

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY
COMMISSION,

Respondent.

Case No. _____

FERC Docket Nos.

CP18-5-000,

CP18-5-001,

CP18-5-002,

CP18-5-003

PETITION FOR REVIEW

Pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. §717r(b), and Rule 15(a) of the Federal Rules of Appellate Procedure (FRAP), petitioner New York State Department of Environmental Conservation (the Department) hereby petitions this Court to review (i) a final order of the Federal Energy Regulatory Commission (FERC) issued August 28, 2019, entitled “Order on Voluntary Remand” (168 FERC ¶61,129) (the Waiver Order); and (ii) FERC’s “Order Denying Rehearing and Stay” issued December 12, 2019 (169 FERC ¶ 61,199) (the Rehearing Denial). This Court has jurisdiction over the Department’s timely

petition for review under 15 U.S.C. §717r(a). The Waiver Order and the Rehearing Denial should be set aside in whole as illegal, unreasonable, arbitrary and capricious. The Waiver Order is attached as Exhibit A to this Petition. The Rehearing Denial is attached as Exhibit B.

Dated: December 30, 2019
Albany, New York

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EXHIBIT A

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

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

Constitution Pipeline Company, LLC

Docket Nos. CP18-5-000
CP18-5-001
CP18-5-002

ORDER ON VOLUNTARY REMAND

(Issued August 28, 2019)

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

I. Background

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

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

² 913 F.3d 1099 (D.C. Cir. 2019).

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

3. Section 401(a)(1) of the Clean Water Act requires that an applicant for a federal license or permit to conduct activities that may result in a discharge into the navigable waters of the United States, such as the Constitution Pipeline Project, must provide to the licensing or permitting agency a water quality certification from the state in which the discharge originates.⁴ If the state “fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request,” then certification is waived.⁵ Section 401(d) of the CWA provides that a certification and the conditions contained therein shall become a condition of any federal license that is issued.⁶

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

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

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

⁴ 33 U.S.C. § 1341(a)(1) (2012).

⁵ *Id.*

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

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

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

federal law, including a section 401 water quality certification, “or evidence of waiver thereof.”⁹

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

Table of Relevant Dates

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

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

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

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

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

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

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

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

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

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

¹³ *Constitution Pipeline Co., LLC v. 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).

¹⁴ *Id.* at 100-103.

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

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

¹⁷ *Id.* at PP 13-21.

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

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

²⁰ 913 F.3d 1099.

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

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

12. On March 11, 2019, the Commission issued a notice affording an opportunity for parties to file supplemental pleadings and record materials by April 1, 2019, on the significance of the *Hoopa Valley* decision, and responsive pleadings by May 1, 2019.²⁴

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

²¹ *Id.* at 1103.

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

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

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

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

II. Discussion

A. Preliminary Issues

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

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

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

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

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

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

³⁰ *Id.* at 700.

³¹ Stop the Pipeline Supplemental Pleading at 19-20.

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

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

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

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

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

³⁸ Stop the Pipeline Supplemental Pleading at 3-6.

³⁹ *Id.* at 3.

⁴⁰ *Id.* at 4, 6.

⁴¹ 33 U.S.C. § 1341(a)(1) (2012).

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

B. Substantive Matters

23. As noted above, under section 401 of the Clean Water Act, if a state certifying agency “fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of [section 401] shall be waived with respect to such Federal application.”⁴²

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

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

⁴² 33 U.S.C. § 1341(a)(1) (2012).

⁴³ *Hoopa Valley*, 913 F.3d at 1101.

⁴⁴ *Id.* at 1101-1102.

⁴⁵ *Id.* at 1104-1105.

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

⁴⁸ *Id.*

26. The *Hoopa Valley* court faulted the Commission for arbitrarily and capriciously concluding that although the licensee’s resubmissions “involved the same [p]roject, each resubmission was an independent request, subject to a new period of review.”⁴⁹ The court concluded that the licensee’s annual submission of an identical letter withdrawing and resubmitting its certification request pursuant to an agreement with the states did not constitute a “new request” and did not restart the clock.⁵⁰ The court explained that “[s]uch an arrangement does not exploit a statutory loophole; it serves to circumvent [FERC’s] congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.”⁵¹ The arrangement let “the states usurp FERC’s control over whether and when a federal license will issue . . . [and] could be used to indefinitely delay federal licensing proceedings and undermine FERC’s jurisdiction to regulate such matters.”⁵² The court concluded that the states’ efforts pursuant to its agreement with the applicant constituted “failure to act” or “refusal to act” within the plain meaning of those phrases in section 401.⁵³ As a result the states had waived their section 401 authority with regard to the project.⁵⁴

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

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

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1105.

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

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

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

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

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

⁵⁸ *Id.* at 25.

⁵⁹ *Id.* at 24.

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

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

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

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

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

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

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

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

⁶⁴ *Id.* at P 14.

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

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

⁶⁷ Sierra Club Responsive Pleading at 2-3.

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

relevant materials and to review Constitution's lengthy submissions."⁶⁹ According to New York DEC, each withdrawal and resubmission represented Constitution's good faith pursuit of a water quality certification⁷⁰ and after each withdrawal and resubmission the agency's evaluation continued apace.⁷¹

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

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

⁷⁰ New York DEC Supplemental Pleading at 26.

⁷¹ *Id.* at 3, 9-17, 25-26, 28-30.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁹ *Hoopa Valley*, 913 F.3d at 1104.

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

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

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

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

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

⁸² New York DEC Responsive Pleading at 3.

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

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

⁸⁵ Holleran Comments at 6.

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

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

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

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

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

⁸⁹ New York DEC Supplemental Pleading at 13.

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

⁹¹ New York DEC Supplemental Pleading at 28.

to be valid and that Constitution had “resubmitted its application with no changes or modifications.”⁹²

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

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

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

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

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

⁹⁹ *Hoopa Valley*, 913 F.3d at 1105.

¹⁰⁰ New York DEC Supplemental Pleading at 32-38.

¹⁰¹ *Id.* at 30-32.

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

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

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

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

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

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

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

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ New York DEC Supplemental Pleading at 34.

¹¹⁰ *Id.* at 34-35.

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

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

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

¹¹¹ *Id.* at 35.

¹¹² *Id.* at 35-37.

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

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

¹¹⁵ New York DEC Supplemental Pleading at 35-36.

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

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

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

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

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

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

¹¹⁸ New York DEC Supplemental Pleading at 37.

¹¹⁹ New York DEC Supplemental Pleading at 37-38.

¹²⁰ *Id.* at 38.

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

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

The Commission orders:

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

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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

Document Content(s)

CP18-5-000.DOCX.....1-23

EXHIBIT B

169 FERC ¶ 61,199
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Constitution Pipeline Company, LLC

Docket No. CP18-5-003

ORDER DENYING REHEARING AND STAY

(Issued December 12, 2019)

1. On August 28, 2019, the Commission issued an order on voluntary remand¹ that concluded, in light of the recent decision from the United States Court of Appeals for the D.C. Circuit in *Hoopa Valley Tribe v. FERC*,² that the New York State Department of Environmental Conservation (New York DEC) waived its authority under section 401 of the Clean Water Act³ to issue or deny a water quality certification for the Constitution Pipeline Project.

2. The Commission received timely requests for rehearing from Catherine Holleran⁴; New York DEC; Catskill Mountainkeeper, Riverkeeper, Inc., Delaware Riverkeeper Network, and Sierra Club (collectively Sierra Club); Stop the Pipeline; and Waterkeeper

¹ *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129 (2019) (Remand Order). On February 28, 2019, the United States Court of Appeals for the D.C. Circuit granted the Commission's unopposed motion for voluntary remand in the proceeding *Constitution Pipeline Co., LLC v. FERC*, D.C. Cir. No. 18-1251 (challenging the Commission's order on petition for declaratory order in *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 (Declaratory Order), *reh'g denied*, 164 FERC ¶ 61,029 (2018) (Declaratory Rehearing Order)).

² 913 F.3d 1099 (D.C. Cir.), *cert. denied*, 2019 WL 6689876 (2019) (*Hoopa Valley*).

³ 33 U.S.C. § 1341 (2018).

⁴ Ms. Holleran and her family own a 23-acre tract in Susquehanna County, Pennsylvania, that is crossed by an easement for the Constitution Pipeline. Catherine Holleran September 27, 2019 Request for Rehearing at 4.

Alliance, Inc. The filings from New York DEC and Waterkeeper Alliance included requests for stay. On October 15, 2019, Constitution filed an answer to the requests for stay. On October 28, 2019, Constitution filed motion for leave to answer and an answer to the requests for rehearing. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to a request for rehearing.⁵ Accordingly, we deny Constitution's motion and reject its answer.

3. As discussed below, we affirm the determination in the Remand Order that New York DEC waived its authority.

I. Discussion

4. Section 401 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 provide to the licensing or permitting agency a certification from the state in which the discharge originates that the discharge will comply with state water quality standards.⁶ If the state "fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of [section 401] shall be waived with respect to such Federal application."⁷

5. The Remand Order provides a detailed discussion of the three proceedings related to the Constitution Pipeline Project that are relevant to our discussion here: Constitution's pursuit of a certificate from the Commission under section 7 of the Natural Gas Act (NGA),⁸ Constitution's pursuit of a water quality certification from New York DEC, and Constitution's pursuit of a declaratory order seeking a determination from the Commission that New York DEC waived its authority under section 401 through delay.⁹

6. On January 11, 2018, the Commission denied Constitution's petition for a declaratory order, concluding that because Constitution had twice withdrawn and resubmitted its request to New York DEC for a water quality certification, Constitution had restarted the one-year period for New York DEC to act on the request and New York

⁵ 18 C.F.R. § 385.713(d)(1) (2019).

⁶ 33 U.S.C. § 1341(a)(1) (2018).

⁷ *Id.*

⁸ 15 U.S.C. § 717f (2018).

⁹ Remand Order, 168 FERC ¶ 61,129 at PP 2-13.

DEC therefore had not waived certification.¹⁰ On July 19, 2018, the Commission denied Constitution's request for rehearing of that determination.¹¹ While Constitution's appeal was pending in the D.C. Circuit, the same court issued an opinion in *Hoopa Valley* vacating a no-waiver determination from the Commission that had rested on the same withdrawal-and-resubmission rationale.¹² The Commission filed an unopposed motion for voluntary remand of the *Constitution* proceedings, which the court granted, to consider the implications of the *Hoopa Valley* decision.¹³ On August 28, 2019, the Commission issued an order on voluntary remand that reversed the prior no-waiver determination in light of the holding in *Hoopa Valley*.¹⁴ The Commission concluded that, at a minimum, Constitution's second withdrawal and resubmission of its request on April 27, 2015, had not restarted the time limit for New York DEC to act on the pre-existing request and New York DEC therefore had waived section 401 certification.¹⁵

A. Jurisdictional Arguments

7. Stop the Pipeline asserts that the Commission has no jurisdiction to decide the issue of waiver. Specifically, Stop the Pipeline claims that because New York DEC denied Constitution's section 401 certification request on April 22, 2016, and the Second Circuit has affirmed the merits of New York DEC's decision, Constitution was required to bring its waiver, or failure-to-act, claim directly to the D.C. Circuit.¹⁶ The Commission fully addressed Stop the Pipeline's arguments in the Remand Order.¹⁷

¹⁰ Declaratory Order, 162 FERC ¶ 61,014 at PP 22-23.

¹¹ Declaratory Rehearing Order, 164 FERC ¶ 61,029 at PP 13-19.

¹² 913 F.3d 1099.

¹³ *Constitution Pipeline Co., LLC v. FERC*, Unopposed Motion of Respondent Federal Energy Regulatory Commission, For Voluntary Remand, No. 18-1251 (D.C. Cir. Feb. 25, 2019).

¹⁴ Remand Order, 168 FERC ¶ 61,129.

¹⁵ *Id.* PP 34, 37, 39, 40.

¹⁶ Stop the Pipeline Rehearing at 4-9, 12-13.

¹⁷ Remand Order, 168 FERC ¶ 61,129 at P 15 (citing *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 700-701 (D.C. Cir. 2017) (*Millennium*), in which the court explained that because section 401 provides for waiver of the certification requirement as the built-in remedy for state inaction, the applicant has no injury after

8. As Stop the Pipeline argued earlier in this proceeding, it again asserts that *Millennium*'s directive requiring an applicant to present evidence of waiver to the Commission is limited to situations where the state has not yet rendered a final decision on the application.¹⁸ We disagree.¹⁹ In *Millennium*, the court explained that the purpose of presenting evidence of waiver to the Commission is “to obtain the agency’s go-ahead to begin construction.”²⁰ Although we agree with Stop the Pipeline that unlawful delay ending in denial can injure the applicant,²¹ the denial of certification does not preclude the subsequent initiation of a proceeding seeking a finding of waiver.²² Rather, as the court in *Millennium* explained, “[o]nce the Clean Water Act’s requirements have been waived, the Act falls out of the equation.”²³ Similarly, the Second Circuit has determined that if the state has failed to act by the deadline in section 401, the state’s later denial of the request has “no legal significance.”²⁴ Accordingly, the fact that Constitution’s waiver

waiver to confer standing for direct appellate review; rather the applicant must present evidence of waiver directly to the Commission). *See also* Declaratory Order, 162 FERC ¶ 61,014 at P 12 (addressing jurisdiction).

¹⁸ Stop the Pipeline Rehearing at 5-9; Stop the Pipeline April 1, 2019 Supplemental Pleading at 6-7, 12-13.

¹⁹ *See* Remand Order, 168 FERC ¶ 61,129 at P 15 (noting that there is no support for Stop the Pipeline’s attempt to distinguish the viability of a waiver claim where the state agency has acted versus has not yet acted).

²⁰ *Millennium*, 860 F.3d 696 at 700.

²¹ *Cf.* Remand Order, 168 FERC ¶ 61,129 at P 15 (mistakenly stating that Stop the Pipeline had “illogically suggest[ed] that unlawful delay ending in denial cannot injure a project sponsor”).

²² A company could satisfy the requirement in the Commission certificate that it receive Clean Water Act authorization either through receipt of a section 401 certification or by showing that certification has been waived.

²³ *Millennium*, 860 F.3d 696 at 700.

²⁴ *Id.* at 700-01 (declining the project sponsor’s request that the court set a deadline for agency action, explaining that after waiver “there is nothing left for the [agency] ... to do” and “the [agency’s] decision to grant or deny would have no legal significance”); *see also Weaver’s Cove Energy, LLC v. Rhode Island Dep’t of Env’tl. Mgmt.*, 524 F.3d 1330, 1333 (D.C. Cir. 2008) (explaining that after waiver, states’ preliminary decisions under section 401 “would be too late in coming and therefore null and void”). We note that the Commission retains discretion, rather than an obligation, to

argument was presented to the Commission after New York DEC denied Constitution's certification request does not invalidate the Commission's authority to consider whether New York DEC waived its certification authority.

9. The Second Circuit's decision in *Constitution Pipeline Co., LLC v. New York DEC* suggests a similar result. There, the court explained that the exclusive jurisdiction given by NGA section 19(d)(2) to the D.C. Circuit to review an "alleged failure to act" by a state agency also encompasses "an allegation that a failure to act within a mandated time period should be treated as a failure to act."²⁵ Thus, Constitution's argument before the court that "the New York DEC Decision must be treated as a nullity by reason of NYSDEC's failing to act within the prescribed time period under the [Clean Water Act]" was a "failure-to-act claim."²⁶ The Second Circuit did not speak to or cite the *Millennium* decision, but, given the Second Circuit's conclusion that it lacked jurisdiction over Constitution's waiver claim, there was no reason for the court to address the question whether Constitution must proceed directly to the D.C. Circuit, or, as the D.C. Circuit held in *Millennium*, present evidence of waiver to the Commission.²⁷

10. Ms. Holleran asserts that because Constitution did not assert waiver during the Commission's certificate proceeding and subsequent rehearing,²⁸ Constitution's assertion of waiver here is a collateral attack on the Commission's certificate order and New York DEC's denial of the request for a water quality certification.²⁹

accept conditions contained in a state's late-filed water quality certification. *Cent. Vt. Pub. Serv. Corp.*, 113 FERC ¶ 61,167, at P 9 (2005).

²⁵ 868 F.3d 87, 99 (2d Cir. 2017).

²⁶ *Id.* at 100.

²⁷ *Id.*

²⁸ *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (2014) (Certificate Order); *Constitution Pipeline Company, LLC*, 154 FERC ¶ 61,046 (2016).

²⁹ Holleran Rehearing at 2-3, 5, 6-8. Ms. Holleran also claims that Constitution failed its duty to notify the Commission of the waived status of the section 401 water quality certification as required by section 380.12(c)(2) of our regulations. *Id.* at 7-8 (citing 18 C.F.R. § 380.12(c)(2)). We presume that she means to cite section 380.12(c)(9), which requires that the application for a natural gas certificate describe the status of other applications for all authorizations required to complete the proposed project. Constitution's

11. In fact, Constitution's petition for declaratory order did not suggest any infirmity in the Certificate Order and thus cannot be construed as a collateral attack upon it. Rather, Constitution seeks to satisfy the requirement in Environmental Condition 8 of the Certificate Order that, prior to commencing construction, Constitution must file documentation that it has received all applicable authorizations required under federal law, including a section 401 water quality certification, "or evidence of waiver thereof."³⁰ As is typical in natural gas proceedings, Constitution sought to satisfy that condition after issuance of the Certificate Order. As to questioning the certification, Constitution asserted waiver before the Second Circuit. Further, section 19(d)(2) of the NGA imposes no time limit on an applicant's assertion of waiver. Thus, we find no support for Stop the Pipeline's or Ms. Holleran's assertions that Constitution's waiver claim was not properly and timely brought before us.

12. New York DEC and Stop the Pipeline argue that the Second Circuit's decision in *New York DEC v. FERC* approved withdrawal and resubmission as a viable way to extend the time for a state's review and that this decision should control the outcome here.³¹ New York DEC also expresses concern that the Commission's application of *Hoopa Valley* to a situation like the Constitution proceeding forecloses the only viable procedure in cases where more time is necessary for a certifying agency to make a decision,³² anticipating "an onslaught of denials," often premature due to missing information, and a resulting need for inefficient subsequent section 401 requests to address changes to proposed projects that would result in altered water quality impacts.³³

13. Addressing this same argument in *Hoopa Valley*, the D.C. Circuit concluded that the Second Circuit's suggestion in *New York DEC v. FERC* that a state could request that

duty to inform the Commission of the status of its section 401 certification request at the time it filed its application does not require it to apprise the Commission of all possible legal arguments that it might raise at any given stage in the surrounding litigation.

³⁰ Certificate Order, 149 FERC ¶ 61,199, app., envtl. condition 8.

³¹ New York DEC Rehearing at 11-12; Stop the Pipeline Rehearing at 15. *See New York DEC v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018) (noting that if a state deems an application incomplete, it could deny the application without prejudice or request that the applicant withdraw and resubmit the application); *see also id.* at n.35 (citing Constitution Pipeline as an example of a withdrawal and resubmittal made at the state agency's request that "restart[ed] the one-year review period").

³² New York DEC Rehearing at 20.

³³ *Id.* at 20-21.

an applicant withdraw and resubmit the application was not central to the court's holding but was "dicta ... offered to rebut the state agency's fears that a one-year review period could result in incomplete applications and premature decisions."³⁴ The *Hoopa Valley* court went on to say that it is the role of the legislature, not the judiciary, to resolve the state agency's fears.³⁵ In the same way, the Commission must construe and apply the statute as enacted by Congress.

B. Validity of Commission's Application of Hoopa Valley

14. On rehearing, the parties primarily contend that the Commission applied an unjustifiably broad reading of the *Hoopa Valley* holding in this proceeding.³⁶ We disagree and affirm our waiver determination, as discussed below.

15. For years, the Commission has criticized the practice of withdrawal and resubmission.³⁷ Even so, both in the Commission's Declaratory Order earlier in this proceeding and in the Commission's orders on review before the D.C. Circuit in the *Hoopa Valley* case, the Commission reluctantly concluded that because the statutory time limit runs from the date of receipt of a request, and because the statute speaks only to a

³⁴ *Hoopa Valley*, 913 F.3d at 1105. The application at issue in *New York DEC v. FERC* had not been withdrawn and refiled; rather, at issue was whether the one year waiver period was triggered upon receipt of the certification application or once the state agency deemed the application to be complete. Moreover, the court cited the opinion in *Constitution Pipeline Co., LLC v. New York DEC*, 868 F.3d 87 (2d Cir. 2017), *cert. denied*, 138 S.Ct. 1697 (2018), where the Second Circuit declined, for lack of jurisdiction, to rule on the merits of Constitution's argument that New York DEC waived its certification authority for failing to act within a year of Constitution's initial application notwithstanding the pipeline's withdrawal-and-resubmission of its application. 868 F.3d at 99.

³⁵ *Hoopa Valley*, 913 F.3d at 1105.

³⁶ *E.g.*, New York DEC Rehearing at 12 (criticizing the Remand Order for inventing a new interpretation of section 401 to be applied as a categorical rule); Sierra Club Rehearing at 14.

³⁷ *E.g.*, *PacifiCorp*, 147 FERC ¶ 61,216 (2014); Declaratory Order, 162 FERC ¶ 61,014 at P 23; Declaratory Rehearing Order, 164 FERC ¶ 61,029 at P 17.

state's action or inaction, not to the practice of withdrawal and resubmission, each repeated withdrawal terminated the state's deadline and each repeated resubmission, as a new application, gave the state a new deadline.³⁸

16. The *Hoopa Valley* court disagreed with the Commission's conclusion that "each resubmission was an independent request, subject to a new period of review."³⁹ The court explained that a state's obligation "to act on a request for certification" within one year 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."⁴⁰ The court undertook "an undemanding inquiry" into whether the withdrawal and resubmission scheme in that case would be effective to reset the statutory clock "because Section 401's text is clear."⁴¹ The court concluded that "the pendency of the requests for state certification in this case have far exceeded the one-year maximum."⁴² When the applicant for water quality certification each year sent an identical letter to the state certifying agencies purporting to withdraw and resubmit the very same certification request that had been pending before that withdrawal, the applicant's resubmission did not constitute a "new request" such that it restarted the one-year clock.⁴³ After noting that the statute does not define "failure to act" or refusal to act,"⁴⁴ the court found that the states' "deliberate and contractual idleness" defied the requirement for "state action within a reasonable period

³⁸ Declaratory Order, 162 FERC ¶ 61,014 at PP 22-23 (asserting that the withdrawal-and-resubmission process is effective "no matter how formulaic or perfunctory"); Declaratory Rehearing Order, 164 FERC ¶ 61,029 at P 17 (same); *PacifiCorp*, 149 FERC ¶ 61,038, at P 20 (2014); *see also Hoopa Valley Tribe v. FERC*, D.C. Cir. No. 14-1271 Brief for Respondent FERC at 20, 23-24 (filed Nov. 14, 2014); *Hoopa Valley Tribe v. FERC*, D.C. Cir. No. 14-1271, Supplemental Brief of Respondent FERC at 4-5 (filed June 8, 2018) (citing the Declaratory Order, 162 FERC ¶ 61,014 at P 23).

³⁹ *Hoopa Valley*, 913 F.3d at 1104.

⁴⁰ *Id.* at 1104.

⁴¹ *Id.* at 1103.

⁴² *Id.* at 1104.

⁴³ *Id.*

⁴⁴ *Id.* at 1101.

of time, not to exceed one year” and that the states’ efforts “constitute[d] failure and refusal within the plain meaning of these phrases.”⁴⁵

17. The *Hoopa Valley* court found waiver based on the text of the statute and the unchanged content of the applicant’s requests; the Commission did the same here with respect to Constitution’s second withdrawal and resubmittal.

18. In the Remand Order, the Commission applied *Hoopa Valley* to conclude that Constitution’s two-page letter dated April 27, 2015, purporting to simultaneously withdraw and resubmit its certification request, as New York DEC had asked for the expressed purpose of avoiding section 401’s time limit, was not a “new request” and did not restart the statute’s prescribed one-year deadline for state action.⁴⁶ The Commission concluded that, at a minimum, New York DEC’s inaction pursuant to its functional agreement with Constitution beyond one year from the receipt of Constitution’s first withdrawal and resubmission by letter on May 9, 2014, constituted a failure or refusal to act within the plain meaning of those phrases in section 401.⁴⁷ Thus, the Commission held that New York DEC waived its section 401 authority with regard to the Constitution Pipeline Project.⁴⁸

19. On rehearing, New York DEC and Waterkeeper Alliance contend that Congress intended that section 401’s waiver mechanism would address only prolonged, indefinite, or ongoing delay described variously in legislative history as “sheer inactivity by the State,” a state’s “dalliance or unreasonable delay,” and “indefinite[] delay.”⁴⁹ Waterkeeper Alliance asserts that Congress intended to allow only contemporaneous findings of waiver so that federal agencies can break existing “log jams.”⁵⁰

20. The Commission fully addressed these issues in the Remand Order.⁵¹ It is generally assumed—absent a clearly expressed legislative intention to the contrary—“that Congress expresses its purposes through the ordinary meaning of the words it

⁴⁵ *Hoopa Valley*, 913 F.3d at 1104.

⁴⁶ Remand Order, 168 FERC ¶ 61,129 at P 39.

⁴⁷ *Id.* P 40.

⁴⁸ *Id.*

⁴⁹ New York DEC Rehearing at 6.

⁵⁰ Waterkeeper Alliance Rehearing at 7-8.

⁵¹ Remand Order, 168 FERC ¶ 61,129 at P 37.

uses”⁵² The *Hoopa Valley* court noted that section 401’s text is clear; it sets a full year as “the absolute maximum” period of time for state action.⁵³ On its face, the statute’s “reasonable period of time” stops at one year.⁵⁴ Delay beyond one year is unreasonable and the certification authority is automatically waived.⁵⁵ New York DEC and Waterkeeper Alliance would qualify section 401’s time limit to allow a delay for a state’s diligent review⁵⁶ or a delay that ends with an untimely state decision.⁵⁷ The *Hoopa Valley* court noted at the close of its analysis that there was “no legal basis” to recognize an exception from section 401’s time limit for the coordinated withdrawal-and-resubmission scheme in that case, and that such an exception would “readily consume Congress’s generally applicable statutory limit.”⁵⁸ This defeats New York DEC’s and Waterkeeper Alliance’s arguments.

21. *Hoopa Valley* controls our determination here and leads to the conclusions that section 401’s one-year time limit is unqualified and that the statute does not allow exceptions based on the arguments raised by the parties here.⁵⁹ The *Hoopa Valley* court

⁵² *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984).

⁵³ *Hoopa Valley*, 913 F.3d at 1103-04. *See also New York DEC v. FERC*, 884 F.3d at 455 (“The plain language of Section 401 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.’”).

⁵⁴ 33 U.S.C. § 1341(a) (emphasis added).

⁵⁵ *Millennium*, 860 F.3d at 701.

⁵⁶ New York DEC Rehearing at 7.

⁵⁷ Waterkeeper Alliance Rehearing at 7-8.

⁵⁸ *Hoopa Valley*, 913 F.3d at 1105.

⁵⁹ For example, whether: the state’s procedures for public notice and hearing make a decision in one year impossible, Stop the Pipeline Rehearing at 11; the state deems serially-filed supplemental information to be overwhelming or of great impact, e.g., New York DEC Rehearing at 22; the state deems the supplemental information to be insufficient from a recalcitrant applicant, e.g., New York DEC Rehearing at 7; the state’s active, ongoing, and diligent review would take longer than one year, e.g., New York DEC Rehearing at 7, 10; the permit applicant’s withdrawal is voluntary, e.g., New York DEC Rehearing at 6; the permit applicant and the state agree (in some way less formal than a written settlement agreement) to use withdrawal and resubmission (but not

concluded that the statute means what the statute says. A state must act on a request within one year from receipt. Unlike the Endangered Species Act, which allows the participants to agree to extend the deadline for required consultation,⁶⁰ there is no provision in section 401 to stop the clock under any circumstance.

22. New York DEC, Sierra Club, and Stop the Pipeline criticize the Commission for focusing on the technique that Constitution used to effect each withdrawal and resubmission, i.e., two identical two-page letters to New York DEC, rather than the additional filings that Constitution submitted to New York DEC before and after each withdrawal and resubmission, which they allege could have constituted “new” requests.⁶¹ New York DEC and Sierra Club extensively describe the communications to and from New York DEC to demonstrate that New York DEC undertook an active, good faith review and did not intend to exploit withdrawal and resubmission.⁶² Both New York DEC and Sierra Club claim that New York DEC never reviewed the same application because Constitution submitted several batches of new materials in the months before and after Constitution’s second withdrawal and resubmission on April 27, 2015, that “were not part of” Constitution’s filings (which New York DEC calls “applications”) submitted

repeatedly use withdrawal and resubmission) to achieve a longer timeline (but not an indefinitely longer timeline) for the state’s ongoing review, e.g., New York DEC Rehearing at 8, 9, 10; the agreement excludes no outside stakeholder, e.g., Sierra Club Rehearing at 11; the resulting delay is less than six years, e.g., Sierra Club Rehearing at 11, 12; the permit applicant and the state both truly intended to and did treat the resubmitted request as a “new request,” e.g., New York DEC at 6, 9, 10, 22; the unlawful delay has already ended in an untimely decision from the state, Holleran Rehearing at 12; or the entity seeking a waiver determination is the permit applicant who, in its self-interest, agreed with the state to withdraw and resubmit a request, e.g., Stop the Pipeline Rehearing at 13.

⁶⁰ 16 U.S.C. § 1536(b)(1), (2) (2018).

⁶¹ New York DEC Rehearing at 22-26; Sierra Club Rehearing at 16-18; Stop the Pipeline Rehearing at 14.

⁶² New York DEC Rehearing at 22-24, 26; Sierra Club Rehearing at 12-13, 16-17.

in September 2014⁶³ and April 2015.⁶⁴ New York DEC asserts that some of the submitted additional materials, which numbered in the tens of thousands of pages, were of such great impact that they could have constituted a new request and commenced a new one-year period of review.⁶⁵ Similarly, Stop the Pipeline notes that in *Hoopa Valley*, the court emphasized the fact that the applicant's water quality certification request was stagnant for more than a decade.⁶⁶

23. We find these arguments unpersuasive in light of the statement in section 401 that the time for state action runs from "receipt of such request."⁶⁷ Thus, Constitution's various submissions⁶⁸ to New York DEC following its first withdrawal-and-resubmission letter on May 9, 2014, do not alter the result here. As in *Hoopa Valley*, Constitution's withdrawals and resubmissions, "were not new requests at all."⁶⁹

⁶³ Sierra Club appears to refer to Constitution's submission of documents in support of its pre-existing Joint Application. New York DEC Rehearing, appendix at 398-400 (reproducing an email from Constitution to New York DEC describing the content of the "Joint Application support documentation" and reproducing a cover page labeled "Joint Application – Waterbody/Wetland Feature-Specific Support Documentation").

⁶⁴ See Sierra Club Rehearing at 17-18; see also New York DEC Rehearing at 25 (claiming that Constitution's revision to its Joint Application on March 27, 2015, is proof that the request that Constitution resubmitted later via the letter on April 27, 2015, had been changed).

⁶⁵ New York DEC Rehearing at 22-26.

⁶⁶ *Hoopa Valley*, 913 F.3d at 1104, 1105.

⁶⁷ *New York DEC v. FERC*, 884 F.3d at 455 ("If the statute required 'complete' applications, states could blur this bright-line rule into a subjective standard, dictating that applications are 'complete' only when state agencies decide that they have all the information they need. The state agencies could thus theoretically request supplemental information indefinitely.").

⁶⁸ See Declaratory Order, 162 FERC ¶ 61,014 at P 23 (noting that New York DEC did not review "a static collection of information" after the letter on April 27, 2015).

⁶⁹ *Hoopa Valley*, 913 F.3d at 1104.

24. New York DEC received Constitution's second two-page letter "simultaneously withdrawing and resubmitting"⁷⁰ its request on April 27, 2015. Constitution's April 27, 2015 withdrawal-and-resubmittal letter did not convey any substantive information to New York DEC. That letter merely withdrew and resubmitted the very same water quality certification request that had been pending in front of New York DEC on that date. In short, because the April 27, 2015 "application" did not contain any additional information that was not already in the certification record pending in front of New York DEC, the April 27, 2015 filing did not constitute a new application.

25. New York DEC points to Constitution's submission of additional information on September 15, 2015⁷¹ as triggering a new request that restarted the one-year clock.⁷² We disagree. As we have previously stated, an applicant's submittal of information requested by the state certifying agency during the state's review of the certification request does not render the certification application a "new" application.⁷³ The Commission has explained that, under the [Clean Water Act], the certification waiver period begins on the

⁷⁰ New York DEC April 2, 2019 Supplemental Pleading, app. at 621-22 (reproducing letter).

⁷¹ See New York DEC Rehearing, app. at 969-75 (reproducing the cover letter that characterized the filing to contain "updated," "additional," and "supplemental" information for the existing Joint Application).

⁷² New York DEC Rehearing at 26. New York DEC states that the filing provided information regarding wetlands and waterbodies for the first time. *Id.* However, it is worth noting that New York DEC had already twice issued a Notice of Complete Application on December 24, 2014, and on April 27, 2015. Remand Order, 168 FERC ¶ 61,129, at P 6.

⁷³ *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185, at P 38 (2019) (finding waiver where the applicant twice withdrew and resubmitted its water quality certification application to provide additional time to submit the data requested by the state certifying agency (a water quality monitoring plan and the Commission's draft EA for the project)). We do not agree with the dissent's characterization of our position here and in *McMahan* as being that "the only change that could constitute a new section 401 application for these purposes is a change so significant that it would require a new application with the Commission" (dissent at P 7). In *McMahan* we explained that in the absence of unusual circumstances (which were not present there) or major physical modifications to a project, the provision of additional information in response to a state agency's request would typically not create a new application that would give the agency an additional year to act. 168 FERC ¶ 61,185 at P 38 n.43. We did not and do not suggest that there would be no instances in which exchanges between an applicant and a state could result in a new application: we did not find *McMahan* or this case to present such an instance.

date the certifying agency receives the certification request, rather than on the date the agency accepts the request or deems it complete.”⁷⁴

26. New York DEC’s argument that Constitution’s voluntary withdrawals left the withdrawn requests “nullified or no longer valid,” leaving nothing for New York DEC to act upon,⁷⁵ also fails. Constitution filed a single letter to effectuate a simultaneous withdrawal and resubmittal; there was never a gap in time between the withdrawal and resubmittal.⁷⁶ Regardless, even if there had been a gap in time between the withdrawal and resubmittal, our waiver determination turns on whether New DEC’s and Constitution’s actions as a whole were an attempt to defeat section 401’s requirement of action within one year. As we detailed in the Remand Order, New York DEC encouraged Constitution, for the explicit purpose of avoiding section 401’s one-year deadline, to withdraw and resubmit an application that New York DEC had deemed complete four months earlier and that New York DEC characterized at the time of resubmission as having “no changes or modifications.”⁷⁷ This leaves no doubt that New York DEC knew that the request was unchanged upon resubmission. We affirm the conclusion in the Remand Order that New York DEC’s and Constitution’s actions are analogous to the arrangement that the *Hoopa Valley* court rejected as inconsistent with section 401 and

⁷⁴ *Id.* (citing *Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, Order No. 464, FERC Stats. & Regs. ¶ 30,730 (1987) (cross-referenced at 38 FERC ¶ 61,146) (Order No. 464). The Commission’s approach is consistent with the U.S. Environmental Protection Agency’s guidance for implementing section 401: “an outstanding or unfulfilled request for information or documents does not pause or toll the timeline for action on a certification request. Accordingly, any effort by a state or tribe to delay action past the reasonable timeline due to insufficient information may be inconsistent with the Act and specifically with Section 401. However, just as a federal permitting agency needs sufficient information to issue a permit or license, a state or tribe needs adequate information to issue a Section 401 certification. The EPA recommends that project proponents provide appropriate water quality-related information to the state or tribe to ensure timely action on a request.” U.S. Environmental Protection Agency, *Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes* at 5 (June 2019), https://www.epa.gov/sites/production/files/2019_06/documents/cwa_section_401_guidance.pdf. The EPA is the federal agency charged with administering the Clean Water Act. 33 U.S.C. § 1251(d) (2018).

⁷⁵ New York DEC Rehearing at 6.

⁷⁶ Declaratory Order, 162 FERC ¶ 61,014 at P 3.

⁷⁷ Remand Order, 168 FERC ¶ 61,129 at PP 33-34, 39.

ineffective to restart the one-year clock.⁷⁸ Thus, as a result of New York DEC's inaction beyond one year from the receipt of Constitution's first withdrawal and resubmission on May 9, 2014, New York DEC waived its authority under section 401 over the Constitution Pipeline Project.

27. New York DEC criticizes the Remand Order's articulation of the general principle from *Hoopa Valley*:

[W]here 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.⁷⁹

New York DEC objects that the Remand Order ignores that the *Hoopa Valley* court explicitly declined to determine whether and how the withdrawal and resubmission of a wholly new request or a changed request might restart section 401's reasonable period of time for state action.⁸⁰ New York DEC asserts that a standard for waiver that depends in part on the applicant's purpose in withdrawing a section 401 request will force the state certifying agency into the impossible position of having to determine an applicant's intent in deciding to withdraw a request, claiming that applicants could game the system to trick a state into waiver.⁸¹

28. New York DEC is correct that *Hoopa Valley* did not address a situation where an applicant "withdrew its request and submitted a wholly new one in its place."⁸² As discussed above, the Commission has determined here that Constitution did not submit a "wholly new" application, and thus the principle articulated in *Hoopa Valley* readily applies. Should, in a future proceeding, a water quality certifying agency make the case that an application has acted in bad faith in order to trick the agency into waiver, the

⁷⁸ *Id.* PP 34, 39-40.

⁷⁹ *Id.* P 31.

⁸⁰ *Id.*

⁸¹ *Id.* PP 19-20.

⁸² *Hoopa Valley*, 913 F.3d at 1104.

Commission will consider that argument. Here, however, the record does not support a claim that New York DEC was in any way misled.

C. Retroactive Application of a Court Interpretation

29. In the Remand Order, the Commission rejected a request to apply *Hoopa Valley* only prospectively because the D.C. Circuit's opinion did not narrow the effect of its decision on pending cases.⁸³ All parties on rehearing assert this was error.⁸⁴ The objections include a charge that the Remand Order's retroactive application of *Hoopa Valley* rests on an overbroad reading of that opinion—arguments that we deny above—but also charges that the retroactive application in general violates various theories of fairness and administrative efficiency such as promissory estoppel, society's interest in finality, due process, and the like.⁸⁵

30. As an initial matter, we note that because the *Hoopa Valley* decision simply enforces the plain language of the existing statute, as opposed to invalidating a rule previously in force or announcing a wholly new rule, the concept of retroactivity appears, at a minimum, misplaced.⁸⁶ Moreover, New York DEC's argument, in particular, assumes that the Remand Order announces a new Commission policy outside the scope of the D.C. Circuit's examination of section 401 in *Hoopa Valley*. For the reasons

⁸³ Remand Order, 168 FERC ¶ 61,129 at P 19. The Commission noted that the D.C. Circuit itself declined to revisit *Hoopa Valley* to consider whether the decision should only be applied prospectively. *See id.* P 19 n.37.

⁸⁴ *See, e.g.*, New York DEC Rehearing at 13-17; Sierra Club Rehearing at 19; Stop the Pipeline Rehearing at 16-18; Waterkeeper Alliance Rehearing at 8; Holleran Rehearing at 5, 7-11. New York DEC contends that Constitution cannot raise an additional argument for waiver based on the intervening *Hoopa Valley* opinion because Constitution did not argue in its petition for a declaratory order that the withdrawal-and-resubmission process is invalid as a general principle. New York DEC Rehearing at 15. The Commission fully addressed this issue in the Remand Order. 168 FERC ¶ 61,129 at PP 16-17. We deny rehearing for the same reasons.

⁸⁵ *E.g.*, New York DEC Rehearing at 7, 16-17, 29; Waterkeeper Alliance Rehearing at 8-10; Holleran Rehearing at 9; Sierra Club Rehearing at 19; Stop the Pipeline at 15.

⁸⁶ Because Congress established a one-year time period in which the state could consider a section 401 application, the Commission has no authority to extend such period for the state to act.

discussed above, *Hoopa Valley*'s articulation of the plain meaning of section 401 governs the outcome of this case.

31. Nonetheless, we will address the parties' retroactivity arguments. New York DEC asserts that the Commission erred because an agency may not "apply newly formulated administrative policies retroactively."⁸⁷ New York DEC errs by relying on principles of retroactivity governing legislation and agency rulemaking.⁸⁸ Though significant policy concerns weigh against retroactive application of new rules created through legislation and agency rulemaking, legal rules announced in judicial decision-making typically have retroactive effect and "[r]etroactivity is the norm in agency adjudications[.]" e.g., the Remand Order, "no less than in judicial adjudications."⁸⁹ Indeed, with few exceptions, when a court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the court's] announcement of the rule."⁹⁰

32. Stop the Pipeline claims that the rule of retroactivity in agency and judicial adjudications does not control here, because, as Stop the Pipeline asserts, the Commission must deny waiver on other grounds.⁹¹ First, Stop the Pipeline states that the Commission's lack of jurisdiction to determine waiver is "a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief."⁹² We have denied this jurisdictional argument in section A above and will not further address the issue here. Second, Stop the Pipeline argues that the rule of retroactivity

⁸⁷ New York DEC Rehearing at 13.

⁸⁸ *Id.* at 13 (citing *Landgraf v. UCI Film Products*, 511 U.S. 244, 265 (1994), *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 214-15 (1988)).

⁸⁹ *Am. Telephone and Telegraph Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006); see also *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 95 (1993) (explaining that the court's role in judicial review lacks the quintessentially legislative prerogative to make rules of law retroactive or prospective as the legislature sees fit and that a court's selective application of new rules violates the principle of treating similarly situated parties the same).

⁹⁰ *Harper v. Virginia Dep't of Taxation*, 509 U.S. at 97.

⁹¹ Stop the Pipeline Rehearing at 16-18 (citing *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758-59 (1995) (*Hyde*)).

⁹² Stop the Pipeline Rehearing at 16 (quoting *Hyde*, 514 U.S. at 758-59).

should not apply because the principle of equitable tolling “is a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications.”⁹³ Stop the Pipeline asserts that New York DEC has been pursuing its rights diligently, that Constitution’s obstructive behavior was an extraordinary circumstance that stood in New York DEC’s way and prevented timely action, and that section 401’s one-year period for state action is a non-jurisdictional deadline.

33. We disagree. Reliance on the Commission’s former interpretation of section 401 does not justify an exception to the rule of retroactivity. The Supreme Court has made clear that “simple reliance” of the type claimed by Stop the Pipeline is inadequate to avoid retroactive application of a judicial decision.⁹⁴ Moreover, we noted above that the statutory language does not allow the Commission to consider, when determining waiver, whether the state’s diligent review would take longer than one year.⁹⁵ Constitution’s alleged obstructive behavior did not prevent New York DEC’s timely action, because the state could have denied the application within section 401’s time limit for reasons of insufficient information or failure to comply with information requests. And section 401’s time limit is a jurisdictional deadline because violation automatically waives section 401 by the statute’s own terms.

34. Finally, New York DEC, Sierra Club, and Catherine Holleran claim that our application of *Hoopa Valley*’s reasoning here could lead project sponsors or the Commission itself to try years later to invalidate states’ section 401 decisions, both grants and denials, that were preceded by a withdrawal and resubmission of the project sponsor’s request.⁹⁶ These arguments are misdirected. As discussed above, the Commission is constrained by Congress’s setting of a firm one-year deadline in section 401.

⁹³ Stop the Pipeline at 16 (quoting *Hyde*, 514 U.S. at 759 (emphasis in original)). We note that *Hyde* pointed to the law of qualified immunity for government officers as an example of such a “significant policy justification.” 514 U.S. at 759.

⁹⁴ *Hyde*, 514 U.S. at 759.

⁹⁵ *Supra* P 21 and note 58.

⁹⁶ New York DEC Rehearing at 16; Sierra Club Rehearing at 19; Holleran Rehearing at 5, 9, 11.

D. Request for Stay

35. In the Remand Order, the Commission denied New York DEC's request that the Commission stay the effectiveness of a decision finding waiver until the rehearing process or judicial review are complete.⁹⁷ The Commission concluded that New York DEC would not suffer irreparable injury without a stay, that a stay would substantially harm Constitution, and that a stay of project construction would not be in the public interest.⁹⁸ On rehearing, New York DEC renews its stay request and Waterkeeper Alliance also requests a stay.⁹⁹

36. New York DEC faults the Remand Order for dismissing New York DEC's allegations of irreparable harm based on the contrary conclusion in Commission staff's Environmental Impact Statement (EIS) that impacts from the Constitution Pipeline Project on waterbody and wetland resources will be effectively minimized or mitigated as Constitution fulfills its own and the Commission's mandatory construction procedures and mitigation measures.¹⁰⁰ The EIS has no bearing, according to New York DEC, on the determination whether project construction would result in irreparable harm without the protective conditions from a state's water quality certification.¹⁰¹ New York DEC asserts that the Commission's assessment based on the EIS cannot take the place of New York DEC's assessment of water quality impacts pursuant to section 401, given the legislative purpose of section 401 to preserve states' authority to protect water quality resources about which states have the most knowledge and expertise.¹⁰²

37. In assessing irreparable harm, the Commission reasonably relied on the Commission's EIS because it analyzed the impacts to waterbody and wetland resources, the same resources that New York DEC asserts will be harmed, and because the EIS drew its conclusions *without* assuming any additional protective conditions from the as-then-undecided state water quality certification. New York DEC points to no specific potential impact and no specific protective condition that the Commission failed to

⁹⁷ Remand Order, 168 FERC ¶ 61,129 at PP 43-53.

⁹⁸ Remand Order, 168 FERC ¶ 61,129 at PP 43-53.

⁹⁹ New York DEC Rehearing at 26-30; Waterkeeper Alliance Rehearing at 4.

¹⁰⁰ New York DEC Rehearing at 27-28; *see* Remand Order, 168 FERC ¶ 61,129 at PP 43-53.

¹⁰¹ New York DEC Rehearing at 28.

¹⁰² *Id.*

evaluate in the EIS that, being omitted, might demonstrate irreparable harm to justify a stay. New York DEC's emphasis on the legislative purpose of section 401 to preserve states' authority is counterbalanced, as we discussed above, by Congress's decision to limit the exercise of state authority to one year and New York DEC's own failure to act before its section 401 authority expired.

38. The Commission concluded in the Remand Order that a stay would substantially harm Constitution by delaying Constitution's commencement of service and thus delaying a revenue stream that would begin to offset sunk costs that have accrued over the more than four years (now five years) since New York DEC waived its section 401 authority on May 9, 2015.¹⁰³ On rehearing, New York DEC asserts that the Commission lacked record evidence for this determination.¹⁰⁴ Constitution stated in its petition for a declaratory order filed on October 11, 2017, that it had already spent over \$380 million on the project.¹⁰⁵ For context, the Commission estimated in the certificate order for the project, based on Constitution's 2013 application and supplemental filings, that all proposed project facilities would cost approximately \$683 million.¹⁰⁶

39. New York DEC also challenges the Remand Order's conclusion that it would not be in the public interest to stay construction of the Constitution Pipeline Project. New York DEC emphasizes that the Commission's reversal in the Remand Order to now conclude that New York DEC waived its section 401 authority undermines "finality and definiteness" for certifying authorities and the general public.¹⁰⁷ These are objections to the retroactive application of the *Hoopa Valley* decision. We address these arguments in section C of this order, above.

40. New York DEC also criticizes the Remand Order for failing to consider New York DEC's companion request that the Commission exercise its discretion to decline to authorize the construction of the Constitution Pipeline Project until Constitution approaches New York DEC again and obtains a section 401 water quality certification or

¹⁰³ Remand Order, 168 FERC 61,129 at P 50.

¹⁰⁴ New York DEC Rehearing at 28.

¹⁰⁵ Constitution October 11, 2017 Petition for Declaratory Order at 3 (Docket No. CP18-5-000).

¹⁰⁶ *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199, at P 6 (2014).

¹⁰⁷ New York DEC Rehearing at 29.

presents new evidence of waiver.¹⁰⁸ New York DEC's request, if granted, would in effect stay the Commission's authorization of the Constitution Pipeline Project until a new section 401 process is complete. The Remand Order fully explained the decision to deny the request for stay until rehearing and judicial review are complete;¹⁰⁹ there is no basis to treat New York DEC's companion request differently. The Commission did not rely on the content of a future section 401 water quality certification when the Commission decided to authorize the Constitution Pipeline Project. There is no legitimate basis for the Commission to effectively stay that authorization and force Constitution to approach New York DEC again, thus negating the agency's waiver of certification for the Constitution Pipeline Project.

41. Waterkeeper Alliance requests that the Commission stay the effect of the determination of waiver at least until the petition for a writ of certiorari from the *Hoopa Valley* parties is finally denied or adjudicated by the U.S. Supreme Court.¹¹⁰ This request is moot because the Court denied the petition on December 9, 2019.¹¹¹

The Commission orders:

The requests for rehearing are denied and the requests for stay are denied, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁰⁸ *Id.* at 17-19.

¹⁰⁹ Remand Order, 168 FERC ¶ 61,129 at PP 43-53.

¹¹⁰ Waterkeeper Alliance Rehearing at 4.

¹¹¹ *See supra* note 2.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Constitution Pipeline Company, LLC

Docket No. CP18-5-003

(Issued December 12, 2019)

GLICK, Commissioner, *dissenting*:

1. I dissent from today's order because the record does not establish that the New York State Department of Environmental Conservation (New York DEC) waived its authority under section 401 of the Clean Water Act.¹ The majority, by contrast, finds waiver based on a crabbed interpretation of section 401 from which I have previously dissented. Although I cannot join the Commission's finding of waiver on that basis, I recognize that this is a difficult case and believe that the record before us is inconclusive. Accordingly, I would direct the parties to submit additional briefing addressing whether any of Constitution Pipeline Company, LLC's (Constitution) various filings with New York DEC rendered its request for a section 401 certificate sufficiently "different . . . to constitute a 'new request'" under *Hoopa Valley Tribe v. FERC*.²

2. *Hoopa Valley* addressed the long-delayed relicensing proceeding for PacifiCorp's Klamath River Hydroelectric Facility on the Klamath River along the border between California and Oregon.³ To make a long story short, several years ago PacifiCorp apparently came to the conclusion that relicensing the facility would not be cost-effective.⁴ PacifiCorp then entered an agreement with the two states and a variety of stakeholders to hold the relevant state licensing proceedings in abeyance while it pursued options for decommissioning the facility.⁵ One of the state licensing proceedings PacifiCorp sought to delay involved its request for a certificate pursuant to section 401 of the Clean Water Act.

¹ 33 U.S.C. § 1341(a)(1) (2018).

² 913 F.3d 1099, 1101 (D.C. Cir. 2019), *pet. for cert. denied sub nom. Cal. Trout v. Hoopa Valley Tribe*, 2019 WL 6689876 (Dec. 9, 2019).

³ *Id.* at 1101.

⁴ *Id.* at 1101-02.

⁵ *Id.* at 1101.

3. Section 401 requires applicants for federal license that “may result in any discharge into the navigable waters”—a category that includes hydroelectric licenses issued by the Commission—to secure a certificate from the state in which the “discharge originates or will originate.”⁶ Section 401, however, imposes a time limit on states’ review of a certificate request: “If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.”⁷ To avoid this one-year limitation, PacifiCorp agreed to annually withdraw and resubmit its section 401 application before the one-year limit expired—a task it accomplished each year by submitting a one-page letter, stating its intent to withdraw and resubmit its application.⁸ That process had gone on for “more than a decade” when the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) decided *Hoopa Valley*.⁹

4. *Hoopa Valley* held that PacifiCorp’s withdrawal-and-resubmission tactic did not restart the one-year limitation on the states’ review of its section 401 application,¹⁰ meaning that the states had waived their section 401 authority by failing to act on PacifiCorp’s application within a year. But the court went out of its way to limit its ruling to the facts before it. The court explained that its decision resolved “a single issue: whether a state waives its Section 401 authority when, pursuant to an agreement between a state and an applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year.”¹¹

5. Most importantly for the purposes of today’s order, the court expressly avoided addressing what happens when the applicant modifies its section 401 application before the one-year period elapses. Indeed, the court explicitly “decline[d] to resolve the legitimacy” of an arrangement in which an applicant withdrew its 401 application and

⁶ 33 U.S.C. § 1341(a)(1).

⁷ *Id.*

⁸ *Hoopa Valley*, 913 F.3d at 1102-04.

⁹ *Id.* at 1104.

¹⁰ *Id.* at 1103.

¹¹ *Id.*; *see also id.* at 1104 (noting that the D.C. Circuit had not previously addressed “the specific factual scenario presented in this case, *i.e.*, an applicant agreeing with the reviewing states to exploit the withdrawal-and-resubmission of water quality certification requests over a lengthy period of time”).

submitted a new one in its place.¹² Similarly, the court did not address “how different a [section 401 application] must be to constitute a ‘new request’ such that it restarts the one-year clock.”¹³ In addition, throughout the opinion, the court referenced a slew of factors that might limit the scope of its decision, including the parties “deliberate and contractual idleness,”¹⁴ the fact that the purpose of the agreement was to delay the license process,¹⁵ the fact that PacifiCorp “never intended to submit a ‘new request,’”¹⁶ and the decade-long licensing delay caused by the scheme.¹⁷

6. That makes *Hoopa Valley* a hard case to apply. On the one hand, the court made clear that the Commission’s prior interpretation—that withdrawal and resubmission of a section 401 application restarted the one-year period for review—was wrong. But that is about all that the court resolved. Indeed, as noted, the court identified, but did not decide, a host of questions that will ultimately determine the scope of the waiver rule announced in *Hoopa Valley* and how it applies to proceedings such as this one, which do not fit neatly within the narrow factual circumstance of that case.

7. In the year-and-a-half since *Hoopa Valley* was decided, the Commission has addressed the question of waiver on a case-by-case basis. The Commission has at times unanimously found a state to have waived its section 401 authority where an unmodified section 401 application had been pending before the relevant state agency for more than a year pursuant to an understanding between the applicant and that state.¹⁸ At other times, however, we have disagreed over how to apply *Hoopa Valley* to circumstances that the court went out of its way not to decide. Specifically, in *McMahan Hydroelectric*, we disagreed over the standard for evaluating when a resubmitted application is ‘different enough’ to constitute a new application for the purposes of section 401’s one-year

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* (“This case presents the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification”); *id.* at 1105 (describing the set of facts before the court as one “in which a licensee entered a written agreement with the reviewing states to delay water quality certification”).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *E.g., Placer Cnty. Water Agency*, 169 FERC ¶ 61,046 (2019).

deadline.¹⁹ In that order, my colleagues appeared to take the position that the only changes that would constitute a new section 401 application are major physical modifications to a proposed project (at least absent some unspecified and undefined “unusual circumstances”).²⁰

8. *Hoopa Valley* does not require that result.²¹ As noted, the court was careful to avoid ruling on what a modified application would mean for section 401’s one-year time limit. Nevertheless, the court expressly contemplated that a modification to the section 401 application *itself* could be significant enough for that application to constitute a new application for the purposes of the one-year clock.²² I see nothing in *Hoopa Valley* or other Commission precedent that supports the majority’s presumption that only a major physical modification to a project can restart the one-year clock or that modifications made directly to the section 401 application are immaterial.

9. In any case, I see no reason to so drastically limit what might constitute a new section 401 application.²³ Congress enacted section 401 so that states can ensure that a federally licensed or certificated project does not violate state or federal water quality standards and to permit states to impose such conditions as are necessary to ensure that result.²⁴ Significant changes in how a project is constructed, operated, or monitored

¹⁹ *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (2019).

²⁰ *Id.* P 38 & n.43; *id.* (Glick, Comm’r, concurring in part and dissenting in part at P 4) (“[T]oday’s order appears to suggest that additional information submitted to the state after the initial application is irrelevant to determining whether the state waived its authority, unless it reflects a major physical modification of the project.”).

²¹ *Id.* (Glick, Comm’r, concurring in part and dissenting in part at P 4) (“Nothing in *Hoopa Valley*’s reasoning requires the Commission to determine that a state waives its water quality certification authority when the applicant withdraws and resubmits an application that has been significantly modified since the previous submission.”).

²² *Hoopa Valley*, 913 F.3d at 1104.

²³ *Cf. McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (Glick, Comm’r, concurring in part and dissenting in part at P 4) (“It is true that considering whether a significant supplemental submission restarts the one-year clock might make it more difficult for the Commission to find that a state has waived its section 401 authority. But that is not, in my opinion, a persuasive reason to ignore the effects that such submissions might have on the one-year clock.”).

²⁴ *See PUD No. 1 of Jefferson Cnty. v. Wa. Dep’t of Ecology*, 511 U.S. 700, 707-08 (1994); *see also S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 386

could well determine whether a state can make the water quality findings required by section 401, even if those changes do not require a new application with the Commission.²⁵ Taking the position that *only* a revised application with this Commission could result in a new section 401 application underestimates the complex and nuanced review that many states undertake in implementing their section 401 authority.

10. This case illustrates the point. Throughout 2014 and 2015, Constitution repeatedly filed revised section 401 applications along with various other amendments and supplements to those applications.²⁶ Several of these filings occurred between May 9, 2014, and May 9, 2015—the one-year period on which the Commission relies for its waiver finding.²⁷ The additional submissions addressed a range of issues that would seem directly relevant to a state’s ability to determine whether discharges caused by the pipeline would comply with state and federal water quality standards.²⁸ For example, many of the additional materials addressed the technical details of how the pipeline would cross water bodies—including the roughly 250 streams along the New York portion of the pipeline’s route—and whether the project would use open trenches or a trenchless procedure. It should almost go without saying that the construction methods and techniques used to cross those streams could materially affect any discharges in those waterbodies, making those differences potentially essential to the state’s ability to evaluate the pipeline’s compliance with the Clean Water Act and applicable state law.

11. But today’s order concludes that those revisions, amendments, and supplements are immaterial.²⁹ For the reasons stated above, I do not believe that the Commission is applying the appropriate standard for evaluating waiver under section 401. Nevertheless,

(2006) (explaining why “Congress provided the States with power to enforce ‘any other appropriate requirement of State law’” pursuant to their section 401 authority).

²⁵ *PUD No. 1 of Jefferson Cnty*, 511 U.S. at 707 (listing the provisions of the Clean Water Act that a state must find a discharge consistent with as part of its section 401 determination).

²⁶ New York DEC Rehearing Request at 22-24; New York DEC Supplemental Answer and Protest at 11-15.

²⁷ *Constitution Pipeline Co., LLC*, 169 FERC ¶ 61,199, at P 18 (2019) (Rehearing Order).

²⁸ New York DEC Supplemental Answer and Protest at 11-13; New York DEC Rehearing Request at 22-23.

²⁹ Rehearing Order, 169 FERC ¶ 61,199 at PP 24-25.

I recognize that this is a particularly difficult case in which to apply *Hoopa Valley* because it turns on the significance of technical changes included within Constitution's revisions, amendments, and supplements to its section 401 application. Rather than finding waiver, I would direct the parties to submit additional briefing addressing those modifications and explain whether—and why—any of them restarted section 401's one-year clock. I believe that that additional information would allow us to do justice to both the rule in *Hoopa Valley* as well as the important federalism and environmental values underlying section 401's reservation of the authority to the states.

12. I would be remiss in failing to note that I supported the finding in the underlying order that New York DEC had waived its section 401 authority. But that was before the Commission announced its policy that, for all intents and purposes, only a physical change to a proposed project could restart section 401's one-year clock.³⁰ In addition, New York DEC's rehearing request identifies changes that could conceivably have restarted section 401's one-year period.³¹ In light of those facts, I believe that we must take a harder look at whether any of Constitution's modifications to its section 401 application restarted the one-year clock and that further briefing is required before we can decide that issue one way or another. Accordingly, I cannot agree with my colleagues that the present record demonstrates that New York DEC waived its authority under section 401.

13. Finally, New York DEC requested a stay pending judicial review.³² Under the Administrative Procedure Act, an agency may grant a stay "where justice so requires."³³ I would grant the stay. For the reasons stated above, I do not believe that the Commission has established that New York DEC waived its section 401 authority under *Hoopa Valley*. Moreover, given the considerable uncertainty about how *Hoopa Valley* applies outside of the narrow context addressed in that opinion, I believe that the more equitable outcome would be to pause development of the pipeline until the courts provide clarity on waivers of section 401. After all, this is a proceeding in which the Commission has already once changed course: As noted, the Commission originally took the position that the withdrawal-and-resubmission scheme in this proceeding restarted the one-year limitation only to reverse course after *Hoopa Valley*.³⁴ Although I agree it was

³⁰ See *supra* notes 19-20 and accompanying text.

³¹ See New York DEC Rehearing Request (citing to New York DEC Supplemental Answer and Protest at 11-15).

³² New York DEC Rehearing Request at 26-30.

³³ 5 U.S.C. § 705 (2018).

³⁴ *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129, at P 8 (2019).

appropriate to reconsider our position in light of *Hoopa Valley*, I am concerned at the prospect of a court again admonishing the Commission that it has misinterpreted section 401, requiring us to make yet another about-face. It would be far better to sort out the waiver question once and for all rather than risking another start-and-stop step in this saga.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner

Document Content(s)

CP18-5-003.DOCX.....1-28