

I. FERC SHOULD NOT ISSUE A CERTIFICATE UNTIL THE APPLICANT RECEIVES ALL STATE PERMITS AND CERTIFICATIONS REQUIRED TO COMMENCE CONSTRUCTION.

FERC seeks comment on how its certification process might better protect landowner interests and how FERC can work “more efficiently and effectively” with state agencies. 83 Fed. Reg. 18,031-32. FERC’s current practice of issuing “conditional” certificates of public convenience and need fails to protect landowners’ interest in avoiding eminent domain, nor does it further the State’s role in reviewing the environmental impacts of natural gas pipelines. Conditional certificates are issued before a natural gas company has received all required permits and authorizations necessary to commence construction, which allows the company to use eminent domain pursuant to Natural Gas Act § 7(h) to obtain the necessary pipeline right-of-way from resistant landowners. 15 U.S.C. § 717f(h). However, there is no guarantee – nor can there be – that the natural gas pipeline company will receive all of the permits and authorizations required to commence construction. By allowing the natural gas pipeline company to condemn land before receiving all required permits and authorizations, FERC is assuming that the State will issue all the required authorizations without regard to its independent review role. In cases where the State ultimately declines to issue required permits or certifications, landowners will have suffered unnecessary condemnation of their land and, in some cases, irreversible environmental damage will already have occurred.

This problem is illustrated by the proposed Constitution pipeline project (FERC Docket No. CP13-499-000). In that proceeding, FERC issued a conditional certificate of public convenience and necessity authorizing the applicant to condemn land for the right-of-way before the State had issued certain authorizations, including a Clean Water Act § 401, 33 U.S.C. § 1341, certification. *See* Order Issuing Certificates and Approving Abandonment, *Constitution Pipeline Co., LLC*, Docket No. CP13-499, 149 FERC ¶61,199 (Dec. 2, 2014). Constitution proceeded to

exercise eminent domain to obtain the necessary right-of-way from New York landowners. *See, e.g.,* Memorandum-Decision and Order, *Constitution Pipeline Co., LLC v. A Permanent Easement for 2.40 Acres, etc.*, Docket No. 3:14-cv-2046 (N.D.N.Y. Feb. 24, 2015), *available at* 2015 WL 1638211. FERC also authorized tree-clearing over the portions of right-of-way that passed through Pennsylvania, resulting in permanent environmental damage in that State. *See* Letter from Terry Turpin, Director of FERC Division of Gas – Environment and Engineering, *Constitution Pipeline Co., LLC*, Docket No. 13-499 (Jan. 29, 2016). However, the New York State Department of Environmental Conservation (DEC) ultimately denied Constitution’s application for a Clean Water Act section 401 certification for that portion of the pipeline to be sited in New York. Accordingly, at this time the Constitution Pipeline cannot be constructed.¹ Nonetheless, many New York State landowners have already had their land taken, with no clear process available for unwinding the eminent domain process. And permanent environmental damage – in the form of tree-clearing – has occurred.

The Constitution pipeline is not an isolated occurrence. In two other recent proceedings, FERC issued conditional certificates of public convenience and necessity for pipeline projects for which the State ultimately declined to issue the required Clean Water Act section 401 certifications. *See* Order Granting Abandonment and Issuing Certificates, *National Fuel Gas Supply Corp.*, Docket No. CP15-115, 158 FERC ¶61,145 (Feb. 3, 2017); Order Denying Motion to Dismiss Issuing Certificate, *Millennium Pipeline Company, L.L.C.*, Docket No. CP16-17-000,

¹ The Second Circuit upheld DEC’s denial of the section 401 certification for Constitution. *See Constitution Pipeline Co., LLC v. Seggos*, 868 F.3d 87 (2d Cir. 2017), *cert. denied* 138 S.Ct. 1697 (2018). Constitution petitioned FERC for a declaratory order finding that DEC waived its section 401 authority, but FERC denied the petition, Order on Petition for Declaratory Order, 162 FERC ¶61,014, Docket No. CP18-5-000, *Constitution Pipeline Co., LLC* (Jan. 11, 2018) and Constitution’s motion for rehearing, Order Denying Rehearing, 161 FERC ¶61,029, *id.* (July 19, 2018).

157 FERC ¶61, 096 (Nov. 9, 2016). In both of these cases, under current FERC practice, the eminent domain process to obtain rights-of-way from New York State landowners is available to project sponsors for pipelines that might never be constructed.²

FERC's certification process should ensure that eminent domain is a project sponsor's option of last resort, and the best way to ensure that goal is to not issue certificates of public convenience and necessity until a pipeline has received all necessary state permits and authorizations and is therefore ready to be built. This approach will ensure that when applicants use eminent domain, it will be for a project that will be constructed.

Waiting to issue a certificate until a pipeline is ready to be constructed also creates a greater incentive for pipeline applicants to work with landowners to obtain permission to access a proposed pipeline route, rather than rushing to Court to start the condemnation process upon receiving a conditional certification. Although FERC has suggested applicants should negotiate in "good faith" with landowners, it has left it to the courts to determine whether such good faith was used. *See, e.g.,* Order on Rehearing, *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at ¶69 (June 15, 2018). Courts, however, are split on whether good faith is required. *See Millennium Pipeline Co. LLC v. Certain Permanent and Temporary Easements*, 552 Fed. Appx. 37, 39 (2d Cir. 2014) (noting split in circuits on whether good faith is required, and declining to resolve split in Second Circuit). It is apparent from eminent domain litigation that natural gas

² NFG petitioned the Second Circuit to review the section 401 denial. Oral argument on NFG's petition for review occurred on November 16, 2017, and the parties are still awaiting a decision. *See National Fuel Gas Supply Corp. v. NYSDEC*, 2d Cir. No. 17-1164. FERC ultimately held that DEC had taken too long to review of Millennium's application for a section 401 certification, *see* Declaratory Order Finding Waiver Under Section 401 of the Clean Water Act, *Millennium Pipeline Co., L.L.C.*, Docket No. CP-16-17-000, 160 FERC ¶61,065 (Sept. 15, 2017), and the Second Circuit upheld FERC's conclusion, *see NYSDEC v. FERC*, 884 F.3d 450 (2d Cir. 2018).

companies make little effort to obtain right-of-ways without resorting to eminent domain. *E.g.* Memorandum-Decision and Order, *Constitution Pipeline Co., LLC v. Permanent Easement for 0.25 Acres, et al.*, Docket No. 3:14-cv-2069 (N.D.N.Y. Feb. 24, 2015), *available at* 2015 WL 12564217 (record indicated that company made one offer and told landowner if he did not accept the offer, it would obtain easement through eminent domain); Memorandum-Decision and Order, *Constitution Pipeline Co., LLC v. Permanent Easement for 0.67 Acres, etc.*, Docket No. 1:14-cv-2023 (NDNY Feb. 21, 2015), *available at* 2015 WL 1638477 (record reflected that applicant made just one offer to landowner before resorting to eminent domain). By declining to issue a certificate until all state permits and authorizations are received, FERC will protect landowner rights and encourage the “good faith” negotiations that FERC favors. *See, e.g.*, Concurring Statement of Neil Chatterjee, *PennEast Pipeline Co., LLC*, Docket No. CP15-558, 162 FERC ¶ 61,053 (Jan. 19, 2018) (expressing concerns regarding certificate’s impact on landowners, and encouraging “pipeline companies and landowners to work with the Commission to maximize engagement and minimize the impacts on landowners going forward.”).

To facilitate the cooperative federalism in project review intended by FERC, FERC should complete its Environmental Assessment or Draft Environmental Impact Statement under the National Environmental Policy Act (NEPA) before state review of an application for a Clean Water Act section 401 certification commences. Environmental agencies such as DEC need the benefit of FERC’s general environmental review before they can conduct their more searching review of state water quality impacts. Accordingly, FERC should ensure that state environmental agencies have a full year from FERC’s completion of an Environmental Assessment or Draft Environmental Impact State to review a Clean Water Act section 401 application. Since states no longer have the option to flag an application as “incomplete” pending completion of FERC’s

environmental review, *see NYSDEC v. FERC*, 884 F.3d 450 (2d Cir. 2018), more applications will be simply denied without prejudice until FERC’s environmental review is completed.

Finally, FERC should require the applicant to obtain state and local permits necessary to minimize adverse environmental impacts. In certain past certification proceedings, FERC’s environmental review has relied on applicants obtaining various state and local permits to minimize adverse environmental impacts, and its Orders have incorporated that mitigation as a condition of the Certificate. *See Order Granting Abandonment and Issuing Certificates, National Fuel Gas Supply Corp.*, Docket No. CP15-115, 158 FERC ¶61,145, at 68 (Feb. 3, 2017) (noting that cumulative impacts of project would be mitigated by “measures required under other federal and state permits”); Environmental Assessment, at 19-21, *National Fuel Gas Supply Corp.*, CP15-115 (listing state and local permits applicable to project, and requiring applicant to “obtain all necessary permits and approvals”); *id.* at 52 (noting that applicant would need to develop compensatory mitigation plan to address permanent wetland impacts “as part of the NYSDEC . . . permitting process”); Final Environmental Impact Statement: Constitution and Wright Interconnect Project, at 1-13 to 1-17, *Constitution Pipeline Co., LLC*, CP13-499-000 (Oct. 2014) (listing various state and local permits applicable to project, and stating that Constitution would be “responsible for obtaining all permits and approvals”); *id.* at ES-13 (a “principal reason[]” for FERC’s conclusion that environmental impacts from the Constitution project would be acceptable was that Constitution “would be required to obtain applicable permits and provide mitigation for unavoidable impacts on waterbodies and wetlands through coordination with . . . NYSDEC”); *id.* at 2-20 (noting that “[w]aterbody crossings would be construction in accordance with federal, state, and local permits”); *id.* at 4-245 (Constitution would minimize adverse impacts from project construction by “complying with applicable federal and state permit

requirements.”). However, when applicants have been unable to obtain such state and local permits, they have gone to Court or back to FERC to argue that state and local permits are preempted by the Natural Gas Act and are not required. *See e.g.* Memorandum-Decision and Order, *Constitution Pipeline Co., LLC v. NYSDEC*, Docket No. 1:16-cv-568 (March 16, 2017) (dismissing action seeking to hold state environmental permits preempted by Natural Gas Act); Request for Reconsideration and Clarification, etc., *National Fuel Gas Supply Corp.*, Docket No. CP15-115 (March 3, 2017) (seeking “clarification” from FERC that all state and local environmental permits were preempted by the Natural Gas Act). Because state and local environmental permits are necessary to minimize environmental impacts, FERC should continue to require that the applicant actually obtain such permits as a condition of its Certificate.

II. FERC SHOULD GRANT OR DENY REHEARING REQUESTS WITHIN 30 DAYS, AS REQUIRED BY THE NATURAL GAS ACT.

FERC should not use tolling orders to extend the pendency of rehearing petitions in order to avoid judicial review of FERC orders. FERC’s use of tolling orders undermines congressional intent, infringes upon property rights of landowners, and renders judicial review meaningless. Under the Natural Gas Act, parties cannot obtain judicial review of a FERC order unless they first move for rehearing of that order and FERC acts on the rehearing request. *See* 15 U.S.C. § 717r(b). While FERC considers a rehearing request, pipeline construction and permanent environmental damage may begin. *See id.* § 717r(c) (request for rehearing does not stay FERC order). Congress gave FERC 30 days to “act” on a rehearing request, or the request would be “deemed to have been denied.” 15 U.S.C. § 717r(a). This Congressional language clearly requires that FERC either grant or deny a rehearing request with 30 days, so that judicial review of the underlying order can proceed in a timely way. Yet FERC regularly uses tolling orders to unilaterally delay judicial review by months, without applicant or party consultation, allowing

natural gas infrastructure to be substantially completed before a Court can even review the FERC order authorizing such construction. *See, e.g., Sierra Club v. FERC*, 867 F.3d 1357, 1364-65 (D.C. Cir. 2017) (project construction had started by the time FERC denied petitioner’s request for rehearing); *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1312 (D.C. Cir. 2014) (FERC took six months to deny rehearing request).

In the context of the Clean Water Act, FERC has concluded that similar language imposes a hard limit on a state’s consideration of an application. Specifically, Clean Water Act § 401(a) requires a State to “act” on an application for a certification with “a reasonable period of time (which shall not exceed one year)” or the certification requirements are deemed waived. 33 U.S.C. § 1341(a)(1). FERC has described this waiver language of section 401(a)(1) as “unambiguous.” Order Denying Rehearings and Motions to Stay, 161 FERC ¶ 61,186, at ¶38, Docket No. CP16-17-003, *Millennium Pipeline Co., LLC* (Nov. 15, 2017). Moreover, FERC has stated that “the length of the section 401 waiver period is one year” and “that the deadlines prescribed by federal law . . . are binding,” Order on Petition for Declaratory Order, 162 FERC ¶61,014, at ¶ 20, Docket No. CP18-5-000, *Constitution Pipeline Co., LLC* (Jan. 11, 2018). And yet when interpreting the Natural Gas Act’s similar mandate to “act” on a rehearing request within 30 days, FERC condones its own indefinite delay of judicial review, and harm from that delay, through the use of tolling orders.

FERC should be required to comply with the plain language of the Natural Gas Act by either granting or denying a request for rehearing within 30 days. This will ensure that parties have the opportunity to seek judicial review of FERC orders before project construction commences or is substantially completed.

CONCLUSION

For the reasons described above, FERC should revise its certification policy to ensure that the rights of states, landowners, and other interested parties are not overridden.

Respectfully submitted,

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