

# Section 401 Water Quality Certification/Clean Water Act: Federal Energy Regulatory Commission Rejects Pipeline's Waiver Argument



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01/12/2018

The Federal Energy Regulatory Commission ("FERC") issued an Order on Petition for Declaratory Order ("Order") addressing Constitution Pipeline Company, LLC's ("Constitution") January 11th Petition for Declaratory Order ("Petition") related to a proposed natural gas pipeline.

Constitution asked that FERC determine that under Section 401(a)(1) of the Clean Water Act the New York State Department of Environmental Conservation ("DEC") waived its authority to issue a water quality certification for the proposed natural gas pipeline.

Constitution is stated to have applied for a Certificate of Public Convenience and Necessity pursuant to section 7 of the Natural Gas Act to construct and operate the natural gas pipeline. The project would consist of approximately 124 miles of 30-inch-diameter pipeline and related facilities that would extend through New York and Pennsylvania. FERC issued a conditional Certificate of Public Convenience and Necessity to Constitution on November 9, 2016.

Section 401 of the Clean Water Act requires an applicant for a federal license or permit to provide a certification that any discharges from the facility will comply with applicable state water quality standards. If not provided, the federal permit or license may not be granted. Further, states can impose certain conditions upon federal permits or licenses as a prerequisite to granting the permit or license.

Because a federal license was needed, Constitution was required by Section 401 of the Clean Air Act to apply to DEC for a water quality certification. Two initial applications were submitted to DEC (August 22, 2013 and May 9, 2014) but subsequently withdrawn. A third application was submitted on April 27, 2015.

On April 22, 2016, DEC issued a letter denying Constitution's third application. DEC stated that Constitution failed to provide sufficient information to enable the agency to determine whether the application demonstrated compliance with New York's water quality standards.

Constitution sought review of DEC's denial before the United States Court of Appeals for the Second Circuit under Section 19(d)(1) of the Natural Gas Act. The company claimed that DEC waived its authority under Section 401 through delay. It also argued that sufficient information was submitted to DEC, making the denial arbitrary and capricious.

The Second Circuit concluded it lacked jurisdiction to address the question of waiver. As a result, it upheld DEC's denial.

On October 11, 2017, Constitution filed a Petition before FERC for a Declaratory Order requesting a finding that DEC waived its authority under section 401 of the Clean Water Act by failing to act within a “reasonable period of time.” The FERC Order references the “waiver” provision in section 401(a)(1) of the Clean Water Act which states:

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.

Constitution argued that DEC failed to act within several possible “reasonable period[s] of time” based on several different starting dates and spanning several different lengths of time.”

FERC notes that the previously cited statutory verbiage provides the appropriate federal agency the authority to determine the reasonable period of time for action (bounded on the outside of one year). It states that since 1987 the regulations and issued Orders for proposed projects had determined that the reasonable period of time for action under section 401 is one year after the date the certifying agency receives a request for certification. As an alternative rationale, the FERC states that Congress intended to give state agencies up to one year to act on water quality certification applications, stating:

. . . and that the reference to a reasonable period was meant to be suggestive, rather than prescriptive.

Constitution’s Petition for Declaratory Order is denied.

[A copy of the order can be downloaded here.](#)