

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission

No. 19-1610-ag (L), 19-1618-ag (Con), United States Court of Appeals for the Second Circuit (March 23, 2021)

SUMMARY

We

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	Barrington D. Parker; Debra Ann Livingston; Gerard E. Lynch
JURISDICTION	Federal
DECIDED	March 23, 2021
DOCKET	19-1610-ag (L), 19-1618-ag (Con)
DISPOSITION	dismissed
PROCEDURAL POSTURE	Petition for review from the Federal Energy Regulatory Commission of orders finding waiver of Section 401 certification authority
STANDARD OF REVIEW	De novo review of FERC's interpretation of the Clean Water Act; Chevron deference for interpretation of the Natural Gas Act and its regulations.
PRECEDENTIAL VALUE	Published
PARTIES	New York State Department of Environmental Conservation and Sierra Club v. Federal Energy Regulatory Commission; National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (Intervenors)

TOPICS

administrative law

appellate jurisdiction

statutory interpretation

federalism

preemption

PRACTICE AREAS

Environmental Law

Administrative Law

Energy Law

QUESTIONS PRESENTED

1. Whether Section 401 of the Clean Water Act prohibits a state certifying agency from entering into an agreement with an applicant to modify the receipt date of a certification request, thereby extending the one-year deadline.
2. Whether equitable principles estopped FERC from finding a waiver.
3. Whether National Fuel's motion for a waiver determination was timely.

HOLDINGS

1. The 30-day timeline in Section 717r(a) is permissive, allowing the aggrieved party to either proceed to federal court after the expiration of the 30-day window or wait until FERC's order denying rehearing as prescribed in subsection (b).
2. Section 401 prohibits a certifying agency from entering into an agreement or otherwise coordinating with an applicant to alter the beginning of the review period. The DEC waived its certification authority by failing to act within one year of the actual receipt of the application.
3. FERC could not be estopped from reaching the waiver issue because it could have addressed it on its own or at the behest of a third party.
4. FERC's treatment of the filing as a separate motion for a waiver determination was reasonable and within its discretion.

KEY QUOTATIONS

“we hold that Section 401 prohibits a certifying agency from entering into an agreement or otherwise coordinating with an applicant to alter the beginning of the review period, and that the DEC waived its certification authority by failing to act within one year of the actual receipt of the application.” (22)

“the 30-day timeline in subsection (a) binds only the agency, affording the aggrieved party discretion to either proceed to federal court after the expiration of the 30-day window or wait until FERC’s order denying rehearing as prescribed in subsection (b).” (12-13)

FACTUAL BACKGROUND

National Fuel proposed a 99-mile natural gas pipeline in New York. The Clean Water Act required a water quality certification from the DEC. The DEC received the application on March 2, 2016. The DEC and National Fuel agreed to change the receipt date to April 8, 2016, to extend the one-year deadline. The DEC denied certification on April 7, 2017, but FERC found the denial untimely because it occurred more than one year after the original receipt date.

PROCEDURAL HISTORY

FERC conditionally authorized a natural gas pipeline project. The DEC denied water quality certification, but FERC found the denial untimely under Section 401's one-year deadline. The DEC and Sierra Club petitioned for review.

DISPOSITION

dismissed

CASES CITED

- Islander E. Pipeline Co., LLC v. McCarthy, 525 F.3d 141 (2d Cir. 2008)
- Constitution Pipeline Co. v. N.Y. State Dep't of Env't Conservation, 868 F.3d 87 (2d Cir. 2017), cert. denied, 138 S. Ct. 1697 (2018)
- PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700 (1994)
- Allegheny Defense Project v. FERC, Allegheny Def. Project v. Fed. Energy Regul. Comm'n, 964 F.3d 1 (D.C. Cir. 2020) (en banc)
- N.Y. State Dep't of Env't Conservation v. Fed. Energy Regul. Comm'n, 884 F.3d 450 (2d Cir. 2018) ("New York I")
- Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)
- Franco v. Gunsalus, 972 F.3d 170 (2d Cir. 2020)
- Henderson v. Shinseki, 562 U.S. 428 (2011)
- Williston Basin Interstate Pipeline Co. v. Fed. Energy Regul. Comm'n, 475 F.3d 330 (D.C. Cir. 2006)
- St. Regis Mohawk Tribe v. Brock, 769 F.2d 37 (2d Cir. 1985)
- Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003)
- Brock v. Pierce Cnty., 476 U.S. 253 (1986)
- Gonzalez v. Thaler, 565 U.S. 134 (2012)
- Union Pac. R. Co. v. Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region, 558 U.S. 67 (2009)
- Hoopa Valley Tribe v. Fed. Energy Regul. Comm'n, 913 F.3d 1099 (D.C. Cir. 2019)
- Millennium Pipeline Co. v. Gutierrez, 424 F. Supp. 2d 168 (D.D.C. 2006)
- Village of Morrisville, Vt., 173 FERC ¶ 61,156 (Nov. 19, 2020)
- Tenn. Gas Pipeline Co. v. Fed. Energy Regul. Comm'n, 871 F.2d 1099 (D.C. Cir. 1989)
- Util. Solid Waste Activities Grp. v. Env't Prot. Agency, 901 F.3d 414 (D.C. Cir. 2018)
- Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978)
- Forest Watch v. U.S. Forest Serv., 410 F.3d 115 (2d Cir. 2005)
- Millennium Pipeline Co. v. Fed. Energy Regul. Comm'n, 860 F.3d 700 (D.C. Cir. 2017)
- Nutritional Health All. v. Food & Drug Admin., 318 F.3d 92 (2d Cir. 2003)
- Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)
- Florez v. Holder, 779 F.3d 207 (2d Cir. 2015)
- Heimeshoff v. Hartford Life & Accident Ins. Co., 571 U.S. 99 (2013)
- United States v. Mezzanatto, 513 U.S. 196 (1995)
- Shutte v. Thompson, 82 U.S. (15 Wall.) 151 (1872)

OPINION

PER CURIAM.

19-1610-ag (L) New York State Dep’t of Env’t Conservation et al. v. Fed. Energy Regul. Comm’n
1 In the 2 United States Court of Appeals 3 For the Second Circuit 4 5 6 August Term 2020 7 8
Nos. 19-1610-ag (L), 19-1618-ag (Con) 9 10 NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL 11 CONSERVATION, and SIERRA CLUB, 12 13 Petitioners, 14 15 v. 16 17
FEDERAL ENERGY REGULATORY COMMISSION, 18 19 Respondent, 20 21 NATIONAL
FUEL GAS SUPPLY CORPORATION 22 and EMPIRE PIPELINE, INC., 23 24 Intervenors.

25 26 27 Petition for Review from the Federal Regulatory Energy Commission. 28 Nos. CP 15-
115-002, CP15-115-003, CP15-115-004 29 (Argued October 29, 2020; Decided March 23, 2021)
30 31 B e f o r e: 32 33 LIVINGSTON, Chief Judge, PARKER AND LYNCH, Circuit Judges. 1 1
Petitioners New York State Department of Environmental Conservation 2 and Sierra Club request
that we vacate two orders of the Federal Energy 3 Regulation Commission.

These orders determined that the DEC had waived its 4 authority under Section 401 of the Clean
Water Act to issue or deny a water 5 quality certification for a natural gas pipeline project
sponsored by Intervenors 6 National Fuel Gas Supply Corporation and Empire Pipeline, Inc.
Petitioners 7 challenge these orders on the ground that FERC erroneously concluded that 8 Section
401’s one-year deadline for state action may not be modified by an 9 agreement between the
parties.

We agree with FERC’s interpretation of the 10 statute and conclude that the DEC waived its
certification authority by failing to 11 act within the statutory time limit. 12 13 Accordingly, we
DENY the petition for review. 14 15 16 17 BRIAN LUSIGNAN, Assistant Attorney General 18
(Letitia James, Attorney General 19 Barbara D. Underwood, Solicitor General, 20 Andrea Oser,
Deputy Solicitor General, 21 Frederick A. Brodie, Assistant Solicitor General, 22 Lisa M.
Burianek, Deputy Bureau Chief, on the brief), 23 for Petitioner New York State Department of 24
Environmental Conservation 25 26 MONEEN NASMITH (Meagan Burton, on the brief), 27
Earthjustice, New York, NY, for Petitioner Sierra Club 28 29 SUSANNA Y. CHU, Attorney
(David L. Morenoff, 30 Acting General Counsel, Robert H. Solomon, 31 Solicitor, on the brief),
Federal Energy Regulatory 32 Commission, Washington, DC, for Respondent 33 34 EAMON P.
JOYCE, Sidley Auston LLP, New York, NY 35 (Tobias S. Loss-Eaton, James R. Wedeking, Daniel
J. Hay, 36 Sidley Auston LLP, Washington, DC, on the brief), for Intervenors 37 2 1
BARRINGTON D. PARKER, Circuit Judge: 2 The New York State Department of Environmental
Conservation (“DEC”) 3 and the Sierra Club challenge two orders of the Federal Energy
Regulatory 4 Commission (“FERC”).

These orders determined that the DEC waived its water 5 quality certification authority under
Section 401 of the Clean Water Act by failing 6 to act within one year of receiving a certification
request. See 33 U.S.C. § 1341. 7 The request was from National Fuel Gas Supply Corporation and

Empire 8 Pipeline, Inc. (“National Fuel”) who planned to construct a natural gas pipeline 9 through upstate New York.

10 FERC conditionally authorized the pipeline project. This authorization 11 required National Fuel, as a condition for final approval, to demonstrate that it 12 had received necessary state and federal permits (or waivers) including 13 certification by the DEC under the Clean Water Act.

The DEC denied 14 certification, but FERC concluded that the denial came too late because, in 15 violation of Section 401, it occurred more than one year after the DEC received 16 National Fuel’s application. FERC reached this conclusion despite an agreement 17 between National Fuel and the DEC to alter the receipt date of the application in 18 order to extend the one-year deadline by 36 days.

This finding of waiver meant 3 1 that FERC effectively approved the pipeline without the water quality 2 certification National Fuel was otherwise required to obtain from New York 3 State. 4 This appeal followed. The DEC and the Sierra Club contend that the DEC’s 5 denial of certification was timely and that FERC should have honored the 6 parties’ agreement to alter the receipt date of the application.

We disagree. We 7 conclude that Section 401’s one-year time limit may not be extended by the type 8 of agreement between a certifying agency and an applicant used here and, 9 therefore, FERC properly concluded that the DEC waived its certification 10 authority.

Accordingly, we deny the petition for review. 11 BACKGROUND 12 National Fuel proposes to construct a 99-mile long natural gas pipeline 13 from western Pennsylvania to upstate New York known as the Northern Access 14 2016 Project.

Before proceeding with this type of project, the Natural Gas Act 15 requires a “certificate of public convenience and necessity” from FERC in 16 addition to a number of other federal and state regulatory approvals. 15 U.S.C. § 17 717f(e); id. § 717n(a)(1), (2).

In this case, because construction and operation of the 18 pipeline could result in discharges into New York waterways, National Fuel was 4 1 required to obtain a water quality certification under Section 401 of the Clean 2 Water Act that the proposed project would comply with the Act, with state water 3 quality standards, and with various other requirements of state law.

See 33 U.S.C. 4 § 1341(a)(1), (d); *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 143–44 (2d 5 Cir. 2008); see also *Constitution Pipeline Co. v. N.Y. State Dep’t of Env’t Conservation*, 6 868 F.3d 87, 100–01 (2d Cir. 2017) (explaining these requirements), cert. denied, 7 138 S. Ct. 1697 (2018). 8 Accordingly, in March 2015, National Fuel applied to FERC for a certificate 9 and, the following year, applied to the DEC for water quality certification.

Under 10 Section 401 of the Clean Water Act, states must “act on a request for certification, 11 within a reasonable period of time (which shall not exceed one year) after receipt 12 of such request,” or their certification authority is waived. 33 U.S.C. § 1341(a)(1). 13 If a state denies certification within the statutory time period, then “[n]o license 14 or permit shall be granted.” *Id.* If a state issues a certification contingent on the 15 applicant’s satisfaction of various conditions, the appropriate federal agency 16 must incorporate those conditions into the final license.

See 33 U.S.C. § 1341(d); 17 PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology, 511 U.S. 700, 711–12 (1994) 18 (quoting 33 U.S.C. § 1341(d)). 5 1 After the DEC received National Fuel’s initial application on March 2, 2 2016, it requested additional information in August and October 2016 and, in 3 response, National Fuel agreed to supplement its application.

At some point after 4 National Fuel was asked to supplement the second time, it became clear that the 5 DEC would not be able to make a final determination within one year of the date 6 of the initial application because it had not completed the notice-and-comment 7 process required by the Clean Water Act and by state regulations. 1 See 33 U.S.C. § 8 1341(a)(1) (requiring a state agency to “establish procedures for public notice” of 9 all applications and for public hearings); 6 N.Y.C.R.R. § 621.7 (setting out 10 procedures and requirements for public notice and comment).

11 In an attempt to finesse the one-year deadline, the DEC and National Fuel 12 entered into an agreement dated January 20, 2017, “revising the date... on 13 which the Application was deemed received by [the DEC] to April 8, 2016.” J. 14 App’x 96.

The agreement had the effect of extending the deadline for the DEC to 15 issue or deny water quality certification by 36 days. 1 The DEC published a Notice of Complete Application on January 25, 2017, which commenced a public comment period that ran through February 24, 2017. It received approximately 5,700 comments, either in writing or during three public hearings it convened during this period.

6 1 On February 3, 2017, FERC conditionally approved the project provided 2 that National Fuel fulfilled various conditions, including filing “documentation 3 that it has received all applicable authorizations required under federal law (or 4 evidence of waiver thereof).” Order Granting Abandonment and Issuing 5 Certificates, Nat’l Fuel Gas Supply Corp., 158 FERC ¶ 61,145 (2017) (“Certificate 6 Order”).

On March 3, 2017, National Fuel sought rehearing of the conditional 7 nature of the certificate, arguing, among other things, that the DEC waived its 8 certification authority by failing to act within the 90-day deadline established by 9 FERC for certain federal authorizations under the Natural Gas Act. 2 At that time, 10 National Fuel did not contend that the DEC failed to act within the one-year 11 review period under Section 401 of the Clean Water Act or challenge the validity 12 of its written agreement with the DEC altering that time frame.

3 Pursuant to the Natural Gas Act, FERC adopted a regulation requiring “all Federal
2 authorizations” required for a natural gas infrastructure to be filed within 90 days of the issuance
of FERC’s final environmental review of that project. 15 U.S.C. § 717n(c); 18 C.F.R. § 157.22.

In this case, FERC issued the environmental assessment for the project in July 2016. Certificate
Order ¶ 76. 3 FERC did not immediately address the request, but instead issued a tolling order
extending its deadline to act on the request for rehearing. See *infra* p. 9 (discussing FERC’s
practice of issuing tolling orders). 7 1 The DEC denied National Fuel’s application on April 7,
2017, and National 2 Fuel petitioned this Court for review.

4 While that petition was pending, National 3 Fuel filed with FERC a “Motion for Expedited
Action” on its March 3, 2017 4 rehearing request. Then, on December 5, 2017, National Fuel filed
a “Renewed 5 Motion for Expedited Action,” arguing, for the first time, that the Department 6
waived its certification authority by not acting within Section 401’s one-year time 7 limit.

On August 6, 2018, FERC denied National Fuel’s request for rehearing, 8 concluding that the DEC
was not required to act by the 90-day regulatory 9 deadline set by FERC because that deadline did
not apply where, as in Section 10 401, “a schedule is otherwise established by Federal law.” Order
on Reh’g and 11 Mot. for Waiver Determination Under Section 401 of the Clean Water Act, 164
12 FERC ¶ 61,084, ¶¶ 37–38 (2018) (“Waiver Order”).

5 Nonetheless, FERC 4 This Court remanded the case with instructions “for the [the DEC] to more
clearly articulate its basis for the denial and how that basis is connected to information in the
existing administrative record.” See *Nat’l Fuel Gas Supply Corp. v. N.Y. State Dep’t of Env’t*
Conservation, 761 F. Appx. 68, 72 (2d Cir. Feb. 5, 2019).

The DEC issued a revised denial on August 8, 2019. National Fuel subsequently sought judicial
review of this revised denial. This Court granted the motion to hold that review in abeyance
pending resolution of this proceeding. See *Nat’l Fuel Gas Supply Corp. v. N.Y. State Dep’t of*
Env’t Conservation, No. 19-2888 (2d Cir. Sept. 24, 2019), ECF No. 27. 5 Unless otherwise
indicated, in quoting cases, all internal quotation marks, alterations, emphases, footnotes, and
citations are omitted.

8 1 concluded that the DEC waived its authority under Section 401 by not acting in 2 one year
(i.e., by March 2, 2017), despite the parties’ agreement to extend that 3 deadline to April 7. In
doing so, FERC acknowledged that National Fuel did not 4 raise the waiver argument under
Section 401 until its December 2017 filing, nine 5 months after the deadline had passed for
submitting a rehearing request under 6 the Natural Gas Act.

But FERC treated the filing as a separate motion requesting 7 a waiver determination, which,
under its regulations, can be filed “at any time.” 8 J. App’x 237 n.10. FERC then concluded that
Section 401 established a deadline 9 that could not be extended by private agreement. 10 The DEC

moved for rehearing, arguing that its agreement with National 11 Fuel was not barred by Section 401 and that FERC erred in treating National 12 Fuel's December 2017 filing as a motion for a waiver determination.

Although 13 FERC was required by Section 19(a) of the Natural Gas Act to act on rehearing 14 requests within 30 days, it issued one of its then-common tolling orders to extend 15 that deadline indefinitely. See *Allegheny Def.e Project v. Fed. Energy Regul. Comm'n*, 16 964 F.3d 1, 13 (D.C. Cir. 2020) (en banc) (disapproving the use of tolling orders 17 under 15 U.S.C. § 717r(a)).

6 On April 2, 2019, nearly eight months after the 6 See discussion *infra* p. 12. 9 1 rehearing requests were filed, FERC eventually denied those requests and 2 reaffirmed its finding of waiver. On May 28, 2019, the DEC filed in this Court its 3 petition for review of FERC's August 6, 2018 and April 2, 2019 orders. National 4 Fuel intervened in support of FERC, and the proceeding was consolidated with a 5 proceeding commenced by Sierra Club seeking review of the same FERC orders.

6 We review *de novo* FERC's interpretation of the Clean Water Act, a statute 7 it does not administer. *N.Y. State Dept' of Env't Conservation v. Fed. Energy Regul. 8 Comm'n*, 884 F.3d 450, 455 (2d Cir. 2018) ("New York I").

The DEC's interpretation 9 of the Clean Water Act also receives no deference. *Id.* FERC's interpretation of 10 the Natural Gas Act and its implementing regulations are entitled to Chevron 11 deference because the Act is committed to FERC's administration. *Chevron, 12 U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see also *New York v. 13 Fed.*

Energy Regul. Comm'n, 783 F.3d 946, 953 (2d Cir. 2015). 14 DISCUSSION 15 I. 16 Before reaching the merits of the petitions, we first consider our 17 jurisdiction because we have an independent obligation to ensure it even where, 10 1 as here, the parties do not contest it. See *Franco v. Gunsalus*, 972 F.3d 170, 174 (2d 2 Cir. 2020); see also *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011).

3 Under the Natural Gas Act, a party aggrieved by a FERC order must first 4 seek rehearing from FERC within 30 days. 15 U.S.C. § 717r(a). The aggrieved 5 party then may seek judicial review in the appropriate court of appeals within 60 6 days of FERC's order resolving the rehearing request. *Id.* § 717r(b). Both 7 requirements have been met here.

The DEC was aggrieved by FERC's August 6, 8 2018 order finding a waiver, which effectively permitted National Fuel to 9 proceed with the project despite New York's denial of a water quality 10 certification, and it sought rehearing within 30 days of the waiver order.

The 11 DEC also timely filed a petition for review in this Court within 60 days of FERC's 12 denial of rehearing. 13 However, a complicating factor in this case is that FERC, somewhat 14

ironically, granted itself an indefinite extension of time to act on Petitioners' rehearing requests by issuing a tolling order. FERC eventually denied the rehearing requests more than seven months after it received them.

This is relevant because the Natural Gas Act provides that a rehearing request "may be deemed to have been denied" if FERC fails to act within 30 days after it receives such a request, allowing the aggrieved party to proceed to federal court. 15 U.S.C. § 717r(a). Interpreting the same provision, the D.C. Circuit, sitting en banc, recently held that FERC may not use a tolling order of the kind used in this case to forestall judicial review.

Allegheny Def. Project, 964 F.3d at 13. There, the court held that the agency "acts upon the application" only by, as enumerated in the statute, "(i) grant[ing] rehearing, (ii) deny[ing] rehearing, (iii) abrogat[ing] its order without further hearing, or (iv) modify[ing] its order without further hearing," and that issuing a tolling order does not constitute "the kinds of actions that prevent a deemed denial." *Id.* (quoting 15 U.S.C. § 717r(a)).

Therefore, unless the agency takes one of the four steps specified in the statute, the aggrieved party may seek judicial review once 30 days has elapsed. *Id.* Here, the DEC and Sierra Club, unlike the petitioners in *Allegheny*, decided to wait until FERC actually denied the rehearing requests, and did not attempt to seek judicial review within 60 days of the expiration of FERC's 30-day window to act upon their rehearing requests.

Thus, the question for us is whether that decision was fatal to the DEC's and Sierra Club's ability to seek judicial review now. We think that it was not. The text of Section 717r supports our conclusion. Subsection (a) provides that an application "may be deemed to have been denied" unless FERC acts upon it within 30 days. 15 U.S.C. § 717r(a) (emphasis added).

The use of "may," instead of "shall" or "must," indicates to us that the clause is permissive rather than mandatory. And, importantly, subsection (a) does not direct the aggrieved party to act at the end of the 30-day time limit for agency action. See *id.* Instead, the following subsection, which requires any petition for review to be filed within 60 days of FERC's order resolving the rehearing request, specifies the deadline by which the aggrieved party must act.

15 U.S.C. § 717r(b); *Williston Basin Interstate Pipeline Co. v. Fed. Energy Regul. Comm'n*, 475 F.3d 330, 334 (D.C. Cir. 2006) ("The 60-day limitations provision is jurisdictional."). Thus, both subsections read together indicate to us that the 30-day timeline in subsection (a) binds only the agency, affording the aggrieved party discretion to either proceed to federal court after the expiration of the 30-day window or wait until FERC's order denying rehearing as prescribed in subsection (b).

Accordingly, we conclude that the DEC and Sierra Club were not required to seek judicial review within 60 days of the expiration of the 30-day time limit for agency action and that we

have appellate jurisdiction to review their 2 petitions. 3 II. 4 Having confirmed our jurisdiction, we proceed to the merits. Petitioners 5 urge us to vacate FERC's waiver determination, contending that the agency 6 erroneously concluded that Section 401's one-year review period cannot be 7 extended by an agreement between the parties to change the receipt date.

They 8 also argue that FERC should have honored the parties' agreement, and that 9 National Fuel should have been estopped from making, and FERC from 10 reaching, the waiver argument FERC accepted. We address each argument in 11 turn. 12 A. 13 We have previously held that "a statutory time period is not mandatory 14 unless it both expressly requires an agency or public official to act within a 15 particular time period and specifies a consequence for failure to comply with the 16 provision." *St. Regis Mohawk Tribe v. Brock*, 769 F.2d 37, 41 (2d Cir.

1985); see also 14 1 *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158–59 (2003). 7 Section 401 meets both 2 conditions: an agency has up to one year to act on a request for water quality 3 certification or its certification authority will be waived. See 33 U.S.C. § 4 1341(a)(1).

Thus, Section 401's one-year deadline is mandatory in a sense that it 5 does not merely "spur" the agency to action, but it bars untimely action by 6 depriving the agency of its authority after the prescribed time limit. *Barnhart*, 537 7 U.S. at 158. 8 That conclusion, however, does not get us far.

The parties do not dispute 9 that Section 401's mandatory deadline would invalidate an untimely agency 10 action. Rather, their central dispute is whether the DEC's denial of National 7 The dispute between the DEC and National Fuel about whether Section 401's one-year deadline can be waived or modified stems partly from their attempt to characterize it as either a "jurisdictional" or "claim-processing rule." Although the Supreme Court has previously used the former term to describe a statutorily prescribed time limit for agency action, see *Brock v. Pierce Cnty.*, 476 U.S. 253, 262– 63 (1986), the Court has "endeavored in recent years to 'bring some discipline' to the use of the term 'jurisdictional,'" *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). "[E]ven if important and mandatory," the Court said, a rule "should not be given the jurisdictional brand" unless it "governs a court's adjudicatory capacity." *Henderson*, 562 U.S. at 435 (citing *Union Pac.*

R. Co. v. Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region, 558 U.S. 67, 81 (2009)). Heeding the Supreme Court's advice, we refrain from using the term to describe Section 401, which delineates a certifying agency's authority to issue or deny a water quality certification and not a court's adjudicatory authority. 15 1 Fuel's certification request should be regarded as untimely because the 2 agreement to change the receipt date must be deemed void.

In order to 3 determine whether Congress intended to permit such an arrangement, we look 4 to the text and legislative background of Section 401. See *Brock v. Pierce Cnty.*, 476 5 U.S. 253, 258

(1986) (examining the statutory language and legislative history to determine the scope of agency authority); *St. Regis Mohawk Tribe*, 769 F.2d at 42–46 (looking at the legislative history to determine whether Congress meant to bar delayed agency action).

We have already had an occasion to examine the text of Section 401 in a recent case involving some of the same parties here. *New York I*, 884 F.3d 450. That case concerned whether Section 401 permits the DEC flexibility to decide the beginning of the one-year review period. *Id.* at 455. There, the DEC argued that its review process under Section 401 could begin only when it deemed an application “complete.” *Id.* Much as it had done in this case, the DEC had from time to time asked an applicant to supplement an original application, contending that it needed additional information to continue its review.

Id. at 453. We concluded that Section 401 does not “specify that th[e] time limit applies only for ‘complete’ applications,” and that it cannot be interpreted to require a “complete” application because that approach would allow a state agency not only to dictate when the review process can begin but also to delay it indefinitely. *Id.* at 455–56.

We held that the “plain language of Section 401 outlines a bright-line rule regarding the beginning of the 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. We apply that approach. Both here and in *New York I*, the DEC wished to change the receipt date to give itself more time to review an application.

The only difference is that, rather than unilaterally altering the date of receipt as the date it considered the application “complete” as it did in *New York I*, the DEC in this case asked the applicant to stipulate to a different receipt date.

However sincere the DEC’s desire might have been to review the application as thoroughly and efficiently as possible by giving itself 36 more days, and however modest and reasonable that extension may have been, allowing the state to dictate the beginning of the review by agreement would “blur th[e] bright-line rule into a subjective standard.” *Id.* at 456.

The DEC argues that Section 401 is analogous to the Coastal Zone Management Act (“CZMA”) and urges us to consider the approach taken in *Millennium Pipeline Co. v. Gutierrez*, 424 F. Supp. 2d 168 (D.D.C. 2006). But a reference to that The legislative background of Section 401 supports this conclusion, because it shows with a good deal of clarity that limiting a certifying state’s discretion and eliminating a potential source of regulatory abuse was what the one-year limit in Section 401 was intended to achieve.

While the original version of the House Bill did not set any time limit for state action, see H.R. Rep. No. 91- 127, at 42–43, it was later amended to require affirmative state action “within a 7

reasonable period of time” in order to prevent delay due to a certifying state’s 8 passive refusal or failure to act. 91 Cong. Rec. H2689 (daily ed. April 16, 1969); 91 9 Cong.

Rec. H2608 (daily ed. April 15, 1969). Later, that provision was further 10 refined, and the one-year time limit was included in the final version of the bill 11 after the Senate bill was combined with the House bill. See Pub. L. No. 91-224, § 12 21(b)(1), 84 Stat. 91, 108 (1980); S. Rep. No. 91-351, at 113 (1969). When the Clean 13 Water Act was reorganized and amended in 1972, the one-year time limit 14 remained intact for the same reason.

See H.R. Rep. No. 92-911, at 122 (1972) case further supports the approach taken here. There, the parties also mutually agreed to extend the six-month review period for state action after the applicant supplemented its application with additional information. Id. at 173.

However, unlike Section 401, “commencement” of review under CZMA occurs only when the application is complete with “all necessary information and data.” Id. at 175 (quoting 16 U.S.C. § 1456(c)(3)); see also 15 C.F.R. § 930.60(a)-(b).

We also note that the legislative history of Section 401, as discussed below, calls for us to interpret Section 401 differently. 18 1 (explaining that the one-year requirement was to ensure that “sheer inactivity by 2 the State... will not frustrate the Federal application”). 3 The DEC argues that the time limit was intended to protect an applicant’s 4 right to speedy resolution and, thus, an applicant should be able to waive or 5 modify this right by agreeing to a different receipt date.

But the legislative 6 history shows that Congress was not primarily concerned with protecting the 7 rights of individual applicants. Rather, it shows that Section 401’s time limit was 8 meant to protect the regulatory structure, particularly in situations involving 9 multiple states: in other words, to “guard[] against” one state “sit[ting] on its 10 hands and do[ing] nothing” at the expense of other states that are also involved 11 in a multi-state project.

91 Cong. Rec. H2690 (daily ed. April 16, 1969); H.R. Rep. 12 No. 92-911, at 122. Thus, in specifying a deadline for state action, we believe 13 Congress intended to limit one state’s ability to delay or otherwise upset multi- 14 state licensing proceedings.

In fact, Congress acknowledged during the debate 15 leading up to the amendment adding the one-year limit that “there [we]re not 16 any real safeguards in the bill to protect an applicant against arbitrary action by a 17 State agency,” but assumed that an applicant’s interests would be sufficiently 18 protected by “normal appeals procedures to the courts.” 91 Cong.

Rec. H2691 19 1 (daily ed. April 16, 1969); see also H.R. Rep. No. 92-911, at 122. Thus, consistent 2 with our approach in New York I, the legislative background of Section 401 3 confirms that Congress could not have intended to permit the arrangement 4 advocated by the

DEC and Sierra Club, which introduces the uncertainty the 5 one-year limitation period was intended to eliminate.

9 6 Additional case law supports our conclusion that Section 401 was intended 7 to curb conduct by certifying states that upsets the regulatory balance set by 8 Congress. *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 9 1099 (D.C. Cir. 2019), involved coordinated activity under which the state 10 certifying agencies and applicants agreed to repeatedly withdraw and resubmit 11 certification requests for over a decade in order to avoid Section 401's one-year 12 time limitation.

The D.C. Circuit held that the states' "deliberate and contractual 13 idleness" defied the clear statutory requirement and "serve[d] to circumvent a 9 The DEC cites several cases for the proposition that statutory or constitutional provisions which confer privileges and rights to criminal defendants or civil litigants are generally subject to waiver. See *Heimeshoff v. Hartford Life & Accident Ins.*

Co., 571 U.S. 99, 107 (2013) (statute of limitations); *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (citing cases); *Shutte v. Thompson*, 82 U.S. (15 Wall.) 151, 159 (1872) (depositions). As we discussed above, however, Congress's primary reason for inserting a deadline in Section 401 was to prevent state inaction. Any resulting benefits to the applicants are only incidental.

Thus, Section 401's one- year time limit is not the applicant's right to waive or modify. 20 1 congressionally granted authority over licensing, conditioning, and developing 2 of a hydropower project." *Id.* at 1103–04. This coordinated withdrawal-and- 3 resubmission approach, the court held, could not be used to extend the "absolute 4 maximum" period of time specified in the statute, because it "could be used to 5 indefinitely delay federal licensing proceedings and undermine FERC's 6 jurisdiction to regulate such matters." *Id.* at 1104.

7 *Village of Morrisville, Vt.*, 173 FERC ¶ 61,156, ¶ 22 (Nov. 19, 2020), involved 8 a different type of effort to avoid the statutory limitation. There, without 9 coordinating with the state, the applicant repeatedly withdrew and resubmitted 10 an application in order to avoid an unfavorable decision. *Id.* ¶¶ 3–7. FERC 11 observed that even what it termed a "functional agreement" between the parties 12 to withdraw and resubmit may be sufficient to find a waiver, but that the parties 13 had not crossed the line.

Id. ¶ 21. FERC found no coordinated agreement because 14 it saw no indication that the state "requested or directed" the applicant to 15 withdraw and resubmit "with the motivation to restart the one-year clock." *Id.* 16 ¶¶ 21–22. Rather, according to FERC, the applicant "acted unilaterally and in its 17 own interest" when it withdrew and resubmitted its application and, 21 1 consequently, the one-year clock restarted with each resubmission.

10 Id. ¶ 21; see 2 also id. ¶¶ 15–19 (distinguishing the cases where FERC found a waiver based on 3 an express or functional agreement or coordination between the parties to give a 4 certifying state more time from the cases where an applicant acted unilaterally to 5 restart the one-year clock). 6 While we see no indication that the DEC engaged in the kind of 7 “deliberate and contractual idleness” found in Hoopa Valley Tribe, 913 F.3d at 8 1104, we conclude that Section 401’s bright-line rule also precludes the line- 9 blurring arrangement under review in this case.

We are sympathetic to 10 Petitioners’ argument that states should be afforded flexibility given the 11 complexity of the projects covered by Section 401 and the paramount interest of 12 every state in protecting its water quality.

However, we are bound by what we 13 believe to be Congress’ intention expressed in the text of Section 401 and 10 Morrisville purported to provide further guidance on the issue Hoopa Valley Tribe left unresolved. There, the D.C. Circuit declined to “determine how different a request must be to constitute a ‘new request’ such that it restarts the one-year clock,” because the yearly resubmissions there were always the same one-page letter.

913 F.3d at 1104. FERC concluded in Morrisville that the pertinent inquiry for waiver analysis is not whether the resubmitted application is materially different from the original application, but whether the state “deliberately circumvent[ed] the one-year deadline or agree[d] with the applicant to do so.” 173 FERC ¶ 61,156, ¶ 24. 22 1 reinforced in its legislative history to reduce flexibility in favor of protecting the 2 overall federal licensing regime.

11 Accordingly, we hold that Section 401 3 prohibits a certifying agency from entering into an agreement or otherwise 4 coordinating with an applicant to alter the beginning of the review period, and 5 that the DEC waived its certification authority by failing to act within one year of 6 the actual receipt of the application. 7 B. 8 Having reached this conclusion, we turn to Petitioners’ claim that 9 equitable principles should have prevented FERC from reaching the waiver 10 question.

The DEC argues that National Fuel waived in the agreement its right to 11 challenge the agreed-upon receipt date, that it is estopped from doing so, and 12 that FERC should have honored that agreement. Sierra Club similarly argues that 11 This conclusion does not mean that the states are left without options if they find that a particular application requires supplementation.

As we stated in New York I, states can deny an application without prejudice within the one-year deadline, which will presumably prompt the applicant to resubmit the application with additional material. See New York I, 884 F.3d at 456.

We have also noted that states are not “preclude[d]... from assisting applicants with revising their submissions.” Id.; see also Morrisville, 173 FERC ¶ 61,156, ¶ 3 & n.5 (noting that Vermont Agency of Natural Resources (“ANR”) had issued “preliminary terms and conditions for the water

quality certification” prior to Morrisville’s submission and had stated in a letter of receipt to Morrisville why its application was “technically” or “administratively” incomplete).

23 1 the parties to the agreement at issue were both sophisticated and well- 2 represented, and that upholding FERC’s waiver determination, despite such an 3 agreement, would result in substantial injustice. 4 We are not without sympathy for these arguments.

The DEC was, after all, 5 flimflammed by National Fuel which made a commitment, later thought better of 6 it, and walked away. But in the end, Petitioners’ argument fails for the simple 7 reason that FERC could not have been estopped from reaching the waiver issue 8 because it could have addressed it on its own or at the behest of a third-party.

As 9 was the case in Hoopa Valley Tribe, a third-party, which was not a party to the 10 agreement to change the receipt date, could have petitioned FERC for a waiver 11 determination. 913 F.3d at 1102; see also 18 C.F.R. § 385.211. Further, regardless of 12 when or whether a request from a third-party is submitted, FERC has broad 13 discretion under the Natural Gas Act to sua sponte “reconsider and correct its 14 order until the time for judicial review has expired.” *Tenn. Gas Pipeline Co. v. Fed.*

15 *Energy Regul. Comm’n*, 871 F.2d 1099, 1108 (D.C. Cir. 1989); see also 15 U.S.A. § 16 717r(a) (“Until the record in a proceeding shall have been filed in a court of 17 appeals..., the Commission may at any time, upon reasonable notice and in 18 such manner as it shall deem proper, modify or set aside, in whole or in part, any 24 1 finding or order made or issued by it....”).

Even after the appeal is filed, courts 2 have granted FERC’s request for a voluntary remand to reconsider a part of its 3 order, even where there are no intervening events and without requiring FERC 4 to admit error. See, e.g., *Util. Solid Waste Activities Grp. v. Env’t Prot. Agency*, 901 5 F.3d 414, 436 (D.C. Cir. 2018), judgment entered, No. 15-1219, 2018 WL 4158384 6 (D.C.

Cir. Aug. 21, 2018). 7 Thus, because FERC could have reached the waiver question irrespective 8 of National Fuel’s ability to raise it, the equitable considerations that Petitioners 9 urge us to consider do not change the outcome. 10 III. 11 Finally, the DEC argues that National Fuel’s December 5, 2017 request for 12 expedited action was untimely because it was not filed within the 30-day 13 window to file a rehearing request under Section 19 of the Natural Gas Act, and 14 that FERC’s disregard of this deadline was arbitrary and capricious.

We disagree. 15 While the filing may not have been properly labeled, we conclude that FERC’s 16 treatment of the filing as a separate motion for a waiver determination was 17 reasonable given FERC’s broad discretion in fashioning its own procedures. See 18 *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 25 1 (1978); see also *Forest Watch v. U.S. Forest Serv.*, 410 F.3d 115, 117–18 (2d Cir.

2005) 2 (federal agency’s “interpretation of its own rules (including which rule applies 3 when) is entitled to deference”). 4 The Natural Gas Act requires that a rehearing request be made within 30 5 days of the issuance of a FERC order, but this requirement applies only to parties 6 “aggrieved by” a FERC order. 15 U.S.C. § 717r(a).

Thus, § 717r(a) is not 7 necessarily an appropriate vehicle for seeking a waiver determination. *Id.*; 8 *Millennium Pipeline Co.*, 860 F.3d at 700–01 (explaining that a gas company cannot 9 demonstrate injury based on state inaction, because the delay triggers Section 10 401’s waiver provision which allows the company to “present evidence of waiver 11 directly to FERC to obtain the agency’s go-head to begin construction”).

12 Moreover, because a request for waiver determination cannot be made until a 13 certifying state concludes its review, which can take up to a year, see 33 U.S.C. § 14 1341(a)(1), it cannot always be filed within 30 days of any relevant FERC order. 15 Accordingly, FERC concluded that a request for waiver determination may more 16 appropriately be filed pursuant to the agency’s general rule for filing a motion, 17 which provides that it may be filed “at any time.” 18 C.F.R. § 385.212(a)(1) 26 1 (simplified); see also 164 FERC ¶ 61,084, ¶ 6 n.10 (2018); 167 FERC ¶ 61,007, ¶ 27 2 & n.69 (2019).

3 Given the Natural Gas Act’s silence on the matter, we find FERC’s 4 interpretation of the statute and its own regulation, though certainly not 5 pellucid, to be at least “reasonable” and to represents the agency’s legitimate 6 policy choice which we have a duty to respect. *Chevron*, 467 U.S. at 843–44. 7 Although the DEC contends that accepting FERC’s position that waiver motions 8 can be brought “at any time” means that, effectively, no time limit exists on when 9 an applicant may present such arguments and forces the states to chase a moving 10 target, we are obliged to defer to policy choices such as these.

See *Nutritional 11 Health All. v. Food & Drug Admin.*, 318 F.3d 92, 97 (2d Cir. 2003) (“[T]he 12 responsibilities for assessing the wisdom of such policy choices and resolving the 13 struggle between competing views of the public interest are not judicial ones... 14.” (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 15 132 (2000))); see also *Florez v. Holder*, 779 F.3d 207, 212 (2d Cir.

2015) (“[W]e are not 16 looking for the best interpretation, or the majority interpretation—only a 17 reasonable one.”). Our task here is limited to determining “whether the agency’s 27 1 answer is based on a permissible construction of the statute,” *Chevron*, 467 U.S. at 2 843, and we conclude that it is. 12 3 For these reasons, we hold that FERC reasonably concluded that the 4 Natural Gas Act’s rehearing provision did not bar National Fuel from seeking a 5 waiver determination outside of the 30-day window to file a rehearing request, 6 and that FERC acted within its discretion in treating National Fuel’s December 7 2017 filing as a timely motion for a waiver determination.

8 CONCLUSION 9 For the foregoing reasons, we DENY the petition for review. 12 Beyond the DEC's argument that National Fuel's December 2017 filing was untimely under the National Gas Act, Petitioners do not otherwise claim that FERC's decision to treat the filing as a separate motion for waiver determination prejudiced them. Indeed, both Petitioners had an opportunity to respond to National Fuel's filing and brief the issue before FERC.

See Waiver Order ¶ 8. 28