 16).

[73] *Id*. at 14, 25; New York DEC Responsive Pleading at 2, 3.

[74] *See* New York DEC Supplemental Pleading at 14; *see also* Hogan Aff. ¶ 11-17. The Hogan affidavit is telling when contrasting what New York DEC relayed to Constitution prior to the pipeline withdrawing and resubmitting its application in 2014 versus what was said to Constitution prior to the 2015 withdrawal and resubmittal. Specifically, Hogan avers that with respect to Constitution's first (2014) withdrawal and resubmission, that New York DEC staff "made clear [to Constitution] that Constitution could decline to submit a new request and force the Department to make a decision, but since Constitution's Joint Application *was still incomplete*, the Department almost certainly would have denied the request." Hogan Aff. ¶ 11 (emphasis added). Contrast this with Mr. Hogan's description of the period after New York DEC's Notice of Complete Application and before Constitution's second (2015) withdrawal and resubmission. Mr. Hogan states only that "[a]s a result of [New York DEC's] ongoing review of voluminous material and the ongoing efforts to address outstanding issues, as of

New York DEC attorney Jonathan Binder speculates that "Constitution apparently understood that the Department would likely have denied the applications based on incomplete information and the Department's resulting inability to determine that the Project would comply with water quality standards,"[75] Mr. Binder does not suggest that this representation was conveyed to Constitution.

34. In fact, it appears from the affidavits that New York DEC appended to its Supplemental Pleading, that Constitution withdrew and resubmitted the application to grant New York DEC's request for additional time to review the application.[76] This is documented in Constitution's two-page form letter to New York DEC that purports to simultaneously withdraw and resubmit its application:

> This action is being taken in response to NYSDEC's request for additional time to comply with the timeframes by which Constitution's certification request for the proposed Constitution Pipeline (Project) must be approved or denied as set forth in Section 401(a)(1) . . . .[77]

New York DEC publicly acknowledged these events in a press release dated April 29, 2015, stating that:

> Due to the extended winter preventing necessary field work by staff, DEC requested additional time to complete its review of any potential impacts on wetlands and water quality. As requested and to continue the substantial progress reviewing the application and supporting documents that has

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April 2015, the Department needed additional time to make a determination regarding the Project's compliance with water quality standards." Hogan Aff. ¶ 16. Mr. Hogan describes no communication with Constitution. Mr. Hogan simply states that on April 27, 2015, Constitution submitted "a third request" that "both Constitution and the Department considered … to be a new request for a [water quality certification]." Hogan Aff. ¶ 17.

[75] New York DEC Supplemental Pleading, Binder Aff. ¶ 24.

[76] *Id*. at 11, 14, 25; *id*. Hogan Aff. ¶ 11, 16.

[77] Constitution Petition for Declaratory Order, app. at 000540-000541 (reproducing letter dated May 9, 2014); *id*. app. at 002299-0022300 (reproducing letter dated April 27, 2015).

> been made to date, the applicant withdrew and subsequently resubmitted its application with no changes or modifications.[78]

New York DEC's and Constitution's actions in connection with a withdrawal and resubmission scheme for the purpose of avoiding section 401's one-year time limit for state action are, as relevant here, analogous to the agreement between the parties in *Hoopa Valley*. Nothing in *Hoopa Valley* suggests that the specific form of the agreement—whether the understanding was formal or informal, written or oral, communicated on paper or electronically—was material to the court's decision. As noted, *Hoopa Valley* held that the parties' arrangement "serve[d] to circumvent [FERC's] congressionally granted authority over the licensing, conditioning, and developing of a hydropower project," which would have permitted "the states [to] usurp FERC's control over whether and when a federal license will issue."[79] The same concern applies here. Accordingly, we conclude that New York DEC failed or refused to act on Constitution's request for a water quality certification within the one-year period running from Constitution's first resubmission on May 9, 2014, to a deadline of May 9, 2015—i.e., that the April 27, 2015 withdrawal and resubmission did not restart the one year clock for waiver.[80]

35. New York DEC seeks to distinguish *Hoopa Valley* based on what it describes as differences between the intent of the parties in that proceeding and this one. It argues that the licensee in *Hoopa Valley* never intended to make a new request and California and Oregon "had no intention to actively review the moribund application."[81] New York DEC contends that Constitution's two-page letters purporting to withdraw and resubmit its application were "new requests" both because (A) Constitution voluntarily sought to

[78] *Id*. app. at 002306 (reproducing press release).

[79] *Hoopa Valley*, 913 F.3d at 1104.

[80] Because we conclude, at a minimum, that New York DEC waived its certification authority by failing to act within one year after the first (2014) resubmission, we do not need to examine whether the first resubmission was a valid new request that restarted the one year clock for waiver.

[81] New York DEC Supplemental Pleading at 26 (citing *Hoopa Valley*, 913 F.3d at 1104-1105); New York DEC Responsive Pleading at 2-3 (same).

effect a withdrawal and a new request to avoid the communicated likely denial and (B) because New York DEC "undertook to review that request actively."[82]

36. New York DEC, Sierra Club, Stop the Pipeline, and commenter Jan Mulroy object that Constitution frustrated New York DEC's review by periodically submitting additional information to the agency over a prolonged period while failing to supply other information necessary to the agency's and the public's review.[83] New York DEC, Sierra Club, and Stop the Pipeline emphasize the agency's active and ongoing review of differing iterations of Constitution's application, supplements, and public comments totaling tens of thousands of pages across the entire timespan from receipt of the first application to New York DEC's ultimate denial.[84] The Holleran Landowners assert that to allow a company to seek a waiver "long after a certificate has been issued and a section 401 water quality certification has been granted or denied" will create uncertainty, deprive other stakeholders of their due process rights, and invite companies to override states' decisions to deny or to condition section 401 water quality certifications.[85] Waterkeeper Alliance posits that Congress intended to enable only contemporaneous findings of waiver to break existing and ongoing state delay. Constitution's assertion of waiver two years after New York DEC's denial, Waterkeeper Alliance continues, cannot serve Congress's intent "to prevent a State from indefinitely delaying a federal licensing proceeding."[86]

37. These comments do not require a contrary conclusion. As an initial matter, the alleged differences in the parties' intent do not distinguish this proceeding from *Hoopa Valley* because New York DEC had a functional agreement with Constitution to exploit

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[82] New York DEC Responsive Pleading at 3.

[83] New York DEC Supplemental Pleading at 3, 9-17; Sierra Club Supplemental Pleading at 3-5; Stop the Pipeline Supplemental Pleading at 6-7; Jan Mulroy April 1, 2019 Comment at 1.

[84] New York DEC Supplemental Pleading at 3, 9-17; New York DEC Responsive Pleading at 3-4; Sierra Club Responsive Pleading at 3-6; Stop the Pipeline Supplemental Pleading at 8-13. Stop the Pipeline notes that New York DEC was obligated by New York statute to provide notice of Constitution's application and to receive public comments, which consumed more than two months and generated more than 15,000 comments. Stop the Pipeline Supplemental Pleading at 8-13. We note that the Clean Water Act as a federal law takes precedence over state law. U.S. Const. amend. VI, § 2.

[85] Holleran Comments at 6.

[86] Waterkeeper Alliance Comments at 5 (internal citations omitted).

the withdrawal and resubmission of water quality certification requests over a period of time extending at least one year and eleven and a half months from the date of Constitution's first resubmission on May 9, 2014. The parties' intent underlying the *Hoopa Valley* conclusion of waiver was to delay state action beyond the statute's prescribed deadline of one year.[87] A state's reason for delay is not material, nor is the fact that the delay was for a shorter period than in *Hoopa Valley*. New York DEC's contention that it pursued active and ongoing review does not cure the violation of section 401. The plain language of Section 401 establishes a bright-line rule regarding the beginning of review: the timeline for a state's action regarding a request for certification "shall not exceed one year" after "receipt of such request."[88] The fact that a state is reviewing additional information does not toll the one-year waiver deadline. Clearly a state that acted one year and a day after it received an application would have waived certification. Likewise, a single withdrawal and resubmission could amount to waiver.

38. New York DEC also suggests that Constitution's subsequent submissions constituted a new application. New York DEC states that the agency's decision to treat the application as administratively complete for purposes of inviting public comment did not foreclose the agency from requesting additional information needed for its review, which the agency continued to do.[89] New York DEC contends that both Constitution and New York DEC treated the two-page letter, filed on April 27, 2015, as a bona fide withdrawal and new request, as shown by New York DEC opening a new public comment period.[90] New York DEC offers an alternative theory that Constitution's later 9,000-page revised Joint Application filed in September 2015 could properly be considered a new request sufficient to restart section 401's waiver period.[91] We note that New York DEC's ensuing Notice of Complete Application published on December 24, 2014 and press release announced, respectively, that comments submitted during the public comment period more than a year earlier in January and February 2015 continued

[87] *See Nat'l Fuel Gas Supply Corp.*, 167 FERC ¶ 61,007, at P 11 (2019) (explaining that an agreement between New York DEC and the applicant to extend review only five weeks beyond the one-year deadline violated the principle of *Hoopa Valley*, among other precedent).

[88] *New York DEC v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018).

[89] New York DEC Supplemental Pleading at 13.

[90] *Id*. at 14; New York DEC Responsive Pleading at 3.

[91] New York DEC Supplemental Pleading at 28.

to be valid and that Constitution had "resubmitted its application with no changes or modifications."[92]

39. The *Hoopa Valley* court left open the question "how different a subsequent request must be to constitute a 'new request' such that it restarts the one-year clock."[93] We need not answer this question here. For the expressed purpose of gaining additional time to gather information and deliberate, in April 2015 New York DEC coordinated with Constitution to file a two-page letter purporting to withdraw and resubmit its application. The *Hoopa Valley* court decided that the Commission had acted arbitrarily and capriciously in treating each of the applicant's identical one-page letters as independent requests subject to new periods of statutory review regardless that each purported resubmission involved the same project.[94] The *Hoopa Valley* licensee's identical one-page letters "were not just similar requests, they were not new requests at all" and did not restart the one-year clock.[95] Here Constitution's two-page letter was not a new request and did not restart section 401's prescribed one-year deadline for state action.

40. We conclude that New York DEC's inaction pursuant to its functional agreement with Constitution beyond one year from the receipt of Constitution's first resubmission on May 9, 2014, constituted a failure or refusal to act within the plain meaning of those phrases in section 401. As a result, New York DEC waived its section 401 authority with regard to the Constitution Pipeline Project. Due to this waiver, New York DEC's later denial had "no legal significance."[96]

41. New York DEC implies and Sierra Club asserts that a plain reading of section 401's one-year deadline for state action results in inherent practical difficulties for certifying states which Congress did not intend would cause waiver, including incomplete applications, large volumes of later-filed information, and premature decisions.[97] They contend that because New York DEC did not delay unreasonably, it satisfied Congress's purposes in section 401 to achieve timely administrative review and also to "recognize,

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[93] *Hoopa Valley*, 913 F.3d at 1104.

[94] *Id.* at 1104.

[95] *Id*.

[96] *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 700-701.

[97] Sierra Club Supplemental Pleading at 14-15 (citing *Hoopa Valley*, 913 F.3d 1104-1105).

preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" of waters within their borders.[98]

42. The court in *Hoopa Valley* ruled that repeated withdrawal and resubmission of certification applications is inconsistent with the statutory one-year limit established by Congress. Because we have found that New York DEC and Constitution engaged in repeated withdrawals and resubmissions of certification applications that are, as relevant here, equivalent to the situation in *Hoopa Valley*, the potential practical difficulties cannot alter the outcome. As the court noted in *Hoopa Valley*, "[i]t is the role of the legislature, not the judiciary, to resolve such fears."[99] Arguments that the waiver conclusion is inconsistent with Congressional intent must be addressed to Congress, which alone has authority to revise federal legislation.

C. Request for Stay

43. New York DEC requests that the Commission stay the effectiveness of a decision finding waiver until judicial review is complete or, at a minimum, until the Commission issues a final appealable order on rehearing.[100] Similarly, New York DEC requests that if FERC concludes waiver, the Commission should exercise its discretion to decline to authorize construction of the project until Constitution obtains a section 401 water quality certification from New York DEC.[101]

44. For the reasons discussed below, the Commission finds that justice does not require a stay and therefore denies New York DEC's request to stay the conclusion of waiver. The Commission grants a stay when "justice so requires."[102] In determining whether this standard has been met, the Commission considers several factors, including: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is

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[98] New York DEC Supplemental Pleading at 29 (quoting 33 U.S.C. § 1251(b)); Sierra Club Responsive Pleading at 8-9.

[99] *Hoopa Valley*, 913 F.3d at 1105.

[100] New York DEC Supplemental Pleading at 32-38.

[101] *Id*. at 30-32.

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

in the public interest.[103] If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.[104]

45. In order to support a stay, the movant must substantiate that irreparable injury is "likely" to occur.[105] The injury must be both certain and great, and it must be actual and not theoretical. Bare allegations of what is likely to occur do not suffice.[106] The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.[107] Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.[108]

46. New York DEC alleges that construction of the Constitution Pipeline Project will result in immediate, severe, and irreparable harm to 251 crossed waterbodies, 85 acres of wetlands and wetland-adjacent areas, and more than 500 acres of stream- or wetland-adjacent interior forest.[109] New York DEC asserts that construction would immediately cause significant adverse impacts to both large and small streams, especially from open-dry trench crossing methods, that would be difficult or impossible to repair.[110] New York DEC anticipates that construction without a water quality certification would adversely impact wetlands by changing the type and species of vegetation and the wetland's soil

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[103] Ensuring definiteness and finality in our proceedings also is important to the Commission. *See Constitution Pipeline Co., L.L.C.*, 154 FERC ¶ 61,092, at P 9 (2016); *Enable Gas Transmission,* 153 FERC ¶ 61,055 at P 118; *Millennium Pipeline* Co., *L.L.C.*, 141 FERC ¶ 61,022, at P 13 (2012).

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

[105] *See Transcontinental Gas Pipe Line Co., LLC*, 150 FERC ¶ 61,183 at P 10 (1981) (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] New York DEC Supplemental Pleading at 34.

[110] *Id*. at 34-35.

profile resulting in permanent or significantly persistent changes to the ecological functions and benefits of such wetlands.[111]

47. We find the allegations about environmental impacts left uncontrolled without a water quality certification unavailing. New York DEC does not support its assertions that Commission staff and the Commission depended on a forthcoming water quality certification to justify the conclusions that project-related environmental impacts would be acceptable and that the project should be authorized.[112]

48. In the Environmental Impact Statement (EIS), Commission staff evaluated the potential construction- and operation-related impacts from the Constitution Pipeline Project on surface waters, fisheries, wetlands, and vegetation resources noted here by New York DEC.[113] The EIS based its evaluation on Constitution's commitment to trenchless crossings at 21 waterbody sites and 13 wetland locations, with other crossings presumed to use open/dry trench crossing methods.[114] New York DEC cites statements from the EIS and Certificate Order acknowledging that Constitution's future compliance with applicable New York DEC permits, such as they may be, would further mitigate potential impacts.[115] But New York DEC offers no example where Commission staff or the Commission relied on the water quality certification as a necessary basis for conclusions about the proposed project. For example, New York DEC quotes the Certificate Order's statement that "[c]onstruction and operation-related impacts on waterbodies and wetlands will be further mitigated by Constitution's compliance with the conditions of the [Corps's] Section 404 and the [New York DEC's] Section 401 permits … ."[116] Yet the concluding sentence of the same paragraph conspicuously omits these permits when it states that "[b]ased on the

[111] *Id*. at 35.

[112] *Id*. at 35-37.

[113] Final Environmental Impact Statement for the Constitution Pipeline and Wright Interconnect Projects at 4-44 to 4-80, Docket Nos. CP13-499-000 and CP13-502-000 (Oct. 24, 2014) (EIS). Commission staff also evaluated potential impacts on geology; soils; groundwater; wildlife and aquatic resources; special status species; land use, recreation, special interest areas, and visual resources; socioeconomics; cultural resources; air quality and noise; reliability and safety; and cumulative impacts. EIS at 4-1 to 4-44, 4-80 to 4-258.

[114] EIS at 4-52; Certificate Order, 149 FERC ¶ 61,199 at PP 77-79.

[115] New York DEC Supplemental Pleading at 35-36.

[116] *Id*. at 36 (quoting Certificate Order, 149 FERC ¶ 61,199 at P 79).

avoidance and mitigation measures developed by Constitution, as well as [the Commission's] Environmental Conditions, the EIS concludes that impacts on waterbody and wetland resources will be effectively minimized or mitigated to the extent practical."[117]

49. Constitution is required to follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EIS, including Constitution's own Environmental Construction Plans and Commission staff's recommendations incorporated as Environmental Conditions to the Certificate Order. Given these requirements, we find that impacts related to ground-disturbing activities will be minimized and we do not believe that denying the request for stay puts the environment at risk.

50. To the question whether issuing a stay may substantially harm other parties, New York DEC answers that Constitution cannot claim to be harmed by delay occasioned by its own refusal to promptly re-apply for a water quality certification after New York DEC's denial as New York DEC explicitly invited Constitution to do.[118] Constitution was free to choose whether to pursue its interests through litigation or by re-applying to New York DEC. Almost six years have elapsed since New York DEC received Constitution's application on August 22, 2013, and more than four years have elapsed since New York DEC waived its authority on May 9, 2015. We conclude that issuing a stay would substantially harm Constitution by delaying its commencement of service and thus delaying a revenue stream that would begin to offset sunk costs.

51. New York DEC states that a stay would further the public interest because construction would not proceed and its environmental harm would not occur until a court can or does review the waiver determination in light of the D.C. Circuit's limiting language in *Hoopa Valley* and the Second Circuit's apparent support for withdrawal and resubmission in *New York DEC v. FERC*.[119] New York DEC points to examples where construction proceeded during the Commission's prolonged consideration of requests for rehearing, before any party could seek judicial review.[120]

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[117] Certificate Order, 149 FERC ¶ 61,199 at P 79. *See id*. at P 3 (concluding that environmental impacts will be reduced to less-than-significant levels based only on "applicable laws and regulations," Constitution's proposed mitigation, and Commission staff's recommendations); *id*. at P 73 (same).

[118] New York DEC Supplemental Pleading at 37.

[119] New York DEC Supplemental Pleading at 37-38.

[120] *Id*. at 38.

52. We find that it would not be in the public interest to stay construction of the Constitution Pipeline Project. The Commission concluded that the project is required by the public convenience and necessity, and commencement of construction will allow Constitution to provide 650,000 dekatherms per day of firm transportation service under long-term contracts to deliver natural gas from supply sources in Pennsylvania to interconnections with the Iroquois and Tennessee Gas Pipeline systems for further transportation.[121]

53. For these reasons, the Commission finds that New York DEC has not demonstrated that it will suffer irreparable harm and further finds that a stay would harm Constitution and would not be in the public interest. Therefore, the request for stay is denied.

The Commission orders:

(A) The Commission determines that the New York State Department of Environmental Conservation has waived its water quality certification authority under section 401 of the Clean Water Act with respect to the Constitution Pipeline Project.

(B) New York DEC's motion for stay is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[121] Certificate Order, 149 FERC ¶ 61,199 at PP 8, 28-29.

Document Content(s)