



CONSTITUTION PIPELINE

**Constitution Pipeline Company, LLC**  
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February 25, 2016

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

Attention : Kimberly D. Bose, Secretary

Reference: Constitution Pipeline Company, LLC (“Constitution”)  
Constitution Pipeline Project  
Docket no. CP13-499-000  
Request for Partial Notice to Proceed

Ladies and Gentlemen:

Constitution Pipeline Company, LLC (“Constitution”) renews its request for Commission authorization to conduct limited, non-mechanized tree felling in the State of New York. On January 8, 2016, as supplemented on January 14, 2016, Constitution requested written authorization (the “Notice to Proceed” or “NTP”) from the Director of the Office of Energy Projects (“Director”) to commence limited, non-mechanized tree felling activities pursuant to the Order Issuing Certificate dated December 2, 2014 (“Order”) under Docket No. CP13-499-000. On January 29, 2016, the Director granted Constitution’s request by approving limited non-mechanized tree felling and workspace variances in Pennsylvania, noting that the letter did not “at this time” authorize tree felling or workspace variances in New York. By way of this letter, Constitution provides additional information and support for its request that the Director authorize limited, non-mechanized tree felling in New York.

Tree felling activities in Pennsylvania began on February 5, 2016 and are now approximately 70 % complete. On February 24, 2016, the United States Court of Appeals for the Second Circuit denied the Emergency Motion for Stay filed on behalf of Petitioners Clean Air Council and Sierra Club. Issues pertinent to this request were before the Court and the Court’s order provides additional support and the proper timing for the Director to act on Constitution’s request. Therefore, with tree felling activity in Pennsylvania moving on schedule, the Court’s decision now issued, and the March 31 deadline established by the U.S. Fish and Wildlife

Service (“USFWS”) fast approaching, Constitution respectfully requests that the Director issue the requested authorization no later than March 2, 2016.

As explained in detail below, the Director has the authority to issue the requested authorization given that (1) there is precedent for the Director to issue a partial NTP for tree felling in New York without the New York Department of Environmental Conservation (“NYSDEC”) Section 401 Certification under the Clean Water Act (“CWA”), and (2) the NYSDEC does not regulate tree felling in circumstances such as Constitution is requesting.

In New York (as in Pennsylvania), Constitution has each applicable state and federal authorization required to engage in the activities described in Constitution’s January 8, 2016 letter. These authorizations are provided by the New York State Historic Preservation Office and the USFWS. The U.S. Army Corps of Engineers stated in a letter to Constitution dated January 14, 2016 that the activities as proposed would **not** require authorization from that agency because:

‘[a]ctivities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing), where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities excavated soil material’ ***are not considered to constitute a discharge of dredged material, and do not require an authorization from this agency pursuant to Section 404 of the Clean Water Act (Title 33 of the United States Code, Section 1344).***

(emphasis added).

It is critical to note that for natural gas pipeline projects regulated under the Natural Gas Act, it is the presence and necessity of the CWA Section 404 permit that triggers the requirement to obtain a Section 401 Water Quality Certification, not the Commission’s Certificate of Public Convenience and Necessity. The U.S. Environmental Protection Agency’s Section 401 Certification Handbook identifies five Federal permits and licenses that may result in such a discharge. Notably, CWA Section 404 permits are listed while FERC Certificates of Public Convenience and Necessity are not. *See* CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES, April 2010, at 1-3. The United States Supreme Court has deferred to EPA’s Certification Handbook. *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 377 (2006). This determination is also supported by EPA’s Section 401 regulations, which define “license or permit” to mean, quite literally, a “license or permit.” 40 CFR § 121.1(a). *See also AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 730 (4th Cir. 2009) (The Commission “is not charged in any manner with administering the Clean Water Act.”). Although the Commission has promulgated Section 401 certification regulations, 18 CFR Part 4, they are limited to hydroelectric **license** applications under the Federal Power Act, *see* 52 Fed. Reg. 5446-01 (Feb.

23, 1987), thus limiting the Commission's role as a "licensing or permitting agency" under the Natural Gas Act. 40 CFR §§ 121.1 and § 121.3.

Where courts have required 401 certifications beyond the Section 404 permitting context, the requirement has been triggered only by *point source* discharges.<sup>1</sup> This point source distinction was recognized in Judge Davis' concurring opinion in *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 735 (4th Cir. 2009) (Davis, concurring) (noting that the Supreme Court's detailed discussion in *S.D. Warren* of "the Clean Water Act's remedial purpose was thus made in the context of an unquestioned 'point source' out of which water was indisputably being emitted"). Thus, because the proposed tree felling activities are not a point source discharge the 401 certification is not triggered.

Moreover, and notwithstanding the authority that the Director already has, NYSDEC recognizes in the context of timber harvesting that the requested tree felling is exempt from its permitting requirements. The NYSDEC website states that "[a] state permit is not necessary for harvesting timber, but a state permit is required when crossing *certain* classified streams, working in *certain* designated wetlands, or for clearcuts over 25 acres in the Adirondack Park." See <http://www.dec.ny.gov/lands/5242.html#Permit> (emphasis added).

In order to avoid even the possibility that its proposed activity might fall within NYSDEC's regulatory authority, Attachment F to Constitution's NTP request incorporates voluntary exclusions in New York stating that "*no trees will be felled in or adjacent to New York State jurisdictional wetlands, and in certain areas involving stream crossings.*" In its January 14, 2016 supplemental response, Constitution further defines "certain areas" as "*locations within 50-feet of a waterbody to avoid inadvertently dropping a tree into a waterbody as well as New York State jurisdictional wetlands and their adjacent areas.*"

Furthermore, a determination by the Commission to grant Constitution's NTP request in New York in the absence of a 401 certification is consistent with the Commission's action in Leidy Southeast, FERC Docket CP13-551. In that instance it was Pennsylvania that had not yet issued its 401 certification. The Delaware Riverkeeper Network ("DRN") sought a stay of the tree felling NTP before FERC, which FERC denied. *Transcontinental Gas Pipe Line Company, LLC*, 150 FERC ¶ 61,183 (2015). DRN also sought a stay from the U.S. Court of Appeals for the District of Columbia Circuit. The D.C. Circuit entered a brief administrative stay, but dissolved it eight days later in a *per curiam* order denying DRN's petition for relief under the All Writs Act. *In re: Delaware Riverkeeper Network*, No. 15-1052 (Mar. 19, 2015).

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<sup>1</sup> See *Oregon Natural Desert Association v. USFS*, 550 F.3d 778, 783-84 (9th Cir. 2008) (purported discharges of sediment and fecal coliform from grazing livestock does not trigger 401 certification requirement); *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997); *Decker v. Northwest Environmental Defense Center*, 133 S.Ct. 1326, 1336-38 (2013); and 33 U.C.S. § 1342(l)(2) (discharges of stormwater runoff from ... oil and gas exploration, production, processing, or treatment operations or transmission facilities exempt from CWA permit requirement).

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One of the prime arguments asserted by the Clean Air Council and Sierra Club in support of their Emergency Stay Motion to the Second Circuit involving Constitution was their unsubstantiated assertion that the Clean Water Act requires a pipeline to obtain a Section 401 Water Quality Certification before the Commission approves projects. As the Commission noted in its Brief in Opposition, p. 15, "The plain text of the Clean Water Act does not appear to prohibit the kind of conditional certificate the Commission issued here." In the case of Constitution, the Second Circuit apparently agrees, since it denied the requested emergency stay.

The tree felling activity requested here does not require authorization under Section 404 of the Clean Water Act, and is not regulated under New York law. There is no separate trigger of a Section 401 certification requirement by this request to authorize tree felling in New York because any alleged discharge from tree felling activities would not be a regulated point source discharge. The Certificate Order in this case is neither a license nor a permit which may result in a discharge to navigable waters, and the request to begin non-mechanized pre-construction tree felling, if granted, will not approve any activity which could result in a regulated discharge.

With tree felling activity in Pennsylvania nearing completion and the March 31 deadline established by the USFWS fast approaching, we respectfully request you to provide Constitution written authorization by March 2, 2016 to commence limited, non-mechanized tree felling activities in New York as more fully described in Constitution's previous letters dated January 8, and January 14, 2016.

Respectfully,

**CONSTITUTION PIPELINE COMPANY, LLC**  
**By Williams Gas Pipeline Company, LLC,**  
**Its Operator**



Timothy Powell  
Director – Land, GIS, and Permits

cc:

Ann Miles, Director, Office of Energy Projects  
Kevin Bowman, Environmental Project Manager, Division of Gas-Environment and Engineering

USFWS  
USACE  
NYSDEC  
PADEP  
SCCD