UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Constitution Pipeline Company, LLC	)	Docket No. CP17-

PETITION FOR DECLARATORY ORDER

Pursuant to Rule 207 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.207, Constitution Pipeline Company, LLC ("Constitution") hereby petitions the Commission for a declaratory order finding that the New York State Department of Environmental Conservation ("NYSDEC") failed to act within a reasonable period of time on Constitution's Clean Water Act Section 401 application, and that such failure to act constitutes a waiver of the Section 401 water quality certification requirement for federal authorizations related to the New York State portion of Constitution's pipeline project.

Section 401 of the Clean Water Act provides that "[i]f 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."[1] Here, NYSDEC clearly failed to act on Constitution's application for a Section 401 water quality certification "within a reasonable period of time." Constitution initially submitted its application for Section 401 certification on August 22, 2013, which was roughly concurrent with Constitution's NGA Section 7(c) application to the Commission. But, at NYSDEC's insistence, Constitution withdrew and resubmitted its application twice, the first resubmittal occurring on May 9, 2014 and the

[1] 33 U.S.C. § 1341(a)(1).

second on April 27, 2015. NYSDEC's decision denying Constitution's application on the contention that Constitution failed to submit certain information came two years and eight months after the initial submittal, almost two years after the first requested resubmittal, 361 days after the second requested resubmittal (which entailed no changes to Constitution's previously re-filed application), and after eight months of unexplained silence and inactivity. This eight-month period of inactivity persisted despite NYSDEC having induced the second re-filing of an identical application by indicating that it just needed a little more time, and stating in July 2015 that it was ready to issue the Section 401 certification.

Because NYSDEC failed to act on Constitution's application for Section 401 certification "within a reasonable period of time," as required by 33 U.S.C. § 1341(a)(1), the Commission should find that, by operation of law, the Section 401 certification requirement for federal authorizations related to the New York State portion of Constitution's pipeline project has been waived.

I.
INFORMATION REGARDING PETITIONER

Constitution Pipeline Company, LLC is a limited liability company formed and existing under the laws of the State of Delaware. Constitution's principal place of business is 2800 Post Oak Boulevard, Houston, Texas 77056-6106. The members of Constitution, who are unanimous in their support of this Petition, are: Williams Partners Operating LLC (41 percent); Cabot Pipeline Holdings, LLC (25 percent); Piedmont Constitution Pipeline Company, LLC (24 percent); and WGL Midstream CP, LLC (10 percent).

The names, titles, addresses, and telephone numbers of the persons to whom correspondence and communications concerning this Petition should be addressed are:

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II.
BACKGROUND

A. Constitution's Role in Northeast Energy Supply

The Constitution pipeline is a critical piece of natural gas infrastructure designed to support the energy needs of the Northeast United States. The Constitution project will connect consumers located in an area with some of the highest energy costs in the nation to an area of reliable energy supplies that is one of the world's lowest-cost sources of natural gas. The markets to be served by Constitution rely heavily on heating oil as an energy source, and the project will provide significant environmental benefits by further enabling generators to switch from heating oil to cleaner-burning natural gas. The project represents an investment in critical energy transportation infrastructure of nearly $1 billion, of which Constitution has already spent over $380 million. As the Commission found, the project will provide significant benefits,[2] including: (i) delivering up to 650,000 Dth per day of natural gas to interconnections with Tennessee Gas Pipeline Company, L.L.C. and

[2] *Constitution Pipeline Co., LLC*, 154 FERC ¶ 61,046, at P 15 n.16 (2016) ("Constitution Rehearing Order").

Iroquois Gas Transmission System LP;[3] (ii) providing natural gas service to areas currently without access to natural gas; (iii) expanding access to multiple sources of natural gas supply; (iv) optimizing existing pipeline systems for the benefit of both current and new customers by creating a more competitive natural gas market; and (v) providing opportunities to improve regional air quality by using cleaner-burning natural gas to achieve the stated objectives of New York and the New England states to reduce their carbon footprint. In addition, the Northeast has long needed additional energy supplies to support new generating capacity.[4]

B. Regulatory/Litigation Background

Constitution filed an application with the Commission on June 13, 2013 for Natural Gas Act ("NGA") Section 7(c) authorization to construct and operate its pipeline project. The Commission issued a certificate of public convenience and necessity authorizing the project on December 2, 2014.[5] The rights of way for the pipeline have been acquired, and the piping and equipment for this project have been held in storage for over two years.

The project requires a Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers (the "Corps"); therefore, states affected by the project are given an opportunity to certify that any discharges from the project will comply with the states' federally approved water quality standards. The Pennsylvania Department of Environmental Protection issued its water quality certification for the Pennsylvania portion

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[3] Iroquois Gas Transmission System LP and Tennessee Gas Pipeline Company, L.L.C. directly serve New York and New England, respectively.

[4] *See, e.g., ISO New England Inc. and New England Power Pool Participants Committee*, 152 FERC ¶ 61,190 (2015), *reh'g denied*, 154 FERC ¶ 61,133, P 5 (2016) ("[W]inter peak day gas supplies will be barely adequate or slightly in deficit through 2020, as long as there are no major contingencies, such as an outage to gas supplies, loss of electrical sales to New England from the north due to extreme weather, or a nuclear unit tripping offline.").

[5] *Constitution Pipeline Co., LLC, et al.*, 149 FERC ¶ 61,199 (2014).

of the Constitution pipeline on September 5, 2014, five months after receiving Constitution's Section 401 application.

Constitution first applied to NYSDEC for a Section 401 water quality certification on August 22, 2013. On April 22, 2016, almost three years later, NYSDEC denied the application on the basis that Constitution had failed to submit certain information. Constitution appealed NYSDEC's denial to the United States Court of Appeals for the Second Circuit, and on August 18, 2017, the court issued its decision denying in part and dismissing in part Constitution's petition.[6] The Second Circuit expressly declined to rule on Constitution's argument that NYSDEC's long-delayed decision on Constitution's application triggered Section 401's self-executing waiver provision. The court determined that it lacked jurisdiction to address that contention, and found that jurisdiction over the waiver issue lies exclusively with the United States Court of Appeals for the District of Columbia Circuit.[7]

III.
COMMISSION AUTHORITY TO DETERMINE WAIVER OF SECTION 401 CERTIFICATION

Millennium Pipeline Co., L.L.C. v. Seggos ("*Millennium*")[8] holds that before a project applicant can seek relief from the D.C. Circuit under Section 19(d)(2) of the NGA,[9] the applicant must first "present evidence of … waiver" to the Commission.[10] The court

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6 *Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation*, 868 F.3d 87 (2d Cir. 2017). The court determined that NYSDEC's denial was not arbitrary or capricious (a determination which Constitution strongly believes is erroneous), and Constitution has filed a petition for rehearing with the Second Circuit, but only on issues unrelated to the Section 401 waiver determination. A copy of the petition is attached hereto as Exhibit B.

7 *Id.* at 100.

8 860 F.3d 696, 698 (D.C. Cir. 2017).

9 15 U.S.C. § 717r(d)(2).

10 The D.C. Circuit also made clear that **a state cannot cure a waiver with a subsequent denial**, explaining that even if the agency "went on to deny the permit outright" the agency could not block the pipeline's construction, because "any decision 'would be too late in coming and therefore null and

explained that the Section 401 certification requirement, by its own terms, is waived automatically if, after "a reasonable period of time (which shall not exceed one year)," an agency fails to act on an application or unreasonably delays such action.[11] Section 401 thus provides a self-executing remedy for a state or federal agency's failure to act or an unreasonable delay. When the statutory criteria for this remedy arise, the Section 401 certification requirement "falls out of the equation" and leaves nothing for the state agency or the court to do.[12] Therefore, the court concluded, an applicant facing such circumstances should present evidence of waiver to the Commission with a request for permission to begin construction.[13] The court explained that, for interstate pipeline projects, "all roads lead to FERC" because an applicant ultimately needs only one permit to begin construction – the certificate of public convenience and necessity from the Commission – and Millennium's certificate (like Constitution's) was conditioned upon documentation to the Commission of receipt **or waiver** of all applicable authorizations required under federal law.[14]

Millennium Pipeline Company, L.L.C. subsequently petitioned the Commission for an order determining that Section 401 certification had been waived in its case because of NYSDEC's failure to act on the company's application. The Commission recently granted that petition, (i) affirming that it has the authority to make such waiver determinations, (ii) concluding that the triggering date for commencing the determination of a reasonable period of time under Section 401 is the date that the certifying agency

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void.'" (quoting *Weaver's Cove Energy, LLC v. R.I. Dep't of Envtl. Mgmt.,* 524 F.3d 1330, 1333 (D.C. Cir. 2008)). 860 F.3d at 700-01.

11 *Millennium*, 860 F.3d at 698-99 (quoting 33 U.S.C. § 1341(a)(1)).

12 *Id.* at 700.

13 *Id*. at 698.

14 *Id.* at 698, 700; 149 FERC ¶ 61,199, Appendix P 8.

receives the certification application, and (iii) finding that NYSDEC's inaction had waived the Section 401 certification requirement for Millennium's project.[15]

The Millennium Waiver Order is not the first time the Commission has exercised its authority to determine that Section 401 certification was waived. As the Commission acknowledged in the order, prior to passage of the EPAct, it was commonly expected that the Commission was the proper forum to make a determination of waiver under Section 401 of the Clean Water Act.[16] In *Georgia Strait Crossing Pipeline LP*,[17] the Commission ruled that the Washington State Department of Ecology waived its Section 401 certification opportunity by failing to act within one year of receiving Georgia Strait's request for Section 401 certification for its natural gas pipeline project. In *Public Service Co. of New Hampshire*,[18] the Commission found that the New Hampshire Water Division had waived certification under Section 401 because it acted on the applicant's application seventeen months after the Water Division had received the application involving a hydroelectric power project. The Commission has made Section 401 waiver determinations regarding several other hydroelectric projects as well.[19]

Thus, the Commission is the proper forum for the Section 401 waiver determination like the one Constitution requests here. The Commission has long exercised its authority to find a waiver of state action within a "reasonable period of time" under Section 401 of the Clean Water Act, and the federal courts of appeals have affirmed that authority.

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15 *Millennium Pipeline Co., L.L.C.*, 160 FERC ¶ 61,065, at PP 2, 17-18 (2017) ("Millennium Waiver Order").

16 Millennium Waiver Order, PP 11-17.

17 108 FERC ¶ 61,053 (2004).

18 75 FERC ¶ 61,111 (1996).

19 *See Pacific Gas and Elec. Co.*, 94 FERC ¶ 62,188 (2001); *Niagara Mohawk Power Co.*, 74 FERC ¶ 62,138 (1996); *Northern Hydro Consultants, Inc.*, 68 FERC ¶ 62,226 (1994).

IV.
NYSDEC FAILED TO ACT WITHIN THE STATUTORILY PRESCRIBED "REASONABLE PERIOD OF TIME"

A. Determination of Reasonable Period of Time under Section 401

1. Section 401 Expressly Contemplates That a Period of Less Than One Year Can Be Unreasonable

At the core of the Commission's consideration in this matter is its interpretation of the statutory language, "within a reasonable period of time (not to exceed one year)." The starting point for such interpretation is "the language of the statute itself."[20] When considering this language, the Commission must "giv[e] effect to each word and mak[e] every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."[21] It is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[22] Based on these accepted interpretational canons, the plain language of Section 401 requires that the state agency act within "a reasonable period of time" after receipt of the application, subject to a one-year outer limit.[23] Therefore, Section 401

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[20] *See* Millennium Waiver Order, P 13 (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987)).

[21] *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991).

[22] *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted); *see United States v. Menasche*, 348 U.S. 528, 538–39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))). "[W]ere we to adopt [Andrews'] construction of the statute," the express exception would be rendered "insignificant, if not wholly superfluous." *Duncan*, 533 U.S. at 174. We are "reluctant to treat statutory terms as surplusage in any setting." *Id.*

[23] Congress made clear that the one year limit was just that, an outer bound after which no action by the state could be deemed "reasonable." The Conference Report provides:

> In order to insure that **sheer inactivity** by the State … will not frustrate the Federal application, a requirement, similar to that contained in the House bill is contained in the conference substitute that **if within a reasonable period, which cannot exceed one year**, after it has received a request to certify, the State … fails or refuses to act on the request for certification, then the certification requirement is waived.

H.R. Conf. Rep. No. 91-940 (1970), reprinted in 1970 U.S.C.C.A.N. 2712, 2741 (emphasis added).

anticipates that a failure to act, and a resulting waiver, can occur in less than a year. Any other interpretation would necessarily ignore the plain meaning of Section 401.

There is additional support for this interpretation in the legislative history of the Clean Water Act. When Congress approved the amendment to Section 401 to insert the waiver language, Representative Edmondson explained that while states are not pressured by the amendment to Section 401 to grant certification, they are "put in the position with this amendment **to do away with dalliance or unreasonable delay** and to require a 'yes' or 'no'" within the period of time deemed reasonable by the federal licensing agency.[24] "The failure by the State to act in one way or the other within the prescribed time would constitute a waiver of the certification required as to that State."[25] Representative Holifield, speaking in favor of the amendment to Section 401, said that "this amendment guards against a situation where the [state agency] … simply sits on its hands and does nothing … it has to take affirmative action to consider the matter and to decide to withhold the certificate if it wants to defeat a proposed project."[26] The addition of the one-year outer limit was a clarification that the discretion of the licensing agency to determine the length of time that qualifies as a "reasonable period" could in no instance exceed one year, in order to insure "that **sheer inactivity** by the State … will not frustrate the Federal application."[27]

In light of the statutory language, which sets the outer limit at one year but makes the test "a reasonable period of time," there is no reason to believe that Congress only intended to discourage "dalliance or unreasonable delay" or "sheer inactivity" when a state

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[24] 115 Cong. Rec. 9264 (Apr. 16, 1969) (emphasis added).

[25] *Id.*

[26] *Id.* at 9265.

[27] H.R. Conf. Rep. No. 91-940 (1970), reprinted in 1970 U.S.C.C.A.N. 2712, 2741 (emphasis added).

takes more than one year to act on a Section 401 application. Were that true, a state could take four months to review an application, then do nothing for one day short of eight months and deny an application, and do so with impunity, knowing that so long as it acted within one year, its delay of the federal permitting process had no consequence. Such a result is directly contrary to the plain language of Section 401.

2. Comparable Federal and State Permitting Processes Offer Useful Guideposts Showing That a Reasonable Period Can Be Significantly Less Than One Year

Other authorities provide helpful guidance as to what would have been a "reasonable" period of time for NYSDEC to act on Constitution's application. The word "reasonable" means "fair, proper, or moderate under the circumstances,"[28] indicating that the Commission has some latitude to determine what a reasonable time would have been.[29] Understanding this latitude, a fitting starting place may well be the State of New York's own laws and regulations. Keeping in mind that states and their agencies do not have authority to dictate what a reasonable period of time would be under Section 401, New York State's own law, and NYSDEC's own regulations, provide solid guidance: "[i]t is the **intent of the [New York State] legislature** to establish **reasonable time periods** for administrative agency action on permits," and, "[i]n the case of an application for a permit for which a public hearing has been held, the department shall mail its decision to the applicant … on or before **sixty calendar days** after receipt by the department of a complete record …." (emphasis added).[30]

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[28] *See, e.g.*, *Definition of Reasonable*, Black's Law Dictionary 1379 (9th ed. 2009).

[29] Moreover, the courts will be obliged to defer to the Commission to decide what is reasonable. *See Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008), cited in *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (the Supreme Court affords "great deference" to the Commission's interpretation of what is "just and reasonable," because those terms are "obviously incapable of precise judicial definition").

[30] NY Environmental Conservation Law § 70-0109(3)(a)(ii); *see also* 6 NYCRR § 621.10(a)(3).

Likewise, the regulations of the Corps and the Environmental Protection Agency ("EPA") provide helpful guidance. Under the Corps' regulations, 60 days of inaction by the state agency after the filing of the Section 401 application can result in a waiver.[31] The EPA regulations provide that a reasonable period of time "shall generally be considered to be 6 months, but in any event shall not exceed 1 year."[32] In its final rule revising its regulations applicable to operations and maintenance activities involving the discharge of dredged or fill material in waters of the U.S. and ocean waters, the Corps stated:

> Based on our experience since enactment of the 1977 CWA amendments, we believe that two months is a reasonable period of time for states to act on requests for routine maintenance dredged material disposal activities. More complex projects or projects with potential water quality problems may require more time. **Thus, we believe that the requirement for the states to act on requests for certification within two months, and within six months as a maximum period of time, is reasonable.**[33]

Thus, a period of sixty days to six months is a sound measure for a reasonable period of time for a state agency to act on a Section 401 application. Pennsylvania's issuance of its Section 401 certification for Constitution within five months of Constitution's application is a strong endorsement of this time frame.

What, then, was a reasonable period of time for NYSDEC to have taken action on Constitution's Section 401 application? Constitution submits that the Commission may find at any one (or more) of several occasions during the processing of Constitution's application that NYSDEC exceeded a reasonable period of time under Section 401. Those instances are described in the analysis that follows. Certainly, under any analysis, a reasonable time for NYSDEC was less than the two-year and eight month period after the

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31 33 C.F.R. § 325.2(b)(1)(ii).

32 40 C.F.R. § 121.16(b).

33 Final Rule for Operation and Maintenance of Army Corps of Engineers Civil Works Projects Involving the Discharge of Dredged Material Into Waters of the U.S. or Ocean Waters, 53 Fed. Reg. 14902-01 (1988).

initial submittal, the almost two year period following the first requested resubmittal, and the 361-day period that it took to act on the second requested re-submission, **which made no changes to Constitution's existing application**.

B. Chronology of Constitution's Section 401 Application Process

No matter the measure used by the Commission to determine a reasonable period of time under the facts of this case, the chronology of Constitution's Section 401 process with NYSDEC (which is detailed in Exhibit A hereto) makes the case for waiver self-evident.[34] The chronology includes the following significant events.

On August 22, 2013, Constitution submitted a single application for a Section 401 water quality certification to NYSDEC and to the Corps (for a Section 404 permit).[35] On March 4, 2014, the Corps issued its public notice regarding Constitution's joint application, reflecting its determination that Constitution's application was complete.[36]

On May 9, 2014, Constitution withdrew and resubmitted its Section 401 application in an effort to cooperate with NYSDEC in good faith. At that point, the application had been pending for almost nine months, and NYSDEC threatened to deny the application if it was not withdrawn and refiled, principally because NYSDEC had expressed disagreement with the proposed route in its comments to FERC, and because Constitution

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[34] The chronology is supported by the record in the proceedings at the Second Circuit, where NYSDEC filed the record of its decision. Constitution also submitted sworn declarations to the Second Circuit, but the court did not consider them. *Constitution Pipeline Co., LLC*, 868 F.3d at 99-100. Although NYSDEC was required to file its decision, and an index of the record supporting it, with the Commission pursuant to 18 C.F.R. § 385.2014, NYSDEC did not do so. Therefore, Constitution has attached an appendix ("Appendix") of relevant documents from the record submitted in the Second Circuit proceedings, indexed in the "Chronology" attached as Exhibit A.

[35] Appendix 000134 – 000139; Declaration of Keith Silliman ("Silliman Declaration"), attached hereto as Exhibit C, ¶ 6.

[36] Appendix 000387 – 000398. *See* 33 C.F.R. § 325.1(d)(10) ("An application will be determined to be complete when sufficient information is received to issue a public notice."). The Corps' public notice is attached hereto as Exhibit D.

was relying on remote sensed surveys as well as ground based surveys at that time.[37] In Constitution's view, NYSDEC's effort to redirect the pipeline route was unreasonable and its refusal to consider remote sensing surveys was arbitrary and capricious.[38]

On July 3, 2014, NYSDEC issued a memorandum to Constitution with recommendations for revised materials in support of Constitution's refiled application.[39] Constitution revised its application format as requested and continued to supplement its application to provide additional details to NYSDEC as additional survey access was obtained.[40]

On November 13, 2014, Constitution and NYSDEC met to discuss remaining items to be provided,[41] and four days later Constitution submitted additional information to NYSDEC.[42] On December 24, 2014, NYSDEC issued its first Notice of Complete Application for Constitution's Section 401 certification.[43]

From December 2, 2014 to July 8, 2015, Constitution had no fewer than forty meetings, conference calls, and field visits with NYSDEC, reflecting Constitution's high level of responsiveness to NYSDEC requests, whether in writing or during conference calls and meetings.[44]

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37 Appendix 00540 – 000541.

38 Appendix 000540 – 000541.

39 Appendix 001121 – 001124.

40 *See* Chronology, Exhibit A, August 13, 2014 entry (Appendix 001127 – 001133), September 12, 2014 entry (Appendix 001140 – 001141), *and* September 30, 2014 entry (Appendix 001142 – 001188); Declaration of Lynda Schubring ("Schubring Declaration"), attached hereto as Exhibit E, ¶¶ 15-16.

41 Silliman Declaration, ¶ 7.

42 Appendix 001682 – 001683.

43 Appendix 001759 – 001766.

44 Silliman Declaration, ¶ 27.

On March 17, 2015, NYSDEC provided Constitution a list of twenty streams that NYSDEC wanted Constitution to cross via trenchless crossing methods,[45] and on April 20, 2015, NYSDEC increased the number of proposed trenchless crossings to 26 streams.[46] Based on proposed re-routes and NYSDEC's agreement to remove certain streams from consideration, the number of streams for trenchless analysis was subsequently narrowed by agreement to 21.[47]

On April 21, 2015, NYSDEC met with Constitution and provided the draft Section 401 certificate conditions, indicating that it was close to issuing the Section 401 certification.[48] Presumably due to its erroneous perception that Section 401 merely requires a "one-year clock" for acting on an application, NYSDEC asked Constitution to withdraw and resubmit the Section 401 application again.[49] NYSDEC indicated that it needed only a couple of months more to complete its permit process, and that the second withdrawal and refiling of Constitution's application would not delay the agency's decision on the Section 401 certification.[50]

In reliance upon NYSDEC's representations, Constitution withdrew and resubmitted its application a second time, on April 27, 2015.[51] The resubmitted application was unchanged from the application that was previously pending before NYSDEC. That same day, NYSDEC published its second Notice of Complete Application. NYSDEC's notice announced that the "re-submitted application incorporates all application materials

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45 Silliman Declaration, ¶ 11; Appendix 002215 – 002217.

46 Appendix 002255 – 002259.

47 Appendix 002322.

48 Silliman Declaration, ¶¶ 12, 13.

49 Silliman Declaration, ¶ 13.

50 Silliman Declaration, ¶ 13.

51 Appendix 002299 – 002300.

previously provided" and that all previously filed public comments would be considered and thus did not need to be re-submitted.[52]

Two days after the second re-submittal, NYSDEC issued a press release stating, in pertinent part, that:

> Due to the extended winter preventing necessary field work by staff, **DEC requested additional time** to complete its review of any potential impacts on wetlands and water quality … . As requested and to continue the substantial progress reviewing the application and supporting documents that has been made to date, **the applicant withdrew and subsequently resubmitted its application with no changes or modifications** … **the applicant's withdrawal and resubmission is not expected to unduly delay the agency's final determination**.[53]

The remaining field visits requested by NYSDEC were completed over the following two weeks.[54]

On June 2, 2015, Constitution submitted a "Responsiveness Summary," which addressed the public comments related to water quality, stream crossings, wetlands, pipeline burial depth, alternatives, cumulative impacts, and blasting, among other issues that were raised during NYSDEC's public comment periods.[55] At the end of June 2015, Constitution submitted to NYSDEC a Stream Crossing Feasibility Analysis matrix evaluating the technical feasibility of using trenchless methods on the 21 streams identified by NYSDEC for trenchless crossings.[56] About a week later, on July 8, 2015, NYSDEC

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52 Appendix 002301 – 002302. NYSDEC's second Notice of Complete Application is also available at: http://www.dec.ny.gov/enb/20150429_reg0.html.

53 Appendix 002306 – 002307 (emphasis added); DEC Announces Public Comment Period on Proposed Constitution Pipeline Until May 14 (Apr. 29, 2015), http://www.dec.ny.gov/press/101519.html (emphasis added). At that time, NYSDEC had physically visited substantially all of the proposed stream crossings with Constitution staff and staff from the Corps. All of NYSDEC's field visits to streams and wetlands are detailed in the Chronology (Exhibit A) and Appendix. *See* Appendix 000123 – 000133, 000177 – 000183, 000531 – 000534, 001120, 001674 – 001681, 001684 – 001685, 002304 – 002305, 002309 – 002315.

54 *See* Chronology (Exhibit A), May 11-12, 2015 entry (Appendix 002309 – 002315).

55 Appendix 002330 – 002487; Silliman Declaration, ¶ 17.

56 *See* Chronology (Exhibit A), June 30, 2015 entry (Appendix 002642 – 002643).

indicated that the Stream Crossing Feasibility Analysis matrix was sufficient for review.[57] NYSDEC also indicated that it had no comments on the Responsiveness Summary.[58] Further, NYSDEC told Constitution that it expected to issue the water quality certification by the end of July 2015.[59]

On July 20, 2015, consistent with its previously stated expectation of issuing the Section 401 certification for Constitution by the end of the month, NYSDEC provided a draft of the certification to the Corps and requested that the Corps promptly review and provide its input to NYSDEC.[60] The detailed 21-page draft water quality certification contains conditions that confirm that NYSDEC and Constitution had reached a mutual understanding that the certification would require Constitution, after issuance of the certification, to undertake additional geotechnical analysis prior to construction to confirm the feasibility of the trenchless stream crossings that NYSDEC proposed.[61]

Shortly thereafter, NYSDEC staff advised Constitution that they had prepared the Section 401 certification and had submitted it to NYSDEC's General Counsel (as of July 31, 2015) for final review and approval.[62] During this same time period, NYSDEC's General Counsel advised that, subject to approval from the Governor's office, he believed

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57 Silliman Declaration, ¶ 20; Appendix 002644.

58 *Id.*

59 Silliman Declaration, ¶¶ 19-20. In addition, in July 2015, at NYSDEC's request, in order to avoid a wetland complex of significant value to NYSDEC, Constitution obtained the land rights to a 2.9 mile reroute, at a cost to Constitution of $3,450,000, and sought and obtained a variance from the Commission authorizing that reroute. Constitution Rehearing Order, P 184. Schubring Declaration, ¶ 11; Appendix 002645 – 002672. Also, solely at NYSDEC's request to address its concerns regarding wetland mitigation, Constitution purchased a 70 acre parcel at Canadarago Lake in Otsego County, New York at a cost of $475,000. Schubring Declaration, ¶¶ 10, 11; Appendix 002637 – 002640.

60 Appendix 002681 – 002703. The draft Section 401 certification that NYSDEC provided to the Corps is also attached hereto as Exhibit F.

61 Appendix 002699 – 002701 (trenchless crossing conditions).

62 *See* Chronology (Exhibit A), July 28, 2015 through July 30, 2015; Silliman Declaration, ¶ 21; Declaration of Pamela S. Goodwin, Esq. ("Goodwin Declaration"), attached hereto as Exhibit G, ¶ 6.

NYSDEC would issue the permit within several days.[63] On July 28, 2015, NYSDEC advised Constitution that it had no unresolved substantive issues and was expecting to issue the water quality certification to Constitution by August 7, 2015.[64] Again, on August 3, 2015, NYSDEC informed Constitution in a phone call that it had no remaining issues with respect to Constitution's application.[65]

Nonetheless, on August 7, 2015, NYSDEC advised Constitution that although it was ready to issue the permits, the Governor's office was not.[66] In fact, on August 18, 2015, NYSDEC advised Constitution that the permit had been signed by the appropriate NYSDEC representative and was merely awaiting approval from the Governor's office to be dated and issued.[67] On August 28, 2015, NYSDEC advised Constitution that a public notice for permit issuance had been drafted.[68]

From August 28, 2015 until April 22, 2016, despite repeated inquiries, NYSDEC refused to communicate with Constitution.[69] NYSDEC's eight-month silence ended only when it issued its letter of April 22, 2016, denying Constitution's Section 401 certification. Notwithstanding its prior statements to the contrary, NYSDEC's denial letter claimed that Constitution failed to provide "sufficient information to enable the Department to determine if the Application demonstrates compliance with" New York's water quality standards.[70] Notably, NYSDEC's own regulations require that any request for additional

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63 Goodwin Declaration, ¶ 6.

64 Goodwin Declaration, ¶ 6.

65 Silliman Declaration, ¶ 22.

66 Silliman Declaration, ¶ 23.

67 Silliman Declaration, ¶ 24.

68 Silliman Declaration, ¶¶ 24-25.

69 Silliman Declaration, ¶ 26; *see* Chronology (Exhibit A), August 28, 2015 through April 22, 2016.

70 Appendix 003181 – 003194. On April 20, 2016, the Corps confirmed by letter that it received all the information it had requested in prior permit review correspondence and that it was waiting only for the Section 401 certification from NYSDEC. Appendix 003179 – 003180. On May 11, 2016, the Corps

information must be in writing, "must be explicit," and "must indicate the reasonable date by which the Department is to receive the information."[71] No such requests were made.

C. NYSDEC Failed to Act Within a Reasonable Period of Time

As the foregoing chronology demonstrates, NYSDEC unreasonably delayed and protracted the federal licensing process and failed to act "within a reasonable period of time" on Constitution's Section 401 application. There are multiple points at which the Commission can and should find that NYSDEC exceeded a reasonable period of time in reaching a decision on Constitution's Section 401 application.

The first instance occurred as of May 9, 2014, when NYSDEC threatened denial of the Section 401 application (based largely upon a disagreement with the proposed route of the pipeline and Constitution's use of remote sensed surveys for properties) and directed Constitution to withdraw and resubmit its Section 401 application. NYSDEC's effort to control the pipeline route under the guise of its Section 401 water quality certification was unreasonable and resulted in an unreasonable delay of both NYSDEC's decision and the federal licensing process. Because NYSDEC's unreasonable demands imposed an unreasonable delay, this is the first instance where the Commission may find waiver of the Section 401 certification requirement.

The second occasion on which the Commission can and should find that waiver occurred was in April 2015, when NYSDEC directed Constitution to re-submit its application for a second time. NYSDEC sought that arrangement so it could have "a couple

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issued another letter notice denying Constitution's Section 404 application without prejudice and that the administrative record would remain open until May 11, 2017, during which time Constitution could reinstate the application by submitting a Section 401 certification or written waiver of same. Appendix 003195 – 003196. The Corps has since extended the period in which the administrative record would remain open to August 11, 2018.

[71] 6 NYCRR § 621.14(b).

additional months" to review the application[72] – this is despite the fact that more than 20 months already had passed since NYSDEC's receipt of Constitution's initial application and just shy of 12 months already had passed since the first re-filing of the application. Most tellingly, the Corps, acting on the very same submission, had issued a public notice of its determination that the application was complete more than a year before NYSDEC's second request to re-submit the application. These dilatory tactics by NYSDEC unreasonably delayed the Section 401 certification process and resulted in waiver under Section 401.

A third point at which the Commission can and should find waiver occurred is May 9, 2015, one year after the first re-filing of Constitution's Section 401 application. Constitution's second withdrawal and resubmission on April 27, 2015 was done at the express request of NYSDEC for additional time to complete the certification, based on NYSDEC's explicit representations that the resubmission (i) would entail no change to the application, and (ii) would not "unduly delay" NYSDEC's final determination. NYSDEC's own press release of April 29, 2015, stated that it had requested the second withdrawal and refiling, and that Constitution had resubmitted the application **with no changes or modifications**.

By its own admission, NYSDEC indicated that only upon a denial would the application be considered a new application that would be subject to a new completeness determination and public review and comment.[73] In fact, the second withdrawal and refiling was merely a continuation of NYSDEC's review of Constitution's existing application, which plainly could not have begun any later than the first re-filing of the

[72] Silliman Declaration, ¶ 13.

[73] Appendix 002301 – 002302, 002306 – 002307.

Section 401 application on May 9, 2014. Thus, the Commission should find that the reasonable period of time allowed under Section 401 expired, at the very latest, on May 9, 2015, one year after the first re-filing of Constitution's Section 401 application.

Finally, even if the Commission were to overlook NYSDEC's unwillingness to act and its insistence upon the two withdrawals and re-filings, there could be no better evidence of unreasonable delay than NYSDEC's unexplained inaction for the final eight months that Constitution's Section 401 application was pending. Even if the Commission were to consider the second withdrawal and refiling as restarting the Section 401 time period for review (though it should not, for the reasons already explained), NYSDEC failed to act within a reasonable period of time on that refiling, too. As described above, Constitution's second refiling was made on April 27, 2015, and NYSDEC issued its Notice of Complete Application for that refiling on the same day. The communications between NYSDEC and Constitution following the second refiling consisted only of submissions relating to the Responsiveness Summary, Stream Crossing Feasibility Analysis, and wetland mitigation plans, all of which occurred in May, June, and July 2015.[74] In phone calls with Constitution, NYSDEC indicated that Constitution's submissions were sufficient for review. Aside from some further admissions from NYSDEC staff that the Section 401 certification had been prepared and was pending issuance, NYSDEC shut down all communications with Constitution **for over eight months** – despite repeated inquiries by Constitution to NYSDEC – and NYSDEC took **no action** on Constitution's application until issuing the denial on April 22, 2016.

[74] In September 2015, Constitution submitted supplemental information to the Corps and NYSDEC to conform its site-specific plans to survey data obtained from parcels acquired through judicial condemnations. Appendix 002714 – 002720; Schubring Declaration, ¶¶ 12-14. NYSDEC did not provide any response, feedback, or questions regarding this supplement.

In light of the legislative history of Section 401, which emphasizes the desire of Congress to avoid "sheer inactivity," NYSDEC's failure to take any action on Constitution's application within 361 days after Constitution's second refiling of the same application – an application which then had already been before NYSDEC for more than 11 months – and its utter silence for the final eight months prior to its decision, constitute a failure to act within the reasonable time that Section 401 requires. Put simply, if eight months of sheer inactivity does not amount to unreasonable delay, particularly where the same application had already been pending for a year before that silence began, it is difficult to imagine what set of circumstances might constitute unreasonable delay under Section 401.

NYSDEC's insistence that Constitution twice withdraw and re-file its application underscores the validity of the waiver conclusion. States have a right to deny Section 401 applications on their merits. However, for an agency to threaten to deny an application unless the applicant withdraws and refiles immediately before the end of the maximum one-year period Section 401 allows – solely in order to restart a perceived "one-year clock" for review under Section 401 – sharply conflicts with Congress's intent that the waiver language of Section 401 would prevent delays of the certification process by dilatory agencies. Such conduct can reasonably be viewed as nothing more than improper "gaming" of the permitting process. Moreover, because NYSDEC could not lawfully order Constitution to refile its application in order to lengthen the state's review period, NYSDEC's threat to deny Constitution's application if Constitution did not refile the

application to provide the state more time treads into the realm of coercive state action forbidden by the unconstitutional conditions doctrine.[75]

Because of NYSDEC's failure to act within a reasonable period of time, *Millennium* dictates that an automatic waiver of the certification under Section 401 occurred and that the determination of such waiver must be made by the Commission. As the D.C. Circuit confirmed in *Millennium*, if the state agency fails to act within a reasonable period of time (not to exceed a year), the Clean Water Act's certification requirements are deemed waived "such that the pipeline no longer needs a water-quality certificate to begin construction."[76]

IV.
NYSDEC HAD NO JUSTIFICATION FOR ITS DELAY

There is no valid justification for NYSDEC's failure to act within a reasonable period of time on Constitution's Section 401 application. In addition to the Commission's comprehensive review of the Constitution pipeline project, in which NYSDEC participated as an intervenor,[77] Constitution underwent an extensive, multi-year review with NYSDEC. That process, which began in 2012, included a plethora of meetings, conference calls and field visits, and continued through the summer of 2015, during which time Constitution provided NYSDEC with sufficient, detailed information as required for NYSDEC to issue a water quality certification. This was compellingly confirmed by the fact that on July 20,

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75 *Cf., e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (explaining why "land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits").

76 *Millennium*, 860 F.3d at 698-99 (citing *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (quoting 33 U.S.C. § 1341(a)(1)).

77 NYSDEC actively participated in the Commission's environmental review of the Constitution project, making nine detailed submissions to the Commission on environmental issues that were specifically considered in the Environmental Impact Statement process. NYSDEC twice stated in its comment letters to the Commission that it "intends to rely upon the federal environmental review prepared pursuant to [NEPA] to determine if the Project will comply with the applicable New York standards." Letter from Patricia J. Desnoyers, Esq. (NYSDEC) to FERC (Nov. 7, 2012), at 1-2 (Appendix 000027 – 000028); Letter from Patricia J. Desnoyers, Esq. (NYSDEC) to FERC (July 17, 2013), at 1 (Appendix 000080).

2015, NYSDEC sent a 21-page draft water quality certification to the Corps requesting expeditious review and comment.[78] NYSDEC's draft certification included over 100 detailed conditions, including specific conditions addressing trenchless crossings, among other things.[79] Significantly, when NYSDEC asked the Corps to comment on the draft certification in July 2015, it did not suggest or claim that it had insufficient information to issue the water quality certification.[80]

Given the extensive input by Constitution from 2012 until July 2015, as memorialized in the draft water quality certification transmitted to the Corps, there can be no doubt that Constitution provided NYSDEC with the information it needed to issue the water quality certification. Moreover, it is significant that, notwithstanding repeated inquiries by Constitution to NYSDEC between July 2015 and the permit denial in April 2016, Constitution was told that NYSDEC needed no additional information from Constitution.[81] NYSDEC's untimely denial disregarded this history and ignored Constitution's comprehensive applications and repeated agreements to go above and beyond what was legally required in order to satisfy NYSDEC's requests for information and costly changes to the Commission-approved project.[82] NYSDEC's misuse of its authority under the Clean Water Act to unreasonably delay its certification is illustrated in

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78 Appendix 002681 – 002703.

79 *See id.*; Appendix 002699 – 002701 (trenchless crossing conditions).

80 The Corps emailed NYSDEC regarding comments on the draft Section 401 certification and asked if there is "a chance we can get them to you next week?" NYSDEC responded: "Things are moving fast here. The sooner the better." Appendix 002704 – 002706.

81 *See* Chronology (Exhibit A), pp. 18-21.

82 For example, rather than seek rehearing once the Commission had determined a route for the pipeline which did not include NYSDEC's preferred alignment along Route I-88, called "Alternative M," NYSDEC sought further justification from Constitution for excluding Alternative M from its water quality application. When Constitution provided a separate 582-page study in June 2014 addressing NYSDEC's request that Constitution analyze Alternative M's constructability and environmental impact, NYSDEC did nothing, only to claim, **a year and ten months later**, that inadequate information about Alternative M was one of the bases for its denial of Constitution's application. NYSDEC denial letter at 11 (Appendix 003191).

Exhibit H hereto, which refutes each item of deficiency asserted by NYSDEC in its letter order denying Constitution's Section 401 application.

Notwithstanding its own regulation requiring its information requests to be made in writing, NYSDEC made only a handful of formal written requests to Constitution for information after Constitution initially submitted its Section 401 application in 2013. Constitution complied with all of those requests, as well as with all of NYSDEC's numerous informal data requests. NYSDEC staff repeatedly assured Constitution in 2015 that NYSDEC required no further information, and that a decision on the Section 401 application would be forthcoming in a timely manner.[83] Despite these assurances, NYSDEC failed to act for two years and eight months after Constitution submitted its application. Thus, the Commission should determine that a waiver occurred and, by doing so, enforce the importance of the timely exercise by other agencies of their authority in connection with projects under the Commission's jurisdiction.

VI.
CONCLUSION

As the Commission itself recognized in its order issuing a certificate of public convenience and necessity to Constitution, "state and local agencies" may not "prohibit or unreasonably delay the construction or operation of facilities approved by this Commission."[84] Accordingly, for the reasons set forth in this Petition and based on the specific facts of this case, Constitution respectfully requests that the Commission issue an order declaring that NYSDEC failed to act within a reasonable period of time on Constitution's Section 401 application and that such failure to act constitutes a waiver of

[83] Appendix 002306 – 002307; Silliman Declaration, ¶¶ 19-20.

[84] 149 FERC ¶ 61,199, at P 147.

the Section 401 certification requirement for federal authorizations related to the New York State portion of Constitution's pipeline project.

Respectfully submitted,

CONSTITUTION PIPELINE COMPANY, LLC
By Williams Pipeline Services LLC, its Operator

By: */s/ Stephen A. Hatridge*
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