ORAL ARGUMENT NOT YET SCHEDULED

16-1568

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONSTITUTION PIPELINE COMPANY, LLC,
Petitioner,

- v. -

BASIL SEGGOS, Acting Commissioner, New York State Department Of Environmental Conservation; JOHN FERGUSON, Chief Permit Administrator, New York State Department Of Environmental Conservation; and NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Respondents,

STOP THE PIPELINE; CATSKILL MOUNTAINKEEPER, INC.; SIERRA CLUB; and RIVERKEEPER, INC.,
Intervenors.

On Petition for Review from the
New York State Department of Environmental Conservation

PAGE-PROOF BRIEF OF INTERVENORS CATSKILL MOUNTAINKEEPER, INC.; SIERRA CLUB; AND RIVERKEEPER, INC.

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Dated: September 12, 2016

CORPORATE DISCLOSURE STATEMENT

Catskill Mountainkeeper, Inc.: Catskill Mountainkeeper, Inc. has no parent companies, and there are no publicly held companies that have a 10 percent or greater ownership interest in Catskill Mountainkeeper, Inc.

Catskill Mountainkeeper, Inc., a corporation organized and existing under the laws of the State of New York, is a nonprofit organization dedicated to being the strongest and most effective possible advocate for the Catskill region. Catskill Mountainkeeper, Inc., works through a network of concerned citizens to promote sustainable growth and protect the natural resources essential to healthy communities in the Catskill region.

Riverkeeper, Inc.: Riverkeeper, Inc. has no parent companies, and there are no publicly held companies that have a 10 percent or greater ownership interest in Riverkeeper, Inc.

Riverkeeper, Inc., a corporation organized and existing under the laws of the State of New York, is a nonprofit organization dedicated to protecting the environmental, recreational, and commercial integrity of the Hudson River and its tributaries, and to safeguarding the drinking water of nine million New York City and Hudson Valley residents.

Sierra Club: Sierra Club has no parent companies, and there are no publicly held companies that have a 10 percent or greater ownership interest in Sierra Club.

Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

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GLOSSARY

401 Certification	Certification under Section 401 of the Clean Water Act
Authorization Order	*Constitution Pipeline Co. & Iroquois Gas Transmission Sys., LP*, 149 FERC ¶ 61,199 (2014) (approving the Project)
Commission or FERC	Federal Energy Regulatory Commission
Constitution	Constitution Pipeline Co., LLC
Corps	U.S. Army Corps of Engineers
Corps Denial	Letter from Stephan Ryba, Corps, to Lynda Schubring, Constitution (May 11, 2016) (denying Constitution's application under Section 404 of the Clean Water Act)
DEIS	FERC Draft Environmental Impact Statement, Constitution Pipeline and Wright Interconnect Projects (June 10, 2013)
EPA	Environmental Protection Agency
FEIS	FERC Final Environmental Impact Statement, Constitution Pipeline and Wright Interconnect Projects (Oct. 24, 2014)
NEPA	National Environmental Policy Act
NYSDEC or the Department	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)

JURISDICTIONAL STATEMENT

This Court has original jurisdiction to review the decision by the New York State Department of Environmental Conservation ("NYSDEC" or the "Department") to deny the application of Constitution Pipeline Company, LLC ("Constitution") for a certification under Section 401 of the Clean Water Act ("401 Certification") that potential discharges from its proposed 124-mile interstate natural gas pipeline (the "Project") would comply with the Clean Water Act. Because 99 miles of the Project would be located in New York State, the Natural Gas Act ("NGA") gives this Court jurisdiction over "any civil action for the review of an order or action of a … State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval… required under Federal law…" *See* 15 U.S.C. § 717r(d)(1).

This Court does not have jurisdiction over a civil action for the review of "an alleged failure to act by a… State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law." *See id.* § 717r(d)(2). The NGA gives exclusive jurisdiction over such claims to the United States Court of Appeals for the District of Colombia. *Id.*

COUNTER STATEMENT OF THE ISSUES

1. Whether Constitution has standing to assert its claim that NYSDEC waived its right to deny Constitution's application for a 401 Certification, where a

waiver by NYSDEC actually would benefit Constitution, not cause harm, and the remedy Constitution seeks from the Court would not redress any injury alleged by Constitution.

2. Whether the NGA's grant of exclusive jurisdiction to the United States Court of Appeals for the District of Columbia for review of a state agency's alleged failure to act to grant or deny a permit required under federal law deprives this Court of jurisdiction to review Constitution's claim that NYSDEC failed to act and therefore waived its right to deny Constitution's application for 401 Certification.

3. Whether either the timeline for environmental review set by the Federal Energy Regulatory Commission ("FERC" or the "Commission") or the 60-day initial deadline in the regulations of the U.S. Army Corps of Engineers ("Corps") establishes an unalterable benchmark for timely denial of a 401 Certification.

4. Whether NYSDEC properly acted within the broad authority given to it under the Clean Water Act and expressly preserved by the NGA in denying Constitution's application for failure to provide sufficient information on the Project's impacts to water quality.

5. Whether NYSDEC reasonably and lawfully denied the 401 Certification, given Constitution's failure to provide the Department with adequate

and site-specific information on stream crossings, blasting activities, depth of pipe burials in stream beds, cumulative impacts of multiple crossings on the same waterbody and its tributaries, and impacts of alternative routes, all of which NYSDEC must understand fully to determine whether the Project's discharges would comply with Clean Water Act's water quality standards, as implemented by New York State and approved by the United States Environmental Protection Agency ("EPA").[1]

COUNTER STATEMENTS OF THE CASE AND FACTS

This case concerns the decision by NYSDEC to deny Constitution's application for a 401 Certification because Constitution failed to provide the Department with the information it needed to certify that the potential discharges from the Project would comply with the requirements of the Clean Water Act. The Project is proposed to run for 99 miles through four counties in New York State

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[1] Intervenors do not address in detail Constitution's claims under Point IV of its brief on the support in the record for the NYSDEC Denial. *See* Pet'r's Br. 53–67. Intervenors submit that, acting pursuant to the authority given to states by Congress in the Clean Water Act and expressly preserved by the NGA, NYSDEC considered the application Constitution voluntarily resubmitted on April 27, 2015 and reasonably determined less than one year later that it did not provide enough information to allow NYSDEC to certify that the Project's discharges would comply with the Clean Water Act's requirements. The basis for NYSDEC's decision is explained in detail in the Denial and rests squarely on the Department's inability to ensure that the Project's discharges will adhere to New York State's EPA-approved water quality standards. For a more detailed discussion, Intervenors join and refer the Court to Respondent NYSDEC's brief at Point III.

and cross 251 streams under New York State's jurisdiction.[2] In New York alone, Project construction would disturb 3,161 linear feet of streams[3] and affect at least 95.3 affect acres of wetlands during construction.[4] Approximately 25 miles of the Project would go through Pennsylvania, crossing approximately 69 waterbodies and disturbing approximately 14 acres of Commonwealth wetlands.[5]

In order to proceed with the Project, Constitution was required to obtain a Certificate of Public Convenience and Necessity under the NGA from FERC, a dredge and fill permit under Section 404 of the Clean Water Act from the Corps, and certifications under Section 401 of the Clean Water Act from both the State of New York and the Commonwealth of Pennsylvania.

The standards governing each authorization vary. Under the NGA, the Commission evaluates whether the Project is required by the present or future public convenience and necessity. 15 U.S.C. § 717f(e). As a federal agency considering a major project, FERC also is required to conduct an analysis of the Project's potential environmental impacts under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. The Corps is tasked under Section 404 of

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[2] Letter from John Ferguson, NYSDEC, to Lynda Schubring, Constitution 2–3 (Apr. 22, 2016) ("NYSDEC Denial") [JA__–__].
[3] *Id.* at 3.
[4] FERC, EIS No. 0249F, Final Environmental Impact Statement, Constitution Pipeline and Wright Interconnect Projects, Docket Nos. CP13-499-000, CP13-502-000, PF12-9-000 at ES-5 (Oct. 24, 2014) ("FEIS") [JA___].
[5] *Id.* at 4-45, 4-62.

the Clean Water Act to administer a program for permits to discharge dredge and fill material into navigable waters at specific disposal sites. 33 U.S.C. §1344. Section 401 of the Clean Water Act charges the states in which the Project is located to certify that potential discharges from the Project will comply with the Clean Water Act, including the water quality standards implemented by the states under the Clean Water Act's model of cooperative federalism. *See id.* § 1341.

On August 21, 2013, Constitution submitted its application to NYSDEC for the 401 Certification.[6] NYSDEC issued a Notice of Incomplete Application on September 12, 2013, because the application contained insufficient information for the Department to proceed with its review.[7] Still lacking a complete application, on May 9, 2014, Constitution voluntarily withdrew and then resubmitted its application.[8] On December 24, 2014, NYSDEC issued a Notice of Complete Application under New York state law, which commenced a comment period that was extended until February 27, 2015.[9] The comments submitted raised numerous substantive concerns about Constitution's application and, as a result, NYSDEC

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[6] NYSDEC Denial at 5. Constitution also requested a 401 Certification for the 25 miles of the Project located in Pennsylvania. That request was granted on September 5, 2014. *See* FEIS 1-15 [JA__].
[7] NYSDEC Denial at 5 [JA__].
[8] *Id.* [JA__].
[9] *Id.* [JA__].

sent Constitution additional requests for information.[10] To give Constitution time to supplement its application and address the deficiencies commentators and NYSDEC identified, Constitution again voluntarily withdrew and then resubmitted its application to NYSDEC on April 27, 2015.[11]

After due consideration of the information received, including the comments submitted by the public, NYSDEC issued a denial of Constitution's application on April 22, 2016, less than one year after the second voluntary resubmission of Constitution's application.[12] In a 14-page document, the Department explained that Constitution had failed to provide NYSDEC with enough information to allow the Department to certify that the potential discharges from the Project would comply with the Clean Water Act, as implemented by New York State.[13] In particular, Constitution did not provide enough information to demonstrate that the potential discharges from the Project would not "materially interfere with or jeopardize the best usages" of each waterbody crossed and therefore comply with the State's water quality standards.[14] Because the NYSDEC Denial was based on Constitution's failure to provide sufficient information, NYSDEC left open the

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[10] *See id.* [JA__].
[11] *Id.* [JA__].
[12] *Id.* [JA__].
[13] *Id.* [JA__].
[14] *Id.* at 8 [JA__].

possibility that Constitution could submit another application for the Project that might address the inadequacies described in the NYSDEC Denial.[15]

On May 11, 2016, the Corps denied Constitution's application for its dredge and fill permit under Section 404 of the Clean Water Act without prejudice.[16] The Corps denied Constitution's permit because the Corps' Clean Water Act regulations require "a water quality certification or waiver be issued" for the Corps to grant a Section 404 permit.[17]

While New York was considering Constitution's application under Section 401 of the Clean Water Act, FERC was evaluating Constitution's application for a Certificate of Public Convenience and Necessity for the Project under the NGA. As part of that evaluation, FERC conducted a review of the Project's environmental impacts under NEPA. It published a draft Environmental Impact Statement ("DEIS") outlining its initial findings on February 12, 2014, and a Final Environmental Impact Statement ("FEIS") on October 24, 2014.[18] The Commission received numerous comments on the DEIS, including comments by Catskill Mountainkeeper, Inc.; Riverkeeper, Inc.; and the Sierra Club (collectively

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[15] *Id.* at 14 [JA__].
[16] Letter from Stephan Ryba, Corps, to Lynda Schubring, Constitution (May 11, 2016), attached to Pet'r's Br. ADD14–15 ("Corps Denial") [JA__–__].
[17] *Id.* [JA__].
[18] FERC, EIS No. 0249D, Draft Environmental Impact Statement, Constitution Pipeline and Wright Interconnect Projects, FERC Docket Nos. CP13-499-000, CP13-502-000, PF12-9-000 (Feb. 12, 2014); FEIS [JA__–__].

"Intervenors") and other interested parties noting significant deficiencies in FERC's analysis.[19] Among other concerns, Intervenors highlighted that Constitution had not provided the Commission with sufficient information on impacts on water resources and that, without the missing information, "it will be impossible to judge the efficacy of measures employed to mitigate adverse impacts to water quality or to hold Constitution responsible for restoring resources to pre-construction conditions."[20]

FERC largely dismissed the concerns raised by Intervenors and approved the Project on December 2, 2014.[21] In doing so, the Commission adopted the finding that the Project had the potential to cause significant environmental impacts but that those impacts could be mitigated.[22]

Intervenors and others filed timely requests for reconsideration with the Commission, as required by 17 U.S.C. § 717r(a). In their rehearing request, Intervenors again highlighted the inadequacy of FERC's analysis of the Project's environmental effects, including the absence of sufficient information on the

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[19] Letter from Bridget Lee, Earthjustice, on behalf of Catskill Mountainkeeper et al., to Kimberly Bose, FERC (Apr. 7, 2014) [JA__–__].
[20] *Id.* at 8 [JA__].
[21] Order Issuing Certificates and Approving Abandonment, *Constitution Pipeline Co. & Iroquois Gas Transmission Sys., LP*, 149 FERC ¶ 61,199 (2014) ("Authorization Order") [JA__–__].
[22] *Id.* ¶ 73 [JA__].

Project's potential to affect water quality.[23] Intervenors listed the critical information FERC was missing, including geotechnical feasibility studies for all trenchless crossings and site-specific blasting plans.[24] The Commission granted the rehearing requests on January 27, 2015, but only to give itself additional time to consider them.[25]

More than a year later, on January 28, 2016, the Commission denied the rehearing requests, and the next day, FERC granted Constitution authorization to proceed with tree felling in Pennsylvania.[26] In its Rehearing Order, FERC dismissed the concerns raised by Intervenors and others about the potential environmental impacts of the Project and insisted that Constitution's mitigation measures would be adequate.[27] Specifically, FERC rebuffed Intervenors' and others' claims that the information Constitution had submitted on water quality impacts was inadequate and concluded, with minimal explanation, that what

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[23] Request for Rehearing of Catskill Mountainkeeper, et al., FERC Dockets No. CP13-499 and CP13-502 (Dec. 30, 2014) [JA__–__].
[24] *See id.* at 16 [JA__].
[25] Order Granting Rehearing for Further Consideration, FERC Docket Nos. CP13-499-001 & CP13-502-001 (Jan. 27, 2015).
[26] Order Denying Rehearing and Approving Variance, *Constitution Pipeline Co. & Iroquois Gas Transmission Sys., LP*, 154 FERC ¶ 61,046 (2016) ("Rehearing Order") [JA__–__]; Letter from Terry Turpin, FERC, to Lynda Schubring, Constitution, FERC Docket No. CP13-499-000 (Jan. 29, 2016) [JA__].
[27] Rehearing Order at ¶¶ 43–53 [JA__].

Constitution had provided was sufficient to establish that Constitution would adequately mitigate any significant water quality impacts.[28]

Intervenors, with two other environmental organizations, promptly challenged FERC's Authorization and Rehearing Orders in a petition for review filed with this Court on February 5, 2016.[29] Intervenor Sierra Club and another environmental organization also filed an emergency motion for a stay,[30] which the Court later denied in a one-sentence order.[31]

After the NYSDEC Denial, Constitution declined to file a new application and instead filed both the instant challenge and an action against NYSDEC in the Northern District of New York. On behalf of NYSDEC, the New York Attorney General has filed a motion to dismiss the latter case, which is pending before the district court.

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[28] *Id.* at ¶¶ 48–52 [JA__–__].

[29] Petition for Review, Catskill Mountainkeeper, Inc. v. FERC, *petition filed*, No. 16-345 (2d Cir. Feb. 2, 2016).

[30] Pet'rs Clean Air Council & Sierra Club's Emergency Motion for a Stay Pending Review of Agency Orders, *Catskill Mountainkeeper*, No. 16-345 (2d Cir. Feb. 5, 2016).

[31] Order, *Catskill Mountainkeeper*, No. 16-345 (2d Cir. Feb. 24, 2016) (denying motion for stay and granting Constitution's motion to intervene). The Court did not explain which of the requirements for obtaining an emergency stay the Sierra Club's motion failed to satisfy. The Sierra Club's motion did not raise the Commission's failure to adequately evaluate impacts on water quality as a basis for providing injunctive relief. *See* Emergency Motion for Stay, *supra* note 30. The Court therefore has not had an opportunity to review the adequacy of either FERC or NYSDEC's review of the Project's potential water quality impacts.

SUMMARY OF THE ARGUMENT

Constitution's attempts to cast the NYSDEC Denial as a politically motivated and "impermissible veto" of the Commission's decision based on "pretextual claims" fail for both jurisdiction and substantive reasons. Now that its application has been denied, Constitution claims that NYSDEC waived its right to make that decision as early as January 22, 2015, and, at the latest, within 60 days of April 27, 2015. But Constitution lacks standing to make these claims, because the waiver it asserts would *benefit* the company by relieving it of the certification requirement. Constitution was not injured by the alleged delay in NYSDEC's decisionmaking, and the relief it seeks from the Court would not allay any alleged harm, because the Corps was entitled to consider the NYSDEC Denial, regardless of any waiver. Moreover, the NGA plainly grants exclusive jurisdiction over claims of undue delay in state agency decisionmaking to the U.S. Court of Appeals for the District of Columbia.

Even if the Court had jurisdiction to hear Constitution's waiver claims, neither January 22, 2015, nor 60 days from April 27, 2015 were a hard deadline that, if missed, would result in a waiver. FERC and the Corps both have far more flexible approaches to their timelines for state action on applications for 401 Certifications. Indeed, the Corps indicated that no waiver occurred in its denial of

Constitution's Section 404 permit. NYSDEC acted within the one-year deadline set out in Section 401 and did not waive its right to deny the 401 Certification.

Nor is the authority given to states under Section 401 "secondary" to FERC's role under the NGA. The 401 Certification requirement allows NYSDEC to stop an interstate natural gas pipeline project within the state—even if FERC already approved the same pipeline—if the record before the Department demonstrates that denial is appropriate. The NGA specifically saves NYSDEC's authority under the Clean Water Act from the NGA's preemptive reach. And the Clean Water Act prohibits NYSDEC from granting a 401 Certification unless Constitution can show that the Project's potential discharges will comply with the requirements of the Act, including broad water quality standards designed to protect the existing use of each of the State's navigable waterways. Because Constitution failed to make this showing, NYSDEC lawfully denied the 401 Certification.

STANDARD OF REVIEW

This Court reviews the NYSDEC Denial under a two-step process. First, the Court reviews *de novo* whether NYSDEC complied with the requirements of relevant federal law in issuing the NYSDEC Denial. *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 150 (2d Cir. 2008) ("*Islander East II*"). "If no illegality is uncovered during such review," the Court examines the findings and

conclusions in the NYSDEC Denial under "the more deferential arbitrary-and-capricious standard of review." *Id.* (internal quotation marks and citation omitted). The Court "will consider only whether there is sufficient evidence in the record to provide rational support for the choice made by the agency in the exercise of its discretion." *Id.* at 152. "A reviewing court may not itself weight the evidence or substitute its judgment for that of the agency." *Id.* at 150. Ultimately, it is Constitution's burden to "demonstrate its entitlement to favorable action on its [401 Certification] application. *See Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 104 (2d Cir. 2006) ("*Islander East I*").[32]

ARGUMENT

Constitution raises several arguments in an ultimately unavailing effort to persuade this Court to invalidate the NYSDEC Denial. Intervenors join the portion of NYSDEC's brief explaining that the record amply supports the NYSDEC Denial. The record demonstrates that NYSDEC's determination that the

[32] Industry amici's argument for stricter scrutiny above and beyond the deferential arbitrary and capricious standard articulated by this Court in the *Islander East* cases is not supported by any legal authority. *See* Br. of *Amicus Curiae* Nat'l Assoc. of Mfrs. et al. Supp. Pet'r 6, 12, 26–37, ECF No. 71-3 ("Industry Amicus Br."). The one-sided picture industry amici present of the purported benefits of natural gas infrastructure projects is irrelevant. The *Islander East* cases—both of which involved a natural gas company seeking to build infrastructure—establish the standard of review here.

Department did not have enough information to conclude that the Project would comply with the Clean Water Act was reasonable and not arbitrary or capricious.

Constitution argues that NYSDEC waived its right to issue the NYSDEC Denial. But the Court does not have jurisdiction to review the timeliness of NYSDEC's decision because Constitution lacks standing to bring this challenge and has raised these claims in the wrong court. Constitution also is incorrect that NYSDEC waived its ability to deny the 401 Certification.

Constitution further mischaracterizes the NYSDEC Denial as a collateral attack on FERC's decision to approve the Project and wrongly contends that NYSDEC exceeded its authority by basing its decision on factors that fall outside the water quality standards EPA has approved for New York State. NYSDEC's ability to exercise independent authority under Section 401 to approve, condition, or deny a FERC project a 401 Certification is rooted firmly in the NGA, the Clean Water, and the case law of this Circuit. The NYSDEC Denial also is based on grounds that fall squarely within New York's EPA-approved water quality standards.

I. THIS COURT DOES NOT HAVE JURISDICTION OVER CONSTITUTION'S CLAIM THAT NYSDEC WAIVED ITS RIGHT TO DENY THE 401 CERTIFICATION.

Constitution attempts to undermine the validity of the NYSDEC Denial by arguing that it came too late, Pet'r's Br. 29–37, but this Court does not have

jurisdiction over these claims for two reasons. First, Constitution lacks standing to sue NYSDEC for the Department's allegedly untimely denial of the company's 401 Certification application. Second, a claim alleging undue delay in an agency action on a project governed by the NGA must be filed in the D.C. Circuit Court of Appeals.

A. Constitution Does Not Have Standing to Sue NYSDEC and Argue that NYSDEC Has Waived the 401 Certification.

Constitution has not alleged any injury from NYSDEC's supposed delay in acting on Constitution's application and has not sought a remedy from this Court that would redress any alleged harm. Constitution, therefore, not have standing to sue NYSDEC for its allegedly untimely denial of certification.

In *Weaver's Cove Energy, LLC v. R.I. Dep't of Envtl. Mgmt.*, 524 F.3d 1330 (D.C. Cir. 2008), the D.C. Circuit addressed exactly this issue. There, an applicant seeking FERC authorization to construct a liquefied natural gas facility petitioned the court for a declaration that two states had waived the 401 Certification requirement by failing to act on the applications after two years. *Id.* at 1332. The court held that the petitioner did not have standing as it was not injured by the states' failures to act. *Id.* at 1334. "On the contrary, [the petitioner's] theory of the case is that it benefited from the agencies' inaction; that is, the agencies, by failing to issue timely rulings…waived their rights to deny the certification." *Id.* at 1333.

Constitution raises precisely the claim foreclosed by *Weaver's Cove*: the company is attacking the NYSDEC Denial with the argument that the 401 Certification requirement already has been waived. Under that theory, however, Constitution was not injured by the delay in NYSDEC's decision but in fact would have benefited from the Department's failure to act. Without being able to allege that it was injured by the timing of NYSDEC's decision, Constitution lacks standing to sue NYSDEC on the grounds of waiver. *See id.*

The fact that NYSDEC ended up denying Constitution's application does not change the result. The *Weaver's Cove* court also contemplated that possibility and found that, even in the case of a denial, the applicant would not have standing:

> Even a final adverse decision would not support [petitioner's] standing, however, because [petitioner's] claim is that the States have waived their right to deny a certification. By [petitioner's] own lights, that is, any denial of its application for a § 401 certification would be too late in coming and therefore null and void. Logically, a petitioner cannot challenge an action as 'an invasion of a legally protected interest' and simultaneously contend the action is of no legal significance.

Id. (internal quotation marks omitted)

Constitution's injury also would not be redressable by this Court because its injury was not caused by *NYSDEC's* failure to act. Constitution claims that the need to get its dredge and fill permit under Section 404 of the Clean Water Act

from the Corps triggered the 401 Certification requirement.[33] Pet'r's Br. 4–5. Given that premise, if Constitution believed that NYSDEC failed to act "within a reasonable period of time" under Section 401, *id.* at 26, its remedy was to petition the Corps to make a finding that the 401 Certification requirement had been waived. *See Weaver's Cove*, 524 F.3d at 1333. If the Corps denied the petition, Constitution would then have had a cause of action against the Corps. *Id.* at 1333. Any theoretical injury Constitution might allege, therefore, was caused by the Corps since the Corps endorsed the NYSDEC Denial by denying Constitution's permit under Section 404.[34] But the Corps is not a respondent here, and the record it used in making its determination is not before this Court. As the *Weaver's Cove* court concluded "A's injuring B does not create a case or controversy between B and C." *Id.* (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973)).

Even if the delay were declared to be a waiver of NYSDEC's right to deny the 401 Certification, the Department would be the wrong party to sue. "[T]he only effect of such a declaration would be to advise the Army Corps that it would

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[33] The Authorization Order also explicitly requires that Constitution obtain all necessary federal approvals. Authorization Order at Environmental Condition 14 [JA__].

[34] *See* Corps Denial at 1 [JA__]. While Constitution attempts to downplay the import of the Corps' Denial because it was based on the NYSDEC Denial and was without prejudice to re-file, it nevertheless was the Corps' final decision on the validity of the NYSDEC Denial. And there is nothing to suggest in the Corps' Denial that the Corps questioned whether the NYSDEC Denial was timely. *See id.*

not be bound by [the] State's denial." *Id.* at 1334. Constitution itself acknowledges this implication. *See* Pet'r's Br. 33 (quoting *FPL Energy Maine Hydro, LLC v. Dept. of Envtl. Prot.*, 2006 WL 2587989, at *8 (Me. Super. May 25, 2006)) ("[F]ederal agencies *are not bound by the decisions* when the state fails or refuses to act on a request for certification." (emphasis added)). Its brief plainly states that "[the Corps] may consider NYSDEC's untimely Denial, but is under no obligation to do so." Pet'r's Br. 37; *see also P.R. Sun Oil Co v. EPA*, 8 F.3d 73, 80 (1st Cir. 1993) (finding a federal agency retains discretion to incorporate additional conditions sought by the state and related to water quality, even after Section 401's one-year deadline). Constitution ignores, however, that the Corps *already considered* the NYSDEC Denial, apparently deemed it valid, and issued a denial of the Section 404 permit. This Court therefore cannot secure an effective remedy from NYSDEC.

B. Constitution Has Brought Its Suit in the Wrong Court of Appeals.

Constitution misinterprets and muddles the provisions of the NGA and ultimately fails to assert a valid claim over which this Court has jurisdiction. Although Constitution invokes 15 U.S.C. § 717r(d)(1) as the basis for the Court's jurisdiction, Pet'r's Br. 1, the core of its claim alleging waiver of the 401 Certification requirement is that "*NYSDEC's failure to act*" on the 401 Certification within the timeline set by FERC for federal authorizations or the

Corps' 60-day window "is inconsistent with Federal law," *see id.* at 31 (emphasis added) (internal quotation marks omitted). The NGA plainly allows suits by applicants against state agencies for failure to act, but under 15 U.S.C. § 717r(d)(2), not 15 U.S.C. § 717r(d)(1). Under Section 717r(d)(2), the U.S. Court of Appeals for the District of Columbia has exclusive jurisdiction over "an alleged failure to act by a…State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit." 15 U.S.C. § 717r(d)(2). Constitution's attempt to conflate subsection (d)(1)—under which it claims this Court has jurisdiction—with subsection (d)(2)—the basis for Constitution's claim—stretches the NGA's judicial review provisions beyond their breaking point. Because the NGA does not give Constitution a cause of action to challenge the timing of NYSDEC's decision in this Court, this Court must dismiss Constitution's petition for lack of jurisdiction.

II. NYSDEC DID NOT WAIVE ITS RIGHT TO DENY THE 401 CERTIFICATION.

In the alternative, if the Court determines that it does have jurisdiction to consider whether the NYSDEC Denial was timely, Constitution is mistaken that such a waiver occurred. Section 401 of the Clean Water Act provides that if a state fails or refuses to act on a request for certification "within a reasonable period of time (which shall not exceed one year)," the Certification requirements "shall be waived." 33 U.S.C. § 1341(a)(1). Constitution voluntarily withdrew and

resubmitted its application to NYSDEC on April 27, 2015, and the NYSDEC Denial was issued on April 22, 2016. In *Islander East*, the applicant also withdrew and resubmitted its 401 Certification application, but the Court made no suggestion that the state had run afoul of the Clean Water Act's deadlines. *See Islander East I*, 482 F.3d at 87.

Constitution nevertheless argues that NYSDEC effectively waived its right to deny the 401 Certification by failing to issue it before January 22, 2015, the "federal authorization deadline" published by FERC in its timetable for the environmental review of the Project. Pet'r's Br. 30–32. Constitution also claims that the NYSDEC Denial comes too late under the Clean Water Act because the denial was issued more than 60 days after April 27, 2015, citing the Corps' regulations implementing the Clean Water Act. *Id.* at 32–37. But the lapsing of either deadline does not render the NYSDEC Denial invalid.

A. FERC's January 22, 2015 Target for Federal Approvals Was Not the Deadline for NYSDEC to Act.

Constitution is incorrect that issuance of the NYSDEC Denial after January 22, 2015, *see id.* at 30–32, is inconsistent with federal law. Constitution cites nothing to support its argument that a failure to adhere to FERC's timeline for environmental review under NEPA is inconsistent with the NGA, and neither FERC nor any court has treated missing that target as a per se violation of the law. In fact, agencies have missed FERC's target in numerous cases considering

challenges to state and federal permits for FERC projects, and the reviewing court did not invalidate the permit on that ground. For example, in *AES Sparrows Point LNG, LLC v. Wilson*, FERC sought approvals required under federal law by March 5, 2009, 589 F.3d 721, 726 (4th Cir. 2009), but the State of Maryland denied 401 Certification on April 24, 2009. *Id.* In evaluating whether Maryland's denial was untimely and not in accordance with law, the court looked only at whether Maryland's decision was properly made within the *one-year* timeline established under the Clean Water Act. *Id.* at 729–30. Similarly, in *Dominion Transmission, Inc. v. Summers*, the D.C. Circuit reviewed Maryland's failure to issue a required Clean Air Act permit under 15 U.S.C. § 717r(d), but did not take issue with Maryland's failure to comply with FERC's timeline for federally required authorizations. *See* 723 F.3d 238, 241 (D.C. Cir. 2013).

FERC similarly does not interpret the timeline for environmental review as a hard and fast deadline under the NGA.[35] The Commission routinely accepts permits and certifications issued after the dates established in the schedule for the environmental review. *See, e.g., Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, P 25 n.31 (2016) (accepting the issuance of NYSDEC's 401

[35] Deference is owed to FERC's interpretation of the NGA. *See Williams Gas Processing—Gulf Coast Co. v. FERC*, 331 F.3d 1011, 1016 (D.C. Cir. 2003).

Certification, with conditions, dated May 5, 2015, where the 90-day target for approvals was April 23, 2015).[36]

It also would not be practical to require strict adherence to FERC's environmental review schedules because the Commission often revises its timelines.[37] For Constitution's Project, FERC changed the schedule, initially announcing on December 13, 2013, that September 11, 2014, was the deadline, and then, with less than one month to go, announcing a revised schedule on August 18, 2014, setting January 22, 2015, as the new deadline.[38]

Moreover, nothing about the Commission's environmental review timeline is keyed to when the state agency actually receives a complete 401 Certification

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[36] *See* Notice of Revised Schedule for Environmental Review of the Algonquin Incremental Market Project, *Algonquin Gas Transmission, LLC*, CP14-96-000 (Dec. 10, 2014) (setting April 23, 2015 as the Federal Authorization Deadline).

[37] *See, e.g.*, Notice of Revised Schedule for Environmental Review of the Virginia Southside Expansion Project II, *Transcontinental Gas Pipe Line Co.*, CP15-118-000 (Apr. 29, 2016) (changing the Federal Authorization Decision Deadline from July 28, 2016 to Aug. 11, 2016); Notice of Revised Schedule for Environmental Review of the Liquefaction and Phase II Amendment Projects, *Freeport LNG Dev., LLC*, CP12-509-000 (Jan. 6, 2014) (revising the Federal Authorization Deadline from Mar. 27, 2014 to Sept. 14, 2014).

[38] Notice of Revised Schedule for Environmental Review of the Constitution Pipeline and Wright Interconnect Projects, *Constitution Pipeline Co.*, CP13-499-000 (Aug. 18, 2014); Notice of Schedule for Environmental Review of the Constitution Pipeline and Wright Interconnect Projects, *Constitution Pipeline Co.*, CP13-499-000 (Dec. 13, 2013).

application.[39] In this case, NYSDEC issued a Notice of Complete Application on December 24, 2014. Even assuming that the application was in fact complete at that point—which is belied by Constitution's continued submission of basic information to NYSDEC well into June 2015, Pet'r's Br. 57—the January 25, 2015 "deadline" would have given NYSDEC barely a month to make its decision. *See AES Sparrows Point*, 589 F.3d at 729–30 (finding it reasonable that only a valid request for a 401 Certification should trigger any deadlines for the state to act). Interpreting the NGA and FERC's scheduling as Constitution requests would be completely at odds not only with the practical realities facing a state agency attempting to comply with the Clean Water Act, but also with the Act itself, which provides the state with "a reasonable period of time" to make its decision. *See* 33 U.S.C. § 1341(a). A mere month to make a decision on whether a Project crossing 251 New York State waterways will comply with the Clean Water Act cannot be viewed as a the "reasonable period" contemplated by Section 401.

B. The NYSDEC Denial Was Not Untimely Under the Clean Water Act.

Constitution misreads the Corps' regulations and argues that the NYSDEC Denial came too late because it was not issued within 60 days "after receipt of such request." Pet'r's Br. 33–34, 35 (citing Corps' regulations implementing the Clean

[39] The NGA, however, requires FERC to set a schedule that complies with applicable schedules established by federal law. 15 U.S.C. § 717n(c)(1).

Water Act and *AES Sparrows Point*, 589 F.3d at 729). The Corps' regulations provide that the 60-day deadline will not apply if "the district engineer determines a shorter or longer period is reasonable for the state to act." 33 C.F.R. § 325.2(b)(1)(ii). In *AES Sparrows Point*, the Fourth Circuit found that it is up to the Corps to determine whether the waiver period has been triggered and that the Corps' findings will not be disturbed, if they are reasonable in light of the statutory text.[40] 589 F.3d at 729. The Corps' record on Constitution's 404 permit is not before the Court, but the Corps denied the 404 permit "because [the Corps' regulations] require[] a water quality certification or waiver be issued for the issuance of [a 404 permit]."[41] The Corps plainly has concluded that NYSDEC has not waived its rights under Section 401.[42] Constitution has not pointed to any basis for disturbing the Corps' findings and, if it wanted to make such a claim, it should have been brought in an action against the Corps.

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[40] Although *AES Sparrows Point* did not touch on the standing question addressed in *Weaver's Cove*, the fact that the Fourth Circuit could not determine whether a waiver occurred without evaluating a decision by the Corps, which was not a named respondent and whose record of decision was not before the court, highlights why the claim that a 401 Certification requirement has been waived is more properly brought against the Corps. *See* 589 F.3d at 726.

[41] Corps Denial at 1.

[42] Constitution argues that the record demonstrates that the time NYSDEC took to make its decision after the April 2015 resubmission went beyond a "reasonable period of time." Pet'r's Br. 36–37. This claim fails for the same reasons.

III. NYSDEC ACTED WITHIN THE SCOPE OF AUTHORITY GIVEN TO IT UNDER THE CLEAN WATER ACT AND THE NGA.

Constitution and the industry amici fundamentally misconstrue the interlocking roles of the NGA, NEPA, and CWA in the context of natural gas pipeline approvals. Constitution and the industry amici drastically exaggerate FERC's preemptive power under the NGA and seek to give the Commission absolute and exclusive authority over every decision connected to natural gas pipeline infrastructure. *See* Pet'r's Br. 38–52; Industry Amicus Br. 26–33. The NGA does not support this interpretation; rather it explicitly preserves the independent role of other federal authorities and of state agencies administering the Clean Air, Clean Water, or Coastal Zone Management Act. 15 U.S.C. § 717b(d). The Clean Water Act, in turn, gives the states broad power to review whether a project's potential discharges will comply with the requirements of the Clean Water Act, including water quality standards, and, if a certification is granted, to impose conditions to ensure compliance. 33 U.S.C. § 1341(a); *see also P.R. Sun Oil Co.*, 8 F.3d at 74–75 ("[T]he state certification may impose discharge limitations or requirements more stringent than federal law requires, and those more stringent obligations are incorporated into the federal permit as a matter of course." (citation omitted)); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 99–100 (1st Cir. 1989).

NYSDEC's exercise of its authority under the Clean Water Act is not a "collateral attack" on FERC's decision to approve the Project, *see* Pet'r's Br. 24, 38, and it does not fundamentally threaten the ordered review of natural gas infrastructure, *see, e.g.*, Industry Amicus Br. 34–36. Both the NGA and the Clean Water Act reflect Congress's clear intent to give the Commission significant authority over natural gas pipelines *and* to preserve the authority of NYSDEC to make an independent decision under Section 401 of the Clean Water Act. Constitution's reading ignores the plain language of both statutes and binding case law in this Circuit. Contrary to Constitution's and the amici's characterization of the NGA, Congress in fact intended for NYSDEC to have the ability to veto the Project by denying the 401 Certification.

A. The Natural Gas Act Does Not Preempt State Authority Under the Clean Water Act.

The NGA gives FERC broad but not exclusive authority to regulate interstate natural gas transmission in the United States. This authority preempts state laws that might otherwise govern such projects. *See, e.g.*, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n*, 894 F.2d 571, 576–79 (2d Cir. 1990). The NGA does not supersede federal laws, however, and it requires that projects comply with the requirements of federal statutes, including the Clean Water Act and NEPA. *See Islander East II*, 525 F.3d at 143; 15 U.S.C. § 717n(b)(1). The NGA also expressly states: "nothing

in [the NGA] affects the rights of States under . . . the Coastal Zone Management Act . . . [,] the Clean Air Act . . . [,] or . . . the [Clean Water] Act." 15 U.S.C. § 717b(d). The language of this savings clause is unambiguous in its preservation of states' rights under those statutes. *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120, 123 (4th Cir. 2008); *Dominion Transmission, Inc. v. Town of Myersville Town Council*, 982 F. Supp. 2d 570, 577 (D. Md. 2013).

Federal courts, including this Circuit, have made it perfectly clear that states have full and independent authority to review natural gas infrastructure projects under Section 401 of the Clean Water Act. *See, e.g., Islander East II*, 525 F.3d at 143–44; *Islander East I*, 482 F.3d at 84; *see also AES Sparrows Point*, 589 F.3d at 730. This Court expressly concluded that "[w]hile state and local permits are preempted under the NGA, state authorizations required under federal law are not." *Islander East I*, 482 F.3d at 84 (citing *Islander E. Pipeline Co. Algonquin Gas Transmission Co.*, 102 FERC ¶ 61,054, 61,130 (2003)). This Court also has expressly rejected the argument that Constitution and its amici put forward here—that Congress somehow intended to prevent a state from vetoing a natural pipeline project by denying a 401 Certification:

> [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. It is, after all, Congress that has provided states with the option of being deputized regulators of the Clean Water Act …. If

> Congress were to agree … that the public interests furthered by its proposed pipeline outweigh [the state's] water quality concerns, Congress could consider whether to dissolve the federal-state partnership it created. Until such time, however, this court is charged with reviewing the state agency's denial only to ensure that it is not arbitrary or capricious.

Islander East II, 525 F.3d at 164 (internal citations omitted). There simply is no merit to Constitution's arguments that NYSDEC did not have the authority to independently evaluate and either approve or deny Constitution's 401 Certification application. *See* Pet'r's Br. 38–39; *see also* Industry Amicus Br. 28 (arguing that the state's role of ensuring water quality is "secondary" to FERC's role of reviewing natural gas projects).

B. FERC's Conclusions in the FEIS and the Authorization Order Do Not Displace New York's Rights under Section 401.

The NGA's requirement that FERC comply with NEPA and conduct an environmental review of the Project cannot be read to preempt NYSDEC's ability to exercise its independent authority under Section 401 of the Clean Water Act. *See* 15 U.S.C. § 717b(d). The NGA plainly preserves the State's independent authority under the Clean Water Act. *Id.* Constitution nevertheless attempts to cast the NYSDEC Denial as a collateral attack on FERC's NEPA analysis and conclusions under the NGA. Constitution urges that, if NYSDEC disagreed with FERC's conclusions on water quality, its only remedy was to challenge the Commission's decision through the NGA's rehearing process. Pet'r's Br. 38.

Constitution's argument is completely at odds with the very different and independent authority provided to state agencies with delegated powers under the Clean Water Act and reflects a total misunderstanding of the NEPA process.

The powers given to FERC under NEPA and to NYSDEC under the Clean Water Act are fundamentally distinct. The NGA gives FERC the task of leading the NEPA review of natural gas infrastructure projects. 15 U.S.C. § 717n(b)(1). The purpose of NEPA is "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. NEPA requires that FERC take a "hard look" at all the environmental consequences of its decisions. *See Coal. on W. Valley Nuclear Wastes v. Chu*, 592 F.3d 306, 310 (2d Cir. 2009) (quoting *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1029 (2d Cir. 1983)). While FERC's analysis under NEPA may cover water quality impacts, NEPA does not include any requirement that a project adhere to particular substantive standards or limits; the law is designed to ensure that FERC disclose and evaluate the environmental impacts of the projects it approves and consider potential mitigation measures to reduce or eliminate those impacts. *See* 40 C.F.R. § 1502.1; *id.* § 1502.16(h); *see also Natural Res. Def. Council, Inc. v. FAA*, 564 F.3d 549, 556, 560–61 (2d Cir. 2009). Moreover, the Clean Water Act explicitly states that "nothing in [NEPA] shall be deemed to—(A) authorize any Federal agency authorized to license or

permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any … the adequacy of any certification under section 1341 of this title…" 33 U.S.C. § 1371(c)(2).

The independent authority in Section 401 is reserved for the states and does not rest with FERC. Section 401 of the Clean Water Act requires that NYSDEC use its expertise to determine whether the Project will comply with substantive requirements of the Clean Water Act, as implemented in laws and programs of New York State that have been approved by the EPA. *See id.* § 1341. The Commission is not authorized to administer the Clean Water Act, *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) (citations omitted), and FERC is owed no deference when interpreting the Clean Water Act or New York's laws implementing the Clean Water Act's requirements. *See Alcoa Power Generating, Inc., v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011); *City of Olmsted Falls, Ohio v. FAA*, 292 F.3d 261, 270 (D.C. Cir. 2002). The authority to interpret those state requirements, which include complying with numeric and other limits, plainly rests with NYSDEC, and the Clean Water Act assigns the task of ensuring that the Project complies with those requirements to New York State.

Although NEPA is meant to be a cooperative effort, participation as a cooperating agency in the NEPA process does not undermine the independent role that an agency has under other federal statutes. FERC—as directed by the NGA—

takes the lead, and cooperating agencies such as NYSDEC routinely issue binding decisions under federal laws such as the Clean Water Act that are at odds with FERC's conclusions under NEPA. Cooperating agencies may issue these decisions without contesting FERC's approval through the NGA's rehearing process.[43]

For example, the U.S. Fish & Wildlife Service participated as a cooperating agency during FERC's NEPA review but also exercised its own independent authority under the Endangered Species Act. The Commission's FEIS contained a section on potential impacts on species, and the U.S. Fish & Wildlife Service provided comments to FERC on the Project's potential impacts on species and critical habitat.[44] Pursuant to the requirements of the Endangered Species Act, *see* 16 U.S.C. § 1536(a), however, the U.S. Fish & Wildlife Service also issued a Biological Opinion on December 31, 2015—more than a full year after the

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[43] The industry amici express concern about investing in a project, only to have it vetoed by a state's denial of the 401 Certification, but that problem is to a great extent of FERC's own making. *See* Industry Amicus Br. 12. FERC's repeated practice of jumping the gun by approving projects before the 401 Certification is issued not only violates the Clean Water Act, but also creates significant headaches for applicants that wrongly believe that their project necessarily will proceed because of the Commission's approval. This case is a prime example of why the Commission should not be permitted to act on a project before the 401 Certification has been issued, denied, or waived.

[44] *See* Letter from David A. Stilwell, U.S. Fish & Wildlife Serv., to Kevin Bowman, FERC (Apr. 13, 2015) (providing comments on Constitution's migratory birds survey protocol) [JA __–__]; Letter from David A. Stilwell, U.S. Fish & Wildlife Serv., to Kimberly Bose, Sec'y, FERC (Feb. 13, 2015) [JA__–__].

Authorization Order was released and more than 14 months after the publication of the FEIS.[45] The U.S. Fish & Wildlife Service never filed a request for a rehearing of the Authorization Order but nevertheless added significant new conditions, including one limiting when Constitution could cut trees along the right-of-way to only part of the year.[46] This condition was not described in the FEIS or required by the Authorization Order, and it has caused Constitution considerable delay.[47] There is no question, however, of the U.S. Fish & Wildlife Service's right to impose this condition. In doing so, the agency was not collaterally attacking FERC's decision but rather was exercising its independent and substantive authority under the Endangered Species Act, which the NGA does not preempt. *See Islander East II*, 525 F.3d at 143 (finding that an NGA project must comply with all requirements of federal law). Just as FERC's evaluation of Project impacts on species pursuant to NEPA and the NGA did not change the U.S. Fish & Wildlife Service's authority under the Endangered Species Act, the Commission's

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[45] N.Y. Field Office, U.S. Fish & Wildlife Serv., Biological Opinion on the Effects to the Northern Long-Eared Bat (*Myotis eptentrionalis*) from the Constitution Pipeline and Wright Interconnect Projects at 38–40 (2015), *attached to* Letter from David A. Stilwell, U.S. Fish & Wildlife Serv., to David Swearingen, FERC (Dec. 31, 2015) [JA__].

[46] *Id.* at 7 [JA__].

[47] *Id.* [JA__]; *see also* FEIS at 4-101–4-104 [JA__]; Authorization Order at ¶ 90 [JA__].

review of the Project's water quality impacts did not change NYSDEC's authority under the Clean Water Act.

The case law in this Circuit is clear on this question. In the *Islander East* cases, FERC already had conducted its analysis under NEPA, including an analysis of impacts to water quality, and the Commission had approved the project, before a decision had been made about the 401 Certification. *Islander East I*, 482 F.3d at 79, 86. FERC issued the FEIS for the *Islander East* pipeline on August 21, 2002, concluding that "if Islander East constructed the project as proposed and in accordance with the recommended mitigation measures, it would be an environmentally acceptable action." *Id.* The Commission issued a final order authorizing the project on September 19, 2002. *Id.* Connecticut first denied the project its 401 Certification on February 5, 2004, *id.* at 87, and denied it again on remand on December 19, 2006, *Islander East II*, 525 F.3d at 142. In neither case did the Court find that FERC's conclusions about water quality in its FEIS or its

order authorizing the pipeline cabined Connecticut's authority to make an independent decision under Section 401.[48]

C. The Basis for the NYSDEC Denial Rested Squarely Within NYSDEC's Broad Jurisdiction Under the Clean Water Act.

The Clean Water Act has the ambitious goal to "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a), and gives states a substantial role in fulfilling that purpose. The Act explicitly states:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

Id. § 1251(b).[49] Congress thus expressed in no uncertain terms its intention that the administration of the Act be a partnership between federal and state agencies.

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[48] In *Islander East II*, the Court noted that FERC had expressed a concern about the siting of the proposed project but thought that the applicant could mitigate the adverse impacts. 525 F.3d at 151. Connecticut disagreed, finding that there was uncertainty over whether the mitigation measures would be effective and concluding therefore that it could not certify that the pipeline's potential discharges would comply with the Clean Water Act. *Id.* The Court found that Connecticut's denial was supported by record evidence and was neither arbitrary nor capricious. *Id.* at 164.

Constitution's characterization of New York State's authority under the Clean Water Act as "narrowly circumscribed," Pet'r's Br. 24, 38, 39, 40, 50, is at odds with the text, legislative history, and implementation of the Act. The NYSDEC Denial falls precisely within the confines of the powers given to New York State by Congress.

1. The Clean Water Gives the State Broad Authority to Address Water Pollution.

The Clean Water Act employs a variety of mechanisms that empower state authorities to effectuate the Act's ambitious goals. These include allowing qualified states to administer permitting programs for discharging point sources and to set water quality standards. *See* 33 U.S.C. §§ 1311, 1313. The states have particularly broad responsibilities to set water quality standards under the Clean Water Act, which requires that those standards "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses" and "shall be such as to protect the public health or welfare,

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[49] The legislative history of the Clean Water Act also emphasizes the importance of the federal-state partnership. *See Bills to Amend the Federal Water Pollution Control Act, as Amended, and Related Matters Pertaining to the Prevention and Control of Water Pollution: Hearings on S.7 and S. 544 Before the Subcomm. on Air & Water Pollution of the Comm. on Public Works*, 91st Cong. 948 (1969) (statement of Walter J. Hickel, Secretary, Department of the Interior) ("We support the approach taken in this bill because it protects the responsibilities of the State and the relationship that must exist between the Federal and State Governments. Every effort must be taken on our part to assure that the partnership approach of the water-pollution control programs of this Nation be preserved.").

enhance the quality of water and serve the purposes of this chapter." *Id.* § 1313(c)(2)(A). In setting water quality standards, states are further tasked with considering the waterways' "use and value for public water supplies, propagation of fish and wildlife, recreational [and other purposes]." *Id.* The Clean Water Act also contains an "antidegradation policy," requiring that "state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation." *PUD No. 1 of Jefferson Cnty. v. Wa. Dep't of Ecology*, 511 U.S. 700, 705 (1994); *see also* 40 C.F.R. § 131.12. Because of this expansive mandate, state water quality criteria often are "open-ended" and may use descriptive language. *See PUD No. 1 of Jefferson Cnty.*, 511 U.S. at 715–16; *see also* 40 C.F.R. § 131.3(b).

The Clean Water Act and EPA regulations set the minimal requirements for water quality standards, but the Act allows states to impose more stringent standards, with EPA review and approval. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1313(c), 1370; 40 C.F.R. § 131.4(a). "[S]tate standards approved by the federal government become the federal standard for that state." *Islander East II*, 525 F.3d at 143; *see also* 33 U.S.C. § 1313(c)(3). Contrary to industry amici's assertions, *see* Industry Amicus Br. 29–30, the implementation and enforcement of EPA-approved standards under the Clean Water Act are not improper exertions of state power over a federal process. As Congress intended, NYSDEC's implementation

of EPA-approved standards is an exercise of delegated federal authority under a federal statute.

New York's regulations implementing federal water quality standard requirements comport with the Clean Water Act. *See* N.Y. Comp. Codes R. & Regs. ("NYCRR") tit. 6, pt. 700. The regulations establish multiple classes into which waterbodies are categorized, based on the suitability of the water for particular uses. *Id.* pt. 701. New York adopted narrative water quality standards for such parameters as taste, color, turbidity, suspended wastes, oils and other refuse, thermal discharges, and flow. *See id.* § 703.2. Under two of these narrative water quality standards, for example, New York State must ensure, for certain classes of waterways, that there is no increase in turbidity "that will cause a substantial visible contrast to natural conditions" and no alteration in flow "that will impair the waters for their best usages." *Id.* The State also adopted numeric water quality standards for parameters such as pH, dissolved oxygen, dissolved solids, odor, color, and turbidity. *See id.* §§ 703.3–703.5. New York's water quality regulations have been approved by EPA, and the State is authorized to enforce them.[50]

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[50] *See* EPA, *State Standards in Effect for CWA Purposes*, https://www.epa.gov/wqs-tech/water-quality-standards-regulations-new-york#state (last updated July 5, 2016).

2. Section 401 Gives New York State Broad Authority to Ensure Compliance with Water Quality Standards.

In addition to giving states a primary role in enforcing water quality standards in their jurisdictional waters, *see* 33 U.S.C. § 1319(a), the Clean Water Act requires that an applicant for a federal license to conduct any activity that "may result in any discharge into the navigable waters" obtain a 401 Certification from the state where such a discharge may occur, *id.* § 1341(a). In order to grant a 401 Certification, the state must be able to certify that any potential discharge from the proposed project "will comply with the applicable provisions of sections [301], [302], [303], [306], and [307]" of the Clean Water Act. *Id.* Section 401 also allows a state to condition the grant of a 401 Certification and provides that a certification "shall set forth any effluent limitations and other limitations… necessary to assure that *any applicant*" will comply with the various provisions of the Clean Water Act "*and with any other appropriate requirement of State law.*" *Id.* § 1341 (d) (emphasis added); *see also PUD No. 1 of Jefferson Cnty.*, 511 U.S. at 711. EPA regulations require a certifying state to find that "there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards," 40 C.F.R. § 121.2(a)(3), including EPA-approved state standards. Unless the state waives its rights under Section 401 or grants the 401 Certification, "no license or permit shall be granted," and "*no*

license or permit shall be granted if certification has been denied by the State." 33 U.S.C. § 1341(a) (emphasis added).

Taken together, the mandate in Section 401 to certify that a potential project will comply with water quality standards and the breadth of those standards give states "a flexible and powerful shield for its water resources"[51] and comprehensive authority to review impacts that a proposed project may have on water quality. For example, if NYSDEC were considering a proposed pipeline project that crossed over portions of a creek that have been designated as "Class B," NYSDEC would be required to ensure that potential discharges from the project's crossings did not affect that creek's best usages, which New York's regulations define as "primary and secondary contact recreation and fishing." NYCRR tit. 6. § 701.7. Class B waters also "shall be suitable for fish, shellfish, and wildlife propagation and survival." *Id.* NYSDEC also would need to ensure the project did not violate any of the narrative water quality criteria, such as those for turbidity or color, as well as applicable numeric water quality standards. *See id.* §§ 703.2, 703.3–703.6.

[51] W. Blaine Early, III, Note and Comment, *States' Powerful New Shield to Guard Water Resources: PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 10 J. Nat. Resources & Envtl. L. 395, 403 (1994–95).

3. The NYSDEC Denial Was Based on Constitution's Failure to Show the Project's Compliance with New York Water Quality Standards.

NYSDEC rejected Constitution's application because the Department did not receive enough information to determine whether the Project would comply with New York's EPA-approved water quality standards.[52] NYSDEC repeatedly and explicitly cited those water quality standards to justify its decision. On pages 8 and 9 of the NYSDEC Denial, NYSDEC stated: "Constitution has not provided sufficient information to enable the Department to determine if the Application demonstrates compliance with 6 NYCRR Part 703, including, but not limited to, standards for turbidity and thermal impacts (6 NYCRR § 703.2), and 6 NYCRR Part 701 (best usages)."[53] On page 12, the Department stated:

> Due to the lack of detailed project plans…the supporting materials supplied by Constitution do not provide sufficient information for each stream crossing to demonstrate compliance with *applicable narrative water quality standards for turbidity and preservation of best usages of affected water bodies.* Specifically, the Application lacks sufficient information to demonstrate that the Project will result *in no increase that will cause a substantial visible contrast to natural conditions*.[54]

Again on page 12, NYSDEC concluded:

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[52] NYSDEC Denial at 1, 7–9, 12 [JA__, __–__, __].
[53] *Id.* at 8–9 [JA__–__].
[54] *Id.* at 12 (citing NYCRR tit. 6, § 703.2) (emphasis added) [JA__].

> [T]he Application remains deficient in that it does not contain sufficient information to demonstrate compliance with 6 NYCRR Part 701 setting forth conditions applying to best usages of all water classifications. Specifically, 'the discharge of sewage, industrial waste or other wastes shall not cause impairment of the best usages of the receiving water as specified by the water classifications at the location of the discharge and at other locations that may be affected by such discharge.'[55]

Those deficiencies alone are sufficient to justify the NYSDEC Denial.

Constitution does not acknowledge these portions of the NYSDEC Denial. Instead Constitution focuses on NYSDEC's statements that it also had insufficient information about blasting, pipe depth, cumulative impacts, and alternative routes. Pet'r's Br. 38–52. Constitution claims that these factors are not encompassed in New York's EPA-approved water quality standards. *Id.* 44–52. As explained above, the breadth of state water quality standards adopted by New York State under the Clean Water Act and approved by EPA defeat Constitution's argument.

Moreover, Federal courts have found that a wide range of factors can be considered as part of the Section 401 review. The Court in *PUD No. 1of Jefferson County* concluded that the state could consider water quantity as part of the inquiry of whether a project would be consistent with existing or designated uses. *See* 511 U.S. at 717–19. In *Islander East II*, this Court found that consideration of anchor strikes and cable sweeps on the bottom of the waterway properly fell within

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[55] *Id.* (citing NYCRR tit. 6, § 701.1) [JA__].

Section 401. *See* 525 F.3d at 157. Here, NYSDEC lacked adequate information about blasting and pipe depth—which, like anchor strikes and cable sweeps, affect a project's ability to meet turbidity standards—as well as cumulative impacts and alternative routes. The absence of full information about those considerations exacerbated the problem created by the data gaps described earlier, which made it impossible for NYSDEC to determine whether the Project would protect designated uses for state waters or comply with the State's EPA-approved water quality criteria.

In-stream blasting has fairly obvious implications for water quality, as it is an extreme construction activity that can result in significant turbidity, entirely destroy a water body's designated use, and result in irreversible degradation in water quality.[56] The Authorization Order and FEIS allude to possible in-stream blasting,[57] but Constitution has not provided either FERC or NYSDEC with information about where or when such blasting might take place or what impacts blasting would have.[58] In the absence of such basic information about such a potentially destructive activity, NYSDEC reasonably concluded that it could not

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[56] *See* FEIS at 4-55 [JA__].
[57] Authorization Order at Environmental Condition 27 [JA__]; FEIS at 4-97 [JA__].
[58] NYSDEC Denial at 12, 13 [JA__, __].

certify that the Project would not threaten designated uses or violate narrative or numeric water quality standards.

Similarly, and as described in the NYSDEC Denial, insufficient pipe depth can lead to pipe exposure, which in turn can lead to pipes bursting and increased incidences of in-stream repairs.[59] These adverse events clearly have the potential to impact a stream's designated uses, and could result in violations of state water quality criteria relating to turbidity, among other factors.[60] The Project proposes to bury pipeline at the same depth across hundreds of waterbody crossings without providing any site-specific information regarding the geology of the burial locations.[61] Without this site-specific information, NYSDEC could not determine

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[59] *Id.* at 12–13 [JA__].

[60] Citing *Ellis v. Chao*, 336 F.3d 114, 126 (2d Cir. 2003), Constitution suggests that NYSDEC's decision on pipe depth is arbitrary because Constitution's proposed burial depth is the same as the depth proposed in a pipeline project that received 401 Certification from NYSDEC. *See* Pet'r's Br. 50, 65, 67. Contrary to Constitution's claim, *see id.*, that case does not stand for the proposition that "an agency bears a heavy burden when it departs from prior precedent." *Id.* The *Ellis* Court in fact rejected the argument that deviation from a prior position was "*per se* arbitrary and capricious and [it found] no reason to believe that it would be." 336 F.3d at 126 (noting that, at most, more explanation of an agency's inconsistent position *might* be necessary on remand). Moreover, this Court rejected Constitution's exact argument in *Islander East II*, finding that "an agency must be given ample latitude to adapt its rules and policies to the demands of changing circumstances." 525 F.3d at 157 (internal quotations marks and citation omitted).

[61] FEIS at 4-18 [JA__]; *see also* NYSDEC Denial at 12–13 [JA__].

whether the proposed pipe depth was adequately protective at a given site.[62] The Department therefore appropriately found that it did not have enough information to certify that the Project's would comply with state water quality standards.[63]

Regarding cumulative impacts, NYSDEC explained how the combined effects of multiple stream crossings on a single waterbody and its tributaries can have significantly different impacts than a single crossing.[64] More than one crossing can make the difference between a temporary impact and a long-term degradation of that waterbody's quality.[65] For example, the Project proposed to cross the Ouleout Creek and its tributaries 28 times, with 15 of these crossings located in trout-spawning areas. Because Ouleout Creek is designated Class C,

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[62] *See* J. M. Castro et al., U.S. Fish & Wildlife Serv., *Risk-Based Approach to Designing and Reviewing Pipeline Stream Crossings to Minimize Impacts to Aquatic Habitats and Species*, 31 River Res. & Applications 767 at 775, 782 (2015) (explaining that the risk of exposing a pipeline buried within the bed of a waterbody varies depending on the rate at which the streambed erodes).

[63] Constitution attempts to dismiss the obvious concerns associated with uncertain pipeline depth by claiming that an exposed pipe is not a "discharge," Pet'r's Br. 49, but that argument ignores the increased risk of pipe bursts associated with overly shallow burial depths. The cases Constitution cites are not binding and address the kinds of activities that trigger the 401 Certification requirement, not the factors that may be considered by the state once that trigger is pulled. *See Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 783–85 (9th Cir. 2008) (holding that "discharge" under in Section 401 did not include discharges of pollutants from non-point sources); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 963 (9th Cir. 2006) (holding that water withdrawals are not subject to the requirements of the Clean Water Act).

[64] NYSDEC Denial at 3–5 [JA__].

[65] *Id.* at 5 [JA__].

where the best use is fishing, *see* NYCRR tit. 6, §§ 931.4 tbl. 1, 701.8, NYSDEC had to determine whether the multiple crossings, cumulatively, would degrade the water quality required for fish.[66] Constitution's failure to provide NYSDEC with the information necessary to evaluate the impacts of 28 crossings, rather than a single crossing of the same creek and its tributaries, made it impossible for NYSDEC to certify that the Project would preserve Ouleout Creek's fishability, as required by the Clean Water Act. NYSDEC's denial on the basis of an absence of information regarding cumulative impacts therefore falls squarely within its role under Section 401.[67]

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[66] *See id.* at 3, 5 [JA__].

[67] Constitution incorrectly claims, *see* Pet'r's Br. 47, that the NYSDEC Denial was based on a provision of New York State law, under which NYSDEC must

> [p]romote and coordinate management of water, land, fish, wildlife and air resources to assure their protection, enhancement, provision, allocation, and balanced utilization consistent with the environmental policy of the state and take into account the cumulative impact upon all of such resources in making any determination in connection with any license, order, permit, certification or other similar action or promulgating any rule or regulation, standard or criterion.

N.Y. Envtl. Conserv. Law § 3-0301(1)(b). That provision, described as "guid[ance]," NYSDEC Denial at 7 [JA__], merely buttresses the Department's decision to deny the 401 Certification, which was based squarely on Constitution's failure to demonstrate compliance with EPA-approved water quality standards.

Constitution's assertion that NYSDEC was not permitted to base its denial, even in part, on a lack of information about route alternatives is similarly unavailing. *See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 2016 WL 4174045, at *11 (3d Cir. Aug. 8, 2016) (upholding 401Certification that considered alternatives). Under Section 401(d), states issuing a water quality certification may include conditions in order to ensure that state water quality standards will be met. 33 U.S.C. § 1341(d). With enough information at its disposal, NYSDEC might have issued a water quality certification requiring Constitution to avoid crossing certain waterbodies in New York in order to avoid violating state water quality standards. *See Am. Rivers*, 129 F.3d at 107, 109–10 (finding that the language of the Clean Water Act requires the federal agency to accept conditions imposed by the state, "even if it disagrees with them" (internal quotation marks and citation omitted)). Instead, in the absence of any information that would have allowed it to issue a conditional certification that would have ensured compliance with state water quality standards, NYSDEC was forced to deny the application altogether.

The decision by the New York Court of Appeals in *Niagara Mohawk Power Corp. v. State Department of Environmental Conservation*, 82 N.Y.2d 191, 197 (1993), is not dispositive of questions of federal law and does not mandate a different result. The court in *Niagara Mohawk* rejected NYSDEC's attempt to

base the denial of a 401 Certification entirely on a state statutory provision that had not been adopted as part of an EPA-approved water quality standard. *Id.* at 193. In contrast, there is no question that the NYSDEC Denial is based on New York's water quality standards. Moreover, contrary to Constitution's reading of *Niagara Mohawk*, subsequent decisions have affirmed that the Section 401 inquiry gives states the authority to consider a broad scope of factors related to water quality. *See PUD No. 1 of Jefferson Cnty.*, 511 U.S. at 711–12; *E. Niagara Project Power Alliance v. State Dep't of Envtl. Conservation*, 840 N.Y.S.2d 225, 227–28 (N.Y. App. Div. 2007) (finding that the U.S. Supreme Court had expanded the scope of Section 401 since the decision in *Niagara Mohawk*); *see also Chasm Hydro, Inc. v. N.Y. State Dep't of Envtl. Conservation*, 872 N.Y.S.2d 235, 236 (N.Y. App. Div. 2009) (finding that, notwithstanding the holding in *Niagara Mohawk*, portions of the Environmental Conservation Law were sufficiently related to water quality to fall within NYSDEC's authority under Section 401).

The NYSDEC Denial is based on Constitution's failure to provide NYSDEC with sufficient information on critical factors that relate directly to water quality, as NYSDEC clearly explained. Constitution's refusal to supply NYSDEC with this information left NYSDEC with no choice but to deny 401 Certification, given the Department's mandate under the Clean Water Act. The NYSDEC Denial therefore

falls squarely within the state's authority under the Clean Water Act and must be upheld.[68]

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Court deny Constitution's Petition for Review on all grounds.

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[68] In the alternative, if the Court determines that no waiver has occurred but that remand is appropriate, Constitution's requests for (1) remand with instructions to NYSDEC to issue a version of the 401 Certification that allegedly was "ready for final signature in July/August 2015," Pet'r's Br. 6–7; and (2) remand with instructions to NYSDEC to make its decision on the 401 Certification in five days, *id.* at 24, must be rejected. Constitution cites no authority to support either request. *See id.* As this Court previously found, if the Court determines that the NYSDEC Denial should be set aside, the appropriate remedy is to remand with instructions and provide a reasonable schedule and deadline for the agency to act. *See Islander East I*, 482 F.3d at 105; *see also* 15 U.S.C. § 717r(d)(3) (on remand, "the Court shall set a reasonable schedule and deadline for the agency to act.").

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

Certification of Compliance with Type-Volume Limitation,
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6. This brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B because this brief contains 11,665 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

7. 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.

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