
Fed Regulators Push Back Against Gov Cuomo's Gas Pipeline Stonewalling

Forbes.com

September 9, 2019

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Ten days ago, the Federal Energy Regulatory Commission (FERC) moved to reassert control over the permitting of interstate oil and gas pipelines. FERC determined that New York State had forfeited its power to block construction of the proposed Constitution Pipeline because the New York State Department of Environmental Conservation (DEC) had taken more than the allotted one-year period to disapprove a request by the pipeline developers for a Section 401 Clean Streams Certification. Ironically, that ruling may be just what New York Governor Andrew Cuomo was hoping for.

The proposed pipeline would run 124 miles from the Marcellus Shale natural gas fields in northeastern Pennsylvania to Schoharie County in upstate New York. There, it would connect with the existing Tennessee Gas Pipeline that already feeds into New England.

For the most part, decisions on interstate energy pipelines are federalized under FERC. Once finally approved by FERC, the only major task left is supposed to be the pipeline construction itself. Practically the only discretion left to the states in this process is whether or not to grant a Certification under Section 401 of the Federal Clean Water Act. This state certification of water quality is basically to confirm that any "discharge" into "navigable waters" resulting from an interstate pipeline would meet the standards of the Federal Clean Water Act. If yes, the certification is supposed to be approved by the state. If no, the state is supposed to list its objections and the pipeline developers would then work from there to address and resolve the state's concerns.

Until 2016, the Section 401 process was thought of mostly as an administrative task. In 2016, however, New York Governor Andrew Cuomo seized upon the 401 Certification as a way to control – more precisely prevent – the construction of interstate pipelines. His DEC refused to grant a 401 Certification for the Constitution Pipeline, stopping that project in its tracks at the time. Cuomo has since used the same technique to block other proposed pipelines that would terminate in or traverse through New York, and other governors have begun to follow his lead. Interstate pipeline construction is now a free-for-all with each state claiming veto power through the Section 401 process.

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In May, President Trump signed an Executive Order requiring the United States Environmental Protection Agency to review the Section 401 process for the purpose of limiting state authority. What effect that Executive Order will have is debatable, but the facts of the Constitution Pipeline case presented FERC with an opportunity to act on its own.

The owners of that pipeline first applied to the DEC for a Section 401 Certification in 2014. At the request of the DEC, which continually asked for more information, the owners resubmitted their application several times. The DEC then took the position that each resubmission constituted a new application, giving itself a fresh one-year timeline from the date of each separate resubmission. FERC disagreed. By a 4-0 vote last week, FERC decided that New York had simply forfeited its right to pass on the project by taking too long. Further, FERC refused to grant the state an injunction against construction while it decided whether or not to appeal.

Not all pipeline cases will have similar facts, but FERC's actions showed that it is prepared to reassert its authority when it feels it needs to. The 4-0 vote included both Democratic and Republican FERC appointees, indicating how annoyed the agency was with the power grab by the Cuomo Administration. It remains to be seen how FERC will exercise its discretion in other cases, especially those where a state appears to be more seriously considering the underlying mandate to consider water quality impacts under Section 401 within the required one-year timeframe.

Ironically, in the Machiavellian world of New York politics, this FERC ruling might be exactly what Andrew Cuomo wants. New York, as a state, desperately needs more natural gas. Moratoria against new gas hookups are now in effect in the city of New York and in many other downstate municipalities. Business growth already is being affected, not to mention impacts on many ordinary citizens. For example, homeowners are being stymied in their attempts to switch their homes from more polluting (and expensive) heating oil to generally cleaner (and less costly) natural gas. If a bad winter hits, New York might even have to import gas from Russia again, as it has had to do in the past.

Governor Cuomo no doubt knows that his state needs new energy sources badly, but he does not want to lose his political support from the environmental movement either. Thus, ideally, he would not mind too much were a third party to "force" him to construct the infrastructure needed to supply New York with natural gas while he can continue to rail against the alleged environmental damage from that construction, not to mention the perceived undermining of "state's rights". While this week the DEC announced that it would continue to oppose the pipeline, it did not say how. Indeed, the Governor's optimum political play now may be to find some way to appease his environmentalist supporters while he quietly allows the Constitution Pipeline to be built at the order of "overbearing" bureaucrats in Washington. All in all, it is not a bad position for Governor Cuomo to be in now.

ATTORNEYS MENTIONED

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