Nos. 19-1610

& 19-1618 (consolidated)

United States Court of Appeals
for the Second Circuit

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
AND SIERRA CLUB,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,
NATIONAL FUEL GAS SUPPLY CORP. AND EMPIRE PIPELINE, INC.,
Intervenors.

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

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

David L. Morenoff
Acting General Counsel
Robert H. Solomon
Solicitor
Susanna Y. Chu
Attorney
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

Final Brief: June 9, 2020

TABLE OF CONTENTS

STATEMENT OF THE ISSUE 1

STATUTES AND REGULATIONS 2

STATEMENT OF THE CASE 2

I. STATUTORY AND REGULATORY BACKGROUND 2

II. FACTUAL AND PROCEDURAL BACKGROUND 6

A. THE NEW YORK WATER QUALITY PROCEEDING 7

B. FERC PROCEEDINGS LEADING TO THE ORDERS ON REVIEW 8

III. THE ORDERS ON REVIEW 10

SUMMARY OF ARGUMENT 13

ARGUMENT 14

I. THE COMMISSION FAITHFULLY APPLIED THE CLEAN WATER ACT AND UNIFORM JUDICIAL PRECEDENT IN FINDING THAT NEW YORK WAIVED ITS CLEAN WATER ACT CERTIFICATION AUTHORITY 14

A. Standard of Review 14

B. The Commission's Application of the Bright-Line Rule in Section 401 of the Clean Water Act Comports with the Plain Text of the Statute and Judicial Precedent 14

C. Contrary to New York's Argument, the One-Year Deadline Is Not a "Statutory Rule" that Can Be Modified by Agreement 20

D. Equitable Principles Do Not Dictate a Different Result 22

II. THE COMMISSION REASONABLY DETERMINED THAT NATIONAL FUEL'S REQUEST FOR A WAIVER DETERMINATION WAS TIMELY UNDER THE NATURAL GAS ACT AND FERC REGULATIONS 26

A. Standard of Review 26

B. The Commission Reasonably Found that National Fuel's One-Year Waiver Request, Filed After Its Request for Rehearing, Was Timely and Appropriate for Agency Consideration 28

CONCLUSION 32

TABLE OF AUTHORITIES

COURT CASES:

Alcoa Power Generating Inc. v. FERC,
643 F.3d 963 (D.C. Cir. 2011).. 4, 5, 14

Am. Lung Ass'n v. Reilly,
962 F.2d 258 (2d Cir. 1992) 19, 26

Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984)... 27

City of Arlington v. FCC,
569 U.S. 290 (2013)..27-28, 31

Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conservation,
868 F.3d 87 (2d Cir. 2017) 4

Dolan v. United States,
560 U.S. 605 (2010)... 20

Fla. Mun. Power Agency v. FERC,
315 F.3d 362 (D.C. Cir. 2003).. 32

Food Mktg. Inst. v. Argus Leader Media,
139 S. Ct. 2356 (2019).. 22

Forest Watch v. U.S. Forest Serv.,
410 F.3d 115 (2d Cir. 2005) 28

Greenery Rehab. Grp., Inc. v. Hammon,
150 F.3d 226 (2d Cir. 1998) 22

Hoopa Valley Tribe v. FERC,
913 F.3d 1099 (D.C. Cir. 2019).. *passim*

Islander E. Pipeline Co., LLC v. McCarthy,
525 F.3d 141 (2d Cir. 2008) 3, 4

Kaiser-Frazer Corp. v. Otis & Co.,
195 F.2d 838 (2d Cir. 1952) 23

Mary V. Harris Found. v. FCC,
776 F.3d 21 (D.C. Cir. 2015).. 26

Millennium Pipeline Co., LLC v. Seggos,
860 F.3d 696 (D.C. Cir. 2017).. 5, 9, 12, 21, 31

Mobil Oil Explor. & Prod. Se. v. United Distrib. Cos.,
498 U.S. 211 (1991)... 28, 31

Mohasco Corp. v. Silver,
447 U.S. 807 (1980)... 19, 24

Nat'l Fuel Gas Supply Corp. v. N.Y. State Dep't of Envtl. Conservation,
761 F. App'x 68 (2d Cir. 2019) (summary order)........................ 6-7, 8, 31

Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n,
894 F.2d 571 (2d Cir. 1990) 3

Nat'l R.R. Passenger Corp. v. Morgan,
536 U.S. 101 (2002)... 24

N.Y. v. FERC,
783 F.3d 946 (2d Cir. 2015) 27

N.Y. State Dep't of Envtl. Conservation v. FERC,
884 F.3d 450 (2d Cir. 2018) .... *passim*

PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology,
511 U.S. 700 (1994)... 5

Schneidewind v. ANR Pipeline Co.,
485 U.S. 293 (1988)... 2-3

St. Regis Mohawk Tribe v. Brock,
769 F.2d 37 (2d Cir. 1985) 20, 21

Tenn. Gas Pipeline Co. v. FERC,
871 F.2d 1099 (D.C. Cir. 1989).. 29

United States v. Ramos,
685 F.3d 120 (2d Cir. 2012) 17

Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.,
435 U.S. 519 (1978)...28, 31-32

ADMINISTRATIVE CASES:

Alcoa Power Generating Inc.,
152 FERC ¶ 61,040 (2015).. 30

Central Vt. Pub. Serv. Corp.,
113 FERC ¶ 61,167 (2005).. 11, 16

Constitution Pipeline Co., LLC,
168 FERC ¶ 61,129 (2019).. 19

Millennium Pipeline Co., LLC,
161 FERC ¶ 61,186 (2017).. 9

Pac. Gas and Elec. Co.,
170 FERC ¶ 61,232 (2020).. 19

Order Granting Abandonment and Issuing Certificates,
158 FERC ¶ 61,145 (2017).. 6, 8

Order Denying Rehearing,
167 FERC ¶ 61,007 (2019).. *passim*

Order on Rehearing and Motion for Waiver Determination,
164 FERC ¶ 61,084 (2018).. *passim*

Placer Cty. Water Agency,
167 FERC ¶ 61,056 (2019).. 19

So. Cal. Edison Co.,
170 FERC ¶ 61,135 (2020).. 19

STATUTES:

Clean Water Act

Section 401(a)(1), 33 U.S.C. § 1341(a)(1) .... *passim*

Section 401(d), 33 U.S.C. § 1341(d) 5

Natural Gas Act

Section 7(c), 15 U.S.C. § 717f(c) 3, 6

Section 19, 15 U.S.C. §§ 717r(a)-(b).................................... 20, 26, 29, 31

REGULATIONS:

18 C.F.R. § 157.22.. 9, 10

18 C.F.R. § 385.212 30

Nos. 19-1610 and 19-1618 (consolidated)

**United States Court of Appeals
for the Second Circuit**

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
AND SIERRA CLUB,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

Petitioner New York State Department of Environmental Conservation (“New York”) has no more than one year, upon receipt of an application for a water quality certification under section 401 of the Clean Water Act, 33 U.S.C. § 1341, to make a decision on that application. If it does not make a decision within one year, its certificate authority is waived. Just two years ago, in a case involving similar issues and parties, this Court called the one-year requirement a “bright-line” rule; other court decisions similarly have emphasized that the plain language of section 401 of the Act requires strict adherence to statutory deadlines.

Applying relevant court precedent, Respondent Federal Energy Regulatory Commission ("FERC" or "Commission") determined here that New York failed to act within the mandatory one-year deadline set forth in the statute. In particular, the Commission found that the statute, based on its plain meaning, does not allow parties to agree to extend the statutory deadline for state action beyond one year.

The question on review is:

Whether the Commission reasonably determined that section 401 of the Clean Water Act requires a state to grant or deny an application for water quality certification within one year of the date it actually receives the application, and reasonably determined that New York cannot lengthen the statutory one-year period, and give itself more time, by agreeing with the applicant to deem the application received on a later date.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the Addendum to this brief. The Addendum also includes a table of relevant dates and filings, as more fully discussed in the Statement of the Case.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

The Natural Gas Act grants FERC "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce." *Schneidewind v.*

ANR Pipeline Co., 485 U.S. 293, 300-301 (1988). *See* 15 U.S.C. § 717(b); *see also Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n*, 894 F.2d 571, 579 (2d Cir. 1990) ("Congress placed authority regarding the location of interstate pipelines . . . in the FERC, a federal body that can make choices in the interests of energy consumers nationally . . . ."). Accordingly, any natural gas company seeking to build an interstate pipeline or related facilities must obtain a certificate of "public convenience and necessity" from FERC. *Nat'l Fuel Gas Supply Corp.*, 894 F.2d at 573 (quoting 15 U.S.C. § 717f(c)).

A natural gas company must also obtain other necessary federal and state regulatory approvals before proceeding with pipeline construction. As relevant here, under section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), any applicant for a federal license or permit for any activity that "may result in any discharge into the navigable waters" of the United States must obtain a water quality certification from the State where the discharge will originate, and provide such certification to the permitting agency (here, FERC). *See Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 143-44 (2d Cir. 2008) (the Natural Gas Act and Clean Water Act "require applicants for federal permits to provide federal licensing agencies such as the FERC with certifications from affected states confirming compliance with local [water quality] standards") (citations omitted). It is FERC's responsibility to "ensure that [a] proposed project complies with all

requirements of federal law, including . . . those established by the Clean Water Act . . . ." *Id.* (citations omitted).

"In enacting the Clean Water Act, Congress sought to expand federal oversight of projects affecting water quality while also reinforcing the role of States as the prime bulwark in the effort to abate water pollution." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011) (citations and internal quotations omitted). "The certification authority granted States . . . provides them with the power to block, for environmental reasons, local water projects that might otherwise win federal approval." *Id.*

Thus, section 401(a)(1) specifies that "[n]o license or permit shall be granted until the [state] certification required by this section has been obtained or has been waived . . . ." 33 U.S.C. § 1341(a)(1). Under this provision, states have "a reasonable period of time (which shall not exceed one year) after receipt of [a] request" for water quality certification to grant or deny the request. *See id.*

If a state denies certification within the statutory time period, then "[n]o [federal] license or permit shall be granted." *Id.*; *see also Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 101-103 (2d Cir. 2017) (affirming state decision denying water quality certification application); *Islander E. Pipeline*, 525 F.3d at 164 (same). If a state issues a certification contingent on the applicant's satisfaction of various conditions, section 401(d)

requires the agency to incorporate those conditions in the final license. *Alcoa Power Generating Inc.*, 643 F.3d at 971 (citing 33 U.S.C. § 1341(d)); *see also PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 711-12 (1994) (section 401(d) allows states to impose limitations on projects "to assure compliance with various provisions of the Clean Water Act and with 'any other appropriate requirement of [s]tate law'") (quoting 33 U.S.C. § 1341(d)).

However, "[i]f the State . . . fails or refuses to act on a request for certification" within the statutory period—i.e., "a reasonable period of time (*which shall not exceed one year*) after receipt of such request"—then "the certification requirements of this subsection shall be waived with respect to such Federal application." 33 U.S.C. 1341(a)(1) (emphasis added); *see also N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018) ("*New York*") ("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.'") (quoting 33 U.S.C. § 1341(a)(1)); *Millennium Pipeline Co., LLC v. Seggos*, 860 F.3d 696, 700 (D.C. Cir. 2017) ("To prevent state agencies from indefinitely delaying issuance of a federal permit, Congress gave States only one year to act on a request for certification under the Clean Water Act.") (internal quotations omitted).

II. FACTUAL AND PROCEDURAL BACKGROUND

Intervenors National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (collectively, "National Fuel") seek to build the Northern Access project, a 99-mile pipeline designed to move natural gas from western Pennsylvania to upstate New York (the "Project"). *See* Order Granting Abandonment and Issuing Certificates, 158 FERC ¶ 61,145, P 1 (2017), R.1093, JA 97 ("Certificate Order"). After an extensive, two-year regulatory review process, the Commission conditionally authorized the Project by issuing to National Fuel a certificate of "public convenience and necessity" under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c). *Id.* PP 1-2, JA 97. Among other things, the Commission found that the "public convenience and necessity require approval and certification of the [P]roject" because the Project "will provide benefits to all sectors of the natural gas market by providing producers access to multiple markets throughout the United States and Canada and increasing the diversity of supply to consumers in those markets." *Id.* P 32, JA 105-107. The Certificate Order is not on review here.

Among other regulatory and environmental conditions, the Commission's Certificate Order required National Fuel to demonstrate that it has received all required federal authorizations, or "evidence of waiver thereof," including water quality certifications under the Clean Water Act. Certificate Order at App. B, Envtl. Condition 10, JA 181; *see also Nat'l Fuel Gas Supply Corp. v. N.Y. State*

Dep't of Envtl. Conservation, 761 F. App'x 68, 69 (2d Cir. 2019) (summary order) (prior to construction, National Fuel was required to "obtain state water quality certifications" under the Clean Water Act).

A. THE NEW YORK WATER QUALITY PROCEEDING

As required, National Fuel submitted to New York an application for water quality certification under section 401 of the Clean Water Act, 13 U.S.C. § 1341(a)(1). New York received National Fuel's application on March 2, 2016. *Nat'l Fuel Gas Supply Corp.*, Order on Rehearing and Motion for Waiver Determination Under Section 401 of the Clean Water Act, 164 FERC ¶ 61,084, P 35 (2018) ("Waiver Order"), R.1171, JA 248-49.[1]

Subsequently, in January 2017, New York and National Fuel entered into a letter agreement "revising the date . . . on which the Application was deemed received by [New York] to April 8, 2016." Jan. 20, 2017 Letter Agreement, FERC Dkt. No. CP15-115, R.1081, JA 96. The letter stated that the agreement to "deem" the application received on April 8, 2016—over one month after the application was actually received (on March 2, 2016)—served to "extend[]" the time for New York "to make a final determination on the application until April 7, 2017." *Id.*

[1] Relevant dates and events, as described in this section, are also set forth in a table included in the Addendum to this brief.

On April 7, 2017, New York denied National Fuel's application for water quality certification. Corrected Notice of Denial of the Section 401 Water Quality Certification, FERC Dkt. No. CP15-115 (Apr. 14, 2017), R.1120, JA 203. National Fuel appealed New York's denial of its application, and this Court ruled that New York failed to adequately explain its decision. *See Nat'l Fuel Gas Supply Corp.*, 761 F. App'x at 70-72. On remand, New York issued a revised denial in August 2019. Notice of Denial, FERC Dkt. No. CP15-115 (Aug. 9, 2019). National Fuel again appealed. *Nat'l Fuel Gas Supply Corp. v. N.Y. State Dep't of Envtl. Conservation*, 2d Cir. No. 19-2888 (in abeyance pending resolution of this appeal and D.C. Cir. No. 17-1143).

B. FERC PROCEEDINGS LEADING TO THE ORDERS ON REVIEW

On March 3, 2017, various parties, including National Fuel, sought rehearing of the Commission's Certificate Order on a variety of issues. Waiver Order P 2, JA 235. Among other things, National Fuel argued to the Commission that New York "[w]aived [i]ts [a]uthority to [i]ssue a [w]ater [q]uality [c]ertificate under [s]ection 401 of the Clean Water Act." Request for Reconsideration and Clarification Or, In the Alternative, Application for Rehearing of National Fuel Gas Supply Corp. and Empire Pipeline, Inc., FERC Dkt. No. CP15-115, R. 1102, at 17, JA 197.

National Fuel contended that Congress vested in FERC the authority to determine the "reasonable period of time (which shall not exceed one year) after receipt of [a] request" in which a state must either approve or deny the request for water quality certification. *Id.* at 21-22, JA 201-202 (quoting 33 U.S.C. § 1341(a)(1)). National Fuel argued that a FERC regulation, 18 C.F.R. § 157.22, effectively set this "reasonable period of time" as 90 days from issuance of FERC's final environmental review document, i.e., October 25, 2016. *See id.* at 17-22, JA 197-202. According to National Fuel, New York waived its statutory water certification authority when it failed to meet this regulatory time limit. *Id.*

Subsequently, National Fuel filed a motion for expedited action. Renewed Motion for Expedited Action, FERC Dkt. No. CP15-115 (Dec. 5, 2017) ("Waiver Motion"), R.1154, JA 227. In the motion, National Fuel again argued that New York waived its Clean Water Act certification authority, but now asserted that the State waived its authority by failing to act within the statutory one-year period set forth in Clean Water Act section 401. In support, National Fuel cited the D.C. Circuit's 2017 opinion in *Millennium Pipeline Co.*, 860 F.3d 696, and a Commission order finding that the Clean Water Act's one-year time limit is an "absolute" prohibition that "cannot [be] waive[d]." Waiver Motion at 3, 7 & n.16, JA 229, 233 (quoting *Millennium Pipeline Co., LLC*, 161 FERC ¶ 61,186 (2017) (later upheld by this Court in *New York*, 884 F.3d at 455-56)).

III. THE ORDERS ON REVIEW

The Commission's Waiver Order rejected National Fuel's argument that New York waived its Clean Water Act certification authority by failing to act within the regulatory deadline established by 18 C.F.R. § 157.22. Waiver Order PP 36-38, JA 249-51. The Commission explained that 18 C.F.R. § 157.22 requires other government agencies to render final decisions on requests for authorizations relating to a proposed project no later than 90 days after the Commission issues its final environmental document for the project, "unless a schedule is otherwise established by Federal law." Waiver Order P 37, JA 250. Following its "long-standing interpretation," the Commission explained that its 90-day regulatory deadline "does not apply to a water quality certification" because the Clean Water Act provides up to one year for a state to act on a request for certification. *Id.* PP 38, 41 & n.77, JA 250-51, 252-53 (citing cases applying the agency's interpretation that a certifying agency has one year under section 401 to grant or deny a certification request).

Thus, while FERC's 90-day regulatory deadline did not apply to New York's review of National Fuel's request for water quality certification, the Clean Water Act's one-year statutory deadline, 33 U.S.C. § 1341(a)(1), did apply. *See* Waiver Order PP 39-45, JA 251-55. And New York waived its certification authority by failing to act within that one-year period. *Id.*

Citing *New York* and similar cases, the Commission explained that its interpretation that a state waives its certification authority if it fails to act within one year "gives effect to the plain meaning" of the statute—i.e., "[i]f 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." 33 U.S.C. § 1341(a)(1); Waiver Order P 41, JA 252-53. In particular, the Commission explained, its interpretation gave effect to the words "after receipt of such request." *Id*.

In light of the statute's plain language, and court precedents such as this Court's 2018 *New York* decision, the Commission determined that New York and National Fuel could not extend the statutory period by entering into an agreement to modify the date of receipt of the application. *See id*. P 41, JA 252-53; *see also id.* P 43, JA 253 (because "[s]ection 401 contains no provision authorizing either the Commission or the parties to extend the statutory deadline," private agreements between a state certifying agency and the applicant "cannot operate to amend the Clean Water Act, nor are they in any way binding on the Commission") (quoting *Central Vt. Pub. Serv. Corp.*, 113 FERC ¶ 61,167, P 16 (2005)). The Commission further explained why, as a matter of policy, "an interpretation of section 401 allowing parties to negotiate the date of receipt" would be problematic, requiring

the Commission to adjudicate claims of "unequal negotiating power" between state certifying agencies and applicants on a case-by-case basis. Waiver Order P 44, JA 254.

Finally, the Commission held that National Fuel timely presented its request for a waiver determination to the agency. *Id.* P 6 & nn.9-10, JA 237 (citing *Millennium Pipeline Co.*, 860 F.3d at 701).

New York and the Sierra Club filed requests for rehearing, challenging the Commission's waiver finding. *See* Req. for Reh'g and Stay (New York) (Aug. 14, 2018), R.1172, JA 305; Req. for Reh'g and Stay (Sierra Club) (Sept. 5, 2018), R.1175, JA 317. On rehearing, the Commission reaffirmed its finding of waiver based on the plain text of section 401 of the Clean Water Act, court precedent, and legislative history. Order Denying Rehearing, 167 FERC ¶ 61,007, PP 7-24 (2019) ("Waiver Rehearing Order"), R.1192, JA 335-43.

In particular, the Commission relied on this Court's holding in *New York* that a state agency may not "defer the date of 'receipt'" of a request for water quality certification under Clean Water Act section 401 "by deeming an application 'incomplete.'" *Id.* P 13, JA 338 (citing *New York*, 884 F.3d at 456 ("The [C]ourt found such an approach contrary to the plain language of the statute.")). The Commission also relied on *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019). *Hoopa Valley* held that a state agency and applicant could

not extend the statutory one-year period by written agreement. Waiver Rehearing Order P 11, JA 337. And again, the Commission reaffirmed that National Fuel's request for a waiver determination was timely. *Id.* PP 25-27, JA 343-44.

These petitions for review followed.

SUMMARY OF ARGUMENT

The Commission faithfully applied section 401 of the Clean Water Act, this Court's precedent, and relevant case law in determining that New York waived its water certification authority relating to the Project. As this Court and others have recognized, the one-year statutory deadline provided in section 401 is a bright-line rule. It plainly dictates that the one-year period for state review of a water quality certification application runs from the date a state certifying agency actually receives the application. Neither the Commission—nor any court—has ever permitted a government agency or private party to circumvent this statutory bright-line rule by setting a fictional date of receipt different from the actual date of receipt. None of the authorities cited by New York and Sierra Club suggests that courts or FERC can disregard the statutory one-year limit even if the state certifying agency agrees with the applicant on a longer period of review.

Further, the Commission reasonably determined that National Fuel's request for a waiver determination was timely, and not barred by the rehearing provisions of the Natural Gas Act. The petitions should be denied.

ARGUMENT

I. THE COMMISSION FAITHFULLY APPLIED THE CLEAN WATER ACT AND UNIFORM JUDICIAL PRECEDENT IN FINDING THAT NEW YORK WAIVED ITS CLEAN WATER ACT CERTIFICATION AUTHORITY

A. Standard of Review

The Court reviews the Commission's interpretation of the Clean Water Act, a statute the Commission does not administer, *de novo*. *New York*, 884 F.3d at 455; *see also Alcoa Power Generating Inc.*, 643 F.3d at 972 (finding the Commission's interpretation of Clean Water Act section 401 "consistent with the plain text and statutory purpose of the provision"). Likewise, New York's interpretation of the Clean Water Act receives no deference. *New York*, 884 F.3d at 455.

B. The Commission's Application of the Bright-Line Rule in Section 401 of the Clean Water Act Comports with the Plain Text of the Statute and Judicial Precedent

Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), provides that, "[i]f 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."

It is not disputed that New York actually received National Fuel's application for water quality certification on March 2, 2016. Waiver Order P 42,

JA 253; N.Y. Br. 9 & n.2. And New York did not issue its decision denying the certification until April 7, 2017. Waiver Rehearing Order P 4, JA 334; N.Y. Br. 14. Thus, under the plain terms of section 401, the State "fail[ed] . . . to act" on the request within the statutory one-year time limit, resulting in waiver of the Clean Water Act certification requirement with respect to the Project. *See* Waiver Order P 42, JA 253. As the Commission explained, "[i]n this case, only one application was ever pending before New York . . . . The agency received the companies' application on March 2, 2016, and was obligated to act on the application within one year." *Id.* Because "New York . . . failed to act by March 2, 2017," the State "waived its authority under section 401 of the Clean Water Act." *Id.*

In the view of Petitioners New York and Sierra Club, the State avoided waiver by reaching an agreement with National Fuel to "deem" the application received on April 8, 2016, thus purportedly extending the State's deadline to act to April 7, 2017. Waiver Rehearing Order P 4, JA 334; *see also* Jan. 20, 2017 Letter Agreement, JA 96.

The Commission rightly concluded that such an agreement is not consistent with the plain text of section 401, which provides that the statutory one-year period commences upon "receipt of [the] request" for certification. *See* Waiver Order P 41 & n.77, JA 252-53 (Commission's "long-standing interpretation that a certifying agency waives the certification requirements of section 401 if the

certifying agency does not act within one year after the date that [it] receives a request for certification . . . gives effect to the plain meaning of the words 'after *receipt* of such request.'"). Quoting a 2005 FERC case, the Commission explained, "Section 401 contains no provision authorizing either the Commission or the parties to extend the statutory [one-year] deadline. To the extent that [the state certifying agency and the applicant] reach[] private agreements about when the agency would act, they cannot operate to amend the Clean Water Act . . . ." *Id.* P 43, JA 253 (quoting *Central Vt. Pub. Serv. Corp.*, 113 FERC ¶ 61,167); *see also* Waiver Rehearing Order P 8, JA 335-36 (same).

Moreover, as the Commission recognized, an agreement to set an artificial date of "receipt" to circumvent the statutory one-year time limit is proscribed under *New York*, 884 F.3d at 455-56, and *Hoopa Valley*, 913 F.3d at 1103-1105. *See* Waiver Rehearing Order PP 11-13, JA 337-38.

New York's brief fails to squarely address this Court's holding in *New York*, an opinion issued just two years ago in a case concerning the same agency, the same statute, and a similar set of facts. *See* N.Y. Br. 5, 38, 42, 45 (citing *New York* for standard of review and *dictum* in connection with discussion of *Hoopa Valley*). Sierra Club misreads *New York* as primarily "recogniz[ing] that states require a certain latitude" in considering section 401 water quality certification applications. Sierra Club Br. 14.

But the case law interpreting Clean Water Act section 401 countenances no such "latitude." In *New York*, this Court "agree[d] with FERC" that "the one-year review period commences when [New York] receives a request for water quality certification." 884 F.3d at 455. This is because "[t]he 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.'" *Id.* at 455-56.

Under the bright-line rule announced in *New York*, receipt means receipt. *See United States v. Ramos*, 685 F.3d 120, 131 (2d Cir. 2012) (receipt ordinarily refers to taking possession or delivery) (citing cases); Oxford English Dictionary (3d ed. 2009), *available at* https://www.oed.com/viewdictionaryentry/Entry/159401 (defining "receipt" as "[t]he act of receiving something, or the fact of something being received, into one's possession or custody"). The statute—and common sense—dictate that the date of receipt is the date the state agency *actually* receives the application, and not any other date. *See* Waiver Rehearing Order, P 13 & n.30, JA 338 (*New York* "affirm[ed] the Commission's determination that the section 401 one-year period began when New York . . . received [pipeline]'s request"). In *New York*, the State was not allowed to defer commencement of the one-year time period for review by setting the date of receipt as the date it considered the application "complete." 884 F.3d at 455-56.

As the Court observed, "[i]f 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." *Id.; see also* Waiver Order P 41 & n.78, JA 252-53 (describing *New York*'s "holding that the 'plain language of Section 401' requires states to grant or deny an application within one year of receiving the application").

Hoopa Valley likewise held that receipt means receipt. As the court in *Hoopa Valley* put it, "[i]mplicit in the statute's reference 'to act on *a request* for certification,'" is the principle that "the provision applies to a specific request." 913 F.3d at 1104. Thus, a state agency and an applicant could not enter into an agreement to withdraw and resubmit the same application at annual intervals in order to avoid the one-year time limit. *Id.* (describing agreement under which applicant "sent a letter indicating withdrawal of its water quality certification request and resubmission of the very same [request] . . . in the same one-page letter . . . for more than a decade") (emphasis omitted). The court concluded that this "arrangement . . . circumvent[s] a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project." *Id.*

The D.C. Circuit issued *Hoopa Valley* in January 2019, several months after the Commission issued its Waiver Order (in August 2018) and several months

before its Waiver Rehearing Order (in April 2019). The Commission reasonably viewed "[t]he events in *Hoopa Valley* . . . and these proceedings" as "shar[ing] the same salient facts, i.e., an agreement was reached to delay the state agency's action on a water quality certification application." Waiver Rehearing Order P 11, JA 337 (holding that New York's "lack of action by the March 2, 2017 deadline here constituted a failure and refusal to act as contemplated by section 401").[2]

The Commission's application of the plain text of section 401, and this Court's holding in *New York*, should be upheld. "[W]hen, as here, a statute sets forth a bright-line rule for agency action . . . , there is no room for debate—[C]ongress has prescribed a categorical mandate that deprives [the agency] of all discretion over the timing of its work." *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 263 (2d Cir. 1992); *see also Mohasco Corp. v. Silver*, 447 U.S. 807, 824-27 (1980) (giving effect to statutory deadline, and rejecting arguments that "strict adherence" to deadline was "unfair," because "[i]t is not our place . . . to alter the balance struck by Congress in procedural statutes").

---

[2] Later-issued Commission decisions are consistent with *New York*, *Hoopa Valley*, and this case. *See, e.g.*, *Pac. Gas and Elec. Co.*, 170 FERC ¶ 61,232 (2020) (applying *New York* and *Hoopa Valley*, and finding state waived section 401 certification authority); *So. Cal. Edison Co.*, 170 FERC ¶ 61,135 (2020) (same); *Placer Cty. Water Agency*, 167 FERC ¶ 61,056 (2019) (same); *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129 (2019), *on reh'g*, 169 FERC ¶ 61,199 (2019) (same), *on appeal*, *N.Y. State Dep't of Envtl. Conservation v. FERC*, 2d Cir. Nos. 19-4338, *et al.*

C. Contrary to New York's Argument, the One-Year Deadline Is Not a "Statutory Rule" that Can Be Modified by Agreement

New York argues that the one-year deadline contained in Clean Water Act section 401 is a "statutory rule," rather than a "jurisdictional" one, and thus subject to modification by New York and National Fuel. N.Y. Br. 25-40. The cases cited by New York to demonstrate that "[n]on-jurisdictional statutory time limits are generally subject to waiver by agreement" (N.Y. Br. 26), are inapposite. None of those cases involved the Clean Water Act, or the specific provision at issue here. *See* N.Y. Br. 25-27 (citing cases involving other statutes).[3]

As this Court has explained, generally, "[a] statutory time period is not mandatory unless it *both* expressly requires an agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provision." *St. Regis Mohawk Tribe v. Brock*, 769 F.2d 37, 41 (2d Cir. 1985) (citation and internal quotations omitted); *see also Dolan v. United States*, 560 U.S. 605, 610 (2010) ("[W]here . . . a statute does not specify a consequence for noncompliance with its timing provisions, federal courts will not in the

---

[3] For example, New York's comparison of the statutory provision at issue here, 33 U.S.C. § 1341(a)(1), with the time period for agency rehearing under the Natural Gas Act, 15 U.S.C. § 717r(a), is unhelpful. *See* N.Y. Br. 34-35. The Natural Gas Act is an entirely different statute, with its own text and context, and has no bearing on the Court's resolution of the waiver issue on review.

ordinary course impose their own coercive sanction.") (citation and internal quotations omitted).

As relevant here, section 401 of the Clean Water Act both (1) "expressly requires an agency . . . to act within a particular time period" (i.e., a reasonable period of time, up to one year), and (2) "specifies a consequence for failure to comply" (i.e., waiver of state water quality certification authority). *See St. Regis Mohawk Tribe*, 769 F.2d at 41.

Accordingly, the one-year time period is a mandatory deadline that is not subject to modification by any party. *See* Waiver Rehearing Order P 8, JA 335-36 (following FERC precedent that "giv[es] plain meaning" to the text of section 401 by recognizing that "private agreements . . . cannot operate to amend the Clean Water Act"); *see also, e.g.*, *New York*, 884 F.3d at 455-56 ("plain language of Section 401 outlines a bright-line rule"); *Hoopa Valley*, 913 F.3d at 1104 (parties may not "circumvent . . . congressionally granted authority over the licensing, conditioning, and developing of a hydropower project" by contracting around the one-year time period); *Millennium Pipeline Co.*, 860 F.3d at 700-701 (Clean Water Act certification requirements "automatically expire after one year;" once waived, the certification requirements "fall[] out of the equation" and applicant "can present evidence of waiver directly to FERC to obtain the agency's go-ahead to begin construction").

The legislative history cited by New York does not help it. *See* N.Y. Br. 28-31. As the court in *Hoopa Valley* observed, the legislative history of Clean Water Act section 401(a)(1) indicates that "Congress intended Section 401 to curb a state's 'dalliance or unreasonable delay.'" 913 F.3d at 1104-1105 (quoting 115 Cong. Rec. 9264 (1969) (emphasis omitted)). This is entirely consistent with the reading of this Court (and all courts that have considered the issue) that section 401 contains a mandatory deadline with specified consequences for failure to meet that deadline—i.e., waiver of state certification authority. *See* Waiver Rehearing Order P 8, JA 335-36; *see also Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop.") (citations omitted); *Greenery Rehab. Grp., Inc. v. Hammon*, 150 F.3d 226, 231 (2d Cir. 1998) ("If the statutory terms are unambiguous, our review generally ends and the statute is construed according to the plain meaning of its words.").

D. Equitable Principles Do Not Dictate a Different Result

New York argues that, because National Fuel agreed to the artificial April 8, 2016 receipt date in the letter agreement with New York, National Fuel should be estopped from arguing that New York waived its section 401 certification authority. N.Y. Br. 40-46. Similarly, Sierra Club argues that the "balance of the

equities . . . strongly disfavors upholding a waiver determination," and "irreparable harm will result" if the Commission's waiver determination is upheld. Sierra Club Br. 21-32. These equitable arguments are unavailing. *See* Waiver Rehearing Order P 24, JA 342-43 ("We disagree that contract principles change the outcome."); *see also Kaiser-Frazer Corp. v. Otis & Co.*, 195 F.2d 838, 843-44 (2d Cir. 1952) ("[W]hatever the rules of estoppel or waiver may be in the case of an ordinary contract . . . , nevertheless it is clear that a contract which violates the laws of the United States and contravenes the public policy as expressed in those laws is unenforceable.") (citations omitted).

First, the Commission correctly recognized that the one-year deadline is a "bright-line rule" that parties cannot modify by contract. *See* Argument §§ I.B and I.C, *supra*. Although the Commission declined to make findings regarding the circumstances leading to the agreement between New York and National Fuel, it also noted that National Fuel alleged "it was clear . . . that unless National Fuel . . . agreed to a [New York]-drafted agreement changing the date [of receipt], [New York] would deny the application (regardless of merit)." Waiver Order P 44, JA 254. The Commission observed that "allowing parties to negotiate the date of receipt would force the Commission to entertain" such allegations "on a case-by-case basis," making "[a]llegations like this one about unequal negotiating power . . . common and intractable." *Id.*

By contrast, "the bargaining power between the applicant and the certifying agency is brought closer to parity by a strict interpretation of section 401 that is consistent with the letter of the law." *Id.*; *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 108 (2002) ("[S]trict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.") (quoting *Mohasco*, 447 U.S. at 826).

Second, the Commission's application of section 401 will not "[u]nnecessarily [h]amstring [s]tates," as Sierra Club contends. Sierra Club Br. 30. As this Court recognized, to the extent a state needs more time to consider an application (for example, if a state believes an application to be incomplete), "it can simply deny the application without prejudice—which would constitute 'acting' on the request under the language of Section 401." *New York*, 884 F.3d at 456; *see also* Waiver Rehearing Order P 17 & n.40, JA 339 (citing *New York*; certifying state agency "is not without suitable recourse" if it needs more time, as it can deny application "with or without prejudice"). This Court also observed that the State could "request that the applicant withdraw and resubmit the application." *New York*, 884 F.3d at 456.

The court in *Hoopa Valley* found that a state waived its certification authority by engaging in a "coordinated withdrawal-and-resubmission scheme" under which the applicant repeatedly withdrew and resubmitted its request for

water quality certification over the course of a decade. 913 F.3d at 1103-1105. The court found it pertinent that the applicant repeatedly resubmitted the same application—i.e., the resubmitted applications "were not new requests at all." *Id.* at 1104. Accordingly, the court stated that it "need not determine how different a request must be to constitute a 'new request' such that it restarts the one-year clock," and "decline[d] to resolve the legitimacy of . . . an arrangement" where an applicant withdraws a request and submits "a wholly new one in its place." *Id.*

Such a withdrawal-and-resubmission scheme was not at issue in *New York*; nor is it at issue here. *See Hoopa Valley*, 913 F.3d at 1105 (recognizing that *dicta* in *New York* concerning withdrawal and resubmission was "not central to the [C]ourt's holding"); *see also* N.Y. Br. 32 n.8 ("[T]he validity of the withdrawal-and-resubmission process is not at issue in this proceeding."). It is unnecessary for the Court here to decide the circumstances under which an applicant may restart the one-year clock by resubmitting an application. It is sufficient to note that, if a state needs more time to consider an application, "it can simply deny the application without prejudice." *New York*, 884 F.3d at 456.

Finally, contrary to New York's contention that the relatively short delay at issue here "falls comfortably within the rule of reason" (N.Y. Br. 39-40), the length of delay is irrelevant. There is no precedent supporting a "rule of reason" approach to the bright-line, one-year period set forth in section 401. Once the one-year

deadline for state action has passed, certification authority is waived. *See* Argument §§ I.B and I.C, *supra*. This is the definition of a bright-line rule. *See, e.g.*, *Am. Lung Ass'n*, 962 F.2d at 263 ("no room for debate" where "statute sets forth a bright-line rule for agency action").

As the Commission explained in rejecting New York's policy arguments, application of a bright-line rule "provid[es] certainty around the deadline for state action." Waiver Rehearing Order P 20, JA 341. "Binding calculation of the deadline to application receipt (as contemplated by the statutory language) makes determining the deadline more straightforward." *Id.*; *see also Mary V. Harris Found. v. FCC*, 776 F.3d 21, 28-29 (D.C. Cir. 2015) ("An agency does not abuse its discretion by applying a bright-line rule consistently in order both to preserve incentives for compliance and to realize the benefits of easy administration that the rule was designed to achieve.").

II. THE COMMISSION REASONABLY DETERMINED THAT NATIONAL FUEL'S REQUEST FOR A WAIVER DETERMINATION WAS TIMELY UNDER THE NATURAL GAS ACT AND FERC REGULATIONS

A. Standard of Review

The Commission is entitled to deference with respect to its decision to treat National Fuel's request for a waiver determination as a general motion not subject to the Natural Gas Act's thirty-day deadline for seeking rehearing of Commission orders, 15 U.S.C. § 717r(a).

As New York recognizes, the Commission's interpretation and application of the Natural Gas Act (a statute committed to FERC's administration), and its implementing regulations, is entitled to deference. N.Y. Br. 5; *see also N.Y. v. FERC*, 783 F.3d 946, 953 (2d Cir. 2015) (challenge to "FERC's interpretation of jurisdiction conferred by statutes that the agency is charged with administering" properly reviewed under "two-step analysis" in *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

At *Chevron* step one, the Court "look[s] to whether 'Congress has directly spoken to the precise question at issue' because, if 'the intent of Congress is clear, that is the end of the matter.'" *N.Y. v. FERC*, 783 F.3d at 954 (quoting *Chevron*, 467 U.S. at 842). If the statute is "'silent or ambiguous with respect to the specific issue' in dispute, a court must proceed to step two of *Chevron* analysis." *Id.* (quoting *Chevron*, 467 U.S. at 843). At this step, the Court "deem[s] Congress to have delegated the resolution of statutory ambiguity to the administering agency, so that our judicial task is simply to determine 'whether the agency's answer is based on a permissible construction of the statute.'" *Id.* "That inquiry is deferential, asking only whether the agency's interpretation is 'reasonable' while 'respect[ing] legitimate policy choices' made by the agency. *Id.* (quoting *Chevron*, 467 U.S. at 843-44) (other citations omitted); *see also City of Arlington v. FCC*,

569 U.S. 290, 301-307 (2013) (affording deference to agency's interpretation of its statutory authority).

Moreover, "[a]bsent constitutional constraints or extremely compelling circumstances," agencies are "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (citation and internal quotations omitted); *see also Mobil Oil Explor. & Prod. Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) (Commission "enjoys broad discretion in determining how best to handle related, yet discrete issues") (citations omitted); *Forest Watch v. U.S. Forest Serv.*, 410 F.3d 115, 117-18 (2d Cir. 2005) (federal agency's "interpretation of its own rules (including which rule applies when) is entitled to deference") (citations omitted).

B. The Commission Reasonably Found that National Fuel's One-Year Waiver Request, Filed After Its Request for Rehearing, Was Timely and Appropriate for Agency Consideration

New York claims that National Fuel submitted its waiver request too late for the Commission's consideration. Specifically, New York contends that National Fuel's December 2017 motion for expedited action, arguing that the state waived its water quality certification authority by failing to act within the one-year statutory timeframe (Waiver Motion at 7-8, JA 233-34), was a "late-filed

supplement to its request for rehearing" barred by the Natural Gas Act, 15 U.S.C. § 717r. N.Y. Br. 47-52.

15 U.S.C. § 717r provides, in relevant part, that parties "aggrieved by an order issued by the Commission in a proceeding under this chapter . . . may apply for a rehearing within thirty days after issuance of such order." 15 U.S.C. § 717r(a). "Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing." *Id.*; *see Tenn. Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1108 (D.C. Cir. 1989) (15 U.S.C. § 717r(a) broadly "confers upon the Commission the authority to reconsider and correct its order until the time for judicial review has expired") (citation and internal quotations omitted).

The Commission reasonably exercised its statutory authority in finding that National Fuel "presented evidence of waiver separate from the claims made in [its] March 3, 2017 request for rehearing and [has] effectively petitioned the Commission for a waiver determination." Waiver Order P 6, JA 237 (treating waiver claim asserted at pages 6-8 of National Fuel's Waiver Motion as a "motion requesting a waiver determination"); *see also* Waiver Rehearing Order PP 25-27, JA 343-44 (explaining why National Fuel's motion was timely).

By its terms, the Natural Gas Act's rehearing requirement applies to parties "aggrieved by an order issued by the Commission." 15 U.S.C. § 717r(a). When a

party applies to the Commission for a determination that a state has waived its certification authority, it is not aggrieved by any order issued by FERC. Indeed, because the one-year time period for state review of a water quality certification application commences on the date the state receives the application, 33 U.S.C. § 1341(a)(1), the time for state review may not conclude until after the thirty-day period for rehearing of a FERC certificate order has lapsed.

Thus, a motion under 18 C.F.R. § 385.212 is an appropriate vehicle for seeking a waiver determination by the Commission. *See* Waiver Order P 6 n.10, JA 237; Waiver Rehearing Order P 27 & n.69, JA 344. As the Commission explained, "the Commission's regulations do not specify the timing or form for an applicant for water quality certification to present evidence of waiver of water quality certification." Waiver Rehearing Order P 27, JA 344. But "a motion may be filed at any time in a proceeding." *Id.* & n.69 (citing Waiver Order P 6 n.10 and 18 C.F.R. § 385.212(a)); *see also Alcoa Power Generating Inc.*, 152 FERC ¶ 61,040, P 17 (2015) ("Regardless of how an entity labels its submissions to the Commission, the Commission has discretion to determine the actual nature of the filing and to treat the filing accordingly.").

The Commission's approach is entirely consistent with judicial precedent. As the Commission explained, courts have recognized that applicants may seek a waiver determination from FERC when a state has failed to act on a water quality

certification application within the one-year timeframe. *See* Waiver Order P 6 & n.9, JA 237 (citing *Millennium*, 860 F.3d at 701 ("in the face of [state] inaction," an applicant may "go directly to FERC and present evidence of [the state]'s waiver," and the applicant may "immediately appeal any adverse FERC decision on the waiver question" under the Natural Gas Act, 15 U.S.C. 717r(b)); Waiver Rehearing Order P 26, JA 343 (same); *see also Nat'l Fuel Gas Supply Corp.*, 761 F. App'x at 72 ("Petitioners are free to present any evidence of waiver to FERC in the first instance.") (citing *Millennium*, 860 F.3d at 700).

As a procedural matter, New York and Sierra Club were not prejudiced by the Commission's treatment of National Fuel's motion for expedited action as a motion for a waiver determination. Both New York and Sierra Club filed requests for rehearing of the Commission's Waiver Order, and their arguments were addressed by the Commission in the Waiver Rehearing Order. *See* Waiver Rehearing Order PP 2-3, JA 334, 9-33, JA 336-46.

Accordingly, the Commission reasonably determined that the thirty-day period for seeking rehearing of a FERC order, 15 U.S.C. § 717r(a), did not bar National Fuel from seeking a waiver determination from the Commission. The Commission acted well "within the bounds of its statutory authority" in issuing the Waiver Order and Waiver Rehearing Order. *City of Arlington*, 569 U.S. at 297; *see also Mobil Oil*, 498 U.S. at 230-31 (Commission "enjoys broad discretion in

determining how best to handle related, yet discrete issues") (citing *Vt. Yankee*, 453 U.S. at 543-44); *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 366 (D.C. Cir. 2003) (administrative agencies enjoy broad discretion to manage their own dockets). The Commission properly exercised its procedural discretion here.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

Respectfully submitted,

David L. Morenoff
Acting General Counsel

Robert H. Solomon
Solicitor

/s/ Susanna Y. Chu
Susanna Y. Chu
Attorney

Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426
(202) 502-8464
Susanna.Chu@ferc.gov

June 9, 2020

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limits of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4) because, excluding the parts of the document exempted by Fed. R. App. R. 32(f), this document contains 7,425 words.

This document complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. 32(a)(6) because this response has been prepared in a proportionally spaced typeface (Times New Roman 14) using Microsoft Word 2010.

/s/ Susanna Y. Chu
Susanna Y. Chu
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel.: (202) 502-8464
Fax: (202) 273-0901
E-mail: Susanna.Chu@ferc.gov

June 9, 2020

ADDENDUM

TABLE OF CONTENTS

Table of Relevant Dates A1

Statutes:

Clean Water Act

Section 401, 33 U.S.C. § 1341 .... A2

Natural Gas Act

Section 1(b), 15 U.S.C. § 717(b) A5

Section 7(c), 15 U.S.C. § 717f(c) A7

Section 19, 15 U.S.C. § 717r(a)-(b).. A10

Regulations:

18 C.F.R. § 157.22 .... A12

18 C.F.R. § 385.212 .... A13

TABLE OF RELEVANT DATES

March 17, 2015	National Fuel files application for certificate of "public convenience and necessity" to build Northern Access Project (the "Project").
March 2, 2016	New York receives request for Clean Water Act section 401 certification from National Fuel.
Jan. 20, 2017	New York and National Fuel enter into letter agreement "revising the date . . . on which the Application was deemed received by [New York] to April 8, 2016."
Feb. 3, 2017	FERC issues Certificate Order conditionally authorizing the Project, 158 FERC ¶ 61,145 (2017).
March 3, 2017	National Fuel files request for rehearing of Certificate Order. Among other things, National Fuel argues that New York waived its Clean Water Act section 401 authority by failing to comply with FERC regulatory deadline.
April 7, 2017	New York denies National Fuel's application for Clean Water Act section 401 water quality certification.
Dec. 5, 2017	Nation Fuel files "Renewed Motion for Expedited Action" with FERC, arguing that New York waived its Clean Water Act section 401 certification authority because it failed to act within the statutory one-year period.
Aug. 6, 2018	FERC issues order on rehearing of Certificate Order, and addresses National Fuel's Renewed Motion for Expedited Action. 164 FERC ¶ 61,084 (2018) ("Waiver Order").
April 2, 2019	FERC issues order on rehearing of Waiver Order. Order Denying Rehearing, 167 FERC ¶ 61,007 (2019) ("Waiver Rehearing Order").

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

tion 1254(n)(4)'', was repealed by Pub. L. 107–303. See Effective Date of 2002 Amendment note below.

1988—Subsec. (a)(2)(B). Pub. L. 100–653, § 1004, and Pub. L. 100–688, § 2001(1), made identical amendments, inserting ''Massachusetts Bay, Massachusetts (including Cape Cod Bay and Boston Harbor);'' after ''Buzzards Bay, Massachusetts;''.

Pub. L. 100–688, § 2001(2), substituted ''California; Galveston'' for ''California; and Galveston''.

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

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

EFFECTIVE DATE OF 2002 AMENDMENT

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

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

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

''SEC. 1002. DEFINITION.

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

''SEC. 1003. FINDINGS AND PURPOSE.

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

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

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

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

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

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

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

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

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

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

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

''SEC. 1005. FUNDING SOURCES.

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

PURPOSES AND POLICIES OF NATIONAL ESTUARY PROGRAM

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

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

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

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

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

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

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

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

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

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

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

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

SUBCHAPTER IV—PERMITS AND LICENSES

§ 1341. Certification

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

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title.

Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

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

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

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

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

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

Case 19-1610, Document 253, 06/09/2020, 2857668, Page46 of 56

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

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

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

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

(d) Limitations and monitoring requirements of certification

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

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

AMENDMENTS

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

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

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

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

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

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

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

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

Case 19-1610, Document 253, 06/09/2020, 2857668, Page47 of 56

EX. ORD. NO. 10752. DELEGATION OF FUNCTIONS TO THE SECRETARY OF THE INTERIOR

Ex. Ord. No. 10752, Feb. 12, 1958, 23 F.R. 973, provided:

SECTION 1. The Secretary of the Interior is hereby designated and appointed as the agent of the President for the execution of all the powers and functions vested in the President by the act of February 22, 1935, 49 Stat. 30, entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes," as amended (15 U.S.C. 715 *et seq.*), except those vested in the President by section 4 of the act (15 U.S.C. 715c).

SEC. 2. The Secretary of the Interior may make such provisions in the Department of the Interior as he may deem appropriate to administer the said act.

SEC. 3. This Executive order supersedes Executive Order No. 6979 of February 28, 1935, Executive Order No. 7756 of December 1, 1937 (2 F.R. 2664), Executive Order No. 9732 of June 3, 1946 (11 F.R. 5985), and paragraph (q) of section 1 of Executive Order No. 10250 of June 5, 1951 (16 F.R. 5385).

DWIGHT D. EISENHOWER.

§ 715k. Saving clause

If any provision of this chapter, or the application thereof to any person or circumstance, shall be held invalid, the validity of the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

(Feb. 22, 1935, ch. 18, § 12, 49 Stat. 33.)

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

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

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

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

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

CODIFICATION

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

DELEGATION OF FUNCTIONS

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

CHAPTER 15B—NATURAL GAS

Sec.
717. Regulation of natural gas companies.
717a. Definitions.
717b. Exportation or importation of natural gas; LNG terminals.
717b–1. State and local safety considerations.
717c. Rates and charges.
717c–1. Prohibition on market manipulation.
717d. Fixing rates and charges; determination of cost of production or transportation.
717e. Ascertainment of cost of property.
717f. Construction, extension, or abandonment of facilities.
717g. Accounts; records; memoranda.
717h. Rates of depreciation.
717i. Periodic and special reports.
717j. State compacts for conservation, transportation, etc., of natural gas.
717k. Officials dealing in securities.
717*l*. Complaints.
717m. Investigations by Commission.
717n. Process coordination; hearings; rules of procedure.
717*o*. Administrative powers of Commission; rules, regulations, and orders.
717p. Joint boards.
717q. Appointment of officers and employees.
717r. Rehearing and review.
717s. Enforcement of chapter.
717t. General penalties.
717t–1. Civil penalty authority.
717t–2. Natural gas market transparency rules.
717u. Jurisdiction of offenses; enforcement of liabilities and duties.
717v. Separability.
717w. Short title.
717x. Conserved natural gas.
717y. Voluntary conversion of natural gas users to heavy fuel oil.
717z. Emergency conversion of utilities and other facilities.

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

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

(b) Transactions to which provisions of chapter applicable

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

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

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters

exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

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

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

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

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

AMENDMENTS

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

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

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

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

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

STATE LAWS AND REGULATIONS

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

''(1) in closed containers; or

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

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

EMERGENCY NATURAL GAS ACT OF 1977

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

EXECUTIVE ORDER NO. 11969

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

PROCLAMATION NO. 4485

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

PROCLAMATION NO. 4495

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

§ 717a. Definitions

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

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

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

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

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

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

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

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

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

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

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

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

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

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

Case 19-1610, Document 253, 06/09/2020, 2857668, Page49 of 56

tions as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, §4A, as added Pub. L. 109–58, title III, §315, Aug. 8, 2005, 119 Stat. 691.)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

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

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

§ 717e. Ascertainment of cost of property

(a) Cost of property

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

(b) Inventory of property; statements of costs

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

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

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

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

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

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

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

(c) Certificate of public convenience and necessity

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

Case 19-1610, Document 253, 06/09/2020, 2857668, Page50 of 56

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

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

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

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

TRANSFER OF FUNCTIONS

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

§ 717g. Accounts; records; memoranda

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

Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this chapter: *Provided, however*, That nothing in this chapter shall relieve any such natural-gas company from keeping any accounts, memoranda, or records which such natural-gas company may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by such natural-gas companies, and may classify such natural-gas companies and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays or receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

(b) Access to and inspection of accounts and records

The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of natural-gas companies; and it shall be the duty of such natural-gas companies to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books, records, data, or accounts, except insofar as he may be directed by the Commission or by a court.

(c) Books, accounts, etc., of the person controlling gas company subject to examination

The books, accounts, memoranda, and records of any person who controls directly or indirectly a natural-gas company subject to the jurisdiction of the Commission and of any other company controlled by such person, insofar as they relate to transactions with or the business of such natural-gas company, shall be subject to examination on the order of the Commission.

(June 21, 1938, ch. 556, § 8, 52 Stat. 825.)

§ 717h. Rates of depreciation

(a) Depreciation and amortization

The Commission may, after hearing, require natural-gas companies to carry proper and adequate depreciation and amortization accounts in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortization of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas. Each natural-gas company shall conform its depreciation and amortization accounts to the rates so ascertained, determined, and fixed. No natural-gas company subject to the jurisdiction of the Commission shall charge to operating expenses any depreciation or amortization charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation or amortization other than that prescribed therefor by the Commission. No such natural-gas company shall in any case include in any form under its operating or other expenses any depreciation, amortization, or other charge or expenditure included elsewhere as a depreciation or amortization charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any natural-gas company, the percentage rates of depreciation or amortization to be allowed, as to any class of property of such natural-gas company, or the composite depreciation or amortization rate, for the purpose of determining rates or charges.

(b) Rules

The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation or amortization rates, shall notify each State commission having jurisdiction with respect to any natural-gas company involved and shall give reasonable opportunity to each such commission to present its views and shall receive and consider such views and recommendations.

(June 21, 1938, ch. 556, § 9, 52 Stat. 826.)

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

REPEALS

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

§ 717r. Rehearing and review

(a) Application for rehearing; time

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

(b) Review of Commission order

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

(c) Stay of Commission order

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

(d) Judicial review

(1) In general

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

(2) Agency delay

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

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section

717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

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

(5) Expedited review

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

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

REFERENCES IN TEXT

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

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended [28 U.S.C. 346, 347]'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

1958—Subsec. (a). Pub. L. 85–791, § 19(a), inserted sentence providing that until record in a proceeding has been filed in a court of appeals, Commission may modify or set aside any finding or order issued by it.

Subsec. (b). Pub. L. 85–791, § 19(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and, in third sentence, substituted ''petition'' for ''transcript'', and ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals'' wherever appearing.

§ 717s. Enforcement of chapter

(a) Action in district court for injunction

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys by Commission

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in investigations made by it, or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Violation of market manipulation provisions

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 717c–1 of this title (including related rules and regulations) from—

(1) acting as an officer or director of a natural gas company; or

(2) engaging in the business of—

(A) the purchasing or selling of natural gas; or

(B) the purchasing or selling of transmission services subject to the jurisdiction of the Commission.

(June 21, 1938, ch. 556, § 20, 52 Stat. 832; June 25, 1948, ch. 646, § 1, 62 Stat. 875, 895; Pub. L. 109–58, title III, § 318, Aug. 8, 2005, 119 Stat. 693.)

CODIFICATION

The words ''the District Court of the United States for the District of Columbia'' in subsec. (a) following ''district court of the United States'' and in subsec. (b) following ''district courts of the United States'' omitted as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of title 28 which states that ''The District of Columbia constitutes one judicial district''.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

§ 717t. General penalties

(a) Any person who willfully and knowingly does or causes or suffers to be done any act,

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

(4) Within 30 days, submit a stakeholder mailing list to Commission staff.

(5) Within 30 days, file a draft of Resource Report 1, in accordance with §380.12(c), and a summary of the alternatives considered or under consideration.

(6) On a monthly basis, file status reports detailing the applicant's project activities including surveys, stakeholder communications, and agency meetings.

(7) Be prepared to provide a description of the proposed project and to answer questions from the public at the scoping meetings held by OEP staff.

(8) Be prepared to attend site visits and other stakeholder and agency meetings arranged by the Commission staff, as required.

(9) Within 14 days of the end of the scoping comment period, respond to issues raised during scoping.

(10) Within 60 days of the end of the scoping comment period, file draft Resource Reports 1 through 12.

(11) At least 60 days prior to filing an application, file revised draft Resource Reports 1 through 12, if requested by Commission staff.

(12) At least 90 days prior to filing an application, file draft Resource Report 13 (for LNG terminal facilities).

(13) Certify that a Follow-on WSA will be submitted to the U.S. Coast Guard no later than the filing of an application with the Commission (for LNG terminal facilities and modifications thereto, if appropriate). The applicant shall certify that the U.S. Coast Guard has indicated that a Follow-On WSA is not required, if appropriate.

(g) Commission staff and third-party contractor involvement during the pre-filing process will be designed to fit each project and will include some or all of the following:

(1) Assisting the prospective applicant in developing initial information about the proposal and identifying affected parties (including landowners, agencies, and other interested parties).

(2) Issuing an environmental scoping notice and conducting such scoping for the proposal.

(3) Facilitating issue identification and resolution.

(4) Conducting site visits, examining alternatives, meeting with agencies and stakeholders, and participating in the prospective applicant's public information meetings.

(5) Reviewing draft Resource Reports.

(6) Initiating the preparation of a preliminary Environmental Assessment or Draft Environmental Impact Statement, the preparation of which may involve cooperating agency review.

(h) A prospective applicant using the pre-filing procedures of this section shall comply with the procedures in §388.112 of this chapter for the submission of documents containing privileged materials or critical energy infrastructure information.

[Order 665, 70 FR 60440, Oct. 18, 2005, as amended by Order 756, 77 FR 4894, Feb. 1, 2012; Order 769, 77 FR 65475, Oct. 29, 2012]

§ 157.22 Schedule for final decisions on a request for a Federal authorization

For an application under section 3 or 7 of the Natural Gas Act that requires a Federal authorization—*i.e.*, a permit, special use authorization, certification, opinion, or other approval—from a Federal agency or officer, or State agency or officer acting pursuant to delegated Federal authority, a final decision on a request for a Federal authorization is due no later than 90 days after the Commission issues its final environmental document, unless a schedule is otherwise established by Federal law.

[Order 687, 71 FR 62921, Oct. 27, 2006]

Subpart B—Open Seasons for Alaska Natural Gas Transportation Projects

SOURCE: Order 2005, 70 FR 8286, Feb. 18, 2005, unless otherwise noted.

§ 157.30 Purpose.

This subpart establishes the procedures for conducting open seasons for the purpose of making binding commitments for the acquisition of initial or voluntary expansion capacity on Alaska natural gas transportation projects, as defined herein.

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

(c) *Answers.* A person who is ordered to show cause must answer in accordance with Rule 213.

§ 385.210 Method of notice; dates established in notice (Rule 210).

(a) *Method.* When the Secretary gives notice of tariff or rate filings, applications, petitions, notices of tariff or rate examinations, and orders to show cause, the Secretary will give such notice in accordance with Rule 2009.

(b) *Dates for filing interventions and protests.* A notice given under this section will establish the dates for filing interventions and protests. Only those filings made within the time prescribed in the notice will be considered timely.

§ 385.211 Protests other than under Rule 208 (Rule 211).

(a) *General rule.* (1) Any person may file a protest to object to any application, complaint, petition, order to show cause, notice of tariff or rate examination, or tariff or rate filing.

(2) The filing of a protest does not make the protestant a party to the proceeding. The protestant must intervene under Rule 214 to become a party.

(3) Subject to paragraph (a)(4) of this section, the Commission will consider protests in determining further appropriate action. Protests will be placed in the public file associated with the proceeding.

(4) If a proceeding is set for hearing under subpart E of this part, the protest is not part of the record upon which the decision is made.

(b) *Service.* (1) Any protest directed against a person in a proceeding must be served by the protestant on the person against whom the protest is directed.

(2) The Secretary may waive any procedural requirement of this subpart applicable to protests. If the requirement of service under this paragraph is waived, the Secretary will place the protest in the public file and may send a copy thereof to any person against whom the protest is directed.

§ 385.212 Motions (Rule 212).

(a) *General rule.* A motion may be filed:

(1) At any time, unless otherwise provided;

(2) By a participant or a person who has filed a timely motion to intervene which has not been denied;

(3) In any proceeding except an informal rulemaking proceeding.

(b) *Written and oral motions.* Any motion must be filed in writing, except that the presiding officer may permit an oral motion to be made on the record during a hearing or conference.

(c) *Contents.* A motion must contain a clear and concise statement of:

(1) The facts and law which support the motion; and

(2) The specific relief or ruling requested.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 225–A, 47 FR 35956, Aug. 18, 1982; Order 376, 49 FR 21705, May 23, 1984]

§ 385.213 Answers (Rule 213).

(a) *Required or permitted.* (1) Any respondent to a complaint or order to show cause must make an answer, unless the Commission orders otherwise.

(2) An answer may not be made to a protest, an answer, a motion for oral argument, or a request for rehearing, unless otherwise ordered by the decisional authority. A presiding officer may prohibit an answer to a motion for interlocutory appeal. If an answer is not otherwise permitted under this paragraph, no responsive pleading may be made.

(3) An answer may be made to any pleading, if not prohibited under paragraph (a)(2) of this section.

(4) An answer to a notice of tariff or rate examination must be made in accordance with the provisions of such notice.

(b) *Written or oral answers.* Any answer must be in writing, except that the presiding officer may permit an oral answer to a motion made on the record during a hearing conducted under subpart E or during a conference.

(c) *Contents.* (1) An answer must contain a clear and concise statement of:

(i) Any disputed factual allegations; and

(ii) Any law upon which the answer relies.

(2) When an answer is made in response to a complaint, an order to show cause, or an amendment to such pleading, the answerer must, to the extent practicable:

CERTIFICATE OF SERVICE

I certify that on June 9, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Susanna Y. Chu
Susanna Y. Chu
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel.: (202) 502-8464
Fax: (202) 273-0901
E-mail: Susanna.Chu@ferc.gov