

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. CP03-350-001

ORDER ON CLARIFICATION AND REHEARING

(Issued July 13, 2004)

1. On April 20, 2004, the Commission issued an order granting Georgia Strait Crossing Pipeline Company LP's (GSX) petition for Declaratory Order¹ and determined that the Washington Department of Ecology (Ecology) had waived the certification requirements of both section 401 of the Clean Water Act (CWA) and section 307 of the Coastal Zone Management Act (CZMA), for the new pipeline facilities previously authorized by the Commission. On May 7, 2004, and May 19, 2004, GSX and Ecology filed respective requests for clarification, reconsideration, or, in the alternative, rehearing of the Commission's April 20, 2004 Order. For the reasons discussed below, the Commission grants GSX's request for clarification of the Commission's finding on CZMA waiver, and denies Ecology's request for rehearing of the finding that Ecology waived the certification requirements of both CZMA and CWA section 401 by exceeding the applicable statutory deadlines.

I. Background

2. On September 20, 2002, the Commission granted Natural Gas Act (NGA) section 7(c) 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 both a CZMA consistency determination and CWA section 401 water quality certification. On April 20, 2004, the Commission granted GSX's

¹107 FERC ¶ 61,065.

²100 FERC ¶ 61,280.

September 8, 2003 petition for Declaratory Order, finding that Ecology had waived the requirements of both the CZMA and CWA because Ecology exceeded the applicable statutory deadlines for acting on GSX's requests for certification. As to CZMA waiver, the Commission did not address the key disputed issue of when the statutory review period was triggered; rather, the Commission held that GSX and Ecology had agreed to two extensions of the statutory deadline, that the last extension expired on March 1, 2004, that nothing in the record indicated that GSX and Ecology agreed to a third extension, and therefore Ecology's concurrence with GSX's CZMA certification must be conclusively presumed.³

3. The April 20, 2004 Order also rejected Ecology's argument that, because the NGA does not preempt the requirements of the CWA and CZMA, the Commission erroneously issued NGA authorization prior to Ecology's issuing both CZMA and CWA section 401 certifications. We noted in the order that, consistent with NGA section 7(e)⁴, the Commission routinely issues certificates for natural gas pipeline projects subject to the federal permitting requirements of the CZMA and CWA, and that the validity of this approach was approved by the D.C. Circuit under a similar statute.⁵ We also rejected Ecology's argument that the Commission lacked jurisdiction to issue a Declaratory Order in this matter because GSX did not request CZMA or CWA certifications in relation to GSX's proposal to construct and operate the GSX Pipeline Project, and we cited several examples which undermined Ecology's argument.⁶

4. GSX states in its clarification request that on March 1, 2004, pending the Commission's review of GSX's petition for Declaratory Order, GSX and Ecology agreed to a third extension of the CZMA deadline, to May 28, 2004, "to maintain the status quo while the Commission completed its review of GSX's petition..."⁷ Given this new

³On January 17, 2003, Ecology and GSX agreed to extend the CZMA deadline to July 17, 2003, and later agreed to a second extension, this time until March 1, 2004.

⁴Section 7(e), 15 U.S.C. § 717(e), gives the Commission "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."

⁵107 FERC ¶ 61,065 at P 16.

⁶107 FERC ¶ 61,065, at P 18.

⁷GSX rehearing request at p. 2.

information, GSX asks that the Commission clarify that Ecology waived CZMA certification because it failed to act within six months of receiving GSX's May 2, 2001 CZMA application, as required by section 307 of the Coastal Zone Management Act.

5. On May 19, 2004, Ecology filed a response to GSX's request, concurring that the parties extended the CZMA deadline to May 28, 2004, and requesting that the Commission clarify its order to reflect this third extension.⁸ Also on May 19, 2004, Ecology asked the Commission to reconsider, or, in the alternative, grant rehearing of, its determination that Ecology waived the requirements of both CWA section 401 and CZMA. On May 28, 2004, GSX filed a response to Ecology's rehearing request.⁹

II. Discussion

6. 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). 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."

7. The CZMA 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.¹⁰ If the applicant fails to submit such necessary data and information, the state "shall" notify the applicant and the federal permitting agency within 30 days of receipt of the CZMA application that: 1) the state's six-month review has not yet begun, and that it will commence once the necessary certification or information deficiencies have been corrected, or 2) that the

⁸On June 2, 2004, GSX advised the Commission that, by letter dated May 27, 2004, Ecology informed GSX that it was objecting to GSX's CZMA consistency determination due to GSX's failure to receive section 401 water quality certification from Ecology. This letter was dated five weeks after the Commission determined that Ecology had waived the requirements of CWA and CZMA; we note that no stay of our April 20, 2004 Order was requested, nor issued.

⁹ On June 3, 2004, the Commission issued an Order Granting Rehearing for Further Consideration of the rehearing requests.

¹⁰ 15 C.F.R. § 930.60(a)(2003).

six-month review has begun, and the deficiencies must be cured by the applicant during the state's six month review period.¹¹ The state agency and applicant may mutually 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."¹²

8. 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.¹³ Before GSX submitted its CZMA application, Ecology told GSX in an April 30, 2001 phone call that, in the absence of shoreline permits and a completed SEPA document, Ecology would likely find GSX's CZMA application incomplete, and if so, would send a letter to GSX to that effect. On May 2, 2001, GSX submitted to Ecology an application for CZMA certification 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.

9. On July 18, 2002, Ecology publicly noticed GSX's CZMA application. On January 14, 2003--20 months after GSX submitted its CZMA application to Ecology-- Ecology informed GSX that its CZMA application was incomplete. In its April 20, 2004 order, the Commission determined that it need not decide whether the six-month CZMA review period was triggered on May 2, 2001 or July 18, 2002, because GSX's and Ecology's second deadline extension expired on March 1, 2004 without Ecology acting on the application, accordingly, Ecology had waived the requirements of CZMA.

GSX's Request for Rehearing

10. Because GSX and Ecology extended the six-month deadline a third time prior to the Commission's April 20, 2004 Order, GSX asks on rehearing that the Commission find that Ecology waived CZMA certification because it failed to act within deadlines established by the CZMA and its regulations. Specifically, GSX argues that the implementing regulations required Ecology to notify GSX of any missing information in GSX's CZMA application within 30 days of Ecology's May 2, 2001 receipt of the application. GSX asserts that no such notice was provided, therefore the six-month

¹¹ 15 C.F.R. §930.60(a)(1), (a)(1)(i), (a)(1)(ii).

¹² 15 C.F.R. § 930.60(a)(3).

¹³ Department of Ecology, Managing Washington's Coast: Washington's Coastal Zone Management Program, Publication 00-06-029, at p. 116 (2001).

review period began to run as of May 2, 2001. Since Ecology did not act on GSX's CZMA application until January 14, 2003, GSX argues that CZMA certification was conclusively presumed.

Commission's Response

11. We agree that, pursuant to 15 C.F.R. § 930.60(a)(1), Ecology had an obligation within 30 days of receiving GSX's CZMA application to notify GSX and the Commission that the application was missing information, and that therefore Ecology's CZMA processing would not commence until the necessary certification or information deficiencies were corrected. No such notice was provided to either GSX or the Commission as required by the federal implementing regulations. Accordingly, the six month consistency time clock commenced on May 2, 2001. Ecology did not notify GSX until well past the six month statutory deadline that GSX's CZMA application was incomplete. Therefore, Ecology's concurrence with GSX's CZMA certification must be conclusively presumed.

12. The Commission is aware that when GSX submitted its CZMA application to Ecology, GSX was on notice that the application was missing information that Ecology's staff had told GSX would almost certainly be required. However, that did not excuse Ecology from federal regulations that required it to notify GSX within 30 days that the application was incomplete, if Ecology wanted to stop the commencement of the statutory six-month review period. The 30-day notice required by the CZMA implementing regulations also gave Ecology the option to notify GSX that the six-month clock would commence on May 2, 2001, but that GSX would have the opportunity to cure the deficiencies in its CZMA application during Ecology's review period. Accordingly, the 30-day notification requirement provides to the CZMA applicant and other interested parties important information regarding the timing of the CZMA statutory deadline. As noted in the preamble to the CZMA implementing regulations, states cannot "unilaterally stop, stay, or otherwise alter" the 6-month review period without the applicant's agreement,¹⁴ yet this would be the result if the Commission were to ignore Ecology's failure to comply with the 30-day notification requirement.

Ecology's Request for Rehearing

13. Ecology does not dispute that it failed to provide 30-day notification to GSX that GSX's CZMA application was missing information. Rather, Ecology reiterates on rehearing that the Commission improperly granted GSX certificate authorization and a

¹⁴ 65 FR 77,147 (December 8, 2000).

Presidential Permit prior to receiving from Ecology both CWA and CZMA certifications.¹⁵ Ecology asserts that, notwithstanding longtime Commission practice, nothing, including NGA section 7(e), allows the Commission to override the statutory requirements of CWA and CZMA. Ecology adds that, as set forth in City of Fredericksburg, Va. v. FERC,¹⁶ the Commission “is well aware that it cannot issue a license for a hydroelectric facility in advance of a 401 certification,” and that there is “nothing unique” about the NGA that warrants a different result from hydroelectric proceedings.¹⁷

Commission’s Response

14. Ecology’s assertion that the Commission should not have granted GSX certificate authorization and a Presidential Permit prior to receiving from Ecology both CWA and CZMA certifications is a collateral attack on the Commission’s September 20, 2002 Order issuing NGA sections 7(c) and 3 authority, and a Presidential permit to construct and operate GSX’s proposed pipeline. Rule 713 of the Commission’s Rules of Practice and Procedure allows parties 30 days after the issuance of the final decision to challenge or request rehearing of the order. Accordingly, the proper time for Ecology to argue that GSX should have obtained necessary CWA and CZMA certifications prior to the Commission’s authorization would have been within 30 days after the Commission issued its September 20, 2002 Order.

15. Notwithstanding Ecology’s collateral attack on the Commission’s prior order, Ecology’s argument that the Commission’s September 20, 2002 issuance of NGA authorizations erroneously preempted the requirements of both the CWA and CZMA fails on its merits. Ecology ignores the fact that, as with virtually every certificate issued

¹⁵ As explained in the April 20, 2004 Order, CWA section 401(a)(1) 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, and that a certifying agency is deemed to have waived the certification requirements if it fails to act within one year after receipt of such request. GSX filed its section 401 application with Ecology on July 12, 2001, which Ecology denied on July 16, 2003. We held that the clear and unambiguous language of section 401(a)(1) required Ecology to act within one year of receiving GSX’s application, and because Ecology acted on GSX’s request well past the statutory deadline, Ecology waived the requirements of CWA section 401.

¹⁶ 876 F.2d 1109 (4th Cir. 1989).

¹⁷ Ecology’s Rehearing request at p. 3.

by the Commission that authorizes construction of natural gas pipeline facilities, the NGA authorization for GSX's proposed pipeline is conditioned upon meeting the federal permitting requirements of, among other things, both the CWA and CZMA. Thus, as so conditioned, GSX could not exercise the certificate authority granted by the Commission by constructing the project without first obtaining CWA and CZMA certifications from Ecology. This reasoning was underscored in City of Grapevine, Texas v. Department of Transportation, in which the court upheld the Federal Aviation Administration's approval of a runway, conditioned upon the applicant's compliance with the National Historic Preservation Act (NHPA).¹⁸

16. Ecology argues that the Commission's reliance on City of Grapevine is "misplaced" because the NHPA, unlike CWA or CZMA, "does not contain express language prohibiting a federal agency from acting prior to compliance with its terms."¹⁹ We disagree. The statutory language at issue in City of Grapevine states that the "head of any Federal agency...shall, prior to the approval of the expenditure of any Federal funds on the undertaking...take into account the effect of the undertaking" on any historic property (emphasis added).²⁰ Contrary to Ecology's assertion, this language expressly prohibits a federal agency from acting prior to compliance with its terms, a fact that did not deter the City of Grapevine court from upholding the FAA's conditional approval of a runway.

17. Ecology's reliance on City of Fredericksburg is also misplaced, as that case did not involve the issuance of a conditional license for a hydroelectric project. Rather, the court held that, because the applicant for a hydroelectric license never made a valid request for section 401 certification to the Virginia State Water Control Board, the applicant's license to construct the project was invalid. This case is wholly consistent with the Commission's practice of issuing a conditional NGA authorization that precludes an applicant from constructing and operating a natural gas pipeline prior to first obtaining CWA and CZMA certifications from the certifying state agency.²¹

¹⁸ 17 F3d 1502, 1509 (D.C. Cir. 1994).

¹⁹ Ecology's Rehearing request at p. 3, footnote 1.

²⁰ 17 F3d 1502, 1509.

²¹ Although the Commission's authority to determine that a state has waived CWA and CZMA requirements is not at issue in this case, we note that in hydroelectric proceedings, the Commission has deemed both CWA and CZMA certifications waived where the certifying state agency failed to act within the statutory deadlines. In 1987, the
(continued...)

18. Finally, Ecology reiterates its argument that GSX did not apply for CZMA and CWA certifications in relation to GSX's proposal for NGA authorization. As explained in the Commission's April 20, 2004 Order, Ecology has known of the nature of the GSX project, and that it required the Commission's approval under the NGA, since at least May 25, 2001, when Ecology intervened in the proceeding upon notice of GSX's April 24, 2001 application to the Commission.²² On rehearing, Ecology raises no additional information that would persuade the Commission to hold otherwise.

The Commission orders:

(A) GSX's request for clarification of the Commission's April 20, 2004 Order in this proceeding is granted.

(B) Washington State Department of Ecology's request for rehearing of the Commission's April 20, 2004 Order in this proceeding is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

Commission issued Order No. 464, which found that CWA's one-year waiver period starts upon receipt by the certifying state agency of a written request for certification. The Ninth Circuit upheld Order No. 464, stating that the Commission's interpretation was "fully consistent with the letter and intent of 401(a)(1) of the CWA..." *California v. FERC*, 966 F.2d 1541, 1554 (9th Cir. 1992). The Ninth Circuit has also addressed FERC's authority to deem CZMA waived, noting (in dicta) that if six months pass without any objection from the state, "then the state, by operation of the federal statute, forfeits its right to object to the project, and the state's coastal program "shall be conclusively presumed' by FERC." *Mountain Rhythm Resources v. FERC*, 302 F3d 958 (2002).

²² See 106 FERC ¶ 61,065 at P 18, which describes additional evidence that Ecology had knowledge that GSX filed requests for CWA and CZMA certifications in connection with proposed GSX Pipeline Project.