

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Millennium Pipeline Company, LLC

Docket No. CP16-17-000

REQUEST FOR STAY

Pursuant to Section 717r of the Natural Gas Act (“NGA”)¹ and Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission² (“FERC” or “Commission”), the New York State Department of Environmental Conservation (“NYSDEC” or “Department”) respectfully makes this Request for Stay (“Request”) of the October 27, 2017 Notice to Proceed. The basis for this Request is that FERC has not ruled on the Department’s (i) Motion for Reopening and Stay or, in the alternative, Request for Rehearing and Stay and (ii) October 13, 2017 Request for Rehearing of FERC’s September 15, 2017 Declaratory Order Finding Waiver Under Section 401 of the Clean Water Act (“Declaratory Order”), which found that the Department waived its jurisdiction under Section 401 of the federal Clean Water Act (“CWA” or “Act”) with respect to the Valley Lateral project (“Project”) (FERC Docket No. CP16-17). The requested stay will prevent potential irreparable harm to the State’s environment and natural resources during FERC’s consideration of the Request for Rehearing and any subsequent appeals. Moreover, issuing a Notice to Project prior to issuing a decision on the Department’s October 13, 2017 Request for Rehearing, including any and all appeals thereof, defies logic and undermines New York’s Section 401 CWA jurisdiction to determine if a project is consistent with

¹ 15 U.S.C. § 717r

² 18 C.F.R. §§ 385.212

New York water quality standards. New York should be given a reasonable opportunity to legally challenge FERC's September 15, 2017 "Declaratory Order Finding Waiver Under Section 401 of the Clean Water Act," prior to the start of construction of this Project.

I. Statement of Issues

1. As set forth in the Department's October 13 Request for Rehearing, which remains outstanding with FERC, the Commission erred in its finding that the Department has waived its jurisdiction under Section 401 of the CWA. Specifically, the Commission erred in finding that the one-year timeframe in which the Department must act on an application for a CWA Section 401 Water Quality Certificate ("WQC") commences as of receipt of an application, regardless of whether such application is complete or contains sufficient information to make an informed determination.

2. On October 20, 2017, Millennium Pipeline Company, LLC ("Millennium" or "Applicant") filed a Renewed Request for Notice to Proceed with Construction. In addition to seeking a Notice to Proceed, the Applicant's Renewed Request sought a modification of Environmental Condition 14 of FERC's underlying Certificate Order to relieve any obligation the Applicant may have to obtain the Department's concurrence on a survey of bog turtles, a state endangered species. Such a modification is wholly inappropriate – if the Applicant is aggrieved by a condition of FERC's Certificate Order, it should seek rehearing pursuant to 15 U.S.C. § 717r(a). On October 26, 2017, the Department filed an Opposition to Millennium's Renewed Request for Notice to Proceed with Construction.

3. FERC has not ruled on the Department's October 13, 2017 Request for Rehearing.

4. Notwithstanding the pending rehearing motion, on October 27, 2017, FERC's Office of Energy Projects issued a Notice to Proceed to Millennium without resolving these critical jurisdictional matters pending on its docket.

5. To prevent potential irreparable harm to the State's environment, including potential harm derived from the Department's reduced oversight of the Project, and trenching and other land- and water-based disturbances, the Commission should order a stay the Notice to Proceed during the pendency of review of the Department's Request for Rehearing, including any appeal thereof. *See* 18 C.F.R. § 385.713(e).

II. Factual Background

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

Department, all conditions of the Order cannot be satisfied and, accordingly, the Applicant would be foreclosed from commencement of the Project in any capacity.

On November 23, 2015, the Applicant submitted to the Department a Joint Application for a WQC, as well as permits under Articles 15 and 24 of the Environmental Conservation Law (“ECL”) for the Project, all of which are required pursuant to Federal law, either as expressly stated in the CWA or as authorizations required by FERC in the Order under the NGA.³ The Department found the Joint Application to be incomplete for multiple reasons, including the lack of an environmental review, which was concurrently being conducted by FERC.⁴ In addition to the lack of an environmental review, the Department also sought additional information from the Applicant in order to “complete” the application for purposes of review and determination. As of August 31, 2016 Applicant had fully responded to all of the Department’s additional information requests. However, on August 30, 2017, in light of new information – a legal determination that downstream greenhouse gas (“GHG”) emissions must be analyzed in projects such as this, the Department conditionally denied Millennium’s WQC and concurrently requested that FERC undertake the necessary GHG review. Despite the Department issuing a decision on August 30, 2017 – within one year of receiving a complete application - on September 15, 2017, FERC issued a “Declaratory Order Finding Waiver Under Section 401 of the Clean Water Act”, which held that the Department waived its authority to issue or deny a CWA section 401 certification. On October 13, 2017, the

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

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

Department filed a Request for Rehearing with FERC seeking rehearing of the Declaratory Order. To date, FERC has not acted on the Department's Request for Rehearing. Nonetheless, on October 27, 2017, FERC's Chief of Gas Branch 1, Division of Gas – Environment and Engineering in the Office of Energy Projects issued a Notice to Proceed with Construction, thereby authorizing Millennium to commence construction of the Project.

III. FERC erred in finding that the Department waived its jurisdiction under the CWA

As set forth in the Department's Request for Rehearing, a state agency's timeframe for issuing or denying a Section 401 certification commences "after receipt of such request [for certification]." 33 U.S.C. § 1341(a)(1). The CWA does not indicate what form a "request for certification" must take to trigger the waiver period; rather, the Act "is ambiguous regarding whether an invalid as opposed to only a valid request for a water quality certification will trigger" the waiver period. *AES Sparrows Point LNG, LLC, et al. v. Wilson, et al.*, 589 F.3d 729 (4th Cir). In light of the CWA's structure and the holding in *AES Sparrows*, the Department reasonably interpreted Section 401 as requiring a complete application to trigger the waiver period. *See id.* Completeness cannot occur before an applicant has submitted sufficient information for the Department to review the request.

A complete application is necessary to commence the waiver period because otherwise, "applicants could frustrate the State's mandate to make [section 401] determination[s] by completing an application 364 days after submitting an incomplete and deficient application." Letter from Thomas S. Berkman, NYSDEC Deputy Commissioner and General Counsel to Millennium Pipeline Company, LLC, dated November 17, 2016, at 2 n.1 (FERC Docket No. 2016117-5080). Under FERC's interpretation of Section 401, the waiver period would commence upon the Department's receipt of *any* request for a WQC, however perfunctory. An applicant could

then force the Department into a premature decision by delaying its submittal of supplemental materials or by submitting materials just before the one-year waiver period expires. Indeed, in this case, Millennium submitted a letter and affidavit demanding that the WQC be granted, along with more than 200 pages of exhibits, a mere eight days before the one-year anniversary of its initial application submittal.

Tying the waiver period to the receipt of a complete application avoids this result, allowing the Department time to assess and respond to submissions in a meaningful way, as prescribed in the CWA. 33 U.S.C. § 1341(a)(1) (the Department “shall establish procedures for public notice in the case of all applications for [WQCs] by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.”). The Department not only must enact public notice procedures, but also must comply with them: failure to provide public notice on an application may result in the federal licensing agency’s rejection of a section 401 certification. *See City of Tacoma v. Fed. Energy Reg. Comm’n*, 460 F.3d 53, 67-68 (D.C. Cir. 2006). Under Title 6 of the New York Codes, Rules and Regulations (“NYCRR”) § 621.7, the Department’s public notice procedure for all applications, including for WQCs, is triggered by a complete application. Although the Department arguably could have denied Millennium’s application as incomplete (*see* Declaratory Order at p. 8), the Department reasonably required a complete application that necessitated FERC undertaking a full, and legally required, environmental review. Millennium, in turn, would then have the opportunity to provide this supplemental information – completing its application. The Department should not be penalized for attempting to work cooperatively with Millennium and FERC to ensure that the application contains all the necessary information.

The Department's interpretation of the waiver period is consistent with the interpretation adopted by the United States Army Corps of Engineers ("USACE"), which was upheld by the United States Court of Appeals for the Fourth Circuit. *AES Sparrows*, 589 F.3d at 721. USACE's regulations provide that "[i]n determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a *valid* request for certification." 33 C.F.R. § 325.2(b)(1)(ii) (emphasis added). When promulgating this regulation, the USACE noted that generally "valid requests for certification must be made in accordance with State laws[.]" *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41,206, 41,211 (Nov. 13, 1986). The Fourth Circuit has held USACE's regulation requiring a "valid request" for a certification "as determined by the Corps" is entitled to *Chevron* deference and "is permissible in light of the statutory text and is reasonable." *AES Sparrows*, 589 F.3d at 729 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

In fact, the Commission's own reasoning belies its conclusion that Section 401 is unambiguous as to the event that triggers the waiver period. The Declaratory Order held that "the plain meaning of 'after receipt of the request' is the day the agency receives a certification application" (Declaratory Order at 5), but that interpretation reads additional words into the statute by interpreting "request" to mean "written certification application." No party contends that receipt of a *verbal* request for a WQC would trigger the waiver period, but that interpretation – however unreasonable – is not ruled out by the statutory term "request."

Consistent with USACE's interpretation, the Department interprets Section 401 to require a complete application to trigger the one-year waiver period. Because the Department is charged with determining whether to issue a WQC for the Project, it – not FERC – is the appropriate agency

to interpret any ambiguous terms of the CWA. *Alabama Rivers Alliance, at al. v FERC*, 325 F.3d 290, 297 (2003 DC Circuit); *see also AES Sparrow Point*, 589 F.3d at 729. Thus, as applied in this instance, FERC must defer to the Department's interpretation of the triggering event for the CWA's one-year waiver period.

IV. Conclusion

In order to prevent any potential irreparable environmental harm to the State of New York, FERC should grant a stay of the Notice to Proceed pending a FERC decision on the Department's October 13, 2017 Request for Rehearing, including any and all appeals thereof. FERC's decision to allow Project construction now, while adjudication of the Department's fundamental jurisdiction under Section 401 authority remains before FERC, is not only improvident and contrary to the Clean Water Act, but it flies in the face of the cooperative federalism envisioned by the Act. FERC's Notice to Proceed acts as a functionally dispositive authorization absent resolution of the important regulatory and jurisdictional issues framed in the Department's Request for Rehearing and Motion for Reopening, and that determination can be reviewed by a court.

Respectfully submitted,



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