

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

CATSKILL MOUNTAINKEEPER, INC.; )  
CLEAN AIR COUNCIL; DELAWARE- )  
OTSEGO AUDUBON SOCIETY, INC.; )  
RIVERKEEPER, INC.; AND SIERRA )  
CLUB, )

Petitioners, )

v. )

FEDERAL ENERGY REGULATORY )  
COMMISSION, )

Respondent. )

No. 16-345

**PETITIONERS CLEAN AIR COUNCIL AND SIERRA CLUB'S  
MEMORANDUM OF LAW  
IN SUPPORT OF THEIR EMERGENCY MOTION  
FOR A STAY PENDING REVIEW OF AGENCY ORDERS**

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February 5, 2016

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## EXHIBITS TO PETITIONERS' MOTION

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**Exhibit 2**, Federal Energy Regulatory Commission, Order Denying Rehearing and Approving Variance, Constitution Pipeline Company, LLC, Docket No. CP.13-499-001 and Iroquois Gas Transmission System, L.P., Docket No. CP13-502-001, 154 FERC ¶ 61,046 (Jan. 28, 2016).

**Exhibit 3**, Declaration of Meryl Solar, dated February 4, 2016.

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**Exhibit 5**, Declaration of Moneen Nasmith, dated February 5, 2016.

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**Exhibit 7**, Motion for Stay Pending Rehearing of Catskill Mountainkeeper; Clean Air Council; Delaware-Otsego Audubon Society; Riverkeeper, Inc.; and Sierra Club, Docket Nos. CP13-499 and CP13-502 (Jan. 14, 2016).

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**Exhibit 12**, Constitution Pipeline Company, LLC, Constitution Pipeline Project, Docket No. CP13-499-000, Request for Partial Notice to Proceed (Jan. 8, 2016) (with Attachment E only).

**Exhibit 13**, Letter from Terry Turpin, Director, Division of Gas – Environment and Engineering, Federal Energy Regulatory Commission, Office of Energy Projects, to Lynda Schubring, PMP, Environmental Project Manager, Constitution Pipeline Company, LLC (Jan. 29, 2016).

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## INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 18 and 27 and Circuit Rule 27.1, Petitioners Clean Air Council and Sierra Club move for an immediate stay pending this Court’s review of two orders by the Federal Energy Regulatory Commission (“FERC” or the “Commission”) that allow Constitution Pipeline, LLC (“Constitution”) and Iroquois Gas Transmission System, L.P. (“Iroquois”) to construct and operate an approximately 125-mile-long, 30-inch-diameter interstate pipeline and related facilities extending from two receipt points in Susquehanna County, Pennsylvania, to a proposed interconnection with Iroquois’ gas transmission system in Schoharie County, New York (the “Project”).<sup>1</sup> Petitioners are being harmed by Project-related construction activity and need immediate relief to prevent further irreparable injury. The Commission has allowed Constitution to start cutting trees along the portion of the pipeline route that is in Pennsylvania.<sup>2</sup> Constitution, however, has not obtained all the federal permits it

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<sup>1</sup> FERC, Order Issuing Certificates and Approving Abandonment, Constitution Pipeline Company, LLC, Docket No. CP.13-499-000 and Iroquois Gas Transmission System, L.P., Docket No. CP13-502-000, 149 FERC ¶ 61,199 (Dec. 2, 2014) (“Certificate Order”) (Emergency Motion Ex. 1); FERC, Order Denying Rehearing and Approving Variance, Constitution Pipeline Company, LLC, Docket No. CP.13-499-001 and Iroquois Gas Transmission System, L.P., Docket No. CP13-502-001, 154 FERC ¶ 61,046 (Jan. 28, 2016) (“Rehearing Order”) (Emergency Motion Ex. 2).

<sup>2</sup> Letter from Terry Turpin, Dir., Div. of Gas – Env’t and Eng’g, FERC, Office of Energy Projects, to Lynda Schubring, PMP, Env’tl. Project Manager, Constitution Pipeline Company, LLC (Jan. 29, 2016) (Emergency Motion Ex. 13).



needs to move forward with the Project. In particular, New York State has yet to grant Constitution a Water Quality Certification under the Clean Water Act (“CWA”). If New York denies the Water Quality Certification, the Project will not proceed and a significant number of trees will have been cut down for nothing.

FERC gave Constitution permission to begin this tree cutting only one day after the Commission issued a final decision on Petitioners’ timely request for rehearing and motion for a stay pending decision on the request for rehearing. Because Petitioners’ request for rehearing languished before the Commission for almost a year, Petitioners have been unable to bring their challenge under the Natural Gas Act (“NGA”), National Environmental Policy Act (“NEPA”), and the CWA to court until now.

NEPA requires that the environmental consequences of proposed major federal actions be reviewed *before* project construction commences. *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985). The CWA requires that the Water Quality Certification be obtained *before* FERC approves projects and allows activities that could affect navigable waters. *See City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006). Contrary to the purposes of NEPA and the CWA, FERC refused to provide Petitioners with an appealable order until the day before authorizing Constitution to cut significant numbers of trees in Pennsylvania, permanently destroying forests and degrading rural

communities. Now that their claims are fully ripe, and to avoid further injury, Petitioners are filing this emergency motion for a stay to stop all tree felling immediately and halt all other construction activities pending this Court's review of FERC's orders.

## **BACKGROUND**

On June 13, 2013, Constitution and Iroquois each filed an application with the Commission to construct and operate a nearly 125-mile transmission line and related facilities capable of delivering 650,000 dekatherms of gas per day.<sup>3</sup> Construction of the Project will require cutting a 100-foot-wide permanent swath through four counties in New York and one county in Pennsylvania.<sup>4</sup> The pipeline largely is greenfield construction, with a mere nine percent of the route co-located with existing rights-of-way. Approximately 1,860 acres of land will be disturbed, including the permanent alteration of at least 757 acres.<sup>5</sup> Constitution will clear-cut hundreds of thousands of trees in the 983 acres of forested land that it will disturb, including 439.7 acres of interior forest, 217.7 acres of which will be

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<sup>3</sup> Constitution Pipeline Company, LLC, Applications for Certificate of Public Convenience and Necessity, Docket No. CP13-499-000 (June 13, 2013) (“Application”); Iroquois Gas Transmission System, LP, Application for Certificate of Public Convenience and Necessity, Docket No. CP13-502-000 (June 13, 2013).

<sup>4</sup> FERC, Final Environmental Impact Statement, Constitution Pipeline and Wright Interconnect Projects, 2-4, 2-8, 4-71 (Oct. 24, 2014) (“FEIS”) (relevant excerpts attached as Emergency Motion Ex. 8).

<sup>5</sup> *Id.* at 2-8.

eliminated permanently.<sup>6</sup> The permanent conversion of forest to open land will fragment important habitat, result in increased stormwater runoff, and compromise the areas' resilience to flooding in the face of increased precipitation and more frequent and intense storm events.

Petitioners Clean Air Council and Sierra Club, non-profit organizations representing members who reside and recreate in the areas that will be affected by the Project, participated in the FERC review of the Project throughout the Commission's process. As part of a coalition, Petitioners filed comments and supplemental comments on the applications and on the Commission's draft Environmental Impact Statement.<sup>7</sup> These comments noted numerous deficiencies in the Commission's analysis of the Project under NEPA, including its failure to take a hard look at the indirect and cumulative impacts of the Project.<sup>8</sup>

Although Constitution had not—and still has not—obtained a CWA Section 401 Water Quality Certification from New York State, the Commission approved

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<sup>6</sup> *Id.* at 4-68, 4-71.

<sup>7</sup> *See, e.g.*, Catskill Mountainkeeper; Clean Air Council; Delaware-Otsego Audubon Society; Delaware Riverkeeper Network; Riverkeeper, Inc.; and Sierra Club, Comments on Draft Environmental Impact Statement for Constitution Pipeline and Wright Interconnect Projects, Docket Nos. CP13-499-000; CP13-502-000; PF12-9 (Apr. 7, 2014) (Emergency Motion Ex. 9).

<sup>8</sup> *Id.*

the Project on December 2, 2014.<sup>9</sup> The Certificate Order does not specify the Project's term of service. On December 30, 2014, Petitioners filed a timely request for rehearing and rescission of the Commission's Certificate Order, reiterating the flaws in FERC's NEPA analysis and arguing that FERC's issuance of the Certificate Order before New York had made a decision to grant or deny the Water Quality Certification violated the CWA.<sup>10</sup> FERC granted the Rehearing Request on January 27, 2015, but only to give itself more time to consider the merits.<sup>11</sup> The Rehearing Request then languished with the Commission for more than a year.

On January 8, 2016, in response to a requirement by the U.S. Fish and Wildlife Service to conduct tree felling only between November 1 and March 31, Constitution filed a request with the Commission to proceed with felling trees in most of the workspaces along the pipeline route.<sup>12</sup> Petitioners filed their

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<sup>9</sup> FERC, Order Issuing Certificates and Approving Abandonment, Constitution Pipeline Company, LLC, Docket No. CP.13-499-000 and Iroquois Gas Transmission System, L.P., Docket No. CP13-502-000, 149 FERC ¶ 61,199 (Dec. 2, 2014) ("Certificate Order") (Emergency Motion Ex. 1).

<sup>10</sup> Request for Rehearing of Catskill Mountainkeeper; Clean Air Council; Delaware-Otsego Audubon Society; Delaware Riverkeeper Network; Riverkeeper, Inc.; and Sierra Club, Docket Nos. CP13-499 and CP13-502 (Dec. 30, 2014). ("Rehearing Request") (Emergency Motion Ex. 6).

<sup>11</sup> FERC, Order Granting Rehearing for Further Reconsideration, Constitution Pipeline Company, LLC, Docket No. CP13-499-001, Iroquois Gas Transmission System, L.P., Docket No. CP13-502-001 (Jan. 27, 2015) (Emergency Motion Ex. 11).

<sup>12</sup> Constitution Pipeline Company, LLC, Constitution Pipeline Project, Docket No. CP13-499-000, Request for Partial Notice to Proceed (Jan. 8, 2016) (Emergency Motion Ex. 12).

opposition to this request on January 11, 2016. Petitioners also filed a Motion for a Stay Pending Rehearing with the Commission on January 14, 2016, requesting that the Commission not allow the tree felling or any other construction activities to proceed before it issued a final decision on the Rehearing Request.<sup>13</sup>

After more than a year, the Commission finally rejected Petitioners' Rehearing Request on January 28, 2016.<sup>14</sup> The Rehearing Order also dismissed Petitioners' request for a stay as moot.<sup>15</sup> The following day, FERC granted Constitution permission to begin cutting trees in Pennsylvania.<sup>16</sup>

Fewer than two business days later, on February 1, 2016, Petitioners' counsel informed the Clerk of this Court and FERC's counsel of Petitioners' intent to file this emergency motion.<sup>17</sup> *See* Local Rule 27.1(d)(1). Petitioners' counsel and FERC's counsel agreed that FERC's response brief would be due seven days after the date this motion is filed.<sup>18</sup> Given the ongoing destruction of invaluable trees, Petitioners respectfully request a decision on this motion as quickly as possible and no later than February 25, 2016.

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<sup>13</sup> Motion for Stay Pending Rehearing of Catskill Mountainkeeper; Clean Air Council; Delaware-Otsego Audubon Society; Riverkeeper, Inc.; and Sierra Club, Docket Nos. CP13-499 and CP13-502 (Jan. 14, 2016) (Emergency Motion Ex. 7).

<sup>14</sup> Rehearing Order at ¶ 3; *id.* at p. 75.

<sup>15</sup> *Id.* at ¶ 13; *id.* at p. 75.

<sup>16</sup> Letter from Terry Turpin, *supra* note 2 (Emergency Motion Ex. 13).

<sup>17</sup> Nasmith Decl. ¶ 3.

<sup>18</sup> *Id.*

This emergency motion pertains to the Petition for Review of FERC's Certificate Order and Rehearing Order filed on February 5, 2016. This Court has jurisdiction to review the Commission's Orders under the NGA and venue is proper in the Second Circuit because Iroquois is headquartered in Connecticut. *See* 15 U.S.C. § 717r(b).

### ARGUMENT

In deciding whether to issue a stay pending review of an agency order, this Court balances “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) (citations omitted). While the existence of “more of one [factor] excuses less of [another],” *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002), each factor here weighs in favor of a stay.

The purpose of a stay is to preserve the *status quo* pending the Court's review of the Commission's decision. *See, e.g., Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir.), *vacated in part on other grounds sub nom. W. Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978) (“By maintaining the Status quo [sic], while additional environmental studies are performed, or additional alternatives are

considered, an injunction ensures that there will be at least a possibility that the agency will change its plans in ways of benefit to the environment. It is this possibility that courts should seek to preserve.” (internal quotations and citations omitted)). When a showing of potential environmental injury is combined with a procedural violation of NEPA, “courts have not hesitated to find a likelihood of irreparable injury.” *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24 (D.D.C. 2009) (internal citation omitted).

**I. PETITIONERS ARE LIKELY TO SUCCEED WITH THEIR CLAIMS THAT FERC’S ORDERS VIOLATED NEPA AND THE CWA.**

Petitioners are likely to succeed with their claims that FERC acted arbitrarily and capriciously in conducting its review of the environmental impacts of the Project under NEPA. The Commission refused to take a hard look at the indirect effects of the Project by irrationally refusing to recognize that constructing and then operating a 125-mile pipeline for decades will spur additional natural gas development in the area. The Commission also failed to adequately analyze the cumulative impacts of the pipeline by ignoring the effects of similar projects in the area, including the wells and infrastructure needed to initially supply the pipeline. In addition, FERC violated the CWA by issuing the Certificate Order and allowing irreparable destruction of vast tracts of forest before securing all required Water Quality Certifications.

**A. Petitioners Are Likely to Succeed with Their Claim that FERC Failed to Take a Hard Look at the Indirect Effects of Building and Operating the Constitution Pipeline.**

The Commission's Certificate Order unlawfully ignored the environmental effects of additional natural gas development that will be induced by building a 125-mile pipeline and operating it for an indefinite period of time. NEPA requires that "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems" be considered. 40 C.F.R. § 1508.8(b). Under this standard, agencies are required to consider the indirect environmental consequences of an infrastructure project, including induced development the agency does not have the ability to regulate.<sup>19</sup> *See, e.g., N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1081–82 (9th Cir. 2011) (finding that the NEPA review of a rail project had to include consideration of the "reasonably foreseeable" impacts from induced coal production at nearby mines); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549–50 (8th Cir. 2003) (environmental effects of increased coal consumption due to

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<sup>19</sup> In an apparent attempt to justify its refusal to assess the Project's indirect effects as required by NEPA, the Rehearing Order repeatedly states that "[t]he Commission does not have jurisdiction over natural gas production." *See, e.g.,* Rehearing Order ¶ 137. But even FERC acknowledges that its obligations under NEPA extend to evaluating "the environmental impacts of non-jurisdictional facilities." *Id.* ¶ 149.



construction of a new rail line to reach coal mines were reasonably foreseeable and required evaluation under NEPA even if their full extent was not known).

Petitioners have presented FERC with ample evidence that the current supply of natural gas in the areas around the Project is insufficient to fill the pipeline indefinitely and that the drilling of new wells is likely.<sup>20</sup> In particular, the customers that have contracted to use Constitution's pipeline have extensive commitments to other markets.<sup>21</sup> It also is well-documented that unconventional wells experience declines in production over time, requiring that new wells be drilled to maintain supplies.<sup>22</sup> Moreover, Environmental Protection Agency ("EPA") regulations and significant cost savings make it very likely that those new wells will be located near the Project.<sup>23</sup>

The Commission acknowledges that the supply of natural gas is an essential predicate to the Project but irrationally refuses to admit the connection between authorizing a major new pipeline and additional gas development in the area.<sup>24</sup> FERC grounds its refusal in factual inaccuracies and an apparent misunderstanding of the scope of NEPA. The Rehearing Order, for example, concludes that higher-than-expected production levels in Pennsylvania in 2015 demonstrate that there

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<sup>20</sup> *See, e.g., id.* ¶ 148.

<sup>21</sup> *See* Rehearing Request at 9–11.

<sup>22</sup> *Id.* at 11.

<sup>23</sup> *See id.* at 8–11.

<sup>24</sup> Certificate Order ¶¶ 99–101; Rehearing Order ¶ 138; Rehearing Request 7–12.

will be enough gas to fill the Project “for many years, if not [its] entire useful life” but does not include any evidence that those increased production levels occurred in the area served by the pipeline or could be sustained throughout the life of the Project.<sup>25</sup> The Commission also continues to wrongly conclude that because natural gas production will continue in the Marcellus shale with or without the Project, it is relieved from analyzing the effects of the production that the Project reasonably will induce.<sup>26</sup> As Petitioners explained in their Rehearing Request, “Nothing in NEPA, its regulations, or applicable case law limits the requirement to evaluate the indirect effects of the development following from a project to those situations where the project is responsible for causing all, as opposed to some, of the development in the area.”<sup>27</sup>

The Commission further contends that even if the Project induced natural gas development, FERC would be unable to meaningfully analyze the impacts of that development because (1) other agencies have more information than FERC about such impacts and (2) the exact location, scale, and timing of additional well development are unknown.<sup>28</sup> But FERC can obtain information from the other agencies.<sup>29</sup> Indeed, under NEPA’s explicit requirement that agencies cooperate, it

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<sup>25</sup> Rehearing Order ¶ 148.

<sup>26</sup> *See id.* ¶ 150.

<sup>27</sup> Rehearing Request at 12.

<sup>28</sup> Rehearing Order ¶¶ 139, 151–52; Certificate Order ¶¶ 101, 107.

<sup>29</sup> *See* Rehearing Order at ¶ 140.

is unlawful for FERC to omit analysis of Project impacts simply because the necessary information is not at its fingertips. *See* 42 U.S.C. § 4332. Moreover, the “inability to fully ascertain the precise extent of the effects of [the activity] is not . . . a justification for failing to estimate what those effects might be before irrevocably committing to the activity.” *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 937 F. Supp. 2d 1140, 1158 (N.D. Cal. 2013) (quoting *Conner v. Burford*, 848 F.2d 1441, 1450 (9th Cir. 1988)). Because NEPA requires that FERC undertakes “[r]easonable forecasting and speculation” in the face of uncertainty,<sup>30</sup> *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975), FERC has no legitimate basis for refusing to evaluate the impacts of natural gas development induced by the Project.

**B. Petitioners Are Likely to Succeed with Their Claim that FERC’s Analysis of the Project’s Cumulative Impacts Violated NEPA.**

FERC did not take a hard look at impacts of the Project against the backdrop of past and present activities in the areas of the Marcellus shale that surround the Project. Because “even a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant,” *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 343 (D.C. Cir. 2002) (internal quotation omitted), FERC’s failure to establish a baseline of “*existing adverse conditions or uses* in the area” is a fatal flaw under NEPA. *See id.*

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<sup>30</sup> Rehearing Request at 8.

(emphasis added); *see also* 40 C.F.R. § 1508.7; *Ore. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1132–33 (9th Cir. 2007) (“One of the specific requirements under NEPA is that an agency must consider the effects of the proposed action in the context of all relevant circumstances.”).

The Marcellus shale region has experienced and will continue to experience substantial harm from natural gas production and transportation, including air and water contamination, additional greenhouse gas emissions, and severely fragmented forests, which the Project will exacerbate significantly.<sup>31</sup> FERC’s cumulative impacts analysis does not begin to capture this reality. Rather, the Commission’s cumulative effects analysis consists of only a recitation of nearby infrastructure projects and a statement that between 74 and 2,135 wells have been developed to supply the Project pipeline, which has resulted in between 355 and 10,248 acres of land disturbance.<sup>32</sup> The record is devoid of any *analysis* of the environmental impacts and consequences of this development or a discussion of whether the incremental effects of the Project would threaten significant harm in light of these baseline conditions.<sup>33</sup>

The Commission’s discussion of cumulative impacts also fails to meet NEPA’s requirements because it includes only a cursory analysis of the combined

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<sup>31</sup> *Id.* at 13–14.

<sup>32</sup> FEIS at 4-233.

<sup>33</sup> Rehearing Request at 13–14.

impacts of the Project and the Northeast Energy Direct (“NED”) project, a pipeline that will be co-located with the Project for 23 miles in Pennsylvania and for most of the Project’s 95-mile route through New York. The Commission refused to undertake a serious analysis of the combined effects of these two pipelines because the NED project had not formally been proposed to the Commission at the time the FEIS was published.<sup>34</sup> The NED application was filed, however, before the Commission issued its decision on the Rehearing Request, providing FERC with ample opportunity to supplement its now-deficient environmental analysis.<sup>35</sup> The Commission cannot drag out the decision period for more than a year, while ignoring key facts that arise in the interim.

**C. Petitioners Are Likely to Succeed with Their Claim that FERC’s Orders Violate the CWA.**

Section 401 of the CWA plainly provides that “no [federal] license or permit shall be granted until the certification required by this section has been obtained or has been waived.” 33 U.S.C. § 1341(a)(1). A certification is required for any

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<sup>34</sup> FEIS at 4-238–4-239.

<sup>35</sup> See Rehearing Order ¶ 97. The Rehearing Order addresses the NED pipeline in a discussion of segmentation claims by other intervenors to the FERC proceeding, but Petitioners raised the need to include the impacts of the NED pipeline in their arguments about the cumulative impacts analysis. See Rehearing Request at 14; see also Catskill Mountainkeeper; Clean Air Council; Delaware-Otsego Audubon Society; Delaware Riverkeeper Network; Riverkeeper, Inc.; and Sierra Club, Supplemental Comments Providing New Information Related to *Constitution Pipeline*, Docket No. CP13-499; Iroquois Gas Transmission System, L.P., Docket No. CP13-502 (Dec. 18, 2015) (Emergency Motion Ex. 10).

activity “which *may* result in any discharge into [ ] navigable waters.” *Id.* (emphasis added). The Supreme Court has concluded that this section of the CWA gives primary enforcement responsibilities to the states and “requires States to provide a water quality certification *before* a federal license or permit can be issued....” *PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology*, 511 U.S. 700, 707 (1994) (emphasis added). “FERC’s role is limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state’s power to block the project would be meaningless.” *City of Tacoma*, 460 F.3d at 67.

There is no question that FERC has failed to comply with that statutory requirement. The Project unquestionably may cause discharges into the navigable waters of both Pennsylvania and New York,<sup>36</sup> and New York has not made a decision to grant or deny a Water Quality Certification or waived its right to do so. Nevertheless, FERC issued the Certificate Order without awaiting or deferring to New York State’s decision.

This Court should reject FERC’s claim that its issuance of the Certificate Order does not violate the CWA because the Certificate Order was conditioned upon Constitution obtaining all necessary federal permits, including the Water Quality Certification from New York.<sup>37</sup> While the conditional approval of a

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<sup>36</sup> FEIS at 1-15–1-16 (noting need to obtain Section 401 Water Quality Certifications).

<sup>37</sup> Rehearing Order ¶ 62.

project awaiting a key authorization has been sanctioned in another context, (1) the agency in that case was following regulatory procedures, and (2) the agency did not allow any prohibited activities to proceed prior to the conclusion of those procedures. *City of Grapevine, Tex. v. Dep't of Transp.*, 17 F.3d 1502, 1508–09 (D.C. Cir. 1994) (upholding the conditional approval of a project where the statute prohibited the expenditure of federal funds prior to review of the project's historic resources impacts). By contrast, FERC has ignored the CWA's mandate to wait and defer to New York by issuing the Order prematurely and then authorizing tree felling pursuant to the Order. Moreover, the tree felling has the potential to impact navigable waters in New York; the watershed where trees are being cut drains into the Susquehanna River before it flows north into New York.<sup>38</sup> FERC's authorization to cut trees arrogantly assumes that New York's Certification decision is a *fait accompli* and unlawfully interferes with New York's ability to block the Project. *See City of Tacoma*, 460 F.3d at 67.

## **II. ABSENT A STAY, PETITIONERS WILL SUFFER IRREPERABLE HARM.**

Without a stay pending this Court's review of FERC's Orders, Petitioners will suffer irreparable injury. The tree cutting the Commission has authorized in Pennsylvania will proceed and likely be complete before this Court decides the

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<sup>38</sup> Compare Susquehanna River Basin Commission, SRBC Maps & Data Atlas, available at <http://www.srbc.net/atlas/uppersusq.asp> (last visited Feb. 5, 2016) with Constitution Pipeline, Application, Vol. II (Public), App. H at 3.

Petition for Review.<sup>39</sup> Unless this Court intervenes, Petitioners' members who live in the vicinity of the tree felling will suffer the immediate and irretrievable loss of forest in and around where they live and recreate and be injured by the associated noise and increased truck traffic that will plague their quiet rural communities.<sup>40</sup> The felling of the trees for the 100-foot right of way and the additional workspaces will permanently alter the rural character of the community Petitioners' members enjoy, even if New York denies the certification and blocks the Project.<sup>41</sup> The injuries Petitioners' members will suffer from Constitution's tree felling are "both certain and great" and "actual and not theoretical." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Harm to one's interest in the environment almost always is irreparable, because damage to the environment "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. of Gambell, Ak.*, 480 U.S. 531, 545 (1987); *see Stand Together Against Neighborhood Decay, Inc. v. Bd. of Estimate of N.Y.C.*, 690 F. Supp. 1192 (E.D.N.Y. 1988). Without a stay, Constitution will

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<sup>39</sup> Constitution Pipeline Company, LLC, Constitution Pipeline Project, Docket No. CP13-499-000, Request for Partial Notice to Proceed, Attachment E (Jan. 8, 2016) (tree cutting to end by March 31, 2016) (Emergency Motion Ex. 12).

<sup>40</sup> Declaration of Meryl Solar, dated Feb. 4, 2016 ("Solar Decl.") (Emergency Motion Ex. 1); Declaration of Catherine Holleran, dated Feb. 4, 2016 ("Holleran Decl.") (Emergency Motion Ex. 2).

<sup>41</sup> Solar Decl. ¶¶ 7–8; Holleran Decl. ¶ 5.



continue to cut down trees and interfere with Petitioners' members' use and enjoyment of their properties.<sup>42</sup> Aesthetic injuries also will result from the visual blight of felled trees, missing tracts of forest, trenches, and massive industrial equipment.<sup>43</sup> The destruction of these trees cannot be undone; it will forever alter the character of interior forest and impair waterways and wetlands for decades to come. *See, e.g., League of Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (finding that the logging of thousands of mature trees "cannot be remedied easily if at all" because "[n]either the planting of new seedlings nor the paying of money damages can normally remedy such damage"); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (finding that injury to one's "ability to view, experience, and utilize [recreational areas] in their undisturbed state" was irreparable and weighed in favor of a stay) (internal quotation marks omitted).

### **III. NO SUBSTANTIAL HARM WILL RESULT FROM A STAY.**

Constitution and Iroquois will not be harmed significantly by a stay of the Orders. Constitution waited more than 13 months since the Certificate Order was issued to ask for permission to begin construction. The short additional delay to accommodate this Court's review should not substantially injure the companies, particularly when compared to the permanent environmental damage and other

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<sup>42</sup> Solar Decl. ¶¶ 3–4, 7–13; Holleran Decl. ¶¶ 4–5.

<sup>43</sup> Solar Decl. ¶ 7; Holleran Decl. ¶ 6.

irreparable injuries to community welfare that would occur absent a stay. *See Citizen's Alert Regarding the Env't v. U.S. Dep't. of Justice*, Civ. A. No. 95-1702 (GK), 1995 WL 748246, \*11 (D.D.C. Dec. 8, 1995) (finding that potential loss of revenue, jobs, and monetary investment that would be caused by project delay did not outweigh "permanent destruction of environmental values that, once lost, may never again be replicated"). The companies have always assumed the risk that construction could be halted when Petitioners finally were able to seek relief from this Court. *See, e.g., Millennium Pipeline Co.*, 141 FERC ¶ 61,022, 2012 WL 4845180, at \*5 (Oct. 9, 2012) (recognizing "litigation risk" when the applicant "elect[ed] to proceed with construction" before judicial review of FERC's order).

#### **IV. A STAY IS IN THE PUBLIC INTEREST.**

NEPA's purpose is to preserve the nation's valuable natural resources and to restore environmental quality for the benefit of current and future generations. *See* 42 U.S.C. § 4331. "The preservation of our environment, as required by NEPA . . . is clearly in the public interest." *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006), *abrogated on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008). To allow construction to continue while Petitioners' case is heard would contravene NEPA's purpose and deprive Petitioners and their members of the chance to obtain a full remedy under the law. A stay is particularly appropriate where permanent environmental impacts are

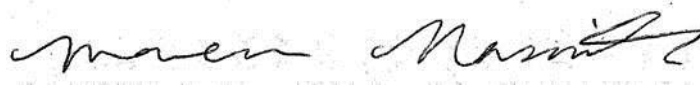
authorized but the project lacks a critical authorization. If New York denies the Water Quality Certification, the Project will not be able to proceed and the loss of trees in Pennsylvania will be for naught.

The public interest also is served by ensuring that FERC complies with NEPA prior to authorizing permanent impacts to the environment. *See Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) (the public interest in completing a highway project “must yield to the obligation to construct the [p]roject in compliance with the relevant environmental laws”). In enacting NEPA and demanding compliance “to the fullest extent possible,” Congress has underscored the public interest in preserving our environment. *See* 42 U.S.C. § 4332. A stay will promote the public interest by preserving existing conditions pending review of the Commission’s Orders under NEPA and the CWA. *See Wild Rockies*, 632 F.3d at 1138 (recognizing “the public interest in careful consideration of environmental impacts before major federal projects go forward”).

### CONCLUSION

Petitioners meet the requirements for a stay and respectfully request that the Court stay all construction activities, including tree felling, pending judicial review of FERC’s Orders.

Dated: February 5, 2016



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