

Clean Water Act Section 401 and Natural Gas Pipelines: Challenges and Responsibilities

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Overview of Presentation

- Natural Gas Act
- FERC Authority
- State Authority Under CWA Section 401
- Key Issues
- Relevant Pipeline Projects
- Best Practices

Natural Gas Act

- In 1938, the Natural Gas Act (“NGA”) established a regulatory scheme providing federal regulation of interstate natural gas pipelines
 - Under Section 7, the Federal Energy Regulatory Commission (“FERC”) reviews applications for the construction and operation of natural gas pipelines
 - FERC is obligated to issue a certificate if it finds an applicant’s construction and operation of the proposed facilities “is or will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717(f)

Is FERC Supreme?

- Has exclusive authority to site interstate natural gas facilities
 - NGA preempts state and local laws (e.g. eminent domain, zoning/construction requirements) that would prevent or unduly delay a project
- Jurisdiction over interstate natural gas pipelines, while broad, does NOT preempt authority of other agencies acting under Federal law

State Federal Authority

- FERC's authority does NOT preempt state agencies acting under Federal authority
- 15 U.S.C. § 717b(d) specifically preserves rights of states to exercise their federally-delegated authority under:
 - Coastal Zone Management Act: Broad federal authority given states to regulate activities impacting the state's coastal zone
 - **Clean Water Act: Section 401 water quality certification**
 - Clean Air Act

Exclusive Jurisdiction for Judicial Review

- Challenges to FERC certificates go before the D.C. Circuit or the circuit where the company is located or has its principal place of business (15 U.S.C. § 717r(b))
- Challenges to orders or actions of other Federal agencies, or to a state agency acting pursuant to federal law (other than CZMA), go before the circuit where the facility is proposed (15 U.S.C. § 717r(d)(1))
- Challenges to an agency's failure to act (other than CZMA) go before the D.C. Circuit (15 U.S.C. § 717r(d)(2))
- Challenges to an agency's action under the CZMA go before the Secretary of Commerce (16 U.S.C. § 1465)

Clean Water Act Section 401

- Requires applicants for a federal license or permit, to provide the federal agency with a certification from the state that the discharge *will not violate state water quality standards* (33 U.S.C. § 1341(a)(1))
- If the state “fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year),” the project may proceed without state certification (*Id.*)

Key 401 Issues

- What triggers one-year statutory waiver period?
 - Receipt of a request for certification (FERC)
 - “Valid request” (Corps)
 - Complete application (e.g. New Jersey)
- What is the proper scope of 401 analysis?
 - Upland impacts (e.g. Atlantic Coast Pipeline)
 - Downstream GHG emissions? (e.g. Millennium Pipeline)
 - Alternatives (e.g. Constitution Pipeline)
- What is the appropriate venue for challenge?
 - U.S. Court of Appeals (NGA)
 - State administrative appeals process (state-specific)
- Will the Corps acknowledge the waiver?

Millennium Pipeline

- June 2017, the D.C. Circuit dismissed a challenge to NYDEC's delay in issuing 401 WQC for Valley Lateral Project, concluding the company could present evidence of waiver to FERC
- NYDEC then denied 401 based on failure to consider downstream GHG emissions in FERC's NEPA review
- Project then presented evidence of waiver to FERC
- FERC found that NYDEC had waived the 401, finding waiver trigger is "receipt of the request"
- Second Circuit upheld FERC determination of waiver

Constitution Pipeline

- April 2016: NYDEC denied 401 for the Constitution Pipeline
- August 2017: Second Circuit determined NYDEC acted within statutory authority, and denial of the pipeline was not arbitrary or capricious
- October 2017: Constitution urges FERC to overrule NYDEC's denial of WQC and find waiver
- January 2018: FERC rejects Constitution's waiver request
- February 2018: Constitution files for rehearing at FERC
- April 2018: SCOTUS denies petition for cert. of Second Circuit decision

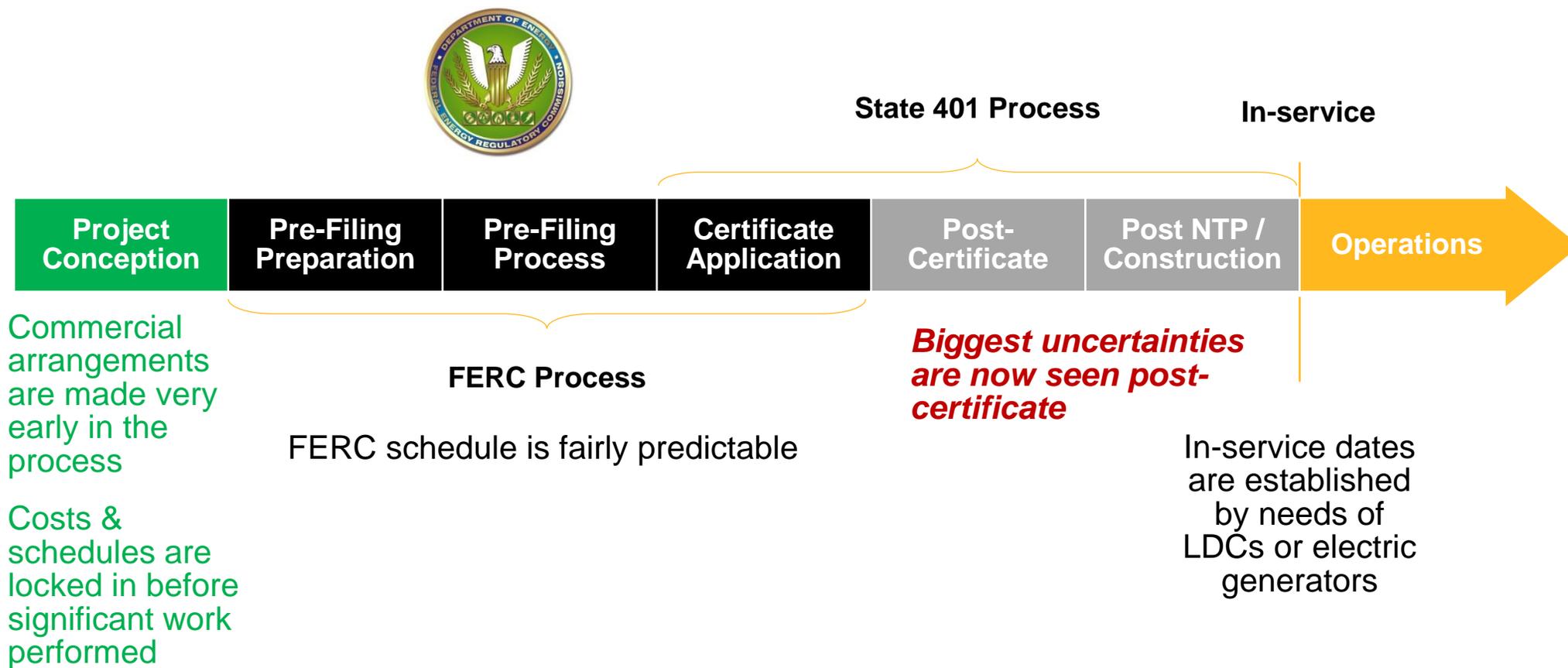
Atlantic Coast & Mountain Valley

- Virginia issued 401 certification for 404 permit (NWP 12).
- Due to opposition for MVP and ACP, Virginia decided to review “upland impacts” separate from the certification for 404 impacts.
 - Are upland impacts properly within the scope of 401?
 - Can the State issue two 401 certifications for a project: one to the Corps, one to FERC?
 - What about BLM, NPS, and other federal authorizations?

Tennessee Gas Pipeline

- June 2015: Tennessee Gas Pipeline Co. submits WQC application to MassDEP for Connecticut Expansion project
- June 2016: MassDEP grants WQC, BUT opposition groups seek to administratively appeal decision.
- August 2016: Tennessee Gas petitions First Circuit to prevent further review of the certification arguing that permit issued by MassDEP ended state's involvement in the permitting process.
- March 2017: First Circuit disagrees, holding that the NGA requires final action from the state agency, including resolving the administrative appeal, before it can be challenged in court.
- Contrast with federal court findings in Ohio and Pennsylvania

Schedule of Regulatory Process



Best Practices

- Environmental permits and authorizations for FERC pipelines are frequently subject to administrative appeals and/or judicial review
 - No issue should be considered too small to provide a basis for a challenge
- Ensure a solid administrative record is established during the water quality certification application and review process
- State agencies should adhere to their own procedures and schedules to ensure an efficient and defensible 401 decision
 - Applicants support FERC’s interpretation that the one-year waiver period is triggered when state agency receives a written application
- Be prepared to litigate “final” permit issue
- Once a 401 permit issue is challenged, there is virtual certainty you will end up in a Court of Appeals