

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 16-345 Caption [use short title]

Motion for: Emergency Stay Pending Review of Agency Orders Catskill Mountainkeeper, Inc., et al v. FERC

Set forth below precise, complete statement of relief sought:
Emergency stay pending judicial review of Federal Energy Regulatory Commission
Order Issuing Certificates and Approving Abandonment, Constitution Pipeline
Company, LLC, Docket No. CP13-499-000 and Iroquois Gas Transmission System, L.P.,
Docket No. CP13-502-000, 149 FERC P 61,199 (Dec. 2, 2016); and Federal Energy
Regulatory Commission Order Denying Rehearing and Approving Variance, Constitution Pipeline Company,
LLC, Docket No. CP13-499-001 and Iroquois Gas Transmission System, L.P., Docket No. CP13-502-001, 154 FERC p 61,046 (Jan. 26, 2016)

MOVING PARTY: Clean Air Council and Sierra Club OPPOSING PARTY: Federal Energy Regulatory Commission

Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Moneen Nasmith and Deborah Goldberg OPPOSING ATTORNEY: Robert Solomon
[name of attorney, with firm, address, phone number and e-mail]

Earthjustice FERC - Solicitor's Office
48 Wall St., 19th Fl., New York, NY 10005 888 First St. NE, Washington, DC 20426
(212)845-7384, mnasmith@earthjustice.org (202)502-8257, robert.solomon@ferc.gov

Court/Judge/Agency appealed from: Federal Energy Regulatory Commission

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
 Yes No (explain): _____

Opposing counsel's position on motion:
 Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:
 Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date: _____

Signature of Moving Attorney: *Moneen Nasmith* Date: 02/05/16

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No

Has this relief been previously sought in this Court? Yes No

Requested return date and explanation of emergency: Decision as soon as possible

but no later than Feb. 25, 2016. The agency has authorized extensive and fast-paced

cutting of trees pursuant to its Orders. Petitioners have agreed to provide

Respondents with seven days to file a Response to the Emergency Motion and Petitioners

will file a Reply as soon as possible, but no later than Feb. 17, 2016

Service by: CM/ECF Other [Attach proof of service]

**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
EMERGENCY MOTION
FOR A STAY PENDING
REVIEW OF AGENCY
ORDERS**

Pursuant to Federal Rules of Appellate Procedure 18 and 27 Circuit Rule 27.1, Petitioners Clean Air Council and Sierra Club move for an immediate stay pending this Court’s review of the Order of December 2, 2014 (“Certificate Order”) issued by the Federal Energy Regulatory Commission (“FERC” or the “Commission”), which granted Constitution Pipeline, LLC (“Constitution”) and Iroquois Gas Transmission System, L.P. (“Iroquois”) Certificates of Public Convenience and Necessity to construct and operate the Constitution Pipeline Project and related facilities (the “Project”) and the Order of January 28, 2012 (“Rehearing Order”) issued by the Commission, which denied Petitioners’ request for rehearing of the Certificate Order and request for a stay of construction activity.

Specifically, Petitioners Clean Air Council and Sierra Club request a stay of all construction activity, including tree felling, until their Petition for Review has been decided.

On January 29, 2016, the day after it denied Petitioners' rehearing request, the Commission gave Constitution permission to cut down trees in the workspaces along the portion of the pipeline route that lies in Pennsylvania. Constitution however does not have all the federal permits needed to complete the Project, which will cut a 100-foot wide swath through six counties in New York and Pennsylvania; disturb more than 1,859 acres of land; cross multiple public drinking water supply sources, three watersheds, and more than 250 waterbodies; and affect more than 90 acres of wetlands. In particular, New York State has not granted Constitution a Water Quality Certification under the Clean Water Act. If this permit were denied, the Project cannot proceed and the destruction of trees the Commission has allowed in Pennsylvania would be for naught.

In filing this Emergency Motion, Petitioners Clean Air Council and Sierra Club have fully complied with the requirements set out in Rules 18 and 27 of the Federal Rules of Appellate Procedure and Rule 27.1 of the Local Rules for the Second Circuit. Attached to this Motion are copies of sworn statements supporting the fact that Petitioners Clean Air Council and Sierra Club's members will suffer irreparable harm absent a stay. Declaration of Meryl Solar, Feb. 4, 2016 (attached

as Ex. 3); Declaration of Catherine Holleran, Feb. 4, 2016 (attached as Ex. 4); *see also* Fed. R. App. P. 18(a)(2)(B)(ii); *id.* 27(a)(2)(B). These documents establish that Constitution will cut down trees in the area where Ms. Solar and Ms. Holleran live and recreate. Solar Decl. ¶ 7; Holleran Decl. ¶ 4. The loss of these trees will cause Ms. Solar and Ms. Holleran substantial injury through the loss of enjoyment of their properties and the transformation of their quiet, rural communities into construction zones. Solar Decl.; Holleran Decl. Their injuries are imminent—Constitution has informed Ms. Holleran that they intend to begin cutting trees on her property as early as February 5, 2016—and cannot be remedied. Holleran Decl. ¶ 10; *see* Local Rule 27.1(d)(3).

The accompanying Memorandum of Law outlines Petitioners Clean Air Council and Sierra Club’s legal claims and establishes that Petitioners Clean Air Council and Sierra Club are likely to succeed in their claims on the merits that in issuing the Certificate Order, the Commission violated both the National Environmental Policy Act (“NEPA”) and the Clean Water Act. *See also* Fed. R. App. P. 18(a)(2)(B)(i); *see also id.* 27(a)(2)(A) (requiring that the motion “state the legal argument necessary to support [the motion]”). FERC’s environmental review of the Project failed to account for clear indirect and cumulative impacts of the Project in violation of NEPA. Moreover, the Commission failed to comply with the Clean Water Act when it issued the Certificate Order prior to New York’s

granting of the Water Quality Certification under Section 401 of the Clean Water Act. Absent this Certification, Constitution may not proceed with construction of its pipeline, making both the Certificate Order and the Commission's authorization to cut trees unlawful.

Also attached is a sworn statement by Petitioner's counsel, Moneen Nasmith. Declaration of Moneen Nasmith, Feb. 5, 2016 ("Nasmith Decl.") (attached hereto as Exhibit 5) that establishes additional procedural facts. Petitioners properly bring this Emergency Motion to the Court because they have exhausted their administrative remedies. *See* Fed. R. App. P. 18(a)(2)(A) (requiring the motion to "show that moving first before the agency would be impracticable" or that "the agency denied the motion."). Petitioners filed a motion to stay construction on January 14, 2016, including all proposed tree felling with the Commission. Nasmith Decl. ¶ 10. The Commission denied the Petitioners' Motion for a Stay in its Rehearing Order of January 28, 2016 as moot and authorized tree felling activities on January 29, 2016. *Id.* Petitioners therefore have attempted to obtain the relief sought in this Motion from the Commission as required under Rule 18(a)(2)(A). It would be impractical for Petitioners to continue to ask FERC to stay construction. *See* Fed. R. App. P. 18(a)(2)(A).

Relevant parts of the record, including a copy of the Certificate Order and Rehearing Order are attached to this Emergency Motion as follows:

- Exhibit 1, Federal Energy Regulatory Commission, 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).
- 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 6, 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).
- 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).
- Exhibit 8, Excerpts from Federal Energy Regulatory Commission, Final Environmental Impact Statement – Vol. 1, Constitution Pipeline and Wright Interconnect Projects, Docket Nos. CP13-499-000, CP13-502-000, PF12-9-000 (Oct. 2014).
- Exhibit 9, 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).
- Exhibit 10, 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).

- Exhibit 11, Federal Energy Regulatory Commission, 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).
- 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).

See Fed. R. App. P. 18(a)(2)(B)(iii), *id.* 27(a)(2)(B)(iii).

Petitioners Clean Air Council and Sierra Club also have adhered to the requirements of Local Rule 27.1 by notifying opposing counsel, Karin Larson, Esq. of FERC's Solicitor's Office, on February 1, 2016 that Petitioners intended to file this Emergency Motion. Nasmith Decl. ¶ 3. Ms. Larson confirmed that FERC would be opposing the Emergency Motion and Petitioners agreed to allow the Commission seven (7) days to respond to this Emergency Motion. *Id.*; *see* Local Rule 27.1(b). Based on the date of this Emergency Motion, FERC has until February 12, 2016 to file its response papers. Petitioners Clean Air Council and Sierra Club will file their reply as quickly as possible the following week and in no event later than February 17, 2016. *Id.*

Petitioners Clean Air Council and Sierra Club ask the Court to act on its Emergency Motion as quickly as possible and no later than February 25, 2016 in

light of the ongoing destruction of trees in Pennsylvania. *See* Local Rule 27.1(d)(4).

Dated: New York

February 5, 2016

Respectfully submitted,

/s/ Moneen Nasmith

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