

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Georgia Strait Crossing Pipeline LP

Docket No. CP03-350-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued April 20, 2004)

1. On September 8, 2003, Georgia Strait Pipeline Company LP (GSX) filed a petition, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,¹ requesting the Commission to declare that because the Washington Department of Ecology (Ecology) has exceeded the statutory time limits for acting, it has waived the certification requirements of both section 401 of the Clean Water Act (CWA), and the Coastal Zone Management Act (CZMA), for the new pipeline facilities previously authorized by the Commission in Docket Nos. CP01-176-000 and CP01-179-000. For the reasons discussed below, the Commission grants GSX's petition.

Background

2. On September 20, 2002, the Commission granted Natural Gas Act (NGA) section 7(c) certificate authority, NGA section 3 authority, and a Presidential Permit to GSX to construct and operate its proposed pipeline and related facilities in Whatcom and San Juan Counties, Washington.² The certificate was conditioned, among other things, on GSX's obtaining from Ecology a CZMA consistency determination and CWA section 401 certification.³ On September 8, 2003, GSX filed a Petition for Declaratory Order, in

¹18 C.F.R. § 385.207 (2003).

²100 FERC ¶ 61,280.

³Page ES-5 of the July 2002 Final Environmental Impact Statement (FEIS) for the GSX Pipeline Project states that compliance with the CWA and CZMA should be completed before GSX can begin project construction. The Commission adopted the FEIS's findings and conclusions in its September 20, 2002 Order, 100 FERC ¶ 61,280 at 62,198. See also 100 FERC ¶ 61,289 at 62,206 (Order conditioned on Ecology's CZMA compliance).

which it asks the Commission to declare that Ecology has waived the requirements to obtain both section 401 certification and a CZMA consistency determination, because Ecology exceeded the Federal statutory time limits for acting on both.

3. On September 29, 2003, Ecology filed a motion to intervene in this proceeding and opposing GSX's petition.⁴ On January 21, 2004, staff requested additional information from GSX and Ecology in an effort to clarify the parties' positions. By letter dated January 23, 2004, staff asked the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), to provide its opinion on the CZMA issue.⁵ On February 20, 2004, both GSX and Ecology filed their responses to the data request; NOAA filed its views on February 23, 2004.

CWA Section 401 Discussion

4. Section 401(a)(1) of the CWA prohibits the Commission from authorizing project construction until GSX first obtains State certification that the project will comply with the State's water quality standards.⁶ Section 401(a)(1) further provides that a certifying agency is deemed to have waived the certification requirements of section 401(a)(1) if the certifying agency fails to act on the request "within a reasonable period of time (which shall not exceed one year) *after receipt of such request*" (emphasis added).

5. GSX submitted a Joint Aquatic Resource Permit Application (JARPA), including its request for section 401 certification, to Ecology on July 12, 2001.⁷ The JARPA also indicated GSX was seeking a CWA section 404 permit from the U.S. Army Corps of

⁴On October 8, 2003, GSX filed a response to Ecology's motion. While the Commission's rules generally prohibit such pleadings, we will accept it in this case as it has provided the Commission with additional information that assisted us in our decision.

⁵The CZMA is administered by the Department of Commerce through NOAA.

⁶33 U.S.C. §1341(a)(1).

⁷The JARPA is used by State and local governments as an application for a variety of environmental permits. See Ecology's February 20, 2004 Data Response, p. 3.

Engineers (Corps).⁸ On July 16, 2003, Ecology denied without prejudice the request for section 401 certification;⁹ on July 29, 2003, the Corps denied without prejudice GSX's application for a section 404 permit based on Ecology's denial of the section 401 permit. GSX argues that because Ecology failed to act on GSX's request for section 401 certification within one year of the July 12, 2001 submittal date, section 401 certification for the project was waived.

6. Ecology responds that, where it coordinates with the Corps on projects requiring section 401 permits, section 404 permits, and CZMA consistency determinations, the Corps' public notice of the 404 permit application triggers the review periods set forth in CWA section 401 and the CZMA.¹⁰ Ecology notes that the Corps issued public notice of GSX's section 404 application and CZMA consistency determination on July 18, 2002,¹¹ the same day Ecology issued public notice of GSX's application for a CZMA consistency determination and section 401 certification. Ecology argues that it denied GSX's request for section 401 certification on July 16, 2003, within the one-year statutory deadline.

7. Ecology's assertion that the one-year review period does not start to run until public notice of the application for section 404 certification contravenes the language of section 401(a)(1), which provides that the one-year period starts to run upon the certifying agency's receipt of the application for certification. The clear and

⁸CWA section 404, 33 U.S.C. § 1344, requires applicants to obtain a dredge and fill permit from the Corps if project construction involves discharge of dredged or fill materials into navigable waters. The Commission's September 20, 2002 Order is also conditioned on GSX's obtaining a section 404 permit.

⁹Ecology cited the need for additional information, mitigation, and completion of the State Environmental Policy Act document.

¹⁰Ecology cites an internal May 1993 document that describes Ecology's process for tracking 401 certification requests, as well as an October 15, 1999 Corps document titled, "Corps Standard Operating Procedures for the Regulatory Program," both of which state that the Corps' public notice constitutes a request for section 401 certification and CZMA consistency determination, and that the date of such notice triggers the statutory deadlines for section 401 certification and CZMA consistency determinations. See Ecology's February 20, 2004 Data Response at p. 10 and Attachments 5 and 6.

¹¹GSX submitted its section 404 application to the Corps on June 18, 2001; the Corps required GSX to provide additional information to complete its application, and issued its July 18, 2002 public notice after GSX provided such information.

unambiguous language in section 401(a)(1) required Ecology to act within one year of receiving GSX's request for section 401 certification. GSX submitted its request for section 401 certification to Ecology on July 12, 2001; Ecology did not act on GSX's request until July 16, 2003, well past the statutory one-year deadline. Accordingly, under the terms of the statute, Ecology waived section 401 certification.

CZMA Discussion

8. Under CZMA section 307(c)(3)(A), 16 U.S.C. § 1456(c)(3)(A), the Commission cannot issue a license for a project within or affecting a State's coastal zone unless the State certifying agency concurs with the applicant's certification of consistency with the State's Coastal Zone Management Program (CZMP), as approved by the Secretary of Commerce. Section 307 provides that a State must furnish CZMA certification within six months "after receipt of its copy of the applicant's certification" or the State's concurrence with the certification "shall be conclusively presumed."

9. NOAA's implementing regulations in turn provide that the six-month certification period does not begin to run until the State has received "necessary data and information," including information identified in the State's CZMP.¹² The State must notify the applicant and the Federal permitting agency within 30 days of receipt of the CZMA application if it intends to delay CZMA review on the basis that necessary data and information is missing.¹³ The State agency and an applicant may extend the six-month review period, as long as they agree in writing before the six-month deadline, and such agreement "shall be provided to the Federal agency."¹⁴

10. Washington's CZMP deems approved shoreline permits and evidence of compliance with the Washington State Environmental Policy Act (SEPA) to be "necessary data and information," and therefore Ecology requires both in order to process a CZMA consistency determination.¹⁵ Both parties agree that in an April 30, 2001 phone conversation, Ecology told GSX that in the absence of shoreline permits and a completed SEPA document, Ecology would likely find a CZMA application incomplete, and if so,

¹²15 C.F.R. § 930.60(a)(1)(2003).

¹³*Id.*

¹⁴15 C.F.R. § 930.60(a)(3).

¹⁵Department of Ecology, *Managing Washington's Coast: Washington's Coastal Zone Management Program*, Publication 00-06-029, at p. 116 (2001).

would send a letter to GSX to that effect.¹⁶ On May 2, 2001, GSX submitted to Ecology an application for a CZMA consistency determination that did not include a shoreline permit or SEPA document; Ecology did not notify GSX within 30 days that GSX's CZMA application was incomplete.

11. As noted above, on July 18, 2002, Ecology issued a Notice of Application for CZMA Consistency and Water Quality Certification. Ecology states that, although "GSX had yet to obtain shoreline permits and SEPA review was still underway, Ecology decided to use the date of the public notice as the submittal date of a complete CZMA consistency determination request."¹⁷

12. On January 14, 2003, Ecology informed GSX that its CZMA application was deficient.¹⁸ In a joint letter to the Corps dated January 17, 2003, Ecology and GSX stated that they agreed to extend the 6-month CZMA review period to July 17, 2003.¹⁹ In a joint letter to the Corps dated July 16, 2003, Ecology and GSX agreed to another extension, this time until March 1, 2004.²⁰

13. Ecology and GSX now disagree on a number of issues regarding whether CZMA was waived, including the date the six-month review period was triggered, whether Ecology timely notified GSX of deficiencies in GSX's CZMA application, whether GSX knew it was filing an incomplete CZMA application, and whether Ecology's requirement that GSX provide shoreline permits and a completed SEPA document before processing GSX's application is consistent with the CZMA and NOAA's regulations.

¹⁶GSX's pipeline requires two shoreline permits because it involves construction within the shoreline jurisdiction of two Washington counties. In June, 2001, GSX applied for both permits.

¹⁷Ecology's February 20, 2004 Data Response at p. 5.

¹⁸September 8, 2003 Petition at p. 19.

¹⁹September 8, 2003 Petition at Exhibit 17.

²⁰Ecology's February 20, 2004 Data Response at Attachment 2. GSX asserts in both letters that Ecology's six-month consistency review period started May 2, 2001, while Ecology maintains that it timely provided notification to GSX of deficiencies in its certification. Both parties agreed to "preserve their rights and move forward cooperatively" by agreeing to extend the time for CZMA review.

14. We need not address any of these arguments, because the undisputed facts show that CZMA was waived after March 1, 2004. As noted earlier, Ecology concedes that on July 18, 2002 (the date the Corps issued public notice of GSX's section 404 and CZMA applications), Ecology accepted as "complete" GSX's CZMA application. Ecology asserts that the Corps' public notice issuance starts the 6-month CZMA review period. Under this interpretation, the 6-month review period would have commenced on July 18, 2002. Ecology and GSX twice mutually agreed to extend the 6-month review period, and did so both times before the review periods expired, as required by NOAA's regulations.²¹ The last extension deadline, March 1, 2004, has expired. Nothing in the record indicates that GSX and Ecology agreed to a third extension. Accordingly, Ecology's concurrence with GSX's CZMA certification must be conclusively presumed.²²

Commission Jurisdiction

15. Ecology asserts that any questions regarding the timeliness of its actions under CWA section 401 and the CZMA must be addressed to the Corp of Engineers. Ecology contends that in issuing NGA authorizations prior to Ecology's issuing section 401 certification and CZMA certification, the Commission has somehow determined that neither section 401 or CZMA certifications were required for the Commission's authorization, therefore the only remaining Federal action that is subject to the certification requirements of section 401 and CZMA is the Corps' pending section 404 permit.²³

²¹Although GSX and Ecology failed to provide the extension agreements to the Commission per 15 C.F.R. §930.60(a)(1), we find that in light of their substantial compliance with the relevant regulatory provisions, the omission is inconsequential.

²²While NOAA takes no position on the merits of the parties' arguments, its February 24, 2004 letter cites to key provisions of the CZMA and NOAA's regulations to assist the Commission in resolving GSX's petition. Where, as here, statutory and regulatory requirements are clear, the Commission will apply them accordingly.

²³Ecology states: "if, as appears from the Commission's action in issuing those authorizations a 401 certification and consistency determination are not required for it to act, then the Commission has no jurisdiction to issue a declaratory order stating whether for purposes of the pending federal permit (the Corps' 404 permit) Ecology has waived certification and/or consistency." Ecology's February 20, 2004 Data Response at p. 9.

16. As explained in previous proceedings, consistent with longstanding practice and as authorized by NGA section 7(e), the Commission routinely issues certificates for natural gas pipeline projects subject to the Federal permitting requirements of the CZMA and CWA.²⁴ The practical reason is that, in spite of the best efforts of those involved, it may be impossible for an applicant to obtain all approvals necessary to construct and operate a project in advance of the Commission's issuance of its certificate without unduly delaying the project. NOAA's regulations take this, and other, eventualities into account by providing that "[F]ederal agencies should not delay processing applications pending receipt of a State agency's concurrence."²⁵ That is what the Commission has done here in issuing a certificate, the exercise of the authority thereunder of which is conditioned upon, among other things, Ecology's issuance of section 401 certification and a CZMA consistency determination.²⁶

17. Finally, although its argument is somewhat confusing, Ecology apparently asserts that the Commission lacks jurisdiction to issue a Declaratory Order in this matter because GSX did not request section 401 certification and a CZMA consistency determination in the context of its April 24, 2001 application to the Commission for authorization to construct and operate the proposed GSX Pipeline Project. Ecology states that the July 12, 2001 JARPA that GSX submitted to Ecology "included no reference to the receipt of an authorization from the Commission, nor did GSX-US submit any request to Ecology for a 401 certification or CZMA consistency determination based on its application to the Commission for authorization to construct and operate the proposed pipeline."²⁷

²⁴See, e.g., *Islander East Pipeline Co.*, 102 FERC ¶ 61,054 (2003); *Gulfstream Natural Gas System, L.L.C.*, 94 FERC ¶ 61,185 (2001); *Florida Gas Transmission System*, 90 FERC ¶ 61,212 (2000).

²⁵15 C.F.R. § 930.63(c).

²⁶The validity of this approach was approved under a similar statute in *City of Grapevine, Texas v. DOT*, 17 F.3d 1502 (D.C.Cir. 1994). In that case, the Federal Aviation Administration (FAA) approved a proposed runway before completion of the review process required by the National Historic Preservation Act (NHPA). To ensure compliance with the NHPA, the FAA conditioned its approval of the runway on completion of the NHPA review. The court rejected a challenge to this approach, noting that "because the FAA's approval of the West Runway was expressly conditioned upon completion of the section 106 process, we find here no violation of the NHPA."

²⁷Ecology's February 2004 Data Response at p. 3.

18. Ecology's argument is not supported by the facts. The July 12, 2001 JARPA submitted to Ecology clearly states that GSX sought section 401 certification for the Georgia Strait Crossing Pipeline Project.²⁸ Similarly, GSX's May 2, 2001 request to Ecology for a CZMA consistency determination states that the "federally licensed or permitted activity" for which certification is sought is "FERC Docket No. CP01-176-000."²⁹ In addition, GSX's cover letter attached to its request for a consistency determination references GSX's April 24, 2001 application to the Commission, and assures Ecology that "enforceable policies will ensure that the GSX project is consistent with the CZMP."³⁰ Moreover, at the time GSX requested section 401 certification and a CZMA consistency determination, it was no secret to Ecology that the GSX Pipeline Project required Commission authorization; on May 25, 2001, Ecology intervened in the proceeding upon notice of GSX's April 24, 2001 application to the Commission.

The Commission orders:

GSX's September 8, 2003 Petition for Declaratory Order is granted, as described above.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

²⁸Page one of the JARPA form indicates that GSX is applying to Ecology for, among other things, section 401 certification. Box 7a of the form asks the applicant in part to "describe the proposed construction...for the project that you want to build that needs aquatic permits." GSX responds, "See attached General Project Description for the Georgia Strait Crossing Pipeline Project." See GSX's Petition at Exhibit 1.

²⁹GSX September 8, 2003 Petition, Exhibit 5.

³⁰Id.