



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

February 29, 2016

Via FERC Electronic Filing

Kimberley D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: Opposition to Constitution Pipeline Company, LLC's February 25, 2016 Renewed Request for Partial Notice to Proceed, Docket No. CP13-499-000

Dear Secretary Bose:

On January 8, Constitution Pipeline Company LLC requested a Partial Notice to Proceed allowing it to fell trees in Pennsylvania and New York in connection with its proposed pipeline ("Pipeline"). On January 14, the Office of the New York Attorney General ("NYAG") filed an opposition to felling trees in New York ("NY Opp."). On January 29, the Commission authorized Constitution to fell trees only in Pennsylvania ("January Order"). On February 25, Constitution renewed its request to fell trees in New York ("Cons. Req."). The NYAG renews its opposition to that request for the reasons stated in its opposition to Constitution's first request, which is incorporated by reference, and the additional reasons stated below.¹

The NYAG's opposition explained that Constitution should not be permitted to fell trees in New York until the New York State Department of Environmental Conservation ("DEC") rules on Constitution's request for a water quality certification under Section 401 of the Clean Water Act, 33 U.S.C. § 1341. NY Opp. 6-9. Section 401 gives "a primary role" to states to address water quality issues by imposing and enforcing water quality standards. *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006). "FERC's role is limited to awaiting, and then deferring to, the final decision of the state." If FERC does not wait, the state's power to address the relevant water quality issues "would be meaningless." *Id.*

Constitution makes the inconsistent arguments that tree felling does not need to await a Section 401 certification, but that its request addresses the impacts of felling trees on water quality by, for example, creating a buffer zone between felled trees and streams. Cons. Req. 2-3. Section

¹The NYAG previously argued that Constitution's request should not be granted until the Commission ruled on motions for rehearing on the Conditional Certificate of Public Convenience and Necessity ("Certificate"). NY Opp. 9-11. The Commission has subsequently denied those motions, accordingly that procedural argument is now moot and not renewed here.

401 requires a state water quality certification for “any activity” that “may result in a discharge into the navigable waters.” 33 U.S.C. § 1341(a)(1) (emphasis added). Because tree felling on the scale proposed here may result in a discharge to navigable waters, as Constitution recognizes, Section 401 review and certification by New York is required for that activity, whether as part of New York’s Section 401 certification for the Pipeline itself or potentially as a separate 401 certification in connection with Constitution’s request to fell trees, which Constitution has not requested from New York.²

The NYAG has shown that felling trees is “construction” under the Certificate and thus must await a Section 401 certification on the Pipeline. NY Opp. 6-9. Indeed, Constitution’s decision to seek authorization to undertake the tree clearing, and FERC’s prior exercise of its authority to deny that request, demonstrate that tree clearing constitutes an element of construction.

Constitution wrongly argues that no Section 401 certification legally is required because no Section 404 dredge and fill permit is required for tree felling, per correspondence from the U.S. Army Corps of Engineers. Section 401 requires a state water quality certification for “any activity” that “may result in a discharge into the navigable waters.” 33 U.S.C. § 1341(a)(1) (emphasis added). The Clean Water Act’s Section 404 permitting requirement, however, is limited to “the discharge of dredged or fill material” into those waters. 33 U.S.C. § 1344(a). Because Congress did not include the “dredged and fill” limitation in Section 401, Section 401 covers a much broader scope of activities, and the purported absence of a discharge of dredged or fill materials does not eliminate the need for a Section 401 certification. *See S.D. Warren Co. v. Maine Bd. of Env’tl. Protection*, 547 U.S. 370, 375-76 (2006).

Moreover, DEC implements Section 401 in New York, not the U.S. Army Corps of Engineers. Constitution may not be allowed to circumvent not only the Certificate’s existing requirements but also New York’s authority under Section 401 by proposing conditions that purport to prevent its tree felling from discharging into New York waters. Nor may the Commission circumvent New York’s authority by ruling on those conditions.

The recent denial by the United States Court of Appeals for the Second Circuit of a request to stay construction and operation of the Pipeline has no bearing on this question. In support of a stay, the Clean Air Council and Sierra Club argued that the Certificate itself violates the Clean Water Act because it was issued before Pennsylvania and New York had issued Section 401 certifications. 2d Cir. No. 16-34, Docket No. 10-15, pp. 14-16. New York does not contest the Certificate, but instead seeks to ensure that Constitution does not fell trees in New York before DEC has ruled on Constitution’s application for a Section 401 certification. Additionally, the only tree felling activity before the court in that proceeding was the activity in Pennsylvania, where the Commonwealth has issued a certification under Section 401.

² One water quality study concluded that cutting down trees and leaving them on site increased turbidity in a nearby river by an average of 279 percent, even when a 65 foot wide buffer zone was in place. Marryanna, L. *et al*, “Water Quality Response To Clear Felling Trees For Forest Plantation Establishment At Bukit Tarek F.R., Selangor” 2007 Journal of Physical Science (Vol. 18[1], 33-45).

The NYAG argued further that Constitution had proposed to leave felled trees in place, and the Final Environmental Impact Statement for the Pipeline needed to be supplemented to address those impacts. NYAG Opp. 11-12. The FEIS has not been supplemented, and that argument is renewed here.

Lastly, the NYAG successfully moved to intervene in this proceeding on July 17, 2013 and in its motion, stated its position and interests as required by 18 C.F.R. § 285.214 and elaborated why its intervention would promote the public interest. Based upon the reasons stated in the July 2013 motion and the additional reasons above, as well as its intervenor status with regard to the Commission's December 2, 2014 Order Issuing Certificates, the NYAG is also a proper party-intervenor to any FERC decision as to Constitution's request to proceed with tree felling in New York.

Respectfully submitted,
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**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

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In the Matter of:

Constitution Pipeline Company, LLC

Docket Nos.: CP13-499-000

For a Certificate of Public Convenience and Necessity.

CP13-499-001

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CERTIFICATE OF SERVICE

I certify that on February 29, 2016, the Office of the New York State Attorney General electronically served the accompanying answer in opposition to the applicant's renewed request for permission to proceed on the individuals and entities appearing on the service list compiled and maintained by the Federal Energy Regulatory Commission for this proceeding.

Dated: February 29, 2016
New York, New York

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