

Client Alert

Energy & Natural Resources, Energy Regulatory, and Global Transactions Practice Groups

September 18, 2017

Federal Energy Regulatory Commission Holds that a State Agency Waived its Authority to Issue a Water Quality Certification by Failing to Act Within the Statutory Period; Quashes One Way States Can Block Interstate Natural Gas Pipeline Project Construction

On September 15, 2017, the Federal Energy Regulatory Commission (FERC) issued an order holding that the New York State Department of Environmental Conservation (NYSDEC) waived its authority under the Clean Water Act (CWA) by failing to issue or deny a water quality certificate, as requested by an interstate natural gas pipeline, within the CWA's statutory one-year timeframe. *Millennium Pipeline Co., L.L.C.*, 160 FERC ¶ 61,065 (2017). FERC's action removes what had appeared to be an insurmountable impediment to construction of Millennium Pipeline Company, L.L.C.'s (Millennium) Valley Lateral Project, which has been delayed for nearly a year as Millennium has had to wait for the NYSDEC to act on its application for a CWA water quality certification (WQC). FERC's action is significant because it demonstrates that the Commission will hold a state permitting agency exercising federally-delegated authority to the statutory timeframe, making it more difficult for a state agency to use its CWA authority to delay and ultimately to block natural gas infrastructure which FERC authorizes under the Natural Gas Act.

In recent years, interstate natural gas pipelines have increasingly encountered delays in obtaining permits from state and local agencies. In a number of cases, state permitting agencies have wielded their CWA authority to issue water quality certifications as a shield, demanding multiple application supplements, declaring that applications for WQCs are not complete (and hence that the statutory clock does not begin to run) until the state agency finds them complete, and ultimately denying the WQC altogether. In addition to Millennium's Valley Lateral Project, the NYSDEC has denied CWA WQCs requested for the Northern Access Project proposed by National Fuel Gas Supply Corporation and Empire Pipeline, Inc. and for the Constitution Pipeline Project owned by subsidiaries of Williams Partners L.P., Cabot Oil & Gas Corporation, Piedmont Natural Gas Company, Inc., and WGL Holdings, Inc.

Millennium's Valley Lateral will consist of 7.8 miles of 16-inch pipeline that will provide service to the Valley Energy Center, a new natural gas-fired electric generating facility located in Wawayanda, New York. FERC granted

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Millennium a certificate of public convenience and necessity authorizing the project on November 9, 2016. The FERC certificate order requires Millennium to file documentation that it has received all authorizations required under federal law, or evidence of waiver thereof, including certification under the CWA, prior to commencing construction. Millennium has been unable to satisfy this requirement because of the NYSDEC's delay in issuing, and eventual decision not to issue, a CWA water quality certification.

NYSDEC received Millennium's application for a CWA WQC on November 23, 2015. Over the ensuing months Millennium received two NYSDEC Notices of Incomplete Application requesting additional information. Millennium responded to those notices, providing the last of the requested information on August 31, 2016. NYSDEC notified FERC that it had denied Millennium's application for certification on August 30, 2017.

Millennium argued that the NYSDEC waived its authority to grant or deny a WQC because it failed to act within the CWA's maximum one-year timeframe (i.e., by November 23, 2016). The relevant portion of the CWA states: "[i]f the State . . . 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." CWA Section 401, 33 U.S.C. § 1341 (emphasis added).

Millennium petitioned the U.S. Court of Appeals for the District of Columbia Circuit in December 2016, alleging that NYSDEC unlawfully delayed action on the water quality certification and had waived its authority under Section 401. The D.C. Circuit dismissed Millennium's petition on jurisdictional grounds, concluding that Millennium needed to return to FERC and present evidence of the NYSDEC's waiver. *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017). It noted, however, that the CWA "makes clear that waiver occurs after one year of agency inaction." *Id.* at 700.

In response to Millennium's July 2017 Request for Notice to Proceed with Construction, FERC held on September 15, 2017 that NYSDEC had waived its authority under the CWA by failing to issue or deny a WQC by November 23, 2016, one year after it received Millennium's application:

Section 401 provides that water quality certification is waived when the certifying agency "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." Thus the term "receipt" specifies the triggering event. The dictionary definition of "receipt" is the act or process of receiving. Therefore, in this context, the plain meaning of "after receipt of the request" is the day the agency receives a certification application, as opposed to when the agency considers the application to be complete. Giving effect to the plain text of a statute, the one-year review period began November 23, 2015, the date that New York DEC received the application.

160 FERC ¶ 61,065 at P 13 (footnotes omitted, emphasis in original). FERC rejected the NYSDEC's contention that the CWA's statutory one-year timeframe starts only when the NYSDEC deems an application for a WQC to be complete (in Millennium's case, August 31, 2016). It defended its interpretation as being "consistent with Congress's intent, given that Congress explained that the review period of one year was established to 'ensure that sheer inactivity by the State... will not frustrate the federal application.'" 160 FERC ¶ 61,065 at P 14 (quoting Clean Water Act 1970 Amendments Conference Report, H.R. Conf. Rep. 91-940 (1970), reprinted in 1970 U.S.C.C.A.N. 2691, 2741). According to FERC, to accept the NYSDEC's position that the statutory clock starts running only when the state agency says it does "would frustrate the purpose of the one-year review period specified by the CWA and allow state agencies to indefinitely delay proceedings by determining applications to be incomplete." *Id.* at P 17.

FERC's *Millennium* order does not entirely eliminate the potential that state agencies can use the CWA WQC process to prevent construction of interstate natural gas pipelines. As FERC notes, its insistence that a state's receipt of a CWA WQC application is the event that starts the statutory clock "does not leave a state water quality certifying agency without remedy. If a state agency concludes that a certification application does not meet CWA requirements, it can deny the application." The order does, however, signal state and local permitting agencies that FERC will strictly enforce statutory deadlines and will not countenance state action (or studied inaction) intended to delay, and ultimately preclude, construction of FERC-certificated natural gas pipeline projects. It also suggests that FERC will not shy away from taking on state efforts to override FERC approvals of interstate natural gas pipeline projects.

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