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2nd Circ. Kills All Approvals For \$683M NY Pipeline

By **Clark Mindock**

Law360 (November 19, 2021, 9:26 PM EST) -- The Second Circuit has put the final nail in the coffin of a defunct \$683 million gas pipeline project, handing environmental activists a win in their quest to kill approvals they said could be revived down the road without vacatur.

A three-judge panel on Thursday sided with activist groups like Stop the Pipeline, the Sierra Club and others to grant a motion to vacate all underlying Federal Energy Regulatory Commission approvals for the Constitution natural gas pipeline, a project that was abandoned by the developer in early 2020 despite having active approvals.

While the diverse group of parties involved in the case had largely agreed that FERC's certificate of public convenience for the project — which granted the developer eminent domain powers through the Federal Power Act — should be vacated, the parties had sparred over whether to leave alive a FERC order for the pipeline that claimed New York state authorities waived their authority by waiting too long to deny the project a Clean Water Act Section 401 permit.

FERC said the authority order should be left in place because it represented agency precedent, while the activists said it was an illegal change of course from FERC precedent and would have a life way beyond the present case. The Second Circuit sided with the activists.

"Now we've really won, because Constitution cannot do anything to revive the project," Anne Marie Garti, an attorney for Stop the Pipeline, told Law360 Friday.

The suit revolves around FERC's authorizations of the 125-mile Constitution pipeline, which was a project first proposed by Williams Cos. Inc., Duke Energy Corp., Cabot Oil & Gas Corp. and AltaGas Ltd. The project, which FERC approved a certificate for after it received an application in 2013, would have connected natural gas production in Pennsylvania to Northeastern markets.

After the initial FERC approvals, the project ran into some hiccups in New York, where the state Department of Environmental Conservation denied it a crucial Clean Water Act permit in 2016. When that issue **came before FERC**, the federal agency originally sided with New York and said it had retained its authority to deny the permit even though statutes required the agency to act within one year of receiving a petition. The agency had waited longer than a year, but Constitution had pulled its application as well in order to revise the documents, which FERC had determined was common practice.

The agency **changed course in August 2019**, however, when it determined that New York regulators blew the one-year deadline to act on the application despite the back-and-forth with the developer.

In February 2020, the developers said they were dropping the project.

Representatives for the other parties to the suit didn't immediately respond to requests for comment Friday.

U.S. Circuit Judges Debra Ann Livingston, John M. Walker Jr. and Richard C. Wesley sat on the panel for the Second Circuit.

The Sierra Club and other environmental groups are represented by Moneen Nasmith and Meagan Burton of Earthjustice.

Stop the Pipeline is represented by Todd D. Ommen of Pace Environmental Litigation Clinic and Anne Marie Garti.

FERC is represented in-house by Susanna Y. Chu.

Constitution is represented by Elizabeth U. Witmer of Saul Ewing Arnstein & Lehr LLP.

The lead suit is N.Y. State Dep't of Env't Conservation v. Fed. Energy Regulatory Comm'n, case number 19-4338, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Morgan Conley and Keith Goldberg. Editing by Janice Carter Brown.

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