By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Purpose. The United States is blessed with plentiful energy resources, including abundant supplies of coal, oil, and natural gas. Producers in America have demonstrated a remarkable ability to harness innovation and to cost-effectively unlock new energy supplies, making our country a dominant energy force. In fact, last year the United States surpassed production records set nearly 5 decades ago and is in all likelihood now the largest producer of crude oil in the world. We are also the world’s leading producer of natural gas, and we became a net exporter in 2017 for the first time since 1957. The United States will continue to be the undisputed global leader in crude oil and natural gas production for the foreseeable future.

These robust energy supplies present the United States with tremendous economic opportunities. To fully realize this economic potential, however, the United States needs infrastructure capable of safely and efficiently transporting these plentiful resources to end users. Without it, energy costs will rise and the national energy market will be stifled; job growth will be hampered; and the manufacturing and geopolitical advantages of the United States will erode. To enable the timely construction of the infrastructure needed to
move our energy resources through domestic and international commerce, the Federal Government must promote efficient permitting processes and reduce regulatory uncertainties that currently make energy infrastructure projects expensive and that discourage new investment. Enhancing our Nation’s energy infrastructure, including facilities for the transmission, distribution, storage, and processing of energy resources, will ensure that our Nation’s vast reserves of these resources can reach vital markets. Doing so will also help families and businesses in States with energy constraints to access affordable and reliable domestic energy resources. By promoting the development of new energy infrastructure, the United States will make energy more affordable, while safeguarding the environment and advancing our Nation’s economic and geopolitical advantages.

Sec. 2. Policy. It is the policy of the United States to promote private investment in the Nation’s energy infrastructure through:

- (a) efficient permitting processes and procedures that employ a single point of accountability, avoid duplicative and redundant studies and reviews, and establish clear and reasonable timetables;

- (b) regulations that reflect best practices and best-available technologies;

- (c) timely action on infrastructure projects that advance America’s interests and ability to participate in global energy markets;

- (d) increased regulatory certainty regarding the development of new energy infrastructure;

- (e) effective stewardship of America’s natural resources; and

- (f) support for American ingenuity, the free market, and capitalism.

Sec. 3. Water Quality Certifications. Section 401 of the Clean Water Act (33 U.S.C. 1341) provides that States and authorized tribes have a direct role in Federal permitting and licensing processes to ensure that activities subject to Federal permitting requirements
comply with established water quality requirements. Outdated Federal guidance and regulations regarding section 401 of the Clean Water Act, however, are causing confusion and uncertainty and are hindering the development of energy infrastructure.

(a) The Administrator of the Environmental Protection Agency (EPA) shall consult with States, tribes, and relevant executive departments and agencies (agencies) in reviewing section 401 of the Clean Water Act and EPA's related regulations and guidance to determine whether any provisions thereof should be clarified to be consistent with the policies described in section 2 of this order. This review shall include examination of the existing interim guidance entitled, "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes" (Section 401 Interim Guidance). This review shall also take into account federalism considerations underlying section 401 of the Clean Water Act and shall focus on:

(i) the need to promote timely Federal-State cooperation and collaboration;

(ii) the appropriate scope of water quality reviews;

(iii) types of conditions that may be appropriate to include in a certification;

(iv) expectations for reasonable review times for various types of certification requests; and

(v) the nature and scope of information States and authorized tribes may need in order to substantively act on a certification request within a prescribed period of time.

(b) Upon completion of the consultation and review process described in subsection (a) of this section, but no later than 60 days after the date of this order, the Administrator of the EPA shall:

(i) as appropriate and consistent with applicable law, issue new guidance to States and authorized tribes to supersede the Section 401 Interim Guidance to
clarify, at minimum, the items set forth in subsection (a) of this section; and

(ii) issue guidance to agencies, consistent with the policies outlined in section 2 of this order, to address the items set forth in subsection (a) of this section.

(c) Upon completion of the consultation and review process described in subsection (a) of this section, but no later than 120 days after the date of this order, the Administrator of the EPA shall review EPA's regulations implementing section 401 of the Clean Water Act for consistency with the policies set forth in section 2 of this order and shall publish for notice and comment proposed rules revising such regulations, as appropriate and consistent with law. The Administrator of the EPA shall finalize such rules no later than 13 months after the date of this order.

(d) Upon completion of the processes described in subsection (b) of this section, the Administrator of the EPA shall lead an interagency review, in coordination with the head of each agency that issues permits or licenses subject to the certification requirements of section 401 of the Clean Water Act (401 Implementing Agencies), of existing Federal guidance and regulations for consistency with EPA guidance and rulemaking. Within 90 days of completion of the processes described in subsection (b) of this section, the heads of the 401 Implementing Agencies shall update their respective agencies’ guidance. Within 90 days of completion of the processes described in subsection (c) of this section, if necessary, the heads of each 401 Implementing Agency shall initiate a rulemaking to ensure their respective agencies’ regulations are consistent with the rulemaking described in subsection (c) of this section and with the policies set forth in section 2 of this order.

Sec. 4. Safety Regulations. (a) The Department of Transportation's safety regulations for Liquefied Natural Gas (LNG) facilities, found in 49 CFR Part 193 (Part 193), apply uniformly to small-scale peakshaving, satellite, temporary, and mobile facilities, as well as to large-scale import and export terminals. Driven by abundant supplies of domestic natural gas, new LNG export terminals are in various stages of development, and these modern, large-scale liquefaction facilities bear little resemblance to the small peakshaving facilities common during the original drafting of Part 193 nearly 40 years ago. To achieve the
policies set forth in subsection 2(b) of this order, the Secretary of Transportation shall initiate a rulemaking to update Part 193 and shall finalize such rulemaking no later than 13 months after the date of this order. In developing the proposed regulations, the Secretary of Transportation shall use risk-based standards to the maximum extent practicable.

(b) In the United States, LNG may be transported by truck and, with approval by the Federal Railroad Administration, by rail in United Nations portable tanks, but Department of Transportation regulations do not authorize LNG transport in rail tank cars. The Secretary of Transportation shall propose for notice and comment a rule, no later than 100 days after the date of this order, that would treat LNG the same as other cryogenic liquids and permit LNG to be transported in approved rail tank cars. The Secretary shall finalize such rulemaking no later than 13 months after the date of this order.

Sec. 5. Environment, Social, and Governance Issues; Proxy Firms; and Financing Energy Projects Through the United States Capital Markets. (a) The majority of financing in the United States is conducted through its capital markets. The United States capital markets are the deepest and most liquid in the world. They benefit from decades of sound regulation grounded in disclosure of information that, under an objective standard, is material to investors and owners seeking to make sound investment decisions or to understand current and projected business. As the Supreme Court held in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976), information is “material” if “there is a substantial likelihood that a reasonable shareholder would consider it important.” Furthermore, the United States capital markets have thrived under the principle that companies owe a fiduciary duty to their shareholders to strive to maximize shareholder return, consistent with the long-term growth of a company.

(b) To advance the principles of objective materiality and fiduciary duty, and to achieve the policies set forth in subsections 2(c), (d), and (f) of this order, the Secretary of Labor shall, within 180 days of the date of this order, complete a review of available data filed with the Department of Labor by retirement plans subject to the Employee Retirement Income Security Act of 1974 (ERISA) in order to identify whether there are
discernible trends with respect to such plans' investments in the energy sector. Within 180 days of the date of this order, the Secretary shall provide an update to the Assistant to the President for Economic Policy on any discernable trends in energy investments by such plans. The Secretary of Labor shall also, within 180 days of the date of this order, complete a review of existing Department of Labor guidance on the fiduciary responsibilities for proxy voting to determine whether any such guidance should be rescinded, replaced, or modified to ensure consistency with current law and policies that promote long-term growth and maximize return on ERISA plan assets.

Sec. 6. Rights-of-Way Renewals or Reauthorizations. The Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce approve rights-of-way for energy infrastructure through lands owned by or within the jurisdiction or control of the United States. Energy infrastructure rights-of-way grants, leases, permits, and agreements routinely include sunset provisions. Operating facilities in expired rights-of-way creates legal and operational uncertainties for owners and operators of energy infrastructure. To achieve the policies set forth in section 2 of this order, the Secretaries of the Interior, Agriculture, and Commerce shall:

(a) develop a master agreement for energy infrastructure rights-of-way renewals or reauthorizations; and

(b) within 1 year of the date of this order, initiate renewal or reauthorization processes for all expired energy rights-of-way grants, leases, permits, and agreements, as determined to be appropriate by the applicable Secretary and to the extent permitted by law.

Sec. 7. Reports on the Barriers to a National Energy Market. (a) Within 180 days of the date of this order, the Secretary of Transportation, in consultation with the Secretary of Energy, shall submit a report to the President, through the Assistant to the President for Economic Policy, regarding the economic and other effects caused by the inability to transport sufficient quantities of natural gas and other domestic energy resources to the States in New England and, as the Secretary of Transportation deems appropriate, to States in other regions of the Nation. This report shall assess whether, and to what extent,
State, local, tribal, or territorial actions have contributed to such effects.

(b) Within 180 days of the date of this order, the Secretary of Energy, in consultation with the Secretary of Transportation, shall submit a report to the President, through the Assistant to the President for Economic Policy, regarding the economic and other effects caused by limitations on the export of coal, oil, natural gas, and other domestic energy resources through the west coast of the United States. This report shall assess whether, and to what extent, State, local, tribal, or territorial actions have contributed to such effects.

Sec. 8. Report on Intergovernmental Assistance. State and local governments play a vital role in supporting energy infrastructure development through various transportation, housing, and workforce initiatives, and through other policies and expenditures. The Federal Government is, in many cases, well positioned to provide intergovernmental assistance to State and local governments. To achieve the policies set forth in section 2 of this order, the heads of agencies shall review existing authorities related to the transportation and development of domestically produced energy resources and, within 30 days of the date of this order, report to the Director of the Office of Management and Budget and the Assistant to the President for Economic Policy on how those authorities can be most efficiently and effectively used to advance the policies set forth in this order.

Sec. 9. Report on Economic Growth of the Appalachian Region. Within 180 days of the date of this order, the Secretary of Energy, in consultation with the heads of other agencies, as appropriate, shall submit a report to the President, through the Assistant to the President for Economic Policy, describing opportunities, through the Federal Government or otherwise, to promote economic growth of the Appalachian region, including growth of petrochemical and other industries. This report also shall assess methods for diversifying the Appalachian economy and promoting workforce development.

Sec. 10. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.
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. At issue is the question whether, in light of the D.C. Circuit’s recent decision in Hoopa Valley Tribe v. FERC, 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...
Docket No. CP18-5-000, et al.

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


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).


<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
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<tbody>
<tr>
<td>August 22, 2013</td>
<td>New York DEC receives Constitution’s application for a water quality certification</td>
</tr>
<tr>
<td>May 9, 2014</td>
<td>Constitution submits a letter to New York DEC to “simultaneously withdraw and resubmit” its application.</td>
</tr>
<tr>
<td>April 27, 2015</td>
<td>Constitution submits a letter to New York DEC to “simultaneously withdraw and resubmit” its application.</td>
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<tr>
<td>April 22, 2016</td>
<td>New York DEC denies Constitution’s application for certification.</td>
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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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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).”\textsuperscript{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.\textsuperscript{17} The Commission affirmed its determination on rehearing.\textsuperscript{18}

9. Constitution sought review before the U.S. Court of Appeals for the District of Columbia Circuit.\textsuperscript{19}

10. On January 25, 2019, the D.C. Circuit decided \textit{Hoopa Valley Tribe v. FERC} (\textit{Hoopa Valley}),\textsuperscript{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

\begin{itemize}
\item \textsuperscript{13} \textit{Constitution Pipeline Co., LLC} v. \textit{N.Y. State Dep’t of Env’tl. 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).
\item \textsuperscript{14} Id. at 100-103.
\item \textsuperscript{15} Declaratory Order, 162 FERC ¶ 61,014 at P 23; Declaratory Rehearing Order, 164 FERC ¶ 61,029 at P 17.
\item \textsuperscript{16} Declaratory Order, 162 FERC ¶ 61,014 at PP 22-23.
\item \textsuperscript{17} Id. at PP 13-21.
\item \textsuperscript{18} Declaratory Rehearing Order, 164 FERC ¶ 61,029 at PP 13-19.
\item \textsuperscript{19} \textit{Constitution Pipeline Co., LLC} v. \textit{FERC}, D.C. Cir. No. 18-1251.
\item \textsuperscript{20} 913 F.3d 1099.
\end{itemize}
applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year.”

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. The court granted this motion three days later.

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.

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 Waterkeeper Alliance, 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.

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21 Id. at 1103.


II. Discussion

A. Preliminary Issues

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

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. 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. Rather, an applicant “can present evidence of waiver directly to FERC to obtain the agency’s go-ahead to begin construction.” 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. There is no support for this distinction, which illogically suggests that unlawful delay ending in denial cannot injure a project sponsor.

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).


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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38 Stop the Pipeline Supplemental Pleading at 3-6.

39 Id. at 3.

40 Id. at 4, 6.

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.”

24. *Hoopa Valley* involved a long-pending relicensing proceeding. 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. The “coordinated withdrawal-and-resubmission scheme” persisted for more than a decade.

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.’” 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.” The court did not “determine how different a request must be “to constitute a ‘new request’ such that it restarts the one-year clock.”

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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 project, 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

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.”\textsuperscript{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.”\textsuperscript{57} New York DEC contends that \textit{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.”\textsuperscript{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.\textsuperscript{59}

29. Sierra Club argues that the \textit{Hoopa Valley} decision rested on the inequity to the petitioner tribe of the specific “coordinated withdrawal-and-resubmission scheme.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{56} New York DEC Supplemental Pleading at 22 (quoting \textit{Hoopa Valley}, 913 F.3d at 1101).

\textsuperscript{57} Id. (quoting \textit{Hoopa Valley}, 913 F.3d at 1104).

\textsuperscript{58} Id. at 25.

\textsuperscript{59} Id. at 24.

\textsuperscript{60} Sierra Club Supplemental Pleading at 8-9, 10-12 (quoting \textit{Hoopa Valley}, 913 F.3d at 1105).

\textsuperscript{61} Id. at 8-9 (quoting \textit{Hoopa Valley}, 913 F.3d at 1105).

\textsuperscript{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

\(^{63}\) 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.”

According to New York DEC, each withdrawal and resubmission represented Constitution’s good faith pursuit of a water quality certification and after each withdrawal and resubmission the agency’s evaluation continued apace.

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” New York DEC implies that Constitution’s application “would most likely be denied” if Constitution did not withdraw, however, New York DEC does not point to record evidence to support this claim.

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

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.


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.\footnote{Id. app. at 002306 (reproducing press release).}

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 \textit{Hoopa Valley}. Nothing in \textit{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, \textit{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.”\footnote{\textit{Hoopa Valley}, 913 F.3d at 1104.} 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.\footnote{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.}

35. New York DEC seeks to distinguish \textit{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 \textit{Hoopa Valley} never intended to make a new request and California and Oregon “had no intention to actively review the moribund application.”\footnote{New York DEC Supplemental Pleading at 26 (citing \textit{Hoopa Valley}, 913 F.3d at 1104-1105); New York DEC Responsive Pleading at 2-3 (same).} 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
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.”

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. 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. 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. 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.”

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. 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.” 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. 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. 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. 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).


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.”

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.” 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. 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. 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.”

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. 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


99 Hoopa Valley, 913 F.3d at 1105.

100 New York DEC Supplemental Pleading at 32-38.

101 Id. at 30-32.

in the public interest. 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.

In order to support a stay, the movant must substantiate that irreparable injury is “likely” to occur. 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. 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. Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.

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. 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. 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

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 … .”\textsuperscript{116} Yet the concluding sentence of the same paragraph conspicuously omits these permits when it states that “[b]ased on the

\textsuperscript{111} Id. at 35.

\textsuperscript{112} Id. at 35-37.

\textsuperscript{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.

\textsuperscript{114} EIS at 4-52; Certificate Order, 149 FERC ¶ 61,199 at PP 77-79.

\textsuperscript{115} New York DEC Supplemental Pleading at 35-36.

\textsuperscript{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.”

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. Constitution was free to choose whether to pursue its interests through litigation or by re-apply 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. 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.

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.


120 id. at 38.
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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.

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121 Certificate Order, 149 FERC ¶ 61,199 at PP 8, 28-29.
On August 6, 2018, the Commission determined that 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 Northern Access 2016 Project sponsored by National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (collectively, National Fuel), by failing to act within a year from when it received the application for water quality certification.  


3 Waiver Order, 164 FERC ¶ 61,084 at P 42.
2. On August 14, 2018, New York DEC requested rehearing of the Waiver Order. New York DEC argues that its April 7, 2017 denial of the water quality certification was timely because National Fuel agreed to extend the one-year deadline. New York DEC also seeks a stay of the Waiver Order.

3. On September 5, 2018, Sierra Club also requested rehearing. Sierra Club argues the Commission irrationally interpreted section 401 and allowed National Fuel to flout an agreement with New York DEC.

I. Background

4. New York DEC received National Fuel’s application for water quality certification on March 2, 2016. On January 20, 2017, National Fuel and New York DEC agreed to revise “the date, to the mutual benefit of both parties, on which the Application was deemed received by [New York DEC] to April 8, 2016.” Thus, the agreement attempted to extend the date for New York DEC to make a “final determination on the application until April 7, 2017.” New York DEC denied National Fuel’s application on April 7, 2017.

4 New York DEC Rehearing Request at 2.

5 Id. at 2-3.

6 Sierra Club Rehearing Request at 1.

7 Waiver Order, 164 FERC ¶ 61,084 at P 35. See New York DEC Rehearing Request at 4.

8 See New York DEC Rehearing Request, Exhibit A.

9 See id.

10 Waiver Order, 164 FERC ¶ 61,084 at P 35. See New York DEC Rehearing Request at 3. A copy of New York DEC’s April 7, 2017 denial is attached to its rehearing request. See id., Exhibit B. On February 5, 2019, the United States Court of Appeals for the Second Circuit vacated and remanded this denial to give New York DEC an “opportunity to explain more clearly – should it choose to do so – the basis for its decision.” Nat’l Fuel Gas Supply Corp. v. N.Y. State Dep’t of Env’tl. Conservation, No. 17-1164, 2019 WL 446990 (2d Cir. Feb. 5, 2019).
5. Based on these facts, the Waiver Order determined that Clean Water Act section 401 required New York DEC to act by March 2, 2017, despite the agreement to alter the receipt date. Accordingly, the Waiver Order determined that New York DEC waived its authority to issue a water quality certification.\textsuperscript{11}

6. National Fuel filed an answer to New York DEC’s rehearing request and motion for stay on August 29, 2018, and an answer to Sierra Club’s rehearing request and motion for stay on September 20, 2018. Our rules permit answers to motions,\textsuperscript{12} but do not permit answers to requests for rehearing, unless otherwise ordered by the decisional authority.\textsuperscript{13} Accordingly, we accept the answers to the motions for stay, but reject the answers to the rehearing requests.

II. \textbf{Analysis}

A. \textbf{Statutory Interpretation}

7. “Section 401 of the CWA requires an applicant for a federal permit to conduct any activity that ‘may result in any discharge into the navigable waters’ of the United States to obtain ‘a certification from the State in which the discharge ... will originate ... that any such discharge will comply with,’ \textit{inter alia}, the state’s water quality standards.”\textsuperscript{14} Section 401 provides that if a state “fails or refuses to act on a request for certification within a reasonable period of time (not to exceed one year) after receipt of such request,” then the certification requirement is waived.\textsuperscript{15}

8. The Commission has long interpreted section 401 as meaning “that a certifying agency waives the certification requirements of section 401 if the certifying agency does not act within one year after the date that the certifying agency receives a request for a certification.”\textsuperscript{16} We base this interpretation on giving plain meaning to the words “after

\textsuperscript{11} Waiver Order, 164 FERC ¶ 61,084 at P 42.

\textsuperscript{12} 18 C.F.R. § 385.213(d) (2018).

\textsuperscript{13} \textit{Id.} § 385.213(a)(2); \textit{id.} § 385.713(d)(1).

\textsuperscript{14} \textit{Constitution Pipeline Co. v. N.Y State Dep’t of Env’t Conservation}, 868 F.3d 87, 99 (2d Cir. 2017) (quoting 33 U.S.C. § 1341(a)(1)).

\textsuperscript{15} 33 U.S.C. § 1341(a)(1).

\textsuperscript{16} Waiver Order, 164 FERC ¶ 61,084 at P 41. \textit{See Constitution Pipeline Co., LLC}, 162 FERC ¶ 61,014, at P 16 (tracing this interpretation back to 1987), \textit{order denying}
receipt of such request.”17 The Commission explained in the Waiver Order that our determination here is consistent with our order in Central Vermont Public Service Corporation, holding that section 401 “contains no provision authorizing either the Commission or the parties to extend the statutory deadline” and that “private agreements . . . cannot operate to amend the Clean Water Act, nor are they in any way binding on the Commission.”18

9. On rehearing, New York DEC states that the Commission erroneously applied principles of statutory construction in the Waiver Order when it found that the section 401 deadline cannot be altered by agreement.19 Citing the general principle that statutory rights are waivable, New York DEC argues that when it acted on National Fuel’s application on April 7, 2017, it had acted within one year from the receipt of the application as established by agreement.20 Rather than address Central Vermont Public Service, New York DEC states that section 401 contains no provision explicitly prohibiting waiver, and emphasizes cases demonstrating that statutory rights are waivable unless Congress affirmatively provides they are not.21 New York DEC’s arguments fail because they support an interpretation of section 401 that would run counter to the statutory intent of preventing delay.

10. Two of the cases cited by New York DEC address waiver of rights by persons in criminal proceedings.22 The outcomes in these cases depended on whether permitting

reh’g, 164 FERC ¶ 61,029 (2018).

17 33 U.S.C. § 1341(a)(1). See N.Y. State Dep’t of Envtl. Conservation v. FERC, 884 F.3d 450, 455-56 (2d Cir. 2018) (holding that the “plain language of Section 401” requires states to grant or deny an application within one year of receiving the application, not the date the agency deems the application to be complete).


19 New York DEC Rehearing Request at 2.

20 Id. at 4-6.

21 New York DEC Rehearing Request at 5-6 (citing Price v. U.S. Department of Justice, 865 F.3d 676 (D.C. Cir. 2017); United States v. Mezzanatto, 513 U.S. 196 (1995); and U.S. Department of Labor v. Preston, 873 F.3d 877 (11th Cir. 2017)).

22 See Price, 865 F.3d 676 (holding that a plea agreement waiving rights under the Freedom of Information Act (FOIA) is unenforceable because the government did not, in that case, identify a legitimate criminal-justice interest in honoring the waiver); and
waiver advances a legitimate criminal-justice interest. Another case cited by New York DEC, *U.S. Department of Labor v. Preston*,\(^{23}\) holds that an Employee Retirement Income Security Act statute of repose was subject to waiver. The court in *Preston* reasoned in part that disallowing waiver would be contrary to the “overarching purpose” of ERISA.\(^{24}\)

11. By contrast to the statutory schemes at issue in the cases cited by New York DEC, the section 401 deadline cannot be waived by agreement. In *Hoopa Valley Tribe v. FERC*,\(^{25}\) the court considered whether waiver occurs when there is a “written agreement with the reviewing states to delay water quality certification.”\(^{26}\) The court concluded that such an agreement constituted a failure and a refusal to act under section 401.\(^{27}\) The events in *Hoopa Valley Tribe* and these proceedings share the same salient facts, i.e. an agreement was reached to delay the state agency’s action on a water quality certification application. *Hoopa Valley Tribe* held that such an agreement results in a refusal and failure to act. Similarly, we find that the lack of action by the March 2, 2017 deadline here constituted a failure and refusal to act as contemplated by section 401. Therefore, New York DEC waived its authority to issue a water quality certification.

12. The language of section 401 that reflects a Congressional intent to establish a statutory policy of preventing delay distinguishes it from the cases cited by New York DEC. *Hoopa Valley Tribe* determined that a “deliberate and contractual idleness” not only usurps the Commission’s “control over whether and when a federal [authorization] will issue,” but would contravene section 401’s intended purpose, i.e. to prevent a state’s “dalliance or unreasonable delay.”\(^{28}\) By contrast to the statutory schemes addressed in the cases cited by New York DEC, accommodating extension of the deadline here would

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*United States v. Mezzanatto*, 513 U.S. 196 (holding that a criminal defendant can waive evidentiary and procedural rules designed to protect plea discussion statements as inadmissible). Neither of these cases involve statutory deadlines.

\(^{23}\) 873 F.3d 877.

\(^{24}\) *Id.* at 885.

\(^{25}\) 913 F.3d 1099 (D.C. Cir. 2019) (*Hoopa Valley Tribe*).

\(^{26}\) *Id.* at 1104.

\(^{27}\) *Id.*

\(^{28}\) *Id.* at 1104-05 (quoting 115 Cong. Rec. 9264 (1969) (quotation omitted)).
contravene the statutory purpose of encouraging timely action on water quality certification applications.

13. Sierra Club claims that *Constitution Pipeline Co. v. New York State Department of Environmental Conservation* and *New York State Department of Environmental Conservation v. FERC* demonstrate that “courts . . . concluded Section 401 allows the parties to move the date an application is ‘received.’” In neither case did the court hold that the state and an applicant could agree to move the date an application is “received.” In *Constitution Pipeline Co. v. New York State Department of Environmental Conservation*, the court found that it lacked jurisdiction to address the waiver issue and merely noted that the applicant had withdrawn and resubmitted an application for certification. *New York State Department of Environmental Conservation v. FERC* addressed whether a state may defer the date of “receipt” by deeming an application “incomplete.” The court found such an approach contrary to the plain language of the statute. And the court further dismissed New York DEC’s policy concerns by, in part, noting that a state “could also request that the applicant withdraw and resubmit the application.”

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29 868 F.3d 87, 94 (2d Cir. 2017) (finding no jurisdiction to consider Constitution Pipeline’s argument that action on water quality certification application was untimely, but denying petition for review on the merits). Following the Second Circuit’s decision, Constitution Pipeline sought and was denied a declaratory order from the Commission finding waiver. *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014, reh’g denied, 164 FERC ¶ 61,029 (2018). Constitution Pipeline petitioned for review of those orders and, following *Hoopa Valley Tribe*, the D.C. Circuit granted the Commission’s motion for voluntary remand of its decision. *Constitution Pipeline Co., LLC v FERC*, D.C. Cir. No. 18-1251 (issued Feb. 28, 2018).

30 884 F.3d 450 (affirming the Commission’s determination that the section 401 one-year review period began when New York DEC received Millennium Pipeline Company’s request, not when New York DEC deemed the application complete).

31 Sierra Club Rehearing Request at 6.

32 868 F.3d at 94.

33 884 F.3d 450 at 456.

34 *Id.*
14. Similarly, New York DEC relies on the Commission’s earlier acknowledgement that an applicant can elect to withdraw and resubmit its application. But whether the “withdrawal-and-resubmission scheme” continues to be a viable procedure is in doubt after Hoopa Valley Tribe. At a minimum, we take the reasoning in Hoopa Valley Tribe – disapproval of an agreement to withdraw and resubmit as a failure and refusal to act resulting in a scheme that thwarts a Congressionally-imposed statutory limit – to apply equally to the facts here.

15. New York DEC cites the Commission’s practice of issuing tolling orders as a similar extension of a statutorily-designated deadline. New York DEC points out that the NGA (like the Clean Water Act) requires the Commission to “act” within 30 days, and that no provision in the NGA permits the Commission to extend the time for acting.

16. New York DEC’s reasoning that NGA section 19 “does not contain any language expressly authorizing [the Commission] to extend the 30-day statutory deadline” is inapt because Commission tolling orders do not extend the deadline. Tolling orders comply with NGA section 19 because they reflect the Commission action required by the statute. By contrast, the authority to extend the deadline for acting under Clean Water Act section 401 that New York DEC seeks to exercise by agreement with National Fuel does not fit within the language of the statute.

17. Finally, New York DEC is not without suitable recourse in the case of an incomplete application. New York DEC can deny an application with or without prejudice.

35 New York DEC Rehearing Request at 6. See Waiver Order, 164 FERC ¶ 61,084 at P 45.

36 In New York State Dept of Envtl. Conservation v. FERC, the court stated that a state could “request that the applicant withdraw and resubmit the application.” 884 F.3d at 455-56. However, the D.C. Circuit in Hoopa Valley Tribe described that statement as “dicta.” 913 F.3d at 1105.

37 New York DEC Rehearing Request at 5-6.

38 Id. (citing 15 U.S.C. § 717r (2012)).

39 Delaware Riverkeeper Network v. FERC, 895 F.3d 102, 113 (D.C. Cir. 2018); Kokajko v. FERC, 837 F.2d 524, 525 (1st Cir. 1988).

40 Waiver Order, 164 FERC ¶ 61,084 at P 45. See N.Y. State Dept’ of Envtl. Conservation v. FERC, 884 F.3d at 456 (“If a state deems an application incomplete, it
B. **Policy**

18. New York DEC argues that the Commission’s ruling encourages the “withdraw and refile” practice and would therefore cause more delay than permitting agreements to extend the deadline.\(^{41}\) According to New York DEC, delay would result for two reasons: (1) the refiling would require the agency to issue notice of the new application; and (2) the new filing would extend the deadline up to a year – in this case a much longer extension than agreed to between New York DEC and National Fuel.\(^{42}\) New York DEC adds that the agreement between it and National Fuel was mutually beneficial, and disallowing the extension by agreement would not further any energy or environmental policy.\(^{43}\) With respect to the pragmatic benefit of avoiding case-by-case determinations, Sierra Club states that such case-by-case determinations will be required in any event.\(^{44}\) Sierra Club adds that the waiver finding is “contrary to the goals Congress established in passing the [Clean Water Act] and Section 401.”\(^{45}\)

19. The Clean Water Act provides for a state to issue a certification within a reasonable period of time, not to exceed one year, and includes language expressly providing for waiver in the absence of action within one-year. As discussed above, the purpose of this provision is to prevent delay.\(^{46}\) The responsibility to act within a reasonable period of time, not to exceed a year, lies with New York DEC. Given New York DEC has the ability to timely act on a section 401 water quality certification request, the Commission finds it misguided to blame the Commission for not facilitating extensions of time. Congress expressly provided for projects to move forward without state water quality certification when the state waives its authority.

\(^{41}\) New York DEC Rehearing Request at 7.

\(^{42}\) Id.

\(^{43}\) Id.

\(^{44}\) Sierra Club Rehearing Request at 7.

\(^{45}\) Id. at 8.

\(^{46}\) See Hoopa Valley Tribe, 913 F.3d at 1104-05.
20. We find that the statute prohibits state agencies and applicants from entering into written agreements to delay water quality certifications, an interpretation consistent with Hoopa Valley Tribe. We have reasonably interpreted section 401 and find that the policy interests advanced by New York DEC cannot override the statute. In addition, New York DEC’s policy arguments fail to recognize countervailing considerations, including the interest in providing certainty around the deadline for state action. Binding calculation of the deadline to application receipt (as contemplated by the statutory language) makes determining the deadline more straightforward.

C. Agreement

21. New York DEC argues the Commission erred by disregarding the agreement. In the Waiver Order, the Commission found that its construction of the Clean Water Act is not affected by a “private agreement not to raise an issue.”

22. Quoting Erie Boulevard Hydropower, LP v. FERC, New York DEC states that the D.C. Circuit “has consistently required the Commission to give weight to the contracts and settlements of the parties before it.” New York’s reliance on Erie Boulevard is unavailing. In Erie Boulevard, the D.C. Circuit affirmed Commission orders regarding headwater benefits assessments pursuant to Federal Power Act section 10(f). In the underlying orders, the Commission considered a settlement between one of the headwater beneficiaries and the State of New York. Although Erie Boulevard gave effect to an agreement between parties while the Commission fulfilled its responsibilities under Part I of the Federal Power Act (FPA), by doing so, the

47 Id. at 1103-05.

48 See Waiver Order, 164 FERC ¶ 61,084 at P 45.

49 New York DEC Rehearing Request at 7-8.

50 Waiver Order, 164 FERC ¶ 61,084 at P 39 n.71. See Central Vermont Public Service, 113 FERC ¶ 61,167 at P 19 (“However, nothing in the Clean Water Act allows a state to use procedures agreed to in a settlement to indefinitely extend the statutory deadline, nor, as we have stated, do we endorse such delay.”).

51 878 F.3d 258, 268 (D.C. Cir. 2017) (internal quotation marks and citation omitted).

52 New York DEC Rehearing Request at 8.

Commission did not act in defiance of the statute, but instead acted consistently with its statutory authority to assess an equitable amount to compensate for headwater benefits.\textsuperscript{54} Unlike these proceedings, \textit{Erie Boulevard} did not involve an agreement that contravened the intent behind a statutory provision.

\textbf{D.\ Estoppel, Waiver, and Ratification}

23. New York DEC argues that waiver, estoppel, ratification, and basic contract law should bar National Fuel from challenging the agreement’s legal basis.\textsuperscript{55} Sierra Club argues that National Fuel is estopped from asserting the agreement was not valid, because New York DEC relied on the agreement.\textsuperscript{56} New York DEC points out that National Fuel accepted the benefits of the agreement, which meant avoiding both an earlier denial of the application and the subsequent need to resubmit a new section 401 application.\textsuperscript{57} Citing \textit{DiRose v. PK Mgmt. Corp.},\textsuperscript{58} New York DEC states that when a contract is invalid, a party must act promptly to repudiate it “or he will be deemed to have waived his right to do so.”

24. We disagree that contract principles change the outcome. Our interpretation of section 401 is not affected by the existence of a contract between New York DEC and National Fuel.\textsuperscript{59} Rather, we find, consistent with \textit{Hoopa Valley Tribe}, that National Fuel and New York DEC cannot enter into “a written agreement . . . to delay water quality certification.”\textsuperscript{60} New York DEC states that National Fuel’s partial performance “is an

\begin{thebibliography}{99}
\item \textsuperscript{54} 878 F.3d at 267-68.
\item \textsuperscript{55} New York DEC Rehearing Request at 2, 8-10.
\item \textsuperscript{56} Sierra Club Rehearing Request at 10-11.
\item \textsuperscript{57} New York DEC Rehearing Request at 9.
\item \textsuperscript{58} 691 F.2d 628, 633-34 (2d Cir. 1982).
\item \textsuperscript{59} \textit{See Central Vermont Public Service}, 113 FERC ¶ 61,167 at P 16 (“VANR’s agreements with other parties are simply not relevant to the issue of whether it met the requirement of the Clean Water Act that it act on a certification application within one year, which it does not dispute it failed to do.”).
\item \textsuperscript{60} 913 F.3d at 1104.
\end{thebibliography}
unmistakable signal that one party believes there is a contract,”61 however, the validity of a contract does not control how we view the controlling language of section 401.

E. Untimely

25. New York DEC and Sierra Club argue that National Fuel’s waiver argument was untimely.62 New York DEC states that the Commission erred by construing National Fuel’s December 5, 2017 filing as a separate motion requesting a waiver determination. New York DEC explains that National Fuel knew of the waiver argument when it filed its March 3, 2017 rehearing request, yet failed to raise it then.63 Accordingly, New York DEC believes National Fuel’s December 5, 2017 filing amounts to an untimely supplement to its rehearing request, which should have been rejected.64

26. The Waiver Order recognized that National Fuel’s December 5, 2017 filing was a “separate basis for their claim that the New York [DEC] waived authority under section 401 of the Clean Water Act to issue or deny a water quality certification for the Northern Access 2016 Project.”65 The Commission recognized that, as an expansion of its request for rehearing, the December 5, 2017 filing was “statutorily barred as outside the thirty day period for seeking rehearing;” however, the Commission, referring to Millennium Pipeline Co., L.L.C. v. Seggos,66 recognized that applicants can present evidence of waiver of a water quality certification to the Commission.67 Therefore, the Commission interpreted National Fuel’s filing as “effectively” a petition for a waiver determination.”68

61 New York DEC Rehearing Request at 9 (quoting R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 75-76 (2d Cir. 1984)).

62 New York DEC Rehearing Request at 10; Sierra Club Rehearing Request at 9-11.

63 New York DEC Rehearing Request at 9-10.

64 Id. (citing City of Tacoma, Washington, 110 FERC ¶ 61,140 (2005); and In Re CMS Midland, Inc., 56 FERC ¶ 61,177 (1991)).

65 Waiver Order, 164 FERC ¶ 61,084 at P 6.


67 Waiver Order, 164 FERC ¶ 61,084 at P 6.

68 Id. P 6.
27. We deny rehearing. The Commission reasonably treated National Fuel’s December 5, 2017 filing as a motion in these circumstances. The Commission’s regulations do not specify the timing or form for an applicant for water quality certification to present evidence of waiver of water quality certification. As noted in the Waiver Order, a motion may be filed at any time in a proceeding. Thus, the timing of National Fuel bringing the issue to the Commission’s attention (or whether it did so at all) are irrelevant for purposes of the determinations made in the Waiver Order. National Fuel was not required to file its request at any particular time, and in this case National Fuel’s timing did not result in its inability to seek the determination.

III. Stay Request

28. New York DEC and Sierra Club also request a stay of the Waiver Order. Finding that justice did not require a stay, the Commission denied an earlier stay request in an order issued on August 31, 2017.

29. The Commission grants a stay when “justice so requires.” 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

69 Waiver Order, 164 FERC ¶ 61,084 at P 6 n.10 (citing 18 C.F.R. § 385.212(a) (2018)). “[T]he Commission has discretion to determine the actual nature of the filing and to treat the filing accordingly.” Alcoa Power Generating Inc., 152 FERC ¶ 61,040, at P 17 (2015).

70 New York DEC Rehearing Request at 10-12; Sierra Club Rehearing Request at 11-13.


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

30. In order to support a stay, the movant must substantiate that irreparable injury is “likely” to occur. 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. 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. Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.

31. New York DEC states that the Environmental Assessment’s (EA) finding of no significant impact and the subsequent section 7 conditional certificate authority is no longer valid given the denial of the water quality certification. New York DEC states that the impact of allowing the project to go forward without the New York DEC mitigation measures would be severe. New York DEC explains that the EA assumed the existence of certain mitigation measures, including those in a future section 401 water quality certification. Sierra Club relies on the significant damage that will be

73 Ensuring definiteness and finality in our proceedings also is important to the Commission. See Enable, 153 FERC ¶ 61,055 at P 118; Millennium Pipeline Co., 141 FERC ¶ 61,022, at P 13 (2012).

74 See, e.g., Algonquin Gas Transmission, 156 FERC ¶ 61,111 at P 9.

75 See Transcontinental Gas Pipe Line Co., LLC, 150 FERC ¶ 61,183, at P 10 (2015) (citing Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

76 Id.

77 Id.

78 Id.

79 New York DEC Rehearing Request at 11.

80 Id.

81 EA at 20 (Table A.8-1) (list of federal and Pennsylvania and New York permits, approvals, and consultations required for the project).

82 New York DEC Rehearing Request at 11.
caused if the project moves forward in what Sierra Club calls a violation of the Clean
Water Act.83

32. New York DEC and Sierra Club have failed to demonstrate “proof indicating that
the harm is certain to occur in the near future.”84 In the EA, Commission staff examined
the project’s impacts on geology, soils, groundwater, surface water, wetlands, vegetation,
aquatic resources, wildlife, threatened and endangered species, land use, visual resources,
socioeconomics, cultural resources, air quality, noise, reliability and safety, cumulative
impacts, and alternatives.85 None of the EA’s findings are now wrong as a result of New
York DEC’s waiver, because Commission staff did not base those findings on any
forthcoming conditions from New York DEC.86 Accordingly, the EA did not provide for
alternative mitigation in the event that New York DEC waived water quality
certification.87

33. When it approved the Northern Access 2016 Project, the Commission fully
considered the EA prepared by Commission staff and addressed the comments of
New York DEC, Allegheny Defense Project, Town of Pendleton and others in the
Certificate Order’s environmental discussion.88 The Commission determined that, on
balance, the Northern Access 2016 Project, if constructed and operated in accordance
with the application and environmental conditions imposed by the Certificate Order,
would not significantly affect the quality of the human environment and would be an
environmentally acceptable action.89 This finding did not assume conditions by New
York DEC. Given this conclusion, New York DEC and Sierra Club have not
demonstrated that irreparable harm is likely to occur, and we deny their motions for stay.

83 Sierra Club Rehearing Request at 11.

84 *Transcontinental Gas Pipe Line*, 150 FERC ¶ 61,183 at P 10 (citing *Wisconsin
Gas Co.*, 758 F.2d 669 at 674).

85 The EA addressed issues raised by New York DEC. *See, e.g.*, EA at 55
(sensitive vegetation communities) and 57 (forest fragmentation).

86 *See* EA at 47.

87 *Id.*

88 *See* Certificate Order, 158 FERC ¶ 61,145 at PP 68-197.

89 *Id.* P 197.
The Commission orders:

(A) The requests for rehearing filed by New York DEC and Sierra Club are denied.

(B) The requests for stay filed by New York DEC and Sierra Club are denied.

By the Commission. Commissioner McNamee is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,
Deputy Secretary.