

# THE FOSTER REPORT

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## Independent and In-Depth Reporting on the Energy Industry

### FERC, Army Corps Discuss State Actions on CWA Section 401 for Pipelines

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With states exercising their authority under the Clean Water Act Section 401 on water quality certificates for natural gas pipelines and legal proceedings stemming from those activities, the case law on the subject is expected to grow, panelists said at the Energy Bar Association Annual Meeting May 7.

Several cases are pending at FERC and in the courts on the details of what constitutes final state agency action under CWA Section 401, the legal options available to pipelines if a state waives its right to act under the law, and when exactly the clock starts running for a state to act within a reasonable period of time, speakers said.

Even as appeals courts have issued decisions and FERC has tried to clarify its interpretation of when a state waives its authority to act on a water quality certificate under CWA Section 401 for a pipeline project, there remains a good bit of uncertainty on the law and state actions, speakers said.

The panelists giving their views were John Katz, deputy associate general counsel at FERC, Milton Boyd, assistant chief counsel for litigation and administrative disputes at the U.S. Army Corps of Engineers, and Jim Messenger, partner in the Boston office of Gordon & Rees Scully Mansukhani.

State actions on water quality certificate applications used to be fairly routine, but New York and a few other states have created uncertainty and added a lot of expense for pipeline applicants to obtain state approvals, said Messenger.

Environmental groups will challenge pipeline projects at every step of the regulatory process, and project developers can expect more legal challenges involving CWA Section 401, said Boyd.

With cases pending on rehearing at FERC, including the New York State Department of Environmental Conservation's denial of a water quality certificate for National Fuel Gas Supply Corp. and Empire Pipeline Inc., "stay tuned for further Commission decisions," said Katz.

The NYSDEC has issued several controversial decisions on water quality certificate applications – involving Millennium Pipeline, Constitution Pipeline, and National Fuel – but other states may follow that path as a means to halt pipeline development, audience members at the EBA panel noted.

Industry concerns about state politics playing more of a role in CWA Section 401 rulings lead the Natural Gas Council to seek help from the White House in April. The five gas industry trade groups that make up the council sent a letter to President Trump seeking administration guidance and direction on CWA Section 401 issues as the infrastructure package is being considered in Congress.

“Recent implementation of Section 401 has created much confusion and frustration and has resulted in significant delays to infrastructure projects. Moreover, some states are improperly using Section 401 to hijack the permitting process for pipelines that transport natural gas in interstate commerce,” the council members said.

The Natural Gas Council has not received a response from the White House to the letter seeking guidance or a directive, a spokeswoman for the council said May 8.

Any legislative fix to address the issues may be a bit of a reach given the CWA deference to state authority and lawmakers’ wariness on hindering state authority, Katz said at the EBA session. “I think a legislative fix makes sense” given the complex legal issues on final state action on applications and conflicting court rulings, said Messenger.

CWA Section 401 requires, as a prerequisite for federal permits on projects that may result in a discharge into navigable waters during construction, that affected states certify that any discharge will comply with the CWA. States can waive this requirement, and if they do not act within one year of a certificate application, waiver is deemed automatic. FERC made that determination one year from the date of application in a case involving Millennium’s Valley Lateral project, which was upheld on appeal by the U.S. Court of Appeals for the Second Circuit, Katz noted.

The natural gas industry and pipelines have asserted that New York politics is playing more of a role in rejection of water quality certificate applications under, and the Second Circuit decision provides some legal backing to challenge NYSDEC or other state decisions on water quality certificates.<sup>1</sup>

The Army Corps typically does not see a lot of litigation on CWA Section 401 issues and it generally does not “look behind” what is driving state waivers or denials of water quality certificates, said Boyd. There are cases pending at the U.S. Court of Appeals for the Fourth Circuit involving waivers that have been challenged, he noted.

Among the issues being reviewed in the courts are what constitutes a final state agency action, since some states do not issue decisions with votes, Messenger said. In a ruling involving Tennessee Gas Pipeline in 2017, the U.S. Court of Appeals for the First Circuit said it does not have jurisdiction to review a state decision that is not considered a final agency action, Messenger said. However, there appears to be a split among court rulings on such issues, and “I believe it’s still an open issue” on what makes state action final and appealable, he said.

Another issue is whether seeking more information on a certificate application restarts the clock for a state to act on an application, Katz added. Given the case law at this point, “tread carefully if you think seeking more information can get you additional time,” he advised.

“I expect there will be more case law” in the coming months addressing such issues, Messenger said.

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<sup>1</sup> For more information, see, *Second Circuit Upholds FERC Decision on Millennium’s Valley Lateral, Denies NYSDEC*, FR No. 3190, pp. 8-10.

By Tom Tiernan [TTiernan@fsoterreport.com](mailto:TTiernan@fsoterreport.com)

To Subscribe contact **Gina Smith**, (508) 263-6263; [GSmithFosterreport.com](http://GSmithFosterreport.com)

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