ORAL ARGUMENT NOT YET SCHEDULED

16-345 (L)

16-361 (consolidated)

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,

STOP THE PIPELINE, INC.

Petitioner,

– v. –

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

CONSTITUTION PIPELINE CO., LLC, IROQUOIS GAS TRANSMISSION SYSTEM, L.P., NATURAL GAS SUPPLY ASSOCIATION,

Intervenors.

On Petition for Review of Orders of the Federal Energy Regulatory Commission

PAGE-PROOF REPLY BRIEF OF PETITIONERS CATSKILL MOUNTAINKEEPER, INC.; CLEAN AIR COUNCIL; DELAWARE-OTSEGO AUDOBON SOCIETY, INC.; AND SIERRA CLUB

Moneen Nasmith
Deborah Goldberg
Christine Ernst
EARTHJUSTICE
48 Wall Street, 19th Floor
New York, NY 10005
Phone: 212-845-7384
mnasmith@earthjustice.org

Counsel for Petitioners Catskill Mountainkeeper, Inc.; Clean Air Council; Delaware-Otsego Audubon Society, Inc.; Riverkeeper, Inc.; and Sierra Club

Dated: September 23, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

GLOSSARY

401 Certification	Certification under Section 401 of the Clean Water Act
Application	Constitution Pipeline Company, LLC, Application for Certificate of Public Convenience and Necessity (June 13, 2013); Iroquois Gas Transmission System, LP, Application for Certificate of Public Convenience and Necessity (June 13, 2013)
Authorization Order	*Constitution Pipeline Company, LLC*, 149 FERC ¶ 61,199 (2014) approving the Project
BLM	Bureau of Land Management
Cabot	Cabot Oil & Gas Corporation
CEQ	Council on Environmental Quality
CEQ Draft Guidance	CEQ, Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change (Dec. 2014)
CEQ Final Guidance	CEQ, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews (Aug. 1, 2016)
Commission or FERC	Federal Energy Regulatory Commission
Constitution	Constitution Pipeline Co., LLC

DEIS	FERC Draft Environmental Impact Statement, Constitution Pipeline and Wright Interconnect Projects (June 10, 2013)
DOT	U.S. Department of Transportation
EPA	U.S. Environmental Protection Agency
EPA Comments on FEIS	Letter from Judy-Ann Mitchell, EPA, to Kimberly Bose, FERC, EPA Comments Constitution Pipeline and Wright Interconnection Projects Final Environmental Impact Statement (Dec. 08, 2014)
FEIS	FERC Final Environmental Impact Statement, Constitution Pipeline and Wright Interconnect Projects (Oct. 24, 2014)
Iroquois	Iroquois Gas Transmission System, L.P.
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
NGSA	Natural Gas Supply Association
NYSDEC	New York State Department of Environmental Conservation

NYSDEC Denial	Letter from John Ferguson, NYSDEC to Lynda Schubring, Constitution (Apr. 22, 2016), denying Constitution's application for certification under Section 401 of Clean Water Act
Project	Constitution's proposed approximately 124-mile-long interstate natural gas pipeline, extending from Susquehanna County, Pennsylvania, to Schoharie County, New York, and related facilities
Rehearing Order	*Constitution Pipeline Co., LLC*, 154 FERC ¶ 61,046 (2016) denying rehearing
Rehearing Request	Request for Rehearing of Catskill Mountainkeeper et al., *In re Constitution Pipeline Co.* (Dec. 30, 2014)

SUMMARY OF THE ARGUMENT

Constitution Pipeline Co., LLC ("Constitution") and Iroquois Gas Transmission System, L.P. ("Iroquois") seek to construct and operate a 124-mile pipeline capable of transporting 650,000 dekatherms of natural gas per day from the wells of Susquehanna County to markets in the Northeast (the "Project").[1] The Project would cross hundreds of waterbodies, degrade significant tracts of wetlands, clear-cut hundreds of acres of forest, and emit over two million tons of greenhouse gas over fifteen years.[2] Providing a conduit between the Project's supply area and major Northeastern for at least fifteen years also would induce natural gas production in the region. The increased natural gas development would result in a wide range of adverse impacts, such as degradation of air and water quality; increased greenhouse gas emissions; the loss of significant swaths of forests and wetlands, including areas that provide critical habitats for at-risk species; and the further industrialization of once-quiet rural communities.[3]

---

[1] Order Issuing Certificates and Approving Abandonment, 149 FERC ¶ 61,199, ¶ 1 (Dec. 2, 2014) ("Authorization Order") [JA__].

[2] FERC, EIS No. 0249F, Final Environmental Impact Statement, Constitution Pipeline and Wright Interconnect Projects (Oct. 24, 2014) ("FEIS") 2-4, 2-8, 4-36–4-37, 4-181–4-183 [JA__, __, __–__, __–__]; *see also* Authorization Order ¶ 14 [JA__].

[3] Rehearing Request of Catskill Mountainkeeper et al., 2 (Dec. 30, 2014) ("Rehearing Request") [JA__]; *see also* Opening Br. of Pet'rs' Catskill Mountainkeeper et al. ("Pet'rs' Br.") 10–11, ECF No. 137-1.

Although the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, requires that the Federal Energy Regulatory Commission ("FERC" or the "Commission") analyze the environmental impacts of the Project, FERC ignored or arbitrarily minimized the vast majority of the Project's potential adverse effects. The Commission shirked its duty under NEPA by ignoring record evidence, using minimal uncertainties to excuse refusals to analyze impacts, accepting woefully incomplete information, and relying entirely on best-case scenario mitigation measures without even documenting the allegedly mitigated impacts.

FERC arbitrarily insisted that it was not required to the evaluate the Project's upstream indirect effects. Br. for Resp't Federal Energy Regulatory Commission ("FERC Br.") 39–51, ECF No. 169. Contrary to the Commission's assertions, there is no record evidence demonstrating that the Project's suppliers can fill the pipeline over its lifetime without drilling additional wells. By contrast, information about the effects of natural gas production is widely-available. The Commission acknowledged the possibility of describing those effects by including a limited evaluation of the Project's upstream impacts in its FEIS.[4] FERC's subsequent unexplained about-face and claim that analysis of the impacts of additional upstream development is too speculative does not relieve the

[4] FEIS 4-233 [JA__].

Commission of its NEPA obligation. Moreover, the argument by the Natural Gas Supply Association ("NGSA") that the Commission was not obliged to review the Project's induced development because other agencies regulate aspects of that development, *see* Page-Proof Br. for Resp't Intervenor Natural Gas Supply Ass'n ("NGSA Br.") 12–14, ECF No. 168, is not supported by case law and contradicts NEPA's requirement that indirect effects of the Project be included in FERC's environmental review.

The Commission's analysis of the Project's climate change impacts fares no better under NEPA. FERC arbitrarily ignored significant volumes of the Project's emissions by inexplicably limiting its analysis to a single year of operations.[5] The Commission also rejected the best available science and tools for estimating the lost carbon sinks resulting from cutting acres of trees or for assessing the climate change consequences of the Project's emissions.[6] NEPA does not permit FERC to eschew tools and methodologies that other expert agencies use and recommend.

In addition, FERC arbitrarily failed to demand site-specific information that would enable it to assess the water quality impacts of the Project's 289 waterbody crossings.[7] The New York State Department of Environmental Conservation

---

[5] Order Denying Rehearing and Approving Variance, *Constitution Pipeline Co.*, 154 FERC ¶ 61,046 ("Rehearing Order") ¶ 127 [JA__].
[6] *Id.* ¶ 128.
[7] FEIS 4-51 [JA__].

("NYSDEC") denied Constitution's application for a certification under Section 401 of the Clean Water Act ("401 Certification") on precisely that ground—the information Constitution provided was insufficient to allow NYSDEC to certify that the Project's potential discharges would comply with the Clean Water Act.[8] The Commission claimed, however, that the data NYSDEC deemed inadequate was sufficient for FERC's NEPA analysis because Constitution identified generic mitigation measures to address the undisclosed water quality impacts. *See* FERC Br. 65–66. FERC is not entitled to assume the efficacy of mitigation measures without first evaluating the underlying impacts.

Finally, the Commission violated the Clean Water Act by approving the Project before NYSDEC made its determination on the 401 Certification. The Clean Water Act requires that states act before a federal authorization is given. 33 U.S.C. § 1341. The Commission's failure to follow this sequence permitted the condemnation of property, irreversible removal of trees, and contamination of waterbodies to occur in furtherance of a Project that now has had its 401 Certification denied. This is precisely the kind of unnecessary damage that would be prevented if FERC complied with the Clean Water Act and waited for states to act under Section 401 before authorizing a project.

---

[8] Letter from John Ferguson, NYSDEC to Lynda Schubring, Constitution (Apr. 22, 2016) ("NYSDEC Denial") [JA__–__].

ARGUMENT

I. FERC'S REFUSAL TO EXAMINE THE UPSTREAM DEVELOPMENT THE PROJECT WOULD INDUCE WAS ARBITRARY AND CAPRICIOUS.

The Commission was required to examine the reasonably foreseeable environmental impacts of the natural gas production that would result from constructing and operating a 124-mile natural gas conduit connecting Susquehanna County with Northeast markets. Contrary to the arguments made by FERC and the industry Intervenors, the Project would be the legally relevant and actual cause of additional upstream natural gas development in the Susquehanna County area. The adverse impacts of that development are reasonably foreseeable and must be evaluated under NEPA. FERC's steadfast refusal to engage in a meaningful analysis of these impacts is arbitrary and capricious.

A. The Project Is the Legally Relevant Cause of Upstream Development.

Misinterpreting both *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), and *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016) ("*Freeport*"), NGSA claims that FERC need not examine the effects of the Project's induced natural gas development because FERC does not have the statutory authority to regulate those effects. *See* NGSA Br. 12–13. *Public Citizen* and *Freeport* limit responsibility under NEPA only when the agency does not have jurisdiction over the *federal action* causing the impacts. Neither case eliminates an

agency's obligation to evaluate indirect impacts of an action that it has the power to approve or deny. The FERC-approved Project therefore is the legally relevant cause of upstream development, and the impacts of that development must be reviewed, even though other agencies regulate the development.

This case contrasts markedly with *Public Citizen*, where the agency "ha[d] no ability to prevent a certain effect due to its limited statutory authority." 541 U.S. at 770. In *Public Citizen*, the Department of Transportation ("DOT") did not have the authority to prevent motor carriers from Mexico from entering the United States, once the President authorized that cross-border traffic. *Id.* at 766. Any attempt to do so would have violated 49 U.S.C. § 13902(a)(1). *Id.* The Court therefore concluded that DOT was not required to evaluate the effects of the carrier traffic under NEPA because DOT "ha[d] no ability categorically to prevent the cross-border operations of Mexican motor carriers, the environmental impact of the cross-border operations would have [had] no effect on [DOT's] decisionmaking—[and DOT] simply lack[ed] the power to act on whatever information might be contained in the EIS." *Id.* at 768.

By contrast here, FERC has undisputed authority to approve or deny the Project. *See* 15 U.S.C. § 717. The Commission could have denied Constitution's application, and thereby prevented the Project from causing any upstream impacts at all. FERC also had the authority to change the location of the Project's termini

and the Project's route, capacity, and lifespan. *See id.* The Commission does not need the power to regulate gas production, because exercising the authority that FERC *does* have—to deny or condition the approval of Project—will prevent or alter the harmful *effect*.[9] When an agency has statutory authority to prevent the relevant effects—as FERC does with respect to the impacts of Project-induced gas production—"*Public Citizen*'s limitation on NEPA does not apply." *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1134 n. 20 (9th Cir. 2007).

This case also is distinct from *Freeport*, which involved a unique statutory scheme governing the review and approval of liquefied natural gas export terminals. 827 F.3d at 40–41. The Department of Energy ("DOE") has statutory authority over the export of natural gas. 42 U.S.C. § 7151(b). The NGA articulates the standards DOE must employ when considering whether or not to allow natural gas to be exported to a particular country. 15 U.S.C. § 717b. DOE delegated authority to FERC to approve or disprove the construction and operation of particular export facilities, but not the authority to approve export.[10] Given the

---

[9] NEPA recognizes that other agencies may have the authority to regulate discrete parts of a process having environmental effects, but the regulatory overlap does not excuse the lead agency—FERC in this case—from examining the direct, indirect, and cumulative impacts of its own action. *See Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1123 (D.C. Cir. 1971).

[10] DOE, Delegation Order No. 00-004.00A, § 1.21A (May 16, 2006), https://www.ferc.gov/industries/electric/indus-act/siting/doe-delegation.pdf.

vesting of "export decisions squarely and exclusively within the [DOE's] wheelhouse" and "objections concerning the environmental consequences stemming from the actual export of natural gas…, including increased emissions and induced production, are raised in [a] parallel challenge to the [DOE's] order authorizing" exports, the court concluded that "any such challenges to the environmental analysis of the export activities themselves must be raised in a petition for review from [DOE's] decision to authorize exports." *Freeport*, 827 F.3d at 46.

The holding in *Freeport* does not apply here for several reasons. First, there is no question that the NGA gives FERC sole and exclusive authority over Project approval. The Act does not place any portion of that decision in the wheelhouse of any other agency.

Second, no other agency is in a position to fulfill NEPA's obligation to evaluate the environmental consequences of induced production. FERC is not being asked to duplicate another agency's environmental impact statement. *Compare with Town of Barnstable, Mass. v. Fed. Aviation Admin.*, 740 F.3d 681, 691 (D.C. Cir. 2014) ("There is no need for [the Federal Aviation Administration to duplicate [Department of] Interior's NEPA analysis. . . .).

Finally, unlike in *Freeport*, there is no other proceeding where Petitioners[11] can raise claims about the impacts of the upstream development induced by the Project. Contrary to NGSA's suggestion, *see* NGSA Br. 2, 8, 13, the Bureau of Land Management ("BLM") has no role in approving gas production on private land in Pennsylvania—its jurisdiction is limited to federal lands—and there is no federal or state law requiring that the Pennsylvania Department of Environmental Protection conduct an environmental impact review of gas extraction. If FERC is relieved of its responsibility to evaluate upstream impacts, those impacts will go unevaluated.

Moreover, adopting NGSA's reading of *Freeport* would completely eviscerate NEPA's requirement that agencies evaluate a project's indirect effects, *see* 40 C.F.R. § 1508.8(b), which often are regulated by another agency. *See, e.g.*, *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 548–50 (8th Cir. 2003) (requiring evaluation under NEPA of indirect air pollution and climate effects of railway facilitating access to coal mine on federal lands, although the Environmental Protection Agency ("EPA") and state agencies regulate sources that would burn coal); *Sierra Club v. Marsh*, 769 F.2d 868, 878–79 (1st Cir. 1985) (requiring evaluation of the indirect growth-inducing effects of a federal project in

[11] The use of "Petitioners" throughout refers to Petitioners Catskill Mountainkeeper, Inc.; Clean Air Council; Delaware-Otsego Audubon Society, Inc.; Riverkeeper, Inc.; and Sierra Club.

a small communities, although local and state agencies regulate local development activity); *Friends of the Earth, Inc., v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 40–41 (D.D.C. 2000) (requiring NEPA assessment to include growth-inducing effects of building three floating casino barges in a rural area, although local and state agencies regulate local development activity).

B. FERC's Conclusion That the Project Will Not Cause Any Gas Development Defies the Record.

Constitution and FERC claim that the Commission was not required to analyze the effects of induced natural gas development because the Project would not cause any additional production. FERC Br. 42–47; Page Proof Br. of Intervenor Constitution Pipeline Co., LLC ("Constitution Br.") 15–16, ECF No. 175; *see also* NGSA Br. 10–14. FERC claims that it would consider the impacts of upstream development only if it could be shown that the "proposed pipeline would transport new production from a specified production area and that production would not occur in the absence of the proposed pipeline." *Id.* at 42 (quoting Rehearing Order ¶ 138 [JA__]). But, focusing on Cabot's contractual commitment to use 500,000 dekatherms per day of the Project' capacity, the record demonstrates the following:

- Cabot's holdings in the Marcellus Shale are primarily located in a particular area of Susquehanna County;[12]
- the Project "would provide [the Northeast with] access to new sources of gas supply;"[13]
- there is little existing pipeline in the direct vicinity of the Project's "Susquehanna Supply Area" and none that goes towards the Northeast markets;[14]
- "[e]ven if additional pipeline was constructed for purposes of connecting [the existing system] to the supply area and the delivery area, there still is not sufficient available capacity on any of these existing pipeline systems to meet the [Project's] required delivery of natural gas;"[15]

---

[12] NPR, *Susquehanna County*, http://stateimpact.npr.org/pennsylvania/drilling/counties/susquehanna-county (last visited Sept. 22, 2016).

[13] Constitution Pipeline Co., Application for Certificates of Public Convenience and Necessity (June 13, 2013) ("Constitution Application") at 5 [JA__].

[14] FEIS 3-15–3-16 [JA__–__].

[15] *Id.* at 3-16 [JA__–__]. Statements such as these completely undermine the Commission's attempt to justify its failure to review upstream development based on the claim that "any new production spurred would reach its intended markets through alternate pipelines or other modes of transportation." *See* FERC Br. 45 (quoting Rehearing Order ¶ 147 [JA__]); *see also* NGSA Br. 17.

- Cabot has extensive existing commitments to supply natural gas to other pipelines and export terminals;[16]
- Cabot's existing production levels likely are insufficient to meet its existing commitments;[17] and
- It is well documented that all natural gas wells experience a sharp decrease in production over time[18]

There is nothing in the record showing that Cabot can provide 500,000 dekatherms per day to the Project over at least the next 15 years without drilling additional wells.

To justify its decision to ignore the adverse impacts of additional natural production, the Commission invokes irrelevant factual assertions and citations to inapposite case law. Both FERC and Constitution make much of the contention that pipeline developers would not seek to build a pipeline where there is no gas production to support it. FERC Br. 42–43; *see also* NGSA Br. 11 n. 8 (citing Rehearing Order ¶ 138 [JA__]). The Commission and NGSA also cite to increasing production levels in Pennsylvania and Susquehanna County as evidence that existing production supports the Project. FERC Br. 43; NGSA Br. 10–11. But

---

[16] *See* Pet'rs' Br. 9–10.
[17] *See also* Rehearing Request at 9–11 [JA__–__].
[18] *Id.* at 11 [JA__].

the undeniable presence of gas reserves in the broad region does not rebut Petitioners' point that the Project serves a specific area of Susquehanna County and that Constitution has contracts with specific suppliers. Neither of the arguments the Commission advances refutes Petitioners' evidence that the existing wells *in the vicinity of the Project*, which are owned and operated by the companies that have committed to supplying the Project—here, primarily Cabot—will produce enough natural gas over the next fifteen years or whether additional wells will be required.

FERC and Constitution also are incorrect that case law supports the Commission's refusal to consider the effects of upstream production. FERC is wrong that two district court case holdings, *Sierra Club v. Clinton* and *Florida Wildlife Federation v. Goldschmidt*, allowed agencies to ignore indirect effects because market forces also affected whether and to what extent development at issue might occur. *See Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045–46 (D. Minn. 2010) (declining to review trans-boundary impacts associated with upstream development of tar sands oil, in part because impacts in Canada were "beyond the review of NEPA."); *Fla. Wildlife Fed'n v. Goldschmidt*, 506 F. Supp. 350, 375 (S.D. Fla. 1981) (finding analysis of growth inducing effects of highway sufficient

where FEIS concluded that highway would provide a focal point for more orderly and effective development).[19]

The holding in *Freeport* and this Court's decision in *Coalition for Responsible Growth & Resource Conservation v. FERC* also do not justify FERC's conclusion that the Project would not cause additional natural gas production. 485 Fed. App'x 472 (2d Cir. 2012); *but see* FERC Br. 40–41, 44–46, 47; Constitution Br. 15–16. *Freeport* explicitly left open the factual question of whether upstream development was caused by the export of natural gas. 827 F.3d at 47–48. As Petitioners explained in their opening brief, the pipeline at issue in *Coalition* is nothing like the 124-mile conduit between the Susquehanna Project Area and the Northeast markets. Pet'rs' Br. 22. The Commission claims that the two pipelines are alike because, in both cases, alternate routes to market allegedly exist. *See,*

---

[19] Other cases cited by FERC and Constitution also are irrelevant or easily distinguishable. *See, e.g.*, FERC Br. 42 (citing *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989) (upholding a NEPA review examining the impacts of a golf course and not the larger resort being constructed around it at the same time); *City of Carmel-By-The-Sea v. DOT*, 123 F.3d 1142, 1162–63 (9th Cir. 1997) (finding that additional analysis of growth-inducing impacts was not necessary when FEIS "admits that development may result from the freeway project" and properly analyzed it)); Constitution Br. 16 (citing *Wilderness Workshop v. BLM*, 531 F.3d 1220, 1228–31 (10th Cir. 2008) (finding that future gas development was not a "connected action" without discussing whether that development also qualified as an indirect effect); *Wilderness Soc'y v. Salazar*, 603 F. Supp. 2d 52, 62 (D.D.C. 2009) (allowing BLM to defer indirect impact review when "further site-specific analysis [would] be conducted prior to exploration in the planning area").

e.g., FERC Br. 46. But the Commission's claim is not supported by any citation to the record. In addition, the description of the need for the Project belies the claim that gas earmarked for the Project could easily find another route to market.[20]

EPA also contests the Commission's finding that there is no connection between the natural gas infrastructure development and additional upstream production. EPA repeatedly has asked that the Commission examine the upstream impacts of natural gas development, including most recently in comments to FERC on another Marcellus Shale interstate natural gas pipeline.[21] *See also Friends of the Earth*, 109 F. Supp. at 41 (citing to EPA's opinion that indirect impacts of project were foreseeable as basis for overturning analysis that ignored the effects of induced development). FERC's continued refusal to acknowledge the connection between the pipeline projects it approves and additional upstream natural gas production is irrational and does not comport with NEPA.

---

[20] NGSA's claim that there are existing options to transport the natural gas destined for the Project also are belied by the record. *See* NGSA Br. 17.

[21] *See* Letter from John R. Pomponio, EPA Region III, to Nathaniel J. Davis, Sr., FERC, FERC Docket No. CP15-558, Enclosure 1 at 15 (Sept. 12, 2016) (recommending that FERC estimate environmental impacts from development and production of natural gas); *see also* EPA's Comments on the Draft Guidance Manual for Environmental Report Preparation for Applications Filed Under the Natural Gas Act, attached to Letter from Karin Leff, EPA, to Kimberly Bose, FERC ("EPA Guidance Comments"), FERC Docket No. AD16-3 (Jan. 19, 2016) [JA__].

C. The Environmental Impacts of Gas Production Are Reasonably Foreseeable.

FERC claims that the impacts of natural gas development are not reasonably foreseeable. FERC Br. 47. The Commission and the NGSA maintain that the exact timing, location, and extent of the development must be known in order to analyze upstream impacts under NEPA. FERC Br. 47–49; NGSA Br. 13. FERC knew, however, where the development would occur and admitted in the FEIS that it could quantify the wells needed to supply 650,000 dekatherms per day as well as the acreage those wells would disturb.[22] *See* Pet'rs' Br. 25–26. Although Petitioners requested that FERC refine its calculations and provide narrower ranges,[23] the Commission instead arbitrarily decided to ignore upstream impacts entirely, for lack of total certainty. FERC has not provided any reasoned explanation to justify its sudden about-face.

II. THE COMMISSION'S CONSIDERATION OF CLIMATE CHANGE IMPACTS VIOLATED NEPA.

The Commission's review of the Project's greenhouse gas emissions and climate change impacts failed to comply with even the most basic requirements of NEPA. At every turn, FERC shirked its duty by inexplicably dismissing the

---

[22] *See* FEIS 4-233 [JA__]. The Commission's own statements in the FEIS and in subsequent briefing completely undermine NGSA's unsupported claim that the additional gas needed to support the Project could come from anywhere in the Marcellus Shale. *See* NGSA Br. 13.

[23] Rehearing Request at 13–14 [JA__].

Project's emissions or claiming that alleged methodological uncertainties justified dismissal of a widely recognized global threat. The Commission's excuses fly in the face of the findings, recommendations, and practices of multiple expert agencies, including the Council on Environmental Quality ("CEQ"), DOE, and EPA.[24] FERC's willful disregard of the climate impacts of natural gas infrastructure projects under its jurisdiction is at odds with the nation's climate goals, including commitments in the Paris Agreement, and violates NEPA.[25]

A. The Commission's Evaluation of the Significance of the Project's Greenhouse Gas Emissions Was Arbitrary and Capricious.

The Commission continues to dismiss the significance of the Project's greenhouse gas emissions because they are "so small." FERC Br. 52. CEQ clearly has stated, however, that

> a statement that emissions from a proposed Federal action represent only a small fraction of global emissions is essentially a statement about the nature of the climate change challenge, and is not an appropriate basis for

---

[24] Memorandum from Christina Goldfuss, Council on Envtl. Quality to Heads of Federal Departments & Agencies 11 (Aug. 11, 2016) ("CEQ Final Guidance") [JA__–__]; Energy Conservation Program: Energy Conservation Standards for Commercial Refrigeration Equipment, 79 Fed. Reg. 17,726, 17,729 (Mar. 28, 2014); EPA Comments, Constitution Pipeline and Wright Interconnection Projects Final Environmental Impact Statement 1, attached to Letter from Judy-Ann Mitchell, EPA to Kimberly Bose, FERC (Dec. 8, 2014) ("EPA Comments on FEIS") [JA__].

[25] *See, e.g.*, Oil Change Int'l et al., A Bridge Too Far: How Appalachian Basin Gas Pipeline Expansion Will Undermine U.S. Climate Goals (July 2016), http://priceofoil.org/content/uploads/2016/08/bridge_too_far_report_v6.3.pdf.

> deciding whether or to what extent to consider climate change impacts under NEPA. Moreover, these comparisons are also not an appropriate method for characterizing the potential impacts associated with a proposed action and its alternatives.[26]

FERC admits that it used an inappropriate comparison between the Project's greenhouse gas emissions and the national inventory of emissions but insists that "nothing in the [FEIS] indicates that the Commission *solely* relied on this comparison in assessing the significance of the impact." FERC Br. 55 (emphasis added). FERC provides little other explanation for its significance determination, however, and the discussion in the FEIS focuses its greenhouse gas impact analysis on the discredited comparison.[27] The only other basis offered for the Commission's conclusion is the two-sentence unsupported hypothesis that the

---

[26] CEQ Final Guidance at 11 [JA__]. Iroquois mischaracterizes Petitioners' climate change arguments, stating that "every one of" these arguments were "based on" CEQ's Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change. *See* Page Proof Br. for Intervenor Iroquois Gas Transmission System, LP ("Iroquois Br.") 34, ECF No. 166. Although CEQ's Guidance—whether in draft or final form—is not binding on FERC, it nevertheless is telling when the Commission's analysis of climate impacts does the precise *opposite* of what CEQ recommends. *See* Pet'rs' Br. 33–34. As Iroquois effectively recognizes, moreover, the Draft and Final CEQ Guidance were not meant to change agencies' obligations under NEPA, but rather to clarify the obligations that NEPA *already* imposed. Iroquois Br. 36–37; *see* CEQ Final Guidance at 2 [JA__]. The fact that these documents had not been published when FERC conducted its evaluation of the Project, therefore, does not relieve the Commission of its obligation to conduct a serious climate analysis.

[27] *See* FEIS 4-256 [JA__].

Project's natural gas "potentially" would offset "some" fuel oil use.[28] FERC's citations to other sections of the FEIS where greenhouse gases are mentioned briefly also do nothing to bolster the Commission's analysis. *See* FERC Br. 55 (citing to FEIS 3-1 (asserting that some of the natural gas from the Project *might* offset the use fuel oil); *id.* at 3-6 (stating "increased use of nuclear power is seen by some as a means of reducing [greenhouse gas] emissions associated with the burning of fossil fuels"); *id.* at 3-7 (speculating that coal and fuel oil could be used as alternative sources of energy generation); *id.* at 3-11 (mentioning greenhouse gas concerns associated with generating energy with biomass). FERC's position on appeal, therefore, simply is not supported by the FEIS. *See Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 95 (2d Cir. 2006) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action.") (internal quotation marks and citation omitted).

B. The Commission Arbitrarily Ignored Significant Potential Greenhouse Gas Emissions.

The Commission also irrationally failed to account for the full amount of the Project's emissions. FERC analyzed only one year of Project operation. It also failed to acknowledge that cutting acres of forest to construct the pipeline will

[28] *See id.* [JA__].

cause substantial losses of carbon sinks that must be factored into the Project's total greenhouse gas emissions.

FERC has not provided any justification for limiting its calculation of the Project's emissions to only one year of operations. *See* Pet'rs' Br. 36–37. Indeed, the Commission's brief does not address this issue at all. Iroquois, however, irrationally claims that there is no precedent for calculating greenhouse gas emissions for the lifetime of a project and that doing so would require an "apples to oranges" comparison to national inventories. Iroquois Br. 26–27 (internal quotation marks and citation omitted), but comparing Project emissions to emissions at the national level is not appropriate in the first place. *See supra* Section II.A. Moreover, tabulating emissions over a span of years is not a "crystal ball inquiry," Iroquois Br. 27, but a rather simple calculation. *See* Pet'rs' Br. 12. Ignoring the greenhouse gas emissions from future years of operation is particularly arbitrary in light of the cumulative impact of such emissions—future emissions will increase the concentration of greenhouse gases in the atmosphere, which will raise the Earth's temperature and cause greater impacts from climate change.[29]

---

[29] EPA, *Climate Change: Basic Information*, https://www3.epa.gov/climatechange/basics (last updated Aug. 9, 2016).

FERC's refusal to consider the greenhouse gas emissions that will result from disturbing 1,033 acres of upland forest during construction, 477 acres of which will remain clear-cut during Project operation, based on its rejection of two reports suggesting methods for calculating such losses also is arbitrary. FERC claims that "neither [report] provides a reliable method to calculate," these impacts, FERC Br. 53, and so abandoned any and all consideration of the emissions from this source. While deference is given to an agency "acting at the frontiers of science," that deference should not be extended when an agency makes no effort to examine a potential impact. *See Helping Hand Tools v. U.S. EPA*, --- F.3d---, 2016 WL 4578364, at *11 (9th Cir. Sept. 2, 2016) (deferring to EPA's scientific expertise when "EPA did consider the environmental impacts…, just not in the manner or the level of detail [petitioner] would prefer."). The contribution to climate change from the loss of carbon sinks is not zero, and even if it genuinely cannot be quantified, the Commission could have ensured mitigation by requiring forest restoration equivalent to the tree cutting.[30]

Contrary to FERC's statement, *see* FERC Br. 54, Petitioners do not expect the Commission to develop its own tool to calculate emissions from the loss of carbon sinks, but NEPA does not permit the Commission to use uncertainty as the

[30] *See* Pomponio, *supra* note 21, at Enclosure 1 p.15 (recommending that "FERC analyze and consider mitigation (e.g., forest restoration) to make up for" a proposed pipeline's removal of 633 acres of forest).

basis for ignoring a potential environmental impact entirely. *See* 40 C.F.R. § 1502.22 (laying out the procedures for dealing with incomplete or unavailable information, including summarizing relevant existing credible scientific evidence). FERC suggests that its approach is acceptable because "greenhouse gas emissions were not determinative in its choice among alternatives analyzed in the [FEIS]." FERC Br. 54. But this is not surprising given the Commission's woefully inadequate analysis of the Project's greenhouse gas emissions and severe undercounting of those emissions. Without a proper accounting and consideration of the Project's greenhouse gas emissions, FERC's choice among alternatives was ill-informed and not in compliance with NEPA.

C. FERC's Refusal to Evaluate the Impacts of the Project's Greenhouse Gas Emissions Was Irrational.

The Commission attempts to exploit uncertainty in measuring climate change impacts to justify its own inconsistent approach to evaluating the effects of the Project's greenhouse gas emissions. Because the impacts of greenhouse gases are separated in time and space from their point of emission, federal agencies and international organizations have developed tools to approximate the impact of each additional ton of carbon dioxide emissions. One such tool is the social cost of carbon, which allows agencies to monetize the damage caused by emitting one ton

of carbon dioxide equivalent.[31] FERC initially accepted the utility of the social cost of carbon and calculated the cost of emissions from one year of the Project's operations at between $1,638,708 and $8,330,100.[32] Without explanation, the Commission failed, however, to calculate costs of construction emissions and ignored costs of Project operations over at least 14 additional years. When pressed to correct these deficiencies,[33] FERC disavowed its use of the social cost of carbon, claiming that the tool was "not appropriate" because there is no consensus on what discount rate to use to calculate the cost of emissions in future years.[34]

FERC's arbitrary rejection of the social cost of carbon presents a stark contrast with the approach of other federal agencies. EPA, DOE, and BLM all have used the social cost of carbon. *See, e.g.*, *Zero Zone v. U.S. DOE*, Nos. 14-2147, 14-2159 & 14-2334, ---F.3d---, 2016 WL 4177217, *16 (7th Cir. Aug. 8, 2016) (upholding DOE's use of the social cost of carbon in setting new energy efficiency standards); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014) (faulting BLM for including social cost of carbon calculations in an earlier draft of an environmental impact statement and

---

[31] EPA, *The Social Cost of Carbon*, https://www3.epa.gov/climatechange/EPAactivities/economics/scc.html (last updated Aug. 9, 2016).
[32] FEIS 4-256 [JA__].
[33] *See, e.g.*, Rehearing Request at 20–21 [JA__–__].
[34] Rehearing Order ¶ 131 [JA_].

then claiming that quantifying the costs of its proposed action was impossible).[35] Contrary to FERC's summary rejection of the reliability of calculations obtained using the social cost of carbon, CEQ describes the tool as having been

> developed through an interagency process committed to ensuring that the [social cost of carbon] estimates reflect the best available science and methodologies and used to assess the social benefits of reducing carbon dioxide emissions…[and] provides a harmonized, interagency metric that can give decision makers and the public useful information for their NEPA review.[36]

The fact that there are a range of discount rates and, therefore, of social costs of carbon associated with a particular volume of emissions does not justify ignoring the tool entirely.[37] *See* Pet'rs' Br. 38–39. At a minimum, it is clear that the impacts of the Project's greenhouse gas emissions are not zero. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*, 538 F.3d 1172, 1200 (9th Cir. 2008) (invalidating agency action for failing to address climate benefits of

---

[35] *See also* EPA Comments on FEIS at 2 [JA__].

[36] CEQ Final Guidance at 33 n.86.

[37] The holding in *EarthReports, Inc. v. FERC* mistakenly determined that petitioners' request to FERC that it calculate a range of social cost of carbon rates and explain the limitations of the tool justified FERC's refusal to use the tool. 828 F.3d 949 (D.C. Cir. 2016). The court in *EarthReports* fundamentally misunderstood the nature of the social cost of carbon tool and the utility of developing even a range of values to quantify the potentially significant adverse environmental impacts of a project dedicated to fostering the continued use of fossil fuels. Under these circumstances, FERC is not owed deference. *See Duncan's Point Lot Owners Ass'n v. FERC*, 522 F.3d 371, 376 (D.C. Cir. 2008) (finding that deference is owed to FERC when "there is nothing in the record to suggest that FERC ignores any significant consequences to the environment.").

reducing greenhouse gas emissions merely because benefits could be calculated only as a range). FERC's rejection of the social cost of carbon is behind the times and its truncated analysis of the Project's climate impacts does not constitute a "hard look" under NEPA.[38]

III. THE COMMISSION'S ANALYSIS OF THE PROJECT'S IMPACTS ON WATER QUALITY WAS ARBITRARY AND CAPRICIOUS.

FERC's review of the Project's water quality impacts was not the hard look that NEPA mandates. NEPA requires that the Commission gather and analyze all data necessary to evaluate the Project's potentially significant environmental impacts "prior to the implementation of the proposed action." *See LaFlamme v. FERC*, 852 F.2d 389, 400 (9th Cir. 1988) (internal quotation marks and citation omitted). FERC's failure to require that Constitution determine what type of stream crossing would be used at each of the 289 waterbodies traversed by the Project precluded any meaningful review of the Project's water quality impacts. Without knowing what method of crossing Constitution would use, FERC also

---

[38] Contrary to Iroquois' characterization, FERC has not addressed this issue "at length." *See* Iroquois Br. 32. The FEIS contains no mention of the effects of the Project's greenhouse gas emissions on climate change, except the one paragraph discussing the social cost of carbon from one year of operational emissions. *See* FEIS 4-256 [JA__]. The other citations to the FEIS in Iroquois's brief are to generic statements on how greenhouse gases cause climate change, *id.* at 4-171 [JA__], and the general environmental impacts from climate change, *id.* at 4-255 [JA__]. The Rehearing Order simply refers back to the FEIS and maintains that the FEIS' analysis is adequate. *See* Rehearing Order ¶¶ 127, 129 [JA__, __].

could not know whether the measures required in the Authorization Order were sufficient to mitigate potentially significant impacts. FERC's analysis of the Project's water quality impacts also irrationally ignored critical issues, such as how multiple crossings would affect a single waterbody, whether in-stream blasting would occur, and whether Constitution has proposed to bury its pipeline at sufficient depths to avoid blowouts and other problems.

A. The Failure to Evaluate Site-Specific Data at Each of the 289 Crossing Locations Violated NEPA.

The Commission's NEPA analysis is inadequate because it does not evaluate the water quality impacts that would result from the different crossing methods used at each of the 289 waterbody crossings. Constitution has proposed to use particular methods at each location, but has made no commitment to do so, a fact that FERC and Constitution both admit. FERC Br. 61 ("Constitution *proposed* trenchless crossing methods…for 21 of the crossings…Dry crossing methods…are *proposed* for the remaining 268 waterbodies." (citations omitted) (emphasis added)); *id.* at 62 ("[T]here is uncertainty regarding stream-crossing

methods….").[39] Constitution did not, however, provide FERC with site-specific data demonstrating that the proposed crossing methods were even feasible at the vast majority of proposed crossing locations. *See* Constitution Br. 17 (noting "[t]he [l]ack of [c]omplete, [s]ite-[s]pecific [d]ata" provided to FERC). Therefore, although the FEIS contains a generic description of each stream crossing method,[40] *see* FERC Br. 61, FERC never analyzed the impacts of using different methods at specific sites or described relevant conditions at those sites. Instead, the Commission assumed without evidence that Constitution would be able to use the proposed crossing method and that any significant impacts would be mitigated.

The excuses Constitution and FERC provide for that unsubstantiated conclusion are unavailing. Constitution points to its inability to survey 24 percent of the pipeline right-of-way, but it offers no explanation for failing to provide site-specific information about crossings to which it had full access. *See* Constitution Br. 44 & n.7; *see also* FERC Br. 62. Even supposing a total lack of access to these sites, FERC should have conducted a worst-case scenario analysis in keeping with

---

[39] FERC's statement that the "Certificate Order" requires use of specific stream-crossing and reference to Environmental Condition 1 are misleading. *See* FERC Br. 62. There is no requirement in the Authorization Order that any particular method be used at any particular stream crossing and Environmental Condition 1 explicitly contemplates modifications to Constitution's provisional plans. Authorization Order at Environmental Condition 1 [JA__].

[40] FEIS 2-20–2-25 [JA__–__].

the best practices of industry participants and other federal agencies.[41] At a minimum, it was required to clearly acknowledge the gaps in the FEIS, describe the relevance of the missing information, provide a summary of accessible information that could help elucidate potential adverse environmental impacts, and analyze the potential adverse impacts to the environment based on available data. *See* 40 C.F.R. § 1502.22(b). Without site-specific information, the assertions that significant water quality impacts are "unlikely" hypotheticals, FERC Br. 6, or based on far-fetched theories, Constitution Br. 22, are unsubstantiated.

Relying on generic measures that are presumed to mitigate water quality impacts, without having any basis for assessing those impacts, also does not satisfy NEPA.[42] The Commission cannot "put the cart before the horse" and assume

---

[41] *See, e.g.*, Canadian Ass'n of Petroleum Producers et al., Pipeline Associated Watercourse Crossings at 4-26 (3d ed. 2005), http://goo.gl/aymwUG; J. M. Castro et al., *Risk-Based Approach to Designing and Reviewing Pipeline Stream Crossings to Minimize Impacts to Aquatic Habitats and Species*, 31 River Res. & Applications 767, 769 (2015), attached to Addendum to Opening Br. of Pet'rs' Catskill Mountainkeeper et al. at A-13–A-29, ECF No. 137-2 ("If land easements are not secured early in the route selection process, alternative development and risk analyses can be significantly impeded if site access is denied by property owners. In such cases, maps, aerial photos, lidar-based topography, and other remotely sensed data are employed, and a worst-case scenario for site conditions must be assumed for initial risk screening and analysis."); *see also Safeguarding the Historic Hanscom Area's Irreplaceable Res., Inc. v. Fed. Aviation Admin.*, 651 F.3d 202, 216 (1st Cir. 2011) (describing federal agency's use of worst case scenario as necessary to assessing adverse impacts).

[42] Petitioners do not argue that FERC's regulations governing mitigation measures are invalid, as Constitution claims. *See* Constitution Br. 26.

that—regardless of what effects construction may have on resources—there are mitigation measures that might counteract the effect without first understanding the extent of the problem." *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084–85 (9th Cir. 2011); *see also Del. Dep't of Natural Res. & Envtl. Control v. U.S. Army Corps of Eng'rs*, 685 F.3d 259, 277 (3d Cir. 2012). Contrary to FERC's assertion, the holding in *National Audubon Society v. Hoffman* underscores this point. *See* FERC Br. 66 (citing 132 F.3d 7, 17 (2d Cir. 1997)).

This Court's precedent also does not allow FERC to rely on mitigation measures that are not supported by adequate analysis. *See Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d at 17. There, the Court found that the agency violated NEPA when it conceded that the project would cause an increase in traffic and that the current level of traffic was unknown, but nevertheless proposed a mitigation measure it claimed would make the traffic impacts of a project insignificant. *Id.* The Court rejected this reasoning because the agency had not studied the effects of the mitigation measure or considered any alternatives if the mitigation measure failed. *Id.* As is the case here, there was "no assurance of [the mitigation measure's] efficacy." *See id.* Just as in *National Audubon Society*, the Commission failed to comply with NEPA because it assumed—without any supporting evidence—that the best-case scenario will prevail. *See also id.*

B. FERC's Analysis Violated NEPA by Ignoring Water Quality Impacts from Multiple Crossings, Blasting, and Inadequate Pipe Burial Depth.

FERC offers no real defense for its failure to consider the cumulative impacts of multiple crossings of a single waterbody, the potential impacts of in-stream blasting, or the potential risks associated with burying the pipeline at insufficient depths. The Commission's explanations for ignoring these impacts ring particularly hollow given the finding by NYSDEC that it could not certify that the Project would comply with the Clean Water Act, in part, because Constitution failed to provide sufficient information on precisely these issues.[43]

FERC failed entirely to consider that waterbodies crossed by the Project multiple times face different risks to water quality than those crossed only once.[44] The Commission asserts that it considered "impacts of all stream-crossings," FERC Br. 65, but the record does not support FERC's claim. Ouleout Creek, for example, is crossed 28 times by the Project.[45] There is no evidence in the FEIS or the Authorization Order that FERC gave any consideration to the cumulative effects of more than two dozen crossings of the Creek. The FEIS contained a description of the impacts of crossings methods generally, but nothing more.[46]

---

[43] *See* NYSDEC Denial at 3, 8, 12, 13 [JA__, __, __, __].
[44] *See id.* at 3 [JA_].
[45] *Id.* [JA__].
[46] *See* FEIS 2-20–2-25 [JA__–__].

Reliance on generic mitigation measures adopted without any reference to or knowledge of actual conditions at each crossing is the height of arbitrariness.

Similarly, citation to generic blasting mitigation plans is no substitute for collecting site-specific information regarding in-stream blasting and analyzing its potential effects in the FEIS. *See* FERC Br. 63–64; Constitution Br. 23–24. Given the huge gaps in information about the conditions at each crossing, the need to use blasting in at least some locations to build the Project would not be surprising, and the impacts of this highly destructive activity should have been analyzed in the FEIS. FERC cannot blithely assume, without evidentiary support, that its cookie-cutter mitigation measures will eliminate all significant water quality impacts from blasting.

Neither FERC nor Constitution point to any evidence that FERC evaluated the suitability of specific pipe burial depths at any of the Project's 289 waterbody crossing locations. FERC simply cites to the FEIS, *see* FERC Br. 65, which listed only two burial depths (60 feet for "normal soil" and 24 feet for "consolidated rock") for all waterbody crossings, regardless of the size of the crossing, the stream flow of the waterbody, or potential differences in geologic make-up of the sites.[47] Similarly, Constitution claims that the FEIS was adequate because the pipe burial depths for the Project comport with DOT regulations. *See* Constitution Br. 24–25.

[47] FEIS 2-16 tbl.2.3.1-1[JA__].

Simply requiring compliance with existing regulations is not a substitute for meaningful analysis of environmental impacts. *See Calvert Cliffs*, 449 F.2d at 1123. Because insufficient burial depth may result in pipe exposure,[48] FERC's failure to request site-specific information regarding the Project's waterbody crossings kept the Commission from meaningfully assessing the risk of pipe exposure. FERC violated NEPA by failing to review the conditions at each crossing, determine whether pipe exposure might occur, and analyze what water quality impacts might result.

C. Petitioners Did Not Waive Any of the Claims in Their Opening Brief.

Contrary to the claims of FERC and Constitution, *see* FERC Br. 64–65 (claiming failure to preserve claim related to cumulative impacts of multiple crossings of a single waterbody and pipeline burial depth); Constitution Br. 20–24 (claiming waiver of claims relating to failure to assess cumulative impacts of multiple crossings of a single waterbody, feasibility of trenchless crossings at all sites, and pipeline burial depth). Petitioner waived none of the claims in their opening brief.

---

[48] *See* NYSDEC Denial at 12–13 [JA__–__]; *see also* Castro, *supra* note 41, at 769.

Petitioners' Rehearing Request clearly stated that FERC's review of water quality and species impacts was unsubstantiated by "expressly requested studies, analyses, and other plans that are essential to the public review and governmental decision-making required under NEPA," including "surveying information," "geotechnical feasibility studies for all trenchless crossing locations," and "site-specific blasting plans[.]"[49] These statements put FERC on notice of Petitioners' claims about the lack of adequate site-specific information and the potential adverse environmental impacts of inadequately analyzed waterbody crossings. *See U.S. Dep't of Commerce, Patent & Trademark Office v. Fed. Labor Relations Auth.*, 672 F.3d 1095, 1102 (D.C. Cir. 2012) (finding that petitioner's failure to use "magic words" specifically describing a claim did not preclude it from raising the issue in briefing when it had argued the substance of its objection in its request for rehearing).

IV. FERC VIOLATED THE CLEAN WATER ACT BY ISSUING THE AUTHORIZATION ORDER BEFORE NYSDEC ACTED ON THE 401 CERTIFICATION.

The facts in this case illustrate why the Commission's practice of approving pipeline projects before a state approves or waives the 401 Certification violates the Clean Water Act. FERC's practice allows projects lacking 401 Certifications to move forward as if their approval by the state is a foregone conclusion. Once

[49] Rehearing Request at 16 [JA__].

the Commission issued the Authorization Order, private land was seized, trees in Pennsylvania were cut with FERC's approval, and landowners cleared trees in the right-of-way in New York, resulting in impacts to waterways[50]—all for a Project that now cannot proceed because NYSDEC denied its 401 Certification.[51] FERC placed an impermissible thumb on the scale, creating incentives for irreversible damage to trees and preventable harm to water quality, in violation of the Clean Water Act.

Neither FERC nor Constitution offer a plausible excuse for the Commission's precipitous issuance of the Authorization Order prior to New York's decision on Constitution's 401 Certification. *See* FERC Br. 72–85; Constitution Br. 33–49. Constitution's arguments that (i) its application to FERC for Project approval did not trigger Section 401 and (ii) following the sequence

---

[50] Contrary to Constitution's claim, *see* Constitution Br. 45–49, Petitioners did suffer harm as a result of FERC's decision to issue the premature Order, including through the condemnation of their members' property and the destruction of trees in Pennsylvania. *See, e.g.* Declaration of Meryl Solar ¶¶ 4–7 (sworn to Sept. 9, 2016), attach. A, [JA__]. None of these activities would have occurred if FERC had waited for NYSDEC to deny the Section 401 permit.

[51] FERC claims that this Court is precluded from considering the tree cutting that occurred in Pennsylvania and New York because Petitioners did not seek rehearing of the order allowing tree cutting in Pennsylvania and because the Commission claims to be conducting an investigation into the tree cutting in New York. *See* FERC Br. 83–84. Petitioners raise these incidents as evidence that unnecessary harms have occurred because of the Commission's failure to comply with the timing mandated by the Clean Water Act and the Court may consider them for that purpose.

expressly provided for in the Clean Water Act would "contravene Congress' intent clear to federalize the regulation of interstate natural gas facilities," *see* Constitution Br. 35–43, 34–35, are without merit.

A. The Clean Water Act Requires That Projects Subject to Section 401 Obtain a 401 Certification Before a Federal Permit Can Be Issued.

Petitioners explained in their opening brief that the plain language of the Clean Water Act, its legislative history, and case law interpreting Section 401 all require FERC to wait for the state's decision on the 401 Certification before approving a project. *See* Pet'rs' Br. 55–56. Petitioners also discussed why the conditional nature of FERC's Authorization Order does not cure the illegality of the Commission's failure to wait for New York's 401 Certification and why the concurrence in *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267 (D.C. Cir. 2015) is mistaken. Pet'rs' Br. 57–59.

The arguments FERC and Constitution raise do not refute Petitioners' claim that FERC's premature issuance of the Authorization Order violated the Clean Water Act. The Commission and Constitution contend that FERC complied with the Clean Water Act because the Authorization Order does not allow activities that would cause a discharge. *See* FERC Br. 75, Constitution Br. 34. This argument ignores that Congress' intention to ensure that "no State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant

without consideration of water quality requirements."[52] *See S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006) (finding that Section 401 was promulgated to prevent applicants for federal licenses from "mak[ing] major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards" (quoting 116 Cong. Rec. 8984). None of the cases cited by FERC and Constitution hold to the contrary. *See, e.g.*, *Myersville Citizens for Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1319 (D.C. Cir. 2015) (interpreting the Clean Air Act);[53] *Del. Dep't of Nat. Resources & Envtl. Control*, 685 F.3d at 579 (dismissing case on standing); *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 283 (D.C. Cir. 1990) (upholding grant of conditional authorization prior to completion of NEPA review where review would be completed prior to the effective date of the authorization); *see also Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 2016 WL 4174045, at *15–*16 (3d Cir. Aug. 8, 2016) (finding no connection between Pennsylvania's delay in issuing the 401 Certification and FERC's authorization of tree cutting). FERC cannot be permitted to put its thumb on the scale and prejudge decisions that are properly reserved for the states.

---

[52] 116 Cong. Rec. 8984 (1970) (statement of Sen. Muskie).

[53] The Clean Air Act does not contain language tracking the requirement in Section 401 of the Clean Water Act that "[n]o [federal] license or permit shall be granted until the certification required by this section has been obtained." 33 U.S.C. § 1341(a)(1).

B. FERC's Authorization Order Triggered the Section 401 Certification Requirement.

Constitution argues that the Authorization Order did not trigger Section 401 of the Clean Water Act because the Order is not a license or permit within the meaning of Section 401.[54] *See* Constitution Br. 39–43. In defense of this argument, Constitution notes that Section 401 does not expressly mention "certificates" and EPA's 401Certification Handbook does not expressly mention FERC's certificates in its examples of approvals requiring a 401 Certification. Constitution Br. at 39–41, 42. But FERC's certification falls squarely within the basic definition of a "permit"[55] and the Clean Water Act and its regulations do not explicitly exclude authorizations that otherwise trigger Section 401 but are not formally designated a "permit" or "license." *See* 40 C.F.R. § 121.1(a); *see also* 33

---

[54] FERC plainly recognizes that Constitution's application for a Certificate of Public Convenience and Necessity qualified as a "license" or a "permit" under Section 401. The Commission's decision to allow Constitution to cut trees in Pennsylvania—which had granted the 401 Certification— but not in New York confirms FERC's understanding that Constitution's application for Project approval triggered Section 401 of the Clean Water Act. *See* Letter from Terry Turpin, FERC, to Lynda Schubring, Constitution (Jan. 29, 2016) [JA__–__].

[55] Permit, Black's Law Dictionary (10th ed. 2014) (defining the term as "an official written statement that someone has the right to do something").

U.S.C. § 1341.[56] EPA's guidance document explicitly contemplates the existence of triggering authorizations beyond the listed "examples."[57]

The law of this Circuit and Constitution's own statements suggest that FERC's Certificates should be regarded as a licenses or permits. This Court has referred to FERC as a "licensing agency" in a case where the only Commission authorization at issue was a Certificate under the NGA. *See Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 144 (2d Cir. 2008) ("Consistent with this scheme, the two Acts require applicants for federal permits to provide federal *licensing* agencies such as the FERC with certifications from affected states confirming compliance with local standards.") (emphasis added). Constitution admitted that "[t]he construction of interstate natural gas pipelines are *licensed* by FERC under

---

[56] Constitution's reference to FERC's regulations is equally unavailing. *See* Constitution Br. 42. Even if the Commission's regulations attempted to expressly exempt certificates from Section 401—which they do not—the Commission does not have the power to exempt its own activities from a statute it does not administer. *See AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 730 (4th Cir. 2009) (finding that "reliance on FERC's regulation interpreting [33 U.S.C. § 1341(a)(1)]'s one-year waiver period is misplaced given that FERC is not charged in any manner with administering the Clean Water Act") (citation omitted).

[57] EPA, Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes 1–3 (interim drft. Apr. 2010), Constitution Br. ADD45–47. (providing "[e]xamples of federal licenses and permits subject to §401 certification " and listing "[f]ederal licenses and permits *most frequently* subject to §401 water quality certification" (emphasis added)).

the Natural Gas Act."[58] Whether treated as permits or licenses, FERC's certificates plainly trigger 401 Certification requirements.

C. FERC's Regulation of Interstate Pipelines Has No Bearing on NYSDEC's Right to Deny a 401 Certification Before Pipeline Approval.

Protecting NYSDEC's right to act on the 401 Certification before the Commission approves a pipeline would not "undermine FERC's exclusive authority to determine the route of an interstate natural gas pipeline." *See* Constitution Br. 34. The NGA states clearly that FERC's role in regulating natural gas infrastructure projects does not change state authority under the Clean Water Act. *See* 15 U.S.C. § 717b(d). This Court also has ruled that a state can veto a natural gas pipeline by denying the 401 Certification. *Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d at 84, 94; *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d at 164 ("[W]e express no view as to the wisdom of … a statutory scheme whereby a single state agency effectively vetoes an energy pipeline that has secured approval from a host of other federal and state agencies.

---

[58] Letter from Gregory A. Hufnagel, AECOM on behalf of Constitution, to Steven Tomasik, NYSDEC (Apr. 29, 2014), attached as Ex. 5 to Letter from Anne Marie Garti, Pace Envtl. Litigation Clinic, Inc., on behalf of Stop the Pipeline, to FERC (Sept. 18, 2015) [JA __–__] (Constitution's Notice of Intent for coverage under New York State water quality permit).

It is, after all, Congress that has provided states with the option of being deputized regulators of the Clean Water Act….) (quotation marks omitted).[59]

V. PETITIONERS MUST BE PERMITTED TO PRESERVE THEIR CLAIMS AGAINST FERC.

In light of the pending litigation against NYSDEC, FERC now questions whether the case against it is ripe. FERC Br. 3–5. The Commission is correct that the Project cannot proceed without a 401 Certification from NYSDEC. *See id* at 3. However, even if the Court upholds NYSDEC's denial of the 401 Certification, the NYSDEC Denial plainly contemplates that Constitution might re-apply for a 401 Certification.[60] If Constitution supplied the information that its application currently lacks, NYSDEC could grant the 401 Certification and allow the Project to proceed under the FERC orders on review in this case.

The Commission treats the eventual grant of Constitution's 401 Certification as a *fait accompli*, stating in a recent letter that the Project's construction schedule merely has been "delayed" by the NYSDEC Denial.[61] Indeed, FERC considered it

---

[59] FERC also recognizes this fact. *See* FERC Br. 75–76 (citing *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011); *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 67 (2009); and *Broadwater Energy, LLC*, 124 FERC ¶ 61,225, at P 58 (2008)).

[60] NYSDEC Denial at 14 [JA__].

[61] Letter from John M. Wood, FERC to Stephen A. Hatridge, Constitution 1 (July 26, 2016) (granting Constitution's request to extend the Authorization Order's deadline for putting the Project into service from December 2, 2016 to December 2, 2018) [JA__–__].

sufficiently likely that the Project ultimately will go forward that, after considering the matter for barely two business days, it extended the term of the Authorization Order by two years.[62] Pushing back the expiration date of the Authorization Order makes it less likely that Constitution will have to re-apply for a new Certificate of Public Convenience and Necessity, if it gets the 401 Certification.[63]

Under these circumstances, the instant challenge should not be dismissed on ripeness grounds, unless the Petitioners' ability to refile is expressly preserved. Dismissal otherwise would have the profoundly inequitable result of foreclosing Petitioners' ability to challenge the Authorization Order and Rehearing Order. *Cf. Goldschmidt*, 677 F.2d at 263 (dismissing because the Court could not "detect any legal issue our decision will foreclose from [future] challenge."); *accord City of Fall River*, 507 F.3d at 7 (finding that the statute of limitations period did not

---

[62] *See id.* [JA__].

[63] The cases the Commission cites to suggest that the instant petition is not ripe present circumstances making it far less likely than here that the project at issue would proceed. *See* FERC Br. 4. In *City of Fall River, Mass. v. FERC*, the Coast Guard indicated that it was unlikely to grant a required authorization to an LNG terminal because the ships calling on the terminal could not navigate around a federally protected bridge. 507 F.3d 1, 5 (1st Cir. 2007). The Department of the Interior also stated that it was unlikely the project would receive approval to do necessary dredging. *Id.* In *Oregon v. FERC*, the project proponent went bankrupt and was not entitled to transfer the Commission's project approval to any other entity. 636 F.3d 1203, 1205–06 (9th Cir. 2011) (per curiam). *National Wildlife Federation v. Goldschmidt* raised the different question of whether the federal agency's decision under NEPA was final. *See* 677 F.2d 259, 263 (2d Cir. 1982). The Court dismissed the case because it was likely that the FEIS for the project would be revised, which is not contemplated here. *See id.* at 263.

begun to run against the appellants until the challenge to FERC's approval of a project was ripe). Dismissal with express permission to renew the challenge is essential here because the NGA requires that a petition to review the Commission's decision be brought within 60 days of FERC's final decision on rehearing. 15 U.S.C. § 717r(b). Although Petitioners have sought rehearing of the Commission's decision to extend the timeline of the Authorization Order, that challenge cannot go to the merits of the Authorization or Rehearing Orders. Unless this Court preserves Petitioners' right to contest the Orders following possible issuance of a 401 Certification, Petitioners will be deprived of their only opportunity for review of FERC's decision to approve the Project.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court vacate FERC's Orders, stay construction of the Project, and remand this proceeding to the Commission for compliance with NEPA.

Dated: September 23, 2016

/s/ Moneen Nasmith

Moneen Nasmith
Deborah Goldberg
Christine Ernst
Earthjustice
48 Wall Street, 19th Floor
New York, New York 10005
212-845-7376
mnasmith@earthjustice.org

dgoldberg@earthjustice.org
cernst@earthjustice.org

Counsel for Petitioners Catskill Mountainkeeper, Inc.; Clean Air Council; Delaware-Otsego Audubon Society, Inc.; Riverkeeper, Inc.; and Sierra Club

FEDERAL RULES OF APPELLATE PROCEDURE FORM 6
CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Certification of Compliance with Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the Court's March 11, 2016 Order because this brief contains 9,979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point font.

/s/ Moneen Nasmith

Attorney for Catskill Mountainkeeper, Inc.; Clean Air Council; Delaware-Otsego Audubon Society, Inc.; Riverkeeper, Inc.; and Sierra Club.

Dated: September 23, 2016

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and Local Rule 25.1(h), I hereby certify that on September 23, 2016, the foregoing Brief for Petitioners Catskill Mountainkeeper, Inc.; Clean Air Council; Delaware-Otsego Audubon Society, Inc.; Riverkeeper, Inc.; and Sierra Club was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Moneen Nasmith

Moneen Nasmith
Earthjustice
48 Wall Street, 19th Floor
New York, New York 10005
212-845-7376
mnasmith@earthjustice.org
dgoldberg@earthjustice.org
cernst@earthjustice.org

Counsel for Petitioners Catskill Mountainkeeper, Inc.; Clean Air Council; Delaware-Otsego Audubon Society, Inc.; Riverkeeper, Inc.; and Sierra Club