16-1568

Oral Argument Not Yet Scheduled

In the United States Court of Appeals for the Second Circuit

Constitution Pipeline Company, LLC,

Petitioner,

v.

Basil Seggos, Commissioner, New York State Department of Environmental Conservation, John Ferguson, Chief Permit Administrator, New York State Department of Environmental Conservation, New York State Department of Environmental Conservation,

Respondents.

Stop the Pipeline, Catskill Mountainkeeper, Inc., Sierra Club, Riverkeeper, Inc.,

Intervenors.

PAGE PROOF BRIEF OF INTERVENOR STOP THE PIPELINE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner Stop the Pipeline hereby states that it is an unincorporated association of citizens and landowners, and that it has never issued stock. As such, Stop the Pipeline has no parent corporations or publicly held corporations owning 10% or more of any of its stock.

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GLOSSARY

ACE	United States Army Corps of Engineers
Application	Company's June 13, 2013 application to FERC
Certificate Order	FERC's December 2, 2014 order. 149 FERC ¶ 61,199
Company	Constitution Pipeline Company, LLC
CPCN	Certificate of Public Convenience and Necessity
CWA	Clean Water Act
D.C. Circuit	United States Court of Appeals for the District of Columbia
Denial	New York State Department of Environmental Conservation Denial of Constitution Pipleine Company, LLC's Clean Water Act Section 401 Water Quality Certification on April 22, 2016
DEC	New York State Department of Environmental Conservation
DEIS	Draft Environmental Impact Statement
FEIS	Final Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
HDD	Horizontal Directional Drilling
JA	Joint Appendix
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
NOCA	Notice of Complete Application

R	Record in case number 16-345, Lead; 16-361, Consolidated
SDEIS	Supplemental Draft Environmental Impact Statement
SEQRA	State Environmental Quality Review Act
SPDES	State Pollution Discharge Elimination System
STP	Stop the Pipeline
WQC	Water Quality Certification
WQS	Water quality standards

JURISDICTION

Although Stop the Pipeline ("STP") does not take issue with Constitution Pipeline Company, LLC's (the "Company") basic jurisdictional statement as far as it goes, the statement omits that this Court is without jurisdiction to hear any claims that the New York State Department of Environmental Conservation ("DEC") failed to timely act on the Company's permit application. Rather, as discussed in Section I(B)(1) below, the Natural Gas Act ("NGA") expressly gives the United States Court of Appeals for the District of Columbia ("D.C. Circuit") exclusive jurisdiction over such claims. 15 U.S.C. § 717r(d)(2) (2012).

Further, the Company makes the erroneous point, both in its jurisdictional statement and throughout its argument, that its application for a permit from the United States Army Corps of Engineers ("ACE") under Section 404 of the Clean Water Act ("CWA") triggered the requirement for a 401 water quality certification ("WQC") from DEC. *See, e.g.*, Brief for Petitioner, *Constitution Pipeline, LLC v. Seggos*, (No.16-1568) at 1, 4-5, 9 26, 29, 30-31, 37 (2d Cir. filed July 12, 2016) ("Company Brief"). In fact, as explained in Section I(B)(3) below, in this case, it was the Company's application to the Federal Energy Regulatory Commission ("FERC") for a certificate of public convenience and necessity ("CPCN") that triggered the requirement for a 401 WQC from DEC. This distinction matters and is an issue in the related cases, 16-0345 and 16-0361.

STATEMENT OF ISSUES

Issue 1. Whether DEC timely acted on the Company's application for a 401 WQC when the Company expressly withdrew its prior application and resubmitted its application to DEC and DEC acted within one year after the Company's final application, and the Company never sought to challenge DEC's alleged inaction in the D.C. Circuit.

Issue 2. Whether DEC acted beyond its authority under the CWA in denying the 401 WQC for a lack of information related to aspects of the pipeline construction such as blasting, pipe depth and water crossings, which left DEC unable to determine if the activities would comply with New York water quality standards.

Issue 3. Whether DEC's Denial for a lack of sufficient information to determine compliance with New York water quality standards was arbitrary, capricious or contrary to law, given the Company's failure to provide the documentation and information DEC stated it needed for its analysis.

STATUTES AND REGULATIONS

Statutory and regulatory provisions are set forth in Addendum A.

STATEMENT OF CASE

The Company's application for a CPCN from FERC and a 401 WQC from DEC ran on parallel tracks, with points of intersection between the two regulatory processes, but no integrated review. Under FERC, the Company pre-filed in April 2012, and filed an application on June 13, 2013 for a 30-inch diameter, 124-mile long interstate gas transmission pipeline that would run from Susquehanna County, Pennsylvania, through Broome, Chenango, Delaware, and Schoharie Counties, New York. FERC, FEIS: CONSTITUTION PIPELINE AND WRIGHT INTERCONNECT PROJECTS (2014) at ES-1, 4-116, JA___, ____ ("FEIS"). FERC assigned docket numbers PF12-9 and CP13-499, respectively. STP intervened and submitted an analysis on December 16, 2013 of the Company's lack of response to issues raised by the DEC and ACE. STP, Motion to Intervene (July 13, 2013), JA____ [hereinafter R.369[1]]; STP, Comment to FERC (Dec. 17, 2013), JA___ ("STP 12/16/13 FERC Comment"). This documentation of the Company's persistent unwillingness to provide DEC with the information it requested contradicts the

[1] References to "R.___" herein refer to the record in the FERC proceedings, which STP submits was required under the NGA to be the record here. *See* 15 U.S.C. § 717r(d)(4). STP will seek to add necessary documents from the FERC record to the Joint Appendix.

Company's storyline, as told by Company personnel in affidavits that are not part of the official record and should be ignored by the Court. *See* NYSDEC Brief in Supp. of Mot. to Strike, (ECF #66). FERC released its Draft Environmental Impact Statement ("DEIS") on February 21, 2014, noting that 24% of the properties had not been surveyed. FERC, DEIS: CONSTITUTION PIPELINE AND WRIGHT INTERCONNECT PROJECTS (2014) at 1-3, JA___. Six federal and state agencies characterized the DEIS as insufficient, and requested a revised or supplemental DEIS on which to comment. DEC, Comment to FERC and ACE (April 7, 2014), JA___; U.S. Dep't of the Interior, Comment on DEIS (April 8, 2014) [hereinafter R.2456] JA___; ACE, Comment to FERC (April 8, 2014) [hereinafter R.2470] JA___; U.S. EPA, Comment to FERC (April 9, 2014) [hereinafter R.2476] JA___; NYS Attorney General, Comment on DEIS (April 16, 2014) [hereinafter R.2511], JA___. STP documented missing information and other deficiencies and requested a thorough analysis of all issues and compliance with all laws. STP, Corrected Comment on DEIS (April 8, 2014) ("STP 4/8/14 DEIS Comment"), JA___. The Final Environmental Impact Statement ("FEIS"), issued on October 24, 2014, did not cure problems noted by the agencies, STP, or its members. *See generally* FEIS, JA___. STP repeatedly requested a Supplemental Draft Environmental Impact Statement ("SDEIS") in which FERC would conduct one environmental review for all required licenses, permits, and

consultations, for all connected projects. STP, Opposition to Company's Request for an Expedited Decision (Sept. 23, 2014) ("STP 9/23/14 Letter") JA___; STP, Response to ACE Request (Oct. 17, 2014) ("STP 10/17/14 Letter") JA___,; STP, Comment on Company Supplement (Sept. 21, 2015) ("R.2749"), JA___. Such an integrated review never took place, and instead FERC issued the CPCN with ten pages of environmental conditions, a clear indication of the amount of regulatory review that had not been completed. FERC, Order Issuing Certificates (Dec. 2, 2014) ("Certificate Order"), JA___.

STP filed a request for rehearing within thirty days. STP, Request for Rehearing (Jan. 2, 2015), JA___. FERC issued a Tolling Order on January 27, 2015, FERC, Tolling Order (Jan. 27 2015), JA___, and denied STP's request for rehearing one year later, on January 28, 2016. FERC, Order Denying Rehearing (Jan. 28, 2016), JA___. STP petitioned for review of FERC's Certificate Order on February 5, 2016 in a related case in this court, case number 16-361. *Stop The Pipeline, Inc. v. FERC*, No. 16-361 (2d Cir. filed Feb. 5, 2016), JA___. One of the conditions in FERC's CPCN was the need to acquire all required federal licenses and permits, including the 401 WQC from DEC. FERC Certificate Order, Att. A, JA___. If FERC had waited for DEC to act, as the CWA requires,which is an issue in the two related cases (16-345 and 16-361), then many of the issues raised by the Company in this case would be moot.

The project would require the clearing of 1,872 acres of land, including the destruction of approximately 700,000 trees on 1,034 acres of forest. FEIS at 4-118, JA___; STP, Opposition to the Company's request for a partial notice to proceed and Motion for a Stay (Jan 13, 2016) at 4, JA___. It would cross 289 bodies of water, most of them cold-water trout streams, and impact over 95 acres of wetlands, of which 34 acres are irreplaceable forested wetlands. FEIS at ES-6, 4-62, JA___,___. Additionally, over 35 miles of the proposed route are located on steep slopes, and 45.5 miles are over shallow bedrock. FEIS at App.G, 4-15, JA___, ___. Twenty-four percent of this land had not been surveyed when the DEIS and FEIS were issued. DEIS at 1-3, JA___; FEIS at 1-5, JA____.

The proposed route is located in an area that has experienced the devastation of extreme storms, and STP members who live along the route have witnessed catastrophic floods near their homes. Daniel J. Brignoli, Comment to FERC (March 24, 2014) [hereinafter R.1703] JA___; Glenn & Laura Bertrand, Comment to FERC (April 7, 2014) [hereinafter R.2259], JA___. As Governor Andrew Cuomo stated, "[t]here is a 100 year flood every two years now." R.1565, JA___. On August 28, 2011, Hurricane Irene caused extensive flooding, and was followed several days later by Tropical Storm Lee, which dropped almost a foot of rain along the proposed route. FEIS at 4-14, JA___.

Understanding the devastating impact the project would have on New York State ("NYS") water quality, STP began an educational campaign and created an extensive website on the 401 WQC process soon after DEC issued its Notice of Complete Application ("NOCA") on December 24, 2014. The background information included the Company's application, NYS laws regarding water quality, stream classifications, and maps of streams. STP also ran campaigns to encourage the public to write comment letters to DEC, and created an online form to make it easier for them to do it. Before the end of the first comment period, STP hand-delivered over 5,000 public comments to DEC, and STP members submitted thousands more by mail and email.

STP submitted its own extensive comments to DEC on February 27, 2015, during the first public comment period. Stop The Pipeline, Comment Letter on Constitution Pipeline 401 WQC and Other Water-Related Permits (Feb. 27, 2015), JA___ ("STP 2/27/15 DEC Comment"). STP's initial comments focused on: (1) deficiencies in FERC's environmental review process and STP's many attempts to rectify the problems; (2) a description of the relevant federal and state laws; (3) the legal and factual reasons why the Company's application for a 401 WQC must be denied; and (4) a short history of water quality violations caused by two prior interstate gas pipeline projects in NYS. *Id.* at 2-28, 18-32, 33-118, 119-24, JA___,___, ___, ___. Also included was a report by Hudsonia on water quality

impacts of the proposed project to streams, wetlands, and species that depend upon aquatic habitats for their survival. *Id*. at Ex.1, JA___. In addition, potential cumulative impacts downstream of the pipeline, which were not studied in FERC's FEIS, were discussed. *Id.* at 8-1, JA___.

Much of the delay in DEC's regulatory process was caused by the fact that the Company took so long to submit the information DEC needed to review the application. For example, when the Company withdrew and resubmitted its application for the third time on April 27, 2015, many parcels still had not been surveyed, and information about parcels that had been surveyed had not yet been provided to DEC. Stop The Pipeline, Supplemental Comment Letter (May 20, 2015), JA___ ("hereinafter STP 5/20/15 DEC Comment").[2] As a result of these extensive delays in submitting required information, the public was never given an opportunity to review and comment upon many vital documents. Stop The Pipeline, Supplemental Comment Letter (July 10, 2015), JA___ ("STP 7/10/15 DEC Comment"). Finally, as STP made clear in its February 27, 2015 comment to DEC, much of the information needed to determine whether water quality standards ("WQS") would be violated, had never been gathered, so the application for a 401 WQC had to be denied. STP 2/27/15 DEC Comment at 33-118, JA___.

[2] STP's May 20, 2015 comment to DEC does not appear to be in the record prepared by the DEC. It has been attached to this brief. *See* Addendum B.

SUMMARY OF ARGUMENT

The Company's initial argument that DEC did not timely act on the Company's application is not within this Court's jurisdiction, and, in any event, is incorrect on the law. The NGA expressly gives the D.C. Circuit exclusive jurisdiction over any claim that a state agency has failed to timely act on an application. 15 U.S.C. § 717r(d)(2). The Company failed to bring any such claims to the proper court, but rather waited for the agency to act. Now, unhappy with the result of that decision, the Company improperly attempts to litigate claims of unreasonable delay or failure to act that are now moot and outside the jurisdiction of this Court. Even if this Court could hear such arguments, DEC's Denial was timely given that it acted within one year of the Company's final submission of its application for a 401 WQC. The Company cites no authority to the contrary. Further, the Company's attempt to alter the applicable deadlines or scope of DEC's review by contending that its application for a section 404 permit triggered the requirement that it apply for a 401 WQC must be rejected given that the Company's application for the CPCN from FERC, not the application for a section 404 permit, triggered the need for a 401 WQC in this case.

DEC also acted well within its authority. DEC amply explained in the Denial that that every piece of information that DEC lacked (because the Company failed to provide it) related to compliance with NYS WQS. As such, DEC acted

within its proper section 401 authority, and *Niagara Mohawk Power Corp. v. New York Department of Environmental Conservation*, 624 N.E.2d 146 (N.Y. 1993), heavily relied upon by the Company, is not to the contrary. Rather, that case involved a far greater reach by DEC, and, unlike this case, was decided under the Federal Power Act ("FPA"), which provides a broader field of preemption.

Finally, the Company's claims that DEC's Denial was arbitrary, capricious or contradicted by record evidence ignores the multiple attempts in vain by DEC to obtain the information that DEC indicated in its Denial was necessary to ensure compliance with NYS WQS. The Company repeatedly ignored or failed to adequately respond to DEC's requests for information. Moreover, the Company incorrectly assumed that FERC determines what is necessary to comply with WQS – a contention that is plainly contrary to established law. Even if FERC had such authority, it was clear to multiple state and federal agencies that the FEIS was lacking significant information and analysis, and was insufficient for DEC to make a proper 401 WQC determination. In light of the missing evidence and the recalcitrance of the Company, DEC did not act arbitrarily or contrary to its prior section 401 decisions in issuing its Denial here. Indeed, DEC learned from past decisions, which, where 401 WQCs were granted, resulted in significant, unanticipated water quality violations. DEC was not required to make the same

mistake with the Company's application. As such, the Denial was not arbitrary, capricious or contrary to law.

ARGUMENT

I. DEC Did Not Miss Any Applicable Deadlines, and Even if the Company Could Have Made Such an Argument, the Argument is Now Moot and This Court Does Not Have Jurisdiction to Hear the Argument.

A. Standard of Review

The Company contends that DEC is not entitled to deference in its interpretation of the CWA, Company Brief at 26, but that argument ignores applicable prior precedent of this Court. While it is correct that, typically, state agencies are not entitled to *Chevron* deference in their interpretation of federal law, *see Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989), this Court has applied *Chevron* deference to state agency interpretations where the statute in question creates a joint federal-state program that requires federal approval of state plans and their implementation, the federal agency has agreed with the state's interpretation and the state's interpretation is consistent with the statute. *See Perry v. Dowling*, 95 F.3d 231, 236-37 (2d Cir. 1996). To be sure, in *Perry*, the state agency had a declaration from the applicable federal agency concurring the state's interpretation of the statute, which DEC does not have here, but district courts interpreting *Perry* have applied *Chevron* deference even in the absence of such direct proof, provided the other two factors are met. *See Carroll v. DeBuono*, 998

F. Supp. 190, 194 (N.D.N.Y. 1998); *Conn. Primary Care Ass'n, Inc. v. Wilson-Coker*, No. 3:02CV626 (JBA), 2006 WL 2583083, at *4 (D. Conn. Sept. 5, 2006). Accordingly, *Chevron* deference is appropriate here to DEC's interpretation of the CWA.

B. DEC's Denial of the 401 Water Quality Certification Was Timely, and, in Any Event, the Arguments that DEC "Unreasonably Delayed" Are Moot and This Court is Without Jurisdiction to Hear Them.

There is no dispute that DEC acted within one year of the Company's final submission of its application for a 401 WQC. Company Brief at 36-37 (recognizing that DEC acted 359 days after the Company's final resubmission). The only express deadline under the statute is one year from the receipt of the request:

> If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (*which shall not exceed one year*) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.

33 U.S.C. § 1341(a)(1) (2012) (emphasis added). Thus, DEC acted within the statutorily prescribed deadline.

Recognizing this fact, the Company tries to seize on the "reasonable period of time" language, contending that DEC missed myriad *other* "deadlines," making its Denial "unreasonably delayed" and therefore waived. As a threshold matter,

such contentions of unreasonable delay are now moot, and, in any event, this Court is without jurisdiction to hear them because the NGA expressly gives the D.C. Circuit exclusive jurisdiction over challenges to a state agency's failure to act on a permit applicable to a pipeline. *See* discussion *infra* Section I(B)(1). Further, the Company's attempt to contend that DEC did not act within a "reasonable time," despite that it acted within one year of the Company's application, ignores the governing regulation, which expressly states that a waiver does *not* occur until after that year has passed. *See* discussion *infra* Section I(B)(2). Finally, the Company's repeated contention that the relevant trigger for the need for a 401 WQC was the Company's application for a section 404 permit ignores the sequence of events in this case and applicable law, both of which make clear that the Company's application for the CPCN triggered the need for the 401 WQC, which expands the scope of the activities reviewable by DEC. *See* discussion *infra* Section I(B)(3).

1. The Company Did Not Timely Make Its Claims Regarding Unreasonable Delay, Which Were Required to be Brought Before the D.C. Circuit.

The Company argues that DEC was required to act by January 22, 2015, as allegedly set by FERC in its revised schedule for the FEIS, or, alternatively, by August 2015, when DEC employees purportedly indicated a decision was ready.

See Company Brief at 29-37. Such claims are under the expressly exclusive jurisdiction of the D.C. Circuit, and are now moot.

The NGA grants exclusive jurisdiction in the D.C. Circuit over any claims related to a state agency's failure to act on a pipeline permit:

> **Agency delay**
>
> The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. . .

15 U.S.C. § 717r(d)(2). The Company cites to this provision in arguing that DEC was acting "inconsistent[ly]" with federal law, *see* Company Brief at 31, yet ignores that the statute expressly provides that this Court does not have jurisdiction over that precise question.

Pursuant to this provision, if DEC were required to act by January 15, 2015, as the Company contends FERC required, the remedy for the Company would have been to bring a "failure to act" claim before the D.C. Circuit, which the Company failed to do. If an applicant such as the Company believes a state agency fails to meet a proscribed deadline or schedule, the solution under the NGA is for the Company to "pursue remedies under section 717r(d)." 15 U.S.C.§ 717n(c)(2).

Given that section 717r(d)(2) expressly covers these exact "failure to act" claims, there can be no doubt that any challenge to DEC's purported failure to act by a certain deadline was required to be brought in the D.C. Circuit, which the Company failed to do.

In any event, any such claim – and the same argument made by the Company here – ignores applicable law. FERC's schedule does not apply to the 401 WQC because the NGA expressly states that deadlines established by FERC must "comply with applicable schedules established by Federal law." 15 U.S.C. § 717n(c)(1)(B).

Likewise, the Company's claims that DEC was required to act within 60 days of April 27, 2015, Company Brief at 34-37, borrowing the 60 day limit in 33 C.F.R. § 325.2(b)(1)(ii), was a claim for a "failure to act" that was ripe as of June 25, 2015, and was under the exclusive jurisdiction of the D.C. Circuit. Yet, the Company neglected to raise such a claim at that time. The same is true of the Company's argument that DEC was required to act within one year of DEC's announcement that the *original* application was complete in 2014. *See* Company Brief at 35-37. Rather than making such a claim, the Company *expressly withdrew* that application and submitted a new application in April 2015. *Id.* at 15. The Company now seeks to reinvent the past, claiming that DEC should have acted on its *prior*, withdrawn application.

Indeed, the Company failed to bring any "failure to act" or "unreasonable delay" claims to the D.C. Circuit, and such claims are now moot given that DEC has acted. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 67-68 (2004) (claims that agency failed to timely act were moot once agency took action). Rather than arguing to the D.C. Circuit that DEC was required to act sooner and had waived its rights, the Company elected to gamble that it would receive its 401 WQC. Now that this gamble has failed to pay off, the Company seeks to go back in time and disingenuously argue that DEC was required to act sooner. Such arguments are moot and, in any event, are not within the jurisdiction of this Court under the NGA. As such, all of the Company's claims the DEC did not act within a "reasonable time" should be rejected.

2. DEC Did Not Waive Its Clean Water Act Section 401 Review Because It Acted Within One Year of DEC's Receipt of the Company's Application.

Recognizing that DEC did, in fact, act within one year of its application, the Company seeks to interpret the "reasonable period of time" clause of CWA section 401 to mean something shorter than one full year. Company Brief at 32-37. This argument must fail because the applicable regulation expressly states that no waiver has occurred. Specifically, FERC's regulation interpreting CWA section 401 under the FPA provides for a full year before any waiver occurs:

> A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act *if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification*. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

18 C.F.R. § 4.34(b)(5)(iii) (2016) (emphasis added). Thus, FERC's own interpretation of section 401 allows a full year for DEC to act. There is no dispute that a year did not pass since the Company submitted its final request for a 401 WQC, therefore, no waiver has occurred.

AES Sparrows Point LNG, LLC v. Wilson, cited by the Company, is not to the contrary. *See generally AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721 (4th Cir. 2009). Although the Company cites *AES Sparrows* for the proposition that DEC was under a 60-day deadline to make its decision, beginning no later than April 27, 2015, Company Brief at 35, the Court in *AES Sparrows* did not apply such a deadline. Quite the opposite, the Fourth Circuit held that the denial of the 401 WQC in *AES Sparrows* was timely because it occurred within *one year* of the ACE determination that a "valid" request for a 401 WQC had been submitted, notwithstanding AES's argument that prior submissions should have triggered the commencement of the one-year limitation. *AES Sparrows*, 589 F.3d at 728-29. Thus, far from establishing the Company's claimed 60-day time limit, *AES Sparrows* is entirely consistent with DEC's position here that: (1) the clock

did not begin to run until the final *valid* request for a 401 WQC was received by DEC; and (2) DEC had a full year, not just 60 days, from that date to make its decision. Thus, under the authority cited by the Company, the Denial was timely. To this point, the Company fails to cite *any* case where an agency determination on a 401 WQC was deemed "waived" in a time period less than one year from the submission of the application.

Notably, not only did the *AES Sparrows* Court did not apply the 60-day limit urged by the Company here, but the regulation where that limit is found is entirely inapplicable to this case. Specifically, the Company cites 33 C.F.R. § 325.2(b)(1)(ii), claiming that it is one of "the regulations implementing the CWA." Company Brief at 33-34. But this claim is misleading. That regulation is an ACE regulation – applicable *only* to 401 WQC determinations made under section 404 – and only gives the ACE district engineer guidance to determine whether a waiver has occurred. *See* 33 C.F.R. § 325.2(b)(1)(ii) (2016) (found in part 325, "Processing of Department of the Army Permits"; "In determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will . . ."). As opposed to challenging DEC on a waiver claim, the Company can only challenge ACE's waiver determination. *See Weaver's Cove Energy, LLC v. Rhode Island Department of Environmental Management*, 524 F.3d 1330, 1333-34 (D.C. Cir. 2008). However, not only was no such determination ever made here, it could

not have been made because, as explained in Section I(B)(3) below, the 401 WQC in this case was not triggered by the section 404 permit application, but rather the Company's application for the CPCN. Thus, the regulation relied upon by the Company, which was not even applied in the Company's own authority or by ACE, is entirely inapplicable.

In sum, DEC had one full year to act from the Company's latest complete application for its 401 WQC. The Company cites to no authority for its proposition that, contrary to the applicable regulation, some shorter deadline should have applied. As such, DEC's Denial was timely and should be upheld.

3. It is the Company's Application for a Certificate of Public Convenience and Necessity That Triggered the Need for a 401 Water Quality Certification, Not the Application for a Section 404 Permit.

The Company makes the erroneous point, in its jurisdictional statement and throughout its argument, that its application for a 404 permit from the ACE is what triggered the need for a 401 WQC from DEC. Company Brief at 1, 4-5, 9. In fact, it was the Company's *prior* application to FERC for a CPCN that triggered the requirement for a 401 WQC from DEC.

As a threshold matter, if the Company were correct that the only trigger for the 401 WQC was the application for a 404 permit, then the Company does not have standing to claim that DEC waived its rights under CWA section 401. *See*

Weaver's Cove Energy, LLC, 524 F.3d at 1333-34. Thus, the Company's position on the need for a 401 WQC is self defeating.

In any event, it was the application for a CPCN, not the 404 permit, that triggered the need for a 401 WQC. The CWA states that a 401 WQC must be obtained prior to the issuance of any federal license or permit that may result in a discharge into navigable waters. 33 U.S.C. § 1341(a)(1) ("Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate. . ."). Although the Company has not argued this point directly, the Company is implying, as it explicitly stated in its January 29, 2015 Answer in opposition to STP's request for rehearing, that the CPCN is not a federal license and so does not trigger the need for a 401 WQC. Company, Motion For Leave to Answer & Answer (Jan. 29, 2015) at 3, JA____ ("The Order issued by the Commission, however, is neither a license nor a permit and does not authorize activity that could result in a discharge into the navigable waters of the United States.").

The basis for this position is unclear as the legal definitions of "certificate" and "license" are intertwined, and the two words are treated as synonyms in common use. By definition, a certificate is a document granting a license

authorizing an action that otherwise would not be lawful. *See License*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("1. A permission, usually revocable, to commit some act that would otherwise be unlawful; 2.The certificate or document evidencing such permission."). This Court has referred to FERC as a "licensing agency" because it issues a CPCN. *See Islander East 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) [hereinafter *Islander East II*]. The D.C. Circuit has also said that FERC's certificate is a license. *See City of Tacoma v. FERC*, 460 F.3d 53, 65 (D.C. Cir. 2006) ("Though FERC makes the final decision as to *whether* to issue a license, FERC sharesits authority to impose license conditions with other federal agencies.") (emphasis in original). Even the Company admitted that FERC's CPCN is a license in its application for a 401 WQC from DEC, as it stated, "[t]he construction of interstate natural gas pipelines are *licensed by FERC* under the Natural Gas Act and the issuance of a Certificate of Public Convenience and Necessity from the FERC demonstrates a project's economic need and public benefit." Constitution Pipeline Company LLC, Joint Application to DEC and ACE for Water-Related Permits (August 22, 2013), Environmental Questionnaire at 1 (emphasis added), JA___. There is no question that the construction of the

pipeline may cause a discharge into navigable waters, and the Company has not argued to the contrary, so both prongs of the CWA have been fulfilled. 33 U.S.C. § 1341(a)(1). As such, the Company's application for a CPCN triggered the need for the 401 WQC.

The Company has relied on a Fourth Circuit Court of Appeals case *AES Sparrows*, but that case is easily distinguished. In *AES Sparrows*, the applicant was seeking to build a liquefied natural gas facility, which required dredging 118-acres of Baltimore Harbor, as well as the processing of that dredged material. *AES Sparrows*, 589 F.3d at 724. As such, it was the dredging activity permitted under section 404 that originally triggered the need for a 401 WQC in that case. No such dredging is required here. The Company here *first* filed an application with FERC for a CPCN on June 13, 2013 for a 124-mile long pipeline, and *subsequently* on August 21, 2013, submitted a joint application to DEC and ACE for the 401 WQC and section 404 permit. Company, Application for CPCN (June 13, 2013), JA,___; Letter from John Ferguson, Chief Permit Administrator, DEC, to Lynda Schubring, Environmental Project Manager, Constitution Pipeline Company, LLC (April 22, 2016) at 1, JA____ [hereinafter Denial]. While a 404 permit may also require a 401 WQC, it was the application to FERC for a CPCN that triggered the joint application, including the 401 WQC application at issue here.

In addition, the applicant in *AES Sparrows* only submitted its application for a 401 WQC once, *AES Sparrows*, 589 F.3d at 725-29, whereas the Company here requested 401 WQC three times. AES applied for a 401 WQC from the State of Maryland on January 8, 2007. *Id*. at 725. The application was not complete and Maryland requested more information on January 23, 2008. *Id*. The last submission by AES to Maryland was made on April 14, 2008, and on April 25, 2008, the ACE issued its NOCA, explicitly stating that "**[t]he Section 401 certifying agencies have a statutory limit of one year in which to make their decisions**." *Id*. (emphasis in original). Maryland denied the 401 WQC on April 24, 2009, within one year of the ACE's notice. *Id*. at 726. The Fourth Circuit held that Maryland had not waived its right to deny the 401 WQC by relying on ACE's notice of complete application as the event that started the one-year time frame. *Id*. at 729-30. There is no discussion in that decision as to whether an application for a CPCN from FERC triggers the requirement for a 401 WQC. To the contrary, the D.C. Circuit has expressly recognized that a FERC application triggers the need for a 401 WQC. *See Keating v. FERC*, 927 F.2d 616, 619 (D.C. Cir. 1991) ("Both a [FPA] section 4(e) (FERC) license and a section 404 (Corps) permit fall within the terms of 'a Federal license or permit' subject to the state certification requirement under section 401.").

In light of the sequence of events in this case, there can be little question that the trigger for the need to acquire a 401 WQC was its June 13, 2013 application for a CPCN from FERC. The Company's repeated, but unsupported, contentions to the contrary should be disregarded.

II. DEC's Denial Was Well Within Its Jurisdiction Under the Clean Water Act.

Relying almost entirely on *Niagara Mohawk Power Corp. v. New York State Department of Environmental Conservation*, the Company argues that DEC did not have the authority or jurisdiction to deny the 401 WQC. Company Brief at 39-44. However, *Niagara Mohawk* is not controlling or dispositive here, and the Company ignores crucial distinctions between *Niagara Mohawk* and the instant facts. The *Niagara Mohawk* decision was issued in the context of the FPA, not the NGA, a distinction that is critical here. *Niagara Mohawk*, 624 N.E.2d at 146-51. *See* discussion *infra* Section II(A). Further, unlike here, where DEC denied the 401 WQC based on a lack of information directly related to WQS, in *Niagara Mohawk*, DEC was attempting to expressly enforce multiple state standards that the court found were outside the scope of section 401. *See* discussion *infra* Section II(B). Third, despite the Company's attempt to gloss over it, this Court cannot ignore the United States Supreme Court's subsequent interpretation of the scope of section 401 authority in *PUD No. 1 of Jefferson County v. Washington Department*

of Ecology, 511 U.S. 700 (1994), which makes clear that DEC's Denial here was well within its jurisdiction. *See* discussion *infra* Section II(C).

A. *Niagara Mohawk* Was Decided Pursuant to the Federal Power Act, Not the Natural Gas Act, and is Therefore Distinguishable.

In *Niagara Mohawk*, like here, the New York Court of Appeals was examining an appeal from the denial of a 401 WQC by DEC. *Niagara Mohawk*, 624 N.E.2d at 195. The similarity to the instant case ends there. First, unlike this case, *Niagara Mohawk* arose in the context of construction of a dam, not a pipeline. *Id.* at 194. Accordingly, FERC's authority was drawn from the FPA, not the NGA. *Id. at* 196. Although not once mentioned by the Company here, it was this context that drove the *Niagara Mohawk* court's decision:

> We agree with the Appellate Division that the Federal Power Act establishes a comprehensive scheme of Federal regulation of hydroelectric projects that essentially preempts State regulation of hydroelectric facilities within the Federal Energy Regulatory Commission's jurisdiction.

Id. at 196. Thus, when the Court stated that "[r]eview by State agencies that would overlap or duplicate the Federal purview and prerogatives was not contemplated [under CWA section 401] and would infringe on and potentially conflict with an area of the law dominated by the nationally uniform Federal statutory scheme," *id.*, it was the statutory scheme of the FPA, *not* the NGA, that was at issue.

FERC's preemptive powers under the FPA are inapplicable to the NGA because the generation of hydroelectric power requires the damming of rivers, with environmental impacts that overlap with the CWA, whereas the construction of gas pipelines does not impact navigable water in the same way. The FPA provides FERC with comprehensive authority over hydroelectric projects and nearly complete occupation of that field. *See, e.g.*, *E. Niagara Project Power Alliance v. N.Y. Dep't of Envtl. Conservation*, 840 N.Y.S.2d 225 (3d Dep't 2007). FERC's preemptive powers over the hydroelectric projects under the FPA are not transferable to interstate gas pipeline projects under the NGA just because the same agency administers both laws.

First, the statutory language of the two Acts is different. For instance, the FPA discusses consideration of fish and wildlife protection, mitigation, and enhancement in issuing licenses:

> [I]n order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. . . . [S]uch conditions shall be based on recommendations received . . . from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

16 U.S.C. § 803(j)(1) (2012). These licensing powers are not included in the NGA. Furthermore, under the FPA, FERC is mandated to balance a host of

interests in licensing hydroelectric projects, thus rendering its authority under the FPA comprehensive and preemptory. *See* 16 U.S.C. § 803. Any state conditions on top of, or in addition to, FERC's license conditions can conflict with this comprehensive authority. *See, e.g.*, *California v. FERC*, 495 U.S. 490, 506-07 (1990) ("Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination."). The NGA lacks such a mandate to balance a host of interests when issuing CPCNs. There is no comprehensive or elaborate scheme or environmental considerations established by the NGA that FERC must follow or consider in granting the CPCN. *See* 15 U.S.C. § 717f(e) (stating CPCN "shall be issued to any qualified applicant therefor" who can abide by the NGA and FERC's requirements).

Second, courts do not treat the two Acts as the same. For instance, in *Algonquin Gas Transmission Co. v. FERC*, Algonquin Gas sought cost recovery for an unsuccessful import project. *Algonquin Gas Transmission Co. v. FERC*, 809 F.2d 136, 137 (1st Cir. 1987). Algonquin Gas Transmission Company argued "because [FERC] permits electric utilities to recover costs under the Federal Power Act for cancelled electric power projects, the Commission must therefore also permit such cost recovery for failed/discontinued projects under the Natural Gas Act." *Id.*at 142. The First Circuit held "[t]his contention, that two different

industries regulated under two different statutes must be treated exactly alike, is utterly unpersuasive." *Id.*

Furthermore, courts do not even consider the comprehensiveness of the Acts to be similar. In *Niagara Mohawk*, the New York Court of Appeals explained:

> Niagara Mohawk's hydroelectric projects are subject to regulation under part I of the Federal Power Act, which vests in the FERC comprehensive authority over the construction, operation and maintenance of hydroelectric facilities located on the navigable waters of the United States. FERC is required to evaluate and ensure that a given project is founded on a comprehensive plan for the adequate protection and enhancement of wildlife and beneficial public uses, including irrigation, flood control and recreational use.

Niagara Mohawk, 624 N.E.2d at 196. The NGA, on the other hand, is not treated as comprehensively:

> [R]espondents correctly point out that Congress, in enacting the Natural Gas Act, did not give the Commission comprehensive powers over every incident of gas production, transportation and sale. Rather, Congress was 'meticulous' only to invest the Commission with authority over certain aspects of this field, leaving the residue for state regulation.

Fed. Power Comm'n v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 8 (1961). This dissimilarity, both in statutory and judicial construction, precludes FERC from transferring its preemptive powers for hydroelectric projects administered under the FPA to gas pipeline projects administered under the NGA.

Thus, the CWA is not preempted by the NGA, and DEC has its full authority under the CWA in evaluating a 401 WQC.

There can be little question that DEC's authority under CWA section 401 is generally quite broad. States have the power to grant, condition, or deny certification of any federal project that has resulted or may result in the discharge into the navigable waters within the State, thereby giving States an important and powerful role under the CWA. 33 U.S.C. § 1341(a)(1). DEC is the expert on NYS WQS, and FERC will not be given deference in interpreting the scope of that authority. *See Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003). Moreover, DEC, as a state agency, must comply with NYS procedural law, such as the State Environmental Quality Review Act ("SEQRA"), whenever it undertakes or grants approval of an action. *See* N.Y. ENVTL. CONSERV. LAW §§ 8-0105(4), 8-0109(2) (McKinney 2016). The NGA expressly recognizes states' rights and authorities under the CWA. 15 U.S.C. § 717b(d)(3) (2012) ("Except as specifically provided in this chapter, nothing in the chapter affects the rights of States under . . . the Federal Water Pollution Control Act."). In spite of this, the Company inappropriately equates the comprehensive authority of FERC under the FPA to the limited authority of FERC under the NGA.

Consequently, the Company's attempt to impose the preemption standards of *Niagara Mohawk*, which arose under and were the result of the comprehensive

FPA statutory scheme, must be rejected. FERC's authority under the NGA does not preempt DEC's review in this case the way the FPA limited review in *Niagara Mohawk.*

B. DEC's Denial Was Based on the Company's Failure to Provide Information Necessary to Evaluate Impacts to Water Quality Standards, Which is a Permissible Exercise of Its Authority Under Clean Water Act Section 401.

The Company's attempt to apply *Niagara Mohawk* also ignores the tremendous difference between what DEC was attempting to accomplish in that case and the basis for its Denial here. In *Niagara Mohawk,* DEC requested information regarding, and expressly stated it intended to enforce, nine different statutory provisions beyond WQS. *See Niagara Mohawk*, 624 N.E.2d at 195. In sharp contrast here, the notes the Company's failure to provide information on a variety of topics, but in each and every instance, the information expressly relates to the analysis of impacts on *federally approved WQS*. Denial at 14, JA___.

First, DEC stated that it could not approve the 401 WQC application because the Company failed to provide information necessary to determine if the hundreds of stream crossings would comply with 6 NYCRR part 703 and 701, including whether the proposed alternative route would allow better compliance with those standards. Denial at 8-12, JA___. The Company concedes that both sections are part of the federally approved WQS enforceable under CWA section 401. *See*

Company Brief at 41 n.53. In the same way, DEC based the Denial on the Company's lack of information regarding how wetlands crossings would impact *WQS*, Denial at 13-14, JA___, which, again, are within the scope of CWA section 401. Thus, the Company cannot complain that the Denial on those grounds was improper.

For the same reasons, the Company's complaints about "cumulative impacts," Company Brief at 47-48, are meritless. The only "cumulative impacts" referenced by DEC were expressly cumulative impacts *on WQS*. Denial at 7, 14, JA___, ___. The fact that DEC also cited to New York Environmental Conservation Law § 3-0301, which merely provides that the agency should "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 . . .," N.Y. ENVTL. CONSERV. LAW § 3-0301(b) (McKinney 2016), does not somehow make the consideration of cumulative impacts to water quality impermissible.

Likewise, DEC based the Denial on the lack of information from the Company regarding impacts that the depth of the pipeline would have *on WQS*. Denial at 12-13, JA___. Again, unlike *Niagara Mohawk*, where DEC sought information related to multiple different statutory requirements, the information sought by DEC related to pipeline depth, and its basis for the Denial is expressly

limited to information regarding WQS. The Company's claimed fears that DEC would somehow seek to alter or establish a different pipe depth are entirely speculative as DEC did not deny the application because the pipe depth was "wrong" or needed to be altered, it denied the application because it could not fulfill its statutorily-required role of determining compliance with WQS due to a lack of information. *Id.*

Similarly, DEC denied the application because it could not certify that the Company's blasting plans *would comply with WQS*. Denial at 13, JA___. DEC did not seek to alter or prohibit the Company's blasting activities; it sought (and seeks) information related to blasting in order to determine if that activity will comply with WQS, which, again, is within the Company's interpretation of the scope of CWA section 401.

None of the Company's complaints regarding the scope or breadth of DEC's Denial comport with the reality what DEC *actually* stated in its Denial letter. That letter makes clear that the relevant basis for the Denial was compliance with WQS, which is exactly what CWA section 401 permits.

C. The Supreme Court's Decision in *PUD No. 1* Confirms the Breadth of DEC's Authority Under the Clean Water Act and the Propriety of the Denial.

Once a 401 WQC is required, DEC assumes significant power over the project. Although the Company glosses over the decision, the Supreme Court

made the breadth of this authority clear in *PUD No. 1*. In *PUD No. 1*, the Court examined whether conditions imposed under a 401 WQC that related to stream flows and their impacts on salmon and steelhead runs were valid. *PUD No. 1.*, 511 U.S. at 703. Notably, the decision, like *Niagara Mohawk*, was in the context of a dam construction governed by the FPA, not, as discussed above, a pipeline under the less comprehensive NGA. *Id.* at 708-09. The power company argued that the conditions the state sought to impose went beyond merely enforcing WQS, and were therefore beyond the state's authority under CWA section 401.

The Supreme Court held that a state's authority under the CWA is extremely broad and includes the right to impose conditions far from the actual disturbance. *Id.* at 708–09, 723. To reach this decision, the Court reviewed all of CWA section 401.

> Section 401 . . . also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project. Section 401(d) provides that any certification shall set forth 'any effluent limitations and other limitations ... necessary to assure that *any applicant*'will comply with various provisions of the Act and appropriate state law requirements.

Id. at 711 (quoting 33 U.S.C. § 1341(d)) (emphasis in original). The Supreme Court thus upheld state-imposed conditions in a 401 WQC that required minimum stream flows in an undisturbed part of the water body, even though minimum stream flows did not implicate the "discharge" that triggered the 401 certification

requirement. *Id.* at 719-22. The Court went on, agreeing with EPA's interpretation of the scope of the state's authority under CWA section 401:

> In 401(d), the Congress has given the States authority to place any conditions on a water quality certification that are necessary to assure that the applicant comply with effluent limitations, water quality standards, . . . and with 'any other appropriate requirement of State law.' EPA's conclusion that *activities* – not merely discharges – must comply with state water quality standards is a reasonable interpretation of § 401, and is entitled to deference.

*Id.*at 712 (quoting EPA, Wetlands and 401 Certification 23 (Apr. 1989)).

Consistent with this breadth, DEC's position is that "the applicant *must* demonstrate compliance with sections 301-303, 306 and 307 of the [CWA], as implemented" by state WQS, effluent limitations, discharge prohibitions, new source performance standards, and state statutes, regulations and criteria otherwise applicable to the project activities. 6 N.Y.C.R.R. § 608.9 (2016) (emphasis added). Thus, DEC was entitled to seek information related to many activities, such as blasting and pipe burial, to determine whether the Company would comply with WQS. Without this information, the state appropriately denied the application.

Moreover, the Company seeks to limit the "activities" at issue by repeatedly claiming that the section 404 permit was the only trigger for the need for a section 401 WQC. *See* Company Brief at 1, 4-5, 9. This is patently false. As discussed above, in Section I(B)(3), it is unquestionably the application for a CPCN that triggered the need for a 401 WQC here. *See also Keating*, 927 F.2d at 619("[b]oth

a [FPA] section 4(e) (FERC) license and a section 404 (Corps) permit fall within the terms of "a Federal license or permit" subject to the state certification requirement under section 401.").

For these reasons, DEC was well within its authority to seek information related to various activities under the CPCN, and lacking this information, DEC was well within its authority to deny the 401 WQC because it was unable to determine that the activities would comply with WQS.

III. The DEC's Denial Is Based on the Facts and the Law

A. Standard of Review

Agency decisions are reviewed under the deferential arbitrary and capricious standard of the Administrative Procedure Act. *Islander East II*, 525 F.3d at 150-51. The whole record should be reviewed to determine whether an agency acted in an arbitrary and capricious manner. *See* 5 U.S.C. § 706 (2012) ("In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party. . . ."). However, a court's role is narrow, and does not include a weighing of the evidence. *Islander East II*, 525 F.3d at 149-50. If DEC provided a rational basis for the Denial, then its decision must be upheld. *Id.* at 154, 164. This narrow and deferential standard of review is even more limited in this instance as an applicant for a 401 WQC has the obligation to prove that the project will not violate state WQS. *Id.* at 154. ("Mindful that it was Islander East's burden

to demonstrate to the CTDEP that its pipeline project complied with state water quality standards, . . . we consider only whether the agency findings are sufficiently grounded in record evidence rationally to support the challenged conclusion. . . .") (citing *Town of Newtown v. Keeney*, 661 A.2d 589, 594 n.5 (Conn. 1995)).

B. The Company Failed to Provide the Evidence Needed to Prove the Project Would Comply with New York State Water Quality Standards

In the Denial, the DEC states:

> [T]he Application fails in a meaningful way to address the significant water resource impacts that could occur from this Project and has failed to provide sufficient information to demonstrate compliance with New York State water quality standards. Constitution's failure to adequately address these concerns limited the Department's ability to assess the impacts and conclude that the Project will comply water quality standards. Accordingly, Constitution's request for a WQC is denied.

Denial at 1, JA___.

In reaction to the Denial, the Company points out the gigabytes of data it submitted as part of its joint application. Company Brief at 21. However, the Company fails to mention the deep dissatisfaction DEC expressed with the substance of the material provided. An objective review of the record shows that the DEC's Denial is consistent with comments it made during the environmental review process. For example, DEC informed the Company what it expected in the

fall of 2012, when it explained why drilling under streams was the preferred method for crossing them. DEC, Comment on Scope of Environmental Impact Statement for Constitution Pipeline (Nov. 7, 2012) at 3, JA___ ("For streams and wetlands the preferred method for crossing is Horizontal Directional Drilling (HDD) because it has the advantages of minimizing land disturbance, avoiding the need for dewatering of the stream, leaving the immediate stream bed and banks intact, and reducing erosion, sedimentation and Project-induced watercourse instabilities."). DEC also stated that it wished "to avoid the potential for catastrophic erosion events witnessed by NYSDEC staff in previous pipeline installations." *Id.* at 2. These preferences and requirements were reiterated in the spring and summer of 2013. *See* DEC, Preliminary Comments on Constitution Pipeline Draft Reports (March 29, 2013) [hereinafter DEC 3/29/13 FERC Comment], JA___; DEC, Preliminary Comments on Constitution Pipeline Environmental Construction Plan (May 28, 2013), JA ___; DEC, Preliminary Comments (July 17, 2013) [hereinafter DEC 7/17/13 Prelim. Comment], JA____. The content of the documents provided by the Company as part of its Joint Application failed to satisfy DEC's requirements, so its application for a 401 WQC was denied. STP 2/27/15 DEC Comment at 79-84, JA____.

Instead of adjusting its plans to address the DEC's concerns, the Company did everything it could to evade the agency's questions and concerns. *See* STP

12/16/13 FERC Comment, JA___. For example, DEC specifically requested that the project use HDD at all stream and wetland crossings, and a report be prepared explaining when, where, and why the preferred crossing method might not be feasible. DEC 7/17/13 Prelim. Comment at 3-4, JA___. The Company avoided preparing this comprehensive analysis by stating it would evaluate the trenchless stream crossings identified by FERC. Company, Supplemental Environmental Information (November 12, 2013) at App.A at 7 [hereinafter R.1514], JA__. In this manner, the Company attempted to reduce the number of times it would drill under streams, which DEC stated was its preferred method, from over two hundred and fifty to less than ten. DEIS, at, 2-21 – 2-22, JA___. The Company also attempted to subvert DEC's authority, arguing that it only needs to do what FERC requires, and nothing more. In a similar manner, the Company discounted the need for the information requested by DEC for the issuance of a State Pollutant Discharge Elimination System ("SPDES") permit, stating that the files it had provided to FERC were sufficient. STP 12/16/13 FERC Comment at 20-21, JA____. To further diminish DEC's power, it mischaracterized the SPDES permit as "state-specific," and argued that it was not legally obligated to do what the DEC requested as a SPDES permit is pre-empted under the NGA. DEC 3/29/13 FERC Comment at 4, JA___. However, the Company is not authorized to interpret the law as part of its application for a pipeline project. Its responses were not only

arrogant, they were also wrong, because DEC is authorized under federal law to issue SPDES permits. *Id.* *See also* 33 U.S.C. § 1342(b) (2012). The Company's *modus operandi* started early in the regulatory process and never changed. As DEC noted in its Denial letter, "in May 2015, Constitution provided detailed project plans for 25 potential trenchless crossings, but only two of those plans were based on full geotechnical borings that are necessary to evaluate the potential success of a trenchless design. Detailed project plans including full geotechnical borings for the remaining stream crossings have not been provided to the Department." Denial at 11, JA___.

The Company claims that FERC's findings in the FEIS should determine what is required to comply with NYS WQS. Company Brief at 53-54. However, as this Court held in *Islander II*, a state agency, like DEC, is authorized to determine whether a 401 WQC should be issued, and can override decisions made by FERC that affect state WQS. *Islander East II*, 525 F.3d at 164. It is significant that six federal and state agencies found FERC's DEIS to be deficient, and the problems they detected add support to the DEC's Denial. STP 2/27/15 DEC Comment at 8-14, JA____. Even FERC, the lead agency of the environmental review, admitted that an extensive amount of information was missing from the DEIS. *See* STP 4/8/14 DEIS Comment at Ex.1 (citing DEIS), JA____. The additional materials the Company provided in the Joint Application after FERC

issued the DEIS and FEIS did not fix the problem. As STP documented in its extensive comments to the DEC, the material in the record did not provide an adequate foundation for certifying that the project would comply with state WQS. *See* STP 2/27/15 DEC Comment, JA___; STP 5/20/15 DEC Comment, JA___; STP 7/10/15 DEC Comment, JA___. Finally, the standards that FERC and DEC must apply, under National Environmental Policy Act ("NEPA") and the CWA respectively, are vastly different. FERC, as lead agency, must comply with NEPA's procedural requirements and require mitigation that will lessen impacts, whereas DEC must make a substantive determination as to whether the project would comply with the state's WQS. 42 U.S.C. § 4332 (2012); 33 U.S.C. §1341(a)(1).

C. Critical Information Was Submitted Long After DEC Issued Its First Notice of Complete Application

The Company claims the DEC had all of the information it needed when it issued its NOCA, but ignores the fact that an enormous number of documents were submitted during the following year and that it takes time for a regulatory agency to process them. Company Brief at 14, 29, 53-63; Denial at 6-7, JA___. DEC's longstanding policy was to wait for "field delineation and verification of all crossings" before issuing a NOCA. DEC, Weekly Call Minutes (Jan. 29, 2014) at 1, JA___. To overcome this obstacle, which would have delayed its aggressive

construction schedule, the Company met with senior staff in the Governor's office. DEC, Weekly Call Minutes (Feb. 22, 2014) at 9, JA___. The Company's lobbying efforts appear to have paid off, as a NOCA was issued on Christmas Eve of 2014, long before many of the properties had been surveyed and the information required by the DEC had been acquired. Denial, at 6, JA___. Thus, while the Company's interference with DEC's policy lead to an earlier start of the official review process, it did not alter the thoroughness of the process. DEC took the time it needed to review the extensive reports and the 15,000 public comments that were submitted in 2015 in order to make a balanced decision.

During DEC's review process, STP documented when surveys were performed, what information was obtained, when it was incorporated into reports and submitted to the DEC, and when the information became available to the public. STP 5/20/15 DEC Comment, JA___; STP 7/10/15 DEC Comment, JA___. In general, there was a lengthy delay between when the Company performed surveys and when it submitted the data and analyses to the DEC. STP 5/20/15 DEC Comment at 2-5, JA___; STP 7/10/15 DEC Comment at 4, JA___. While the Company claims the application was complete when the NOCA was issued, many surveys had not been performed at that point, and DEC needed time to review materials that were submitted as much as a year later. STP 5/20/15 DEC Comment at 2-5, JA___. The fact that so many documents were filed in the first four months

of 2015 supports DEC's position that the application had to be withdrawn and resubmitted in April 2015.

While the Company claims that FERC's FEIS was sufficient for making a 401 WQC determination, the deficiencies of that document, coupled with the extensive reports and comments submitted to the DEC after the FEIS was issued, proves that the FEIS could not be relied upon to certify that the project would comply with NYS WQS. STP was concerned that information and reports were being submitted in a piecemeal fashion, over an extended period of time, and that an integrated environmental review for all required licenses and permits was not being performed.[3] STP 7/10/15 DEC Comment at 4, JA___. *See also* STP 4/8/14 DEIS Comment, JA___; STP 9/23/14 Letter, JA___; STP 10/17/14 Letter, JA___. However, FERC chose not to provide the analysis needed by DEC, and other agencies, in its environmental review. STP 4/8/14 DEIS Comment at 4, 18-32, JA___. Finally, STP believes that a substantial amount of critical information, including surveys on aquatic species and habitat areas, is still missing from the application. STP 2/27/15 DEC Comment at 2-17, 24-26, 28-29, 35-79, 99-111, JA, ___, ___, ___, ___, ___.

[3] While not an issue in this case, it is STP's position that DEC is required to perform a SEQRA analysis and make findings before it can issue a 401 WQC. This was noted in comments made to the DEC. STP 2/27/15 DEC Comment at 31-32, JA___.

D. The Company Ignores the Vital Role the Public Plays in These Proceedings

The Company characterizes its relationship with DEC staff as one of "cooperation and collaboration" and claims it was told that the 401 WQC would be issued in July or August of 2015. Company Brief at 13. Without conceding the veracity of statements in the affidavits or the legitimacy of filing affidavits, there are three major flaws in the Company's argument.[4] First, DEC staff members with whom it was interacting are not authorized to make a decision on a 401 WQC. Second, draft conditions are not final agency actions, so they prove nothing about DEC's actual decision after all materials were reviewed. Third, the public plays a vital role under the CWA, so behind the scenes negotiations cannot be considered a legitimate part of the process if the public is excluded from the exchange. 33 U.S.C. § 1251(e) (2012); N.Y. ENVTL. CONSERV. LAW § 70-0103(4) (McKinney 2016). There is no law authorizing an agency to make interim decisions in backroom deals, which is why appeals must be taken from final agency actions, not draft permits or informal discussions with staff. 15 U.S.C. § 717r(d)(1).

In this case, DEC received over 15,000 public comments on the Company's application. Denial at 5. Most of these comments were submitted as the direct

[4] While STP did not file a brief in support of the DEC's motion to strike the Company's affidavits, it does not believe that affidavits prepared after the decision are a valid part of the record. If the Court does not strike them, STP requests that it also be allowed to submit affidavits.

result of STP's public education and advocacy, which emphasized the need for strict compliance with NYS WQS in order to protect the state's water.[5] The Company says that it supplied a "Responsiveness Summary" to the DEC, but the CWA does not allow states to delegate their authority to private corporations.[6] Company Brief at 58. DEC is required to review public comments and consider them in relation to the agency's mandate to protect the state's resources. N.Y. ENVTL. CONSERV. LAW § 70-0103(4). The Company's goal, on the other hand, is to gain approval as quickly, with as few restrictions as possible. To accomplish this, it submitted draft permit conditions for itself. Letter from Lynda Schubring, Environmental Product Manager, Constitution Pipeline, LLC., to Stephen Tomasik, Project Manager, DEC (Aug. 21, 2013), JA___. Self-regulation and "negotiated" permit conditions do not ensure compliance with NYS WQS.

STP submitted extensive comments to DEC, including legal and factual reasons why the Company's application for a 401 WQC must be denied. *See* STP 2/27/15 DEC Comment, JA___; STP 5/20/15 DEC Comment, JA___; STP 7/10/15 DEC Comment, JA___. STP's initial comments focused on: (1) deficiencies in

[5] STP established a subsection of its website to educate the public about the 401 WQC, including pertinent sections of laws, copies of the Company's application, and bullet points for writing comments to DEC. STP also ran campaigns to generate comment letters, including an online form. *See* STOP THE PIPELINE, http://dec.stopthepipeline.org (last visited Sept. 9, 2016).

[6] STP could not find this document in the record.

FERC's environmental review process and STP's many attempts to rectify the problems; (2) a description of the relevant federal and state laws; (3) the legal and factual reasons why the Company's application for a 401 WQC must be denied; and (4) a short history of water quality violations caused by two prior interstate gas pipeline projects in NYS. STP 2/27/15 DEC Comment at 2-28, 18-32, 33-118, 118-124, JA___, ___, ___, ___. Also included was an expert report on water quality impacts of the proposed project to streams, wetlands, and species that depend upon aquatic habitats for their survival. *Id*. at Ex.1, JA___. The Company claims that Governor Cuomo interfered in DEC's decision, but offers no proof from documents in the record that he altered DEC's decision. Nor does the Company point to any bad faith on the part of DEC, except to express a *feeling* that it was mislead. *Islander East II*, 525 F.3d at 164 ("While the [DEC] might have made more of an effort to resolve seeming discrepancies in or omissions from Islander East's proposal before issuing its challenged denial, its failure to do so does not demonstrate bad faith or an arbitrary and capricious decision."). Finally, the Company completely ignores the extensive comments STP submitted, which supplied ample justification for the DEC's Denial. *See generally* STP 2/27/15 DEC Comment, JA___. In fact, much of the reasoning in the DEC's decision reflects points made by STP, including the Company's lack of responsiveness to DEC's prior comments and the cumulative (watershed wide) impacts on water

quality caused by clear-cutting, trenching, and multiple upstream crossings. Denial at 7-14, JA___; STP 12/16/13 FERC Comment, JA___; STP 2/27/15 DEC Comment at 2-28, 41-43, 52-60, 79-111, JA___, ___, ___, ___.

E. DEC Learned from Prior Mistakes

The Company argues that because DEC recently approved other pipeline projects, it is arbitrary and capricious for the agency to deny this one. Company Brief at 50, 64-65. However, the Company fails to mention that two earlier pipeline projects, the Iroquois and Millennium Pipelines, resulted in thousands of water quality violations. STP 2/27/15 DEC Comment, at 118-124, JA___. The construction techniques for the Company's proposed project are the same as those used in these prior two pipeline projects, but the impacts would have been greater in this project as the proposed right of way is 50% wider. *Id*. at 119-21, JA___. Thus, similar to *Islander East*, the Company's "argument misses the essential point that the [DEC], with the benefit of hindsight, has now concluded that the Iroquois pipeline failed to comply with the state's water quality standards, and it is this realization that now informs its denial of the [Constitution] proposal." *Islander East II*, 525 F.3d at 157. Also, the projects mentioned by the Company are not comparable in size or scope, nor is the proposed route similar in geography or types of habitat. WQS are based upon the classifications and designated uses of streams and waterbodies, therefore, it is not reasonable to compare a 17-mile long,

12.75 or 16-inch diameter pipeline in the Southern Tier with a 99-mile long, 30-inch diameter pipeline that would tear through the forested slopes of the Western Catskills. STP 2/27/15 DEC Comment at 19-22, JA___. "Where circumstances are thus distinguishable, the different CTDEP rulings do not demonstrate arbitrary or capricious decision-making." *Islander East II*, 525 F.3d at 157.

CONCLUSION

While the Company complains about how long DEC took to issue its decision, much of the delay was caused by the fact that the Company took so long to submit the information DEC needed to review the application. Whatever the reason for the delay, the ultimate Denial was timely, was rational, and was not inconsistent with any law or regulation. As such, it should be upheld, and the Company's petition should be denied.

Respectfully submitted,

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Dated: September 12, 2016
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CERTIFICATE OF COMPLIANCE

I, Todd D. Ommen, the Attorney of Record for the Intervenor Stop the Pipeline herein, hereby certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B), as it contains 11,276 words, excluding the portions of the brief exempted by Fed.R. App. P. 32(a)(7)(B)(iii).

s/ TODD D. OMMEN

Addendum A

Statutes and Regulations

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Clean Water Act

33 U.S.C. § 1341(a)(1)
(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

33 U.S.C. § 1341(d)
(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard

of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. § 1342(b)
(b) State permit Programs
At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

33 U.S.C. § 1251(e)
(e) Public participation in development, revision, and enforcement of any regulation, etc.
Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

Natural Gas Act

15 U.S.C. § 717b(d)(3)

(c) Construction with other laws

Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under—

(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

15 U.S.C. § 717f(e)

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c) (1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

15 U.S.C. § 717n(c)(1)(B)

(c) Schedule

(1) Commission authority to set schedule

The Commission shall establish a schedule for all Federal authorizations. In establishing the schedule, the Commission shall—

(B) comply with applicable schedules established by Federal law.

15 U.S.C. § 717n(c)(2)

(c) Schedule

(2) Failure to meet schedule

If a Federal or State administrative agency does not complete a proceeding for an approval that is required for a Federal authorization in accordance with the schedule established by the Commission, the applicant may pursue remedies under section 717r(d) of this title.

15 U.S.C. § 717r(d)(1)

(d) Judicial Review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

15 U.S.C. § 717r(d)(2)

(d) Judicial Review

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

15 U.S.C. § 717r(d)(4)

(d) Judicial Review

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

Clean Water Act Regulations

33 C.F.R. § 325.2(b)(1)(ii)

(b) Procedures for particular types of permit situations.—

(1) Section 401 Water Quality Certification. If the district engineer determines that water quality certification for the proposed activity is necessary under the provisions of section 401 of the Clean Water Act, he shall so notify the applicant and obtain from him or the certifying agency a copy of such certification.

(ii) No permit will be granted until required certification has been obtained or has been waived. A waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt of such a request unless the district engineer determines a shorter or longer period is reasonable for the state to act. In determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a valid request for certification. If, however, special circumstances identified by the district engineer require that action on an application be taken within a more limited period of time, the district engineer shall determine a reasonable lesser period of time, advise the certifying agency of the need for action by a particular date, and that, if certification is not received by that date, it will be considered that the requirement for certification has been waived. Similarly, if it appears that circumstances may reasonably require a period of time longer than sixty days, the district engineer, based on information provided by the certifying agency, will determine a longer reasonable period of time, not to exceed one year, at which time a waiver will be deemed to occur.

Federal Power Act Regulations

33 C.F.R. § 4.34(b)(5)(iii)
(b) Notice and comment hearings

(5)(iii) A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

Federal Power Act

16 U.S.C. § 803(j)(1)
(b) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

16 U.S.C. § 803
All licenses issued under this subchapter shall be on the following conditions:
(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title1 if necessary in order to secure such plan the

Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.
(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:
(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by--
(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or
(ii) the State in which the facility is or will be located.
(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.
(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.
(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license.

(b) Alterations in project works

That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) Maintenance and repair of project works; liability of licensee for damages

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the

development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

(d) Amortization reserves

That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 808 of this title, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

(e) Annual charges payable by licensees; maximum rates; application; review and report to Congress

(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: Provided, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds

appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended: Provided, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: Provided further, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission: Provided however, That no charge shall be assessed for the use of any Government dam or structure by any licensee if, before January 1, 1985, the Secretary of the Interior has entered into a contract with such licensee that meets each of the following requirements:

(A) The contract covers one or more projects for which a license was issued by the Commission before January 1, 1985.

(B) The contract contains provisions specifically providing each of the following:

(i) A powerplant may be built by the licensee utilizing irrigation facilities constructed by the United States.

(ii) The powerplant shall remain in the exclusive control, possession, and ownership of the licensee concerned.

(iii) All revenue from the powerplant and from the use, sale, or disposal of electric energy from the powerplant shall be, and remain, the property of such licensee.

(C) The contract is an amendatory, supplemental and replacement contract between the United States and: (i) the Quincy-Columbia Basin Irrigation District (Contract No. 14-06-100-6418); (ii) the East Columbia Basin Irrigation District (Contract No. 14-06-100-6419); or, (iii) the South Columbia Basin Irrigation District (Contract No. 14-06-100-6420).

This paragraph shall apply to any project covered by a contract referred to in this paragraph only during the term of such contract unless otherwise provided by subsequent Act of Congress. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

(2) In the case of licenses involving the use of Government dams or other structures owned by the United States, the charges fixed (or readjusted) by the Commission under paragraph (1) for the use of such dams or structures shall not exceed 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces in any year, 1 ½ mills per kilowatt-hour for over 40 up to and including 80 gigawatt-hours in any year, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours in any year. Except as provided in subsection (f) of this section, such charge shall be the only charge assessed by any agency of the United States for the use of such dams or structures.

(3) The provisions of paragraph (2) shall apply with respect to--

(A) all licenses issued after October 16, 1986; and

(B) all licenses issued before October 16, 1986, which--

(i) did not fix a specific charge for the use of the Government dam or structure involved; and

(ii) did not specify that no charge would be fixed for the use of such dam or structure.

(4) Every 5 years, the Commission shall review the appropriateness of the annual charge limitations provided for in this subsection and report to Congress concerning its recommendations thereon.

(f) Reimbursement by licensee of other licensees, etc.

That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by

the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.
Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 810 of this title.
Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.

(g) Conditions in discretion of Commission

Such other conditions not inconsistent with the provisions of this chapter as the Commission may require.

(h) Monopolistic combinations; prevention or minimization of anticompetitive conduct; action by Commission regarding license and operation and maintenance of project

(1) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

(2) That conduct under the license that: (A) results in the contravention of the policies expressed in the antitrust laws; and (B) is not otherwise justified by the public interest considering regulatory policies expressed in other applicable law (including but not limited to those contained in subchapter II of this chapter) shall be prevented or adequately minimized by means of conditions included in the license prior to its issuance. In the event it is impossible to prevent or adequately minimize the contravention, the Commission shall refuse to issue any license to the applicant for the project and, in the case of an existing project, shall take appropriate action to provide thereafter for the operation and maintenance of the affected project and for the issuing of a new license in accordance with section 808 of this title.

(i) Waiver of conditions

In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this subchapter, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: Provided, That

the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

Subsection (i) of this section shall not apply to the conditions required under this subsection.

New York Environmental Conservation Law

§ 3-0301(1)(b)

(1) It shall be the responsibility of the department, in accordance with such existing provisions and limitations as may be elsewhere set forth in law, by and through the commissioner to carry out the environmental policy of the state set forth in section 1-0101 of this chapter. In so doing, the commissioner shall have power to:

(b) Promote and coordinate management of water, land, fish, wildlife and air resources to assure their protection, enchancement, 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;

§ 8-0105(4)(i)-(ii)

(4) Actions" include:

(i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies;

(ii) policy, regulations, and procedure-making.

§ 8-0109(2)

(2) All agencies (or applicant as hereinafter provided) shall prepare, or cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment.

§ 70-0103(4)

The legislature finds and declares that:

(4) It is the intent of the legislature to encourage public participation in government review and decision-making processes and to promote public understanding of all government activities.

New York Environmental Conservation Regulations

6 N.Y.C.R.R. § 608.9(a)

(a) Water quality certifications required by section 401 of the Federal Water Pollution Control Act, Title 33 United States Code 1341 (see subdivision [c] of this section).

Any applicant for a Federal license or permit to conduct any activity, including but not limited to the construction or operation of facilities that may result in any discharge into navigable waters as defined in section 502 of the Federal Water Pollution Control Act (33 USC 1362), must apply for and obtain a water quality certification from the department. The applicant must demonstrate compliance with sections 301-303, 306 and 307 of the Federal Water Pollution Control Act, as implemented by the following provisions:

(1) effluent limitations and water quality-related effluent limitations set forth in section 754.1 of this Title;

(2) water quality standards and thermal discharge criteria set forth in Parts 701, 702, 703 and 704 of this Title;

(3) standards of performance for new sources set forth in section 754.1 of this Title;

(4) effluent limitations, effluent prohibitions and pretreatment standards set forth in section 754.1 of this Title;

(5) prohibited discharges set forth in section 751.2 of this Title; and

(6) State statutes, regulations and criteria otherwise applicable to such activities.

Administrative Procedure Act

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1)compel agency action unlawfully withheld or unreasonably delayed; and

(2)hold unlawful and set aside agency action, findings, and conclusions found to be--

(A)arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B)contrary to constitutional right, power, privilege, or immunity;

(C)in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D)without observance of procedure required by law;

(E)unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F)unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

National Environmental Policy Act

42 U.S.C. § 4332

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
(ii) the responsible Federal official furnishes guidance and participates in such preparation,
(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.
The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;
(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;
(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;
(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and
(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

Addendum B

Stop the Pipeline Supplemental Comment Letter, dated May 20, 2015

PACE ENVIRONMENTAL LITIGATION CLINIC, INC.

PACE UNIVERSITY SCHOOL OF LAW
78 NORTH BROADWAY
WHITE PLAINS, NEW YORK 10603
PHONE: 914.422.4343
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SUPERVISING ATTORNEYS
KARL S. COPLAN
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ADMINISTRATOR
JENNIFER RUHLE

May 20, 2015

Via email (DEPPermitting@dec.ny.gov) and UPS Overnight

Stephen M. Tomasik
DEC - Division of Environmental Permits
625 Broadway, 4th Floor
Albany, NY 12233-1750

Regarding:

Application ID: 0-9999-00181/00009 - Water Quality Certification
Application ID: 0-9999-00181/00010 - Freshwater Wetlands
Application ID: 0-9999-00181/00011 - Water Withdrawal
Application ID: 0-9999-00181/00012 - Excavation and Fill in Navigable Waters
Application ID: 0-9999-00181/00013 - Stream Disturbance
Application ID: 4-4350-00008/00012 - Air Title V

Dear Mr. Tomasik:

On behalf of our client, Stop the Pipeline ("STP"), the Pace Environmental Litigation Clinic, Inc. ("PELC") hereby supplements its February 27, 2015 comments on the Joint Application for a Water Quality Certification ("WQC") and four water related permits, and submits a comment on the Title V Clean Air Act permit based upon newly acquired information. The certificate and five permits are being sought for the proposed Constitution Pipeline / Iroquois Compressor Station Project ("Project"). While STP's February 27, 2015 comments to

the Department documented many of the deficiencies in the Federal Energy Regulatory Commission's ("FERC") environmental impact statement and Constitution Pipeline Company's ("Company") Joint Application, DEC has another year before it must make a decision on the WQC now that the Company has withdrawn and resubmitted its application. Given this change in the legal status of the application, STP respectfully requests that all of the missing information be provided to the public and a new sixty-day comment period be opened once a truly complete application is available.

I. The Joint Application Is Not Complete.

On December 24, 2014, DEC issued a Notice of Completion for the proposed Constitution Pipeline, noting that the Joint Application is available on the Company's website.[1] Three sets of documents are stored there: (1) the original application, which was filed in August 2013; (2) a supplemental filing, from November 2013; and (3) a second supplemental filing made in August 2014.[2] The cover letter for the most recent filing summarizes what information was added or revised between November 2013 and August 2014.[3] (See Exhibit 1.) While the time frame between filings appears to include a complete growing season, the information in most of the pertinent attachments was gathered from late summer or early fall of 2013 through June 3, 2014. During most of those months accurate biological surveys and field delineation of

[1] *ENB - Statewide Notices 12/24/2014*, N.Y. ST. DEP'T OF ENVTL. CONSERVATION (Dec. 24, 2014), http://www.dec.ny.gov/enb/20141224_not0.html.

[2] CONSTITUTION PIPELINE CO., JOINT APPLICATION, *available at* https://www.dropbox.com/sh/uqd0quuiifpt0j8/AADdMecLxKvzM0ruWyOxsQh5a?oref=e&n=358617499.

[3] CONSTITUTION PIPELINE CO., COVER LETTER (Aug. 13, 2014), *available at* https://www.dropbox.com/sh/uqd0quuiifpt0j8/AAC0vWZQR4js8BErI7uUGe3Ya/August%202014%20-%20Supplemental%20Filing%20No.%202?dl=0.

wetlands cannot be performed as the significant and indicative species are not active or alive. For example, in terms of the Site-Specific Drawings for Wetlands and Waterbodies, which are located in Attachment E, the cover letter states:

> a. Revised site-specific drawings are included in this attachment for all wetlands and waterbodies crossed by the Project in New York, depicting updated Project impacts related to the modified route and new wetlands and/or waterbodies field delineated from September 6, 2013 through June 3, 2014.

Field delineation of wetlands requires the identification of vegetation, which is not possible during the late fall, winter, or early spring. Thus, while the filing states the application was updated in August 2014, most of the information gathering ended months earlier, by the end of May 2014. Also, most parcels could not be surveyed from late-fall 2013 through mid-spring 2014 because the indicative species were not active, or growing, during the long winter months.

In addition to the information that was not included for parcels on which survey access had been granted, the supplemental filing states that fourteen percent of the parcels in New York State (twenty-one percent in Delaware County) had not been surveyed as of June 3, 2014 because access had been denied.[4] The accuracy of these percentages is questionable as from January 1, 2015 to May 12, 2015, one hundred and nine easement agreements and court ordered easements to the Company were recorded in the Office of the Delaware County Clerk. Since there are two hundred thirty-four affected parcels of land in Delaware County,[5] it appears that a higher percentage of parcels of land were not surveyed as of August 2014. In either case, there

[4] CONSTITUTION PIPELINE CO., ATTACHMENT I, 1 (Aug. 2014), *available at* https://www.dropbox.com/sh/uqd0quuiifpt0j8/AAC0vWZQR4js8BErI7uUGe3Ya/August%202014%20-%20Supplemental%20Filing%20No.%202?dl=0.

[5] *Id*.

was a significant amount of missing information in the second supplemental filing that has not been made available to the public.

On April 29, 2015, DEC issued a new Notice of Completion for the withdrawn and resubmitted Joint Application, stating no new information was provided.[6] Since almost all of the information in the most current application was acquired before June 3, 2014, the "complete" application does not include any survey information from the past year, or from the surveys that are currently being performed based upon access acquired by eminent domain. This past winter one hundred and twenty one complaints in condemnation were filed in the Northern District of New York, and an injunction has been granted for immediate access to the land in almost all that did not settle.[7] Surveys are currently being performed on these parcels of land.

On May 19, 2015, the Company filed 114 supplemental documents, containing 748 megabytes of data.[8] While these documents are described as being part of an Implementation Plan ("IP"), they contain countless changes to the proposed project that will require more surveys and environmental analysis. For example, file numbers thirty-three to forty-one (IP 5) contain changes that were not previously filed with FERC, and many of them are not even shown on the newly submitted alignment sheets. In file number 105 (IP 20) five new contractor yards are being proposed. In a quick perusal of this material it is apparent that there would be many water quality impacts that have never been disclosed or considered. In Table 4 of file number 106 (IP 29), the Company is proposing to cut over forty-one miles of forests this summer,

[6] *ENB - Statewide Notices 4/29/2015*, N.Y. ST. DEP'T OF ENVTL. CONSERVATION (April 29, 2015), *available at* http://www.dec.ny.gov/enb/20150429_reg0.html.

[7] *Constitution Pipeline, Co. v. Certain Permanent & Temporary Easements*, 1:14-cv-02000-NAM-RFT — 3:14-cv-02120-NAM-RFT (N.D.N.Y. Dec. 12-23, 2014).

[8] Constitution Pipeline Company, Implementation Plan (May 19, 2015), *available at* http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20150519-5135.

outside of the official tree-clearing season. This would have profound impacts on New York State water quality, and on the species the State's water quality standards are supposed to protect.

An application that is missing so much information in regard to water quality impacts is an incomplete application. This is also the official position of the DEC, but that policy may have been changed without justification. Over the past few years STP has been obtaining documents exchanged between DEC and the Company through freedom of information requests.[9] On January 29, 2014 a weekly conference call was held between the Company and DEC that included a discussion of "DEC stance on non-access parcels." According to the notes of the call, Stephen Tomasik stated that the "NYSDEC position is that a complete application requires field delineation and verification of all crossings. . . ."[10] (See Exhibit 2.) However, on December 24, 2014, when the Notice of Completion was announced, at least fourteen percent of the parcels in New York State had not been field delineated, and many stream and wetland crossings had not been verified.

II. A Health Impact Assessment Must Be Prepared Prior to the Issuance of any Certificates or Permits.

Many STP members requested a comprehensive health impact assessment ("HIA") of the pipeline, compressor station(s), and other facilities during the scoping phase of the environmental review conducted by FERC.[11] Comments objecting to the absence of a HIA in

[9] Electronic copies of these documents are attached as appendices.

[10] CONSTITUTION PIPELINE CO., NYSDEC/Constitution Status Call Notes (Jan. 29, 2014), (Exhibit 2).

[11] Scoping and other comments, Name / Accession No. in FERC's eLibrary, Docket PF12-9: Sanders / 20120924-5008; Sanders / 20120927-5003; Huston / 20121009-5180; US House of Representative Chris

FERC's Draft Environmental Impact Statement were also filed.[12] However, the Final Environmental Impact Statement also failed to mention a health impact assessment. In November 2014, the Center for Sustainable Rural Communities submitted an addendum to its comment on the DEIS.[13] Attached were three appendices of recent scientific studies of health impacts associated with the extraction and transport of oil and gas. The significance of the first study was noted:

> The key finding of this study is that short-term spikes in toxic emissions within a half-mile of gas production and transportation infrastructure often exceed federal emission guidelines by several orders of magnitude. These short-term spikes represent a causal mechanism for recently reported correlations between proximity to gas infrastructure and negative health status.[14]

In other words, compliance with air emissions requirements does not mean there are no health impacts. (All of these comments, which were submitted to FERC, are hereby incorporated by reference.).

STP members submitted similar comments to the DEC prior to February 27, 2015. Then, in early May, the Medical Society of the State of New York ("MSSNY") passed a resolution calling for a comprehensive health impact assessment for natural gas infrastructure. (See Exhibit 3.) This recent development raises a significant issue that warrants an adjudicatory hearing.

Gibson letter regarding the 3/19/13 letter of Schoharie County Board of Supervisors requesting a comprehensive health impact assessment / 20130624-0014; Chairman Wellinghoff's response to Rep. Gibson in Docket CP13-499 / 20130718-0035.

[12] Center for Sustainable Rural Communities, Comment on DEIS (April 4, 2014), *available at* http://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20140404-5051.

[13] Center for Sustainable Rural Communities, Addendum to comment on need for health impact assessment (Nov. 18, 2014), *available at* http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20141119-5058.

[14] *Id*. Statement in letter regarding Appendix A: Air concentrations of volatile compounds near oil and gas production: a community-based exploratory study, Gregg P. Macey, Ruth Breech, Mark Chernaik, Caroline Cox, Denny Larson, Deb Thomas and David O. Carpenter.

III. Supplemental Materials Need to be Considered.

The likelihood of pipeline construction and operation causing water related damage based on extreme weather events was discussed in STP's February 27, 2015 comments. Since then, STP has become aware of an official study, a federal advisory regarding flooding, and two recent pipeline ruptures that need to be considered by the DEC. The New York State Attorney General published a report on the impacts of extreme storm events in New York State.[15] In a related bulletin based upon potential impacts from flooding, scouring and river migration, the U.S. Department of Transportation issued a pipeline safety advisory in the Federal Register pertinent to operations throughout the United States.[16] Simultaneously, pipeline ruptures took place on two pipelines owned by Williams in West Virginia as a result of spring storms.[17] It is simply unreasonable for the Company to rely on a five-year storm event as the basis of its application and mitigation plans given the present reality of climate change impacts in New York State.

[15] New York State Office of the Attorney General, Current and Future Trends in Extreme Rainfall Across New York State (Sept. 2014), *available at* https://www.ag.ny.gov/pdfs/Extreme_Precipitation_Report%209%202%2014.pdf.

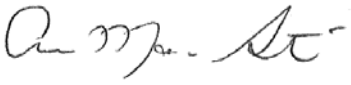
[16] Pipeline and Hazardous Materials Safety Administration, United States Department of Transportation, Pipeline Safety: Potential for Damage to Pipeline Facilities Caused by Flooding, River Scour, and River Channel Migration, FEDERAL REGISTER (April 9, 2015).

[17] Casey Junkins, Heavy Rains Cited In Marshall Pipeline Failure, THE INTELLIGENCER (April 11, 2015), *available at* http://www.theintelligencer.net/page/content.detail/id/630275/-Heavy-Rains--Cited-In-Marshall----.html.

IV. Conclusion

We respectfully request that all of the missing information for the proposed pipeline be integrated and shared with the public, and the complete application then be reopened for public comment. In addition, adjudicatory hearings on the health impacts of natural gas infrastructure, including compressor stations should be held.

Respectfully submitted,



Daniel E. Estrin
Supervising Attorney

Volunteer Attorney

Attachments: Exhibits 1-3

Enclosure (with hard copy only): Appendix contained on one compact disc

Exhibit 1

Cover Letter to DEC

August 13, 2014

AECOM
125 Rock Road
Horsham, Pennsylvania 19044
www.aecom.com

215.315.4315 tel
215.315.4151 fax

August 13, 2014

Mr. Steven Tomasik
New York State Department of Environmental Conservation
Major Projects Management Section
Division of Environmental Permits
NYS Department of Environmental Conservation
625 Broadway - 4th Floor
Albany, NY 12233-1750

Subject: **NYSDEC and USACE Joint Application – Supplemental Information #2**
Constitution Pipeline Company, LLC
Constitution Pipeline
Broome, Chenango, Delaware, Otsego and Schoharie Counties, New York

Dear Mr. Tomasik:

On behalf of Constitution Pipeline Company, LLC (Constitution), supplemental information is being submitted in support of its Joint Application/verification which was initially submitted in August 2013, with a supplemental information filing (#1) submitted in November 2013. Applications were submitted to the U.S. Army Corps of Engineers (USACE) for authorization under Section 404 of the Clean Water Act (CWA) and with the New York State Department of Environmental Conservation (NYSDEC) to satisfy the requirements for obtaining a Section 401 Water Quality Certification (Application ID: 0-9999-00181/00001) for the proposed Constitution Pipeline (Project). Constitution is also submitting this supplemental information in support of its Joint Application/verification for purposes of review and coordination with the NYSDEC under the Protection of Waters Permit and a Freshwater Wetlands Permit programs (Application ID: 0-9999-00181/00002, 0-9999-00181/00003, and 0-9999-00181/00004).

This supplement provides updated information for components of the Project that have been modified or provides new information that has been obtained since the initial Joint Application submission in August 2013 and supplemental information filing #1 in November 2013. Specifically, this submission includes new information resulting from minor deviations to the pipeline proposed route alignment (primarily due to landowner requests, agency consultations, or engineering concerns), impacts associated with temporary and permanent access roads, contractor yards and updated wetland and waterbody survey data collected in the field from September 6, 2013 through June 3, 2014. The following revisions and additional data are being provided in support of these adjustments:

1. **Project Narrative (Revised – updated with new or changed information)**
    a. Revisions to the Joint Application narrative are limited to the replacement of specific impact tables that contain new or modified information that has been obtained since the November 2013 supplemental filing. In addition to this, Section 3.2.3.3 of the narrative has been expanded to include specific language relative to the crossing of locations within the watersheds associated with three reservoir systems that serve the Village of Cobleskill, Village of Schoharie, and serve as a backup source for the Village of Sidney. The supplemental text that has been added to the narrative is identified in blue print, and a note has been included at base of each table to indicate whether a complete replacement has occurred or if changes were limited to specific components of the table.

2. **Attachment A – Forms (Revised – updated with new or changed information)**
    a. This attachment to the Joint Application contains minimal revisions consisting of the following:
        i. Modification of the Item 8 Form – added town of Milford, Otsego County to list of towns affected by Project due to the addition of Contractor Yard 4A;
        ii. Revisions to the Structural Archaeolgoical Assessment Form (SAAF) ;

iii. No modifications to the Environmental Questionnaire have been made, therefore it is not included.

3. **Attachment B – Figures (Revised – updated with new or changed information)**
   a. Previously submitted Project figures have been updated to reflect the current Project alignment.

4. **Attachment C – FERC Alignment Sheets (Revised – updated with new or changed information)**
   a. Revised alignment sheets depicting the modified Project route, access roads, the Westfall Meter Station, and Contractor Yards proposed for the Project are provided in this attachment. Additional changes to the Project alignment sheets include the incorporation of the best management practices (BMPs) to be implemented at specific resource areas in the Environmental Site Specific E&S band of the alignment sheets. The BMPs identified on the alignment sheets are identified by their typical detail drawing number as included in the Environmental Construction Plan (Attachment D).

5. **Attachment D – Environmental Construction Plan (Revised – updated with new or changed information)**
   a. Supplemental material includes the following:
      i. A Free-span Temporary Equipment Bridge typical detail drawing; and
      ii. A modified New York Invasive Species Management Plan and associated mapping, outlining proposed locations for equipment cleaning stations and procedures for working within locations containing invasive species.

6. **Attachment E – Wetland and Waterbody Site-Specific Drawings (Revised – updated with new or changed information)**
   a. Revised site-specific drawings are included in this attachment for all wetlands and waterbodies crossed by the Project in New York, depicting updated Project impacts related to the modified route and new wetlands and/or waterbodies field delineated from September 6, 2013 through June 3, 2014.

7. **Attachment F – Agency Correspondence (Revised – updated with new information)**
   a. This attachment to the Joint Permit has been revised to include all correspondence that has occurred since submission of the November 2013 supplemental filing.

8. **Attachment G – Hydraulic and Hydrologic Analysis Calculations (Revised – updated with new information)**
   a. This attachment includes two analysis reports detailing hydrologic and hydraulic calculations for waterbodies crossed by the Project, as well as silt fence design criteria and methodology performed as part of a comprehensive erosion and sedimentation design for the Project.

9. **Attachment H – Wetland Delineation Report (Revised – updated with new information)**
   a. Material within the Wetland Delineation Report is limited to new wetland and waterbody features that have been field delineated from September 6, 2013 through June 3, 2014, and thus were not included in the November 2013 supplemental information filing (#1). Wetland and Waterbody data sheets included within this document are organized first by the feature type (wetland vs. waterbody), then by county of occurrence, then by team number, and lastly by feature number. Additionally, to simplify review and searching for specific features contained within both the digital and hardcopy of the delineation report, Constitution has digitally bookmarked each of the feature datasheets within the electronic copy and provided tabs identifying each county and team number within the hardcopy document.

10. **Attachment I – Landowner Line List (Revised – updated with new or changed information)**
    a. Information on parcels crossed by the Project and landowners of record within Attachment I has been updated to include a summary table of the total parcel number, total parcel distance, and overall percent complete for wetland and waterbody surveys. Additionally, the table of

parcels and landowners crossed has been updated to include the mile posts along the pipeline for each parcel crossed by the Project, the wetland and waterbody survey completion status of the parcel, and mapping of the Project that identifies parcels where survey has and has not been completed.

11. **Attachment J – Waterbody and Wetland Impact Master Table (Revised – updated with new or changed information)**
    a. Details within the master table have been expanded to include a portion of the specific items recommended in the July 3, 2014 memorandum received from the NYSDEC.

12. **Attachment K – Wetland Mitigation Plan (Revised – updated with new or changed information)**
    a. The Project mitigation plans have been modified to incorporate impact totals relative to wetlands delineated from September 6, 2013 through June 3, 2014, and the subsequent reduction in impacts to remote-sensed wetlands previously detailed within the mitigation plan submitted in November 2013, NYSDEC wetlands associated with the Project delineated between the dates referenced above, a breakdown of mitigation type based on criteria identified by the NYSDEC, site plans of proposed mitigation locations, and a schedule for post-construction monitoring.

13. **Attachment Q – Trout Stream Restoration Report (New information)**
    a. Constitution has developed site-specific restoration procedures to address concerns relative to the restoration of streambeds and banks following installation of the pipeline facilities. These procedures have been designed to minimize issues at specific sensitive waterbody locations and were developed following the stream visits with the NYSDEC and USACE conducted in July and August 2013, and April 2014.

14. **Attachment R – Wetlands and Waterbodies with a Crossing Method Change Since November 2013 Application Filing (New information)**
    a. This attachment contains a table of wetland and waterbodies where the proposed crossing method has changed since the November 2013 submittal. Justification for each crossing method has also been provided within the table.

15. **Attachment S – Agency Requested Route Modifications and Status for the Constitution Pipeline in New York (New information)**
    a. This attachment includes a table that details all the NYSDEC/USACE requested re-routes and applicant proposed re-routes associated with the Project reviewed since August 2013. The table details whether or not a proposed re-route was incorporated into the Project route alignment or provides the justification if a proposed re-route was not incorporated.

Constitution received a Notice of Incomplete Application from the NYSDEC, dated September 12, 2013 identifying additional steps and information required so that the application could be deemed complete for purposes of public review and comment under the New York State Uniform Procedures Act (UPA). Constitution addressed these items in the NYSDEC Notice of Incomplete Application Response Tracking Table attached to their cover letter dated November 27, 2013 submitted with the supplemental information filing #1. That tracking table includes information on the location of NYSDEC-identified incomplete items in the Joint Application Project narrative and supporting documentation. Additionally, Constitution received a memorandum from the NYSDEC, dated July 3, 2014, identifying recommendations to Constitution for preparation of revised materials to support their Joint Application for Permit, and conducted a subsequent meeting with the NYSDEC and USACE staff on July 9, 2014, to discuss the recommendations. Below is a brief response to the July 3, 2014 memorandum from the NYSDEC indicating where the requested or recommended information is contained within the current and/or previously submitted application. For ease of review, the recommendations by the NYSDEC are detailed in italicized font, followed by Constitution's response as to location within the support documentation submitted to date where the requested information can be found. The responses are consistent with the discussions that took place between the NYSDEC, USACE, AECOM, and Constitution on July 9, 2014.

Response to the July 3, 2014 NYSDEC Recommendations Memorandum

1.0 Organization

Provide a master table (e.g., Appendix J) as a key to reference all documents related to each specific crossing.

1.1 Identify each crossing shown on the master table with a specific code (milepost number to .01 is recommended). Label all documents in the application related to each specific crossing with the same code.

Attachment J (Waterbody and Wetland Impacts Master Table) of the current supplemental filing includes a revised master table addressing the requested items detailed above. Each resource area crossed by the Project is included in this document with revised milepost locations.

1.2 Identify parcels where survey access has not been granted by the landowner, preferably in a specific color or shading. For these parcels, describe the opportunities and limitations available to do minor re-routing after field surveys are conducted.

1.3

Attachment I (Land Owner Line List) of the current supplemental filing includes color-coded mapping depicting the status of survey access permission for the Project and a corresponding table, organized by land tract which provides additional details pertaining to each individual land parcel crossed by the Project as depicted on the Project alignment sheets (Attachment C). Minor re-routing of the pipeline after field surveys are conducted will be dependent upon surrounding environmental and/or cultural features, constructability, approval from federal agencies, landowner agreement, and approval of a variance request from the Federal Energy Regulatory Commission (FERC). These requirements are outlined in FERC's variance procedures.

1.3 At the end of the master table, provide totals for all of the following:
a. Temporary impacts to DEC streams.
b. Permanent impacts to DEC streams.
c. Temporary impacts to DEC wetlands.
d. Permanent impacts to DEC wetlands (including all conversion of forested wetland to non-forested wetland).
e. Temporary impacts to DEC wetland adjacent areas.
f. Permanent impacts to DEC wetland adjacent areas.
g. Temporary impacts to exclusively USACE-jurisdictional streams.
h. Permanent impacts to exclusively USACE-jurisdictional streams.
i. Temporary impacts to exclusively USACE-jurisdictional wetlands.
j. Permanent impacts to exclusively USACE-jurisdictional wetlands.
k. Combined DEC-USACE totals for all categories above.
l. Combined totals for parcels where survey access has been granted.
m. Combined totals for parcels where survey access has not been granted.

New table 3.3-6c included in the Project narrative details information requested in items 1.3a through 1.3l above. Revised and new tables 3.3-6 and 3.3-6b, respectively, include information requested in items 1.3l and 1.3m above.

2.0 Content

2.1 Provide GIS shape files for the route and all temporary and permanent ancillary facilities.

A digital copy of the shape files associated with the current Project route and ancillary facilities have been included with this supplemental application.

2.2 For each property where a regulated activity is proposed, provide the tax map number and the name of the property owner. This includes properties proposed to be crossed by the pipeline or proposed to be used by Constitution for any temporary or permanent ancillary facility.

Attachment I (Land Owner Line List) of the current supplemental filing incudes includes the parcel tax map number and the name of the property owner for all properties crossed by the Project.

2.3 Provide a construction environmental monitoring plan that allows for an independent third-party monitor.

Constitution is currently developing a third party monitoring plan which will be submitted to FERC during the implementation plan phase of the Certificate process. Constitution is and will continue to coordinate with the NYSDEC and the USACE for development of a monitoring plan.

2.4 Provide, at a minimum, the following details for each crossing:

2.4.1 Map panel at a scale sufficient to assess project impacts and proposed control measures. Each map panel should include:

a. Crossing code (milepost number).
b. Property boundary.
c. Property owner name and tax map number.
d. Right-of-Way (ROW) boundary.
e. Project limits of disturbance.
f. Contours (10 feet or less).
g. Regulated resource boundary (delineated wetland, DEC adjacent area, stream, 50-foot bank or other high-water limit) with the area of proposed disturbance shown.
h. For all DEC-jurisdictional resources, label showing DEC ID (DEC wetland number, Fisheries Index Number [FIN]).
i. Text box for each area of regulated disturbance to show DEC ID, area and/or length of temporary and permanent disturbance, area of temporary and permanent forest conversion.
j. Location and type of pipeline crossing method.
k. Location of temporary equipment crossings.
l. Location of proposed temporary stream structures (dam & pump, etc.).
m. Location of permanent stream control measures.

Attachment E (Wetland and Waterbody Site-Specific Drawings) of the current supplemental information filing depicts information requested in items 2.4.1a-b, d-g, i-m above. Attachment I (Land Owner Line List) of the current supplemental information filing includes information requested in item 2.4.1c above. Attachment J (Waterbody and Wetland Impact Master Table) of the current supplemental information filing includes information requested in item 2.4.1h above.

2.4.2 Color photos of each proposed regulated area.
2.4.3 Documentation of existing wetland vegetation.

Attachment H (Wetland Delineation Report) and Attachment K (Wetland Mitigation Plan) provide extensive descriptions on the existing wetland vegetation and included site photographs of each resource area.

2.4.4 Temporary equipment bridge details.
2.4.5 Pipeline installation crossing method and details, including:
a. Temporary stream water management (dam & pump, etc.).
b. Wetland topsoil segregation.
c. Blasting plan (if required).

2.5 Access road culvert details (conforming to DEC stream crossing guidance).

Attachment D (Environmental Construction Plan) of supplemental information filing #1 submitted in November 2013 includes information requested in items 2.4.4 and 2.4.5 above. New information included in the Attachment D of the current supplemental filing includes a new construction detail (FIGURE NO. 2A) depicting a free span temporary equipment bridge crossing detail. Information requested in item 2.5 above

pertaining to culverts proposed at specific locations along access roads can be found on the full-size site plan drawings for access roads included in Attachment C (FERC Alignment Sheets) as well as the access road waterbody and wetland site-specific drawings included in Attachment E of the current supplemental information filing.

2.6 Ancillary project facilities (pipe yards, meter stations, cell towers, water withdrawal staging areas, etc.) site plans (where regulated resources are impacted).

Attachment B (Figures), Attachment D (FERC Alignment Sheets) and Attachment E (Waterbody and Wetland Site-Specific Drawings) of the current supplemental information filing depict Project facilities as well as the delineated boundaries of all regulated resource areas within the survey corridor associated with the Project.

2.7 Avoidance and minimization narrative for proposed regulated disturbances and all temporary and permanent facilities.

Section 3.3.9 (Avoidance, Minimization and Mitigation) of the November 2013 supplement filing provides a summary of the proposed avoidance and minimization measures to be implemented by Constitution during construction of the Project.

3.0 Site restoration and maintenance

3.1 Provide a list of planting mixes for upland and wetland disturbances (both temporary and permanent), and a proposed restoration planting plan for each crossing location.

Attachment D (Environmental Construction Plan) of the November 2013 supplemental filing and Attachment K (Wetland Mitigation Plan) of the current submission provides a list of planting mixes for both temporary and permanent site stabilization in uplands and wetlands. Section 6.1 of the current Wetland Mitigation Plan provides details on the species selected for restoration of wetland locations outside the operational ROW.

3.2 Provide an invasive species management plan with a goal of 0% net areal increase in invasive species.

3.3 Provide proposed methods to control invasive species (hand clearing, herbicides, etc.).

3.4 Provide a monitoring schedule to include a regular schedule for site inspection and reporting to the regulatory agencies.

Attachment D (Environmental Construction Plan) of the current supplemental filing contains a modified New York Invasive Species Management Plan and associated Project mapping, outlining proposed locations for equipment cleaning stations, procedures for working within locations containing invasive species and the methodology Constitution utilized to determine the appropriate locations for the proposed cleaning stations. The construction, restoration and monitoring procedures detailed in Section 3.0 of the New York Invasive Species Management Plan are anticipated to minimize the transport of invasive species during all phases of the Project.

4.0 Conceptual mitigation plans

4.1 Provide total wetland and wetland adjacent area impacts (see notes on "master table," above) to include all wetland impacts, all NYS DEC wetland impacts, and all NYS DEC wetland adjacent area impacts.

Attachment K (Wetland Mitigation Plan) of the current supplemental filing contains a revised NYSDEC Wetland Mitigation plan. Section 3.0 of the Wetland Mitigation Plan document provides a summary of the total wetland and wetland adjacent area impacts associated with the Project. Additionally, new table 3.3-6c included in the Project narrative details information requested in item 4.1 above on all wetland impacts, all NYSDEC-regulated (Article 24) wetland impacts, and all NYSDEC-regulated wetland adjacent area impacts.

4.2 Provide a calculation of proposed area for mitigation, and the type of mitigation proposed, based on wetland class, cover type, functions and values, at a ratio sufficient to account for the risk of a

percentage of mitigation project failure, for both wetland and adjacent area impacts. Include proposed mitigation for both temporary and permanent impacts.
4.3 Provide potential locations for wetland mitigation sites.

Attachment K (Wetland Mitigation Plan) of the current supplemental filing contains a series of conceptual mitigation plan sites. Impact calculations are found in Section 3.0 of the NYSDEC Wetland Mitigation Plan and wetland descriptions are found in sections 3.1 through 3.22. Mitigation site proposal is found in section 4.0. Impacts on wetland functions and services by watershed systems for the Project are provided in Section 4.2 of the Wetland Mitigation Plan. Each plan provides a narrative detailing the the type of mitigation proposed, available acreage, the associated wetland cover types present and the potential functions and services each location provides. Ratios are included in a memo in Attachment K.

4.4 Provide a mitigation plan for permanent impacts to streams.

Attachment Q (Trout Stream Restoration Report) of the current supplemental filing provides site-specific restoration procedures to address concerns relative to the restoration of streambeds and banks following installation of the pipeline facilities. These procedures have been designed to minimize issues at specific sensitive waterbody locations and were developed in consultation with the NYSDEC following the stream visits which were conducted in July and August 2013, and April 2014.

4.5 Provide a post-construction monitoring and reporting plan for wetland and stream mitigation sites. A minimum of 5 years post-construction monitoring needs to be included.

Attachment K (Wetland Mitigation Plan) of the current supplemental filing identifies in Section 7.0 (Monitoring) that Constitution will monitor and maintain permittee-responsible mitigation sites for a minimum of 5 years to ensure that USACE performance standards are met.

Thank you in advance for your timely review of this supplemental information pertaining to Constitution current application under review by the NYSDEC. If you have any questions, please do not hesitate to contact Chris Newhall at (508) 833-6952 or christopher.newhall@aecom.com.

Yours sincerely,

Gregory A. Hufnagel
Senior Project Manager

cc: Mr. Peter Innes, NYSDEC Region 4 Manager
Mr. Daniel Bishop, NYSDEC Region 7 Regional Supervisor of Natural Resources
Mr. Kevin Bruce, USACE New York District – Upstate Regulatory Field Office (CENAN-OP-RU)
Ms. Judy Robinson, USACE Buffalo District – Auburn Field Office (CELRB-Auburn)
Ms. Diane Kozlowski, USACE Buffalo District (CELRB-TD-R)
Ms. Lynda Schubring, Constitution Pipeline Company, LLC
Mr. Frank Bifera, Esq., Hiscock and Barclay, LLP
Mr. Kirk Stark, Dawson and Associates
Mr. Christopher Newhall, AECOM
Ms. Heather Brewster, AECOM
Mr. Keith Silliman, VHB

ENCLOSURES Joint Application – Supplement Information Filing #2

Exhibit 2

Conference Call Notes with DEC

January 29, 2014

NYSDEC/Constitution Status Call
Call Notes: Wednesday, January 29, 2014 3PM
Participants: Tomasik, Silliman, Schubring, Hufnagel, Newhall and Kindlon.

Agenda 1/29/14

1) Set time for 2/6/13 meeting: Tentatively set for 10 AM – noon.
2) Review action items from previous agenda: Comments below.
3) DEC update on bore permits application review: Tomasik referenced an e-mail Keith sent regarding the temporary access applications in Davenport and Sydney. Once Region 4 provides comment, Tomasik believes they both can be processed quickly. Tomasik indicated to reach out to Chris Van Maaren for general questions or updates on the process.

Notes on action items from previous agenda:

1) **Timeline for Notice of Completion**

   a. Meetings ongoing for June submittal date.

2) **Notice of Completion Action Items**

   a. Withdrawal/discharge permit status – Process is ongoing.

   b. DEC stance on non-access parcels – Steve Tomasik indicated the NYSDEC position is that a complete application requires field delineation and verification of all crossings. Tomasik indicated that permits in which NYSDEC is the issuing agency, NYSDEC processes applications by the UPA (Uniform Procedures Act). Keith asked "Is this consistent with how you processed other FERC pipeline applications?" Tomasik responded that more senior members of NYSDEC staff would have to answer that. The position was noted and the discussion was tabled.

   c. DEC Wetland and Stream Crossing Mitigation – Steve Tomasik indicated that Jean Foley (Region 7) has provided several comments which Tomasik will prepare in a future letter. Tomasik indicated that Foley recommended the team review the department's Wetland Mitigation manual (Freshwater Wetlands Regulation Guidelines on Compensatory Mitigation, 1993). Lynda responded that they had felt those guidelines were broad and that they were expecting comments on their plan. Newhall discussed a conversation with Tim Post that occurred during a USACE meeting in December 2013. The planned mitigation strategy would be a combination of suitable measures incorporated from and extending beyond the department's guidelines. Tomasik indicated he would have another conversation with Tim Post, Jerome Fraine, Jean Foley, to pose the issue of focusing on the plan we have provided with the understanding that the planned mitigation strategy will be a combination of department guidelines and additional measures. Tomasik suggested a face to face meeting or conference call, Lynda agreed. Newhall raised the question regarding offsite mitigation and what would be acceptable

for addressing impacts to DEC regulated wetlands, as the mitigation guidelines are not clear with what is an acceptable distance between the mitigation area and the impacted wetland. Tomasik indicated that this issue has been raised in other projects and those projects were able to develop a consolidated mitigation area.

d. SWPPP Draft – Under development.

3) **Draft Permit Conditions**

a. Review still under way by Constitution team.

b. Tomasik indicated that NYSDEC wants a "Rosetta Stone" plan set/binder that would be referenced as one the first permit conditions (*conformance with plans and specs*), therefore assuming the measures in those plans as conditions. Tomasik indicated that a milepost by milepost binder which would show what construction activities are occurring and what NYSDEC resources are being permitted there is ideal for NYSDEC.

c. Lynda indicated that the Implementation Plan submitted to FERC incorporates all project aspects in an orderly fashion capturing all permit conditions which will be used by Environmental Inspectors. Tomasik suggested limiting this plan to NYSDEC jurisdictional areas.

d. Tomasik suggested that Appendix J be expanded to include associated plans and drawings that show specific activities at specific jurisdictional resources/areas.

e. Tomasik suggested reviewing Roaring Wind Brook Farm application for guidance about the structure of this "binder" format.

4) **State Forest Properties**

a. NYSDEC is holding an internal meeting 1/30/2014 (Thursday) to establish questions and comments on the issue prior to meeting Constitution staff.

b. Keith suggested holding this meeting also on February 6th, Tomasik will raise this at the NYSDEC internal meeting.

5) **Meeting To Develop Schedule To Achieve Completeness And Draft Permit Conditions** – See (3) for comments.

6) **I-88 Scoping –** Meeting tentatively set for February 6th at 10 AM – Noon. Tomasik indicated that Patti Desnoyers will not be available for the meeting. Keith sent the draft Issue Sheet to Tomasik, in which he will hold an internal NYSDEC discussion prior to the February 6th meeting.

7) **Contingency Plans for Trenchless Crossing Methods –** Lynda indicated that this plan development is ongoing.

8) **Equipment Bridging –** Lynda indicated that this plan development is ongoing.

9) **Additional Questions**

- Lynda brought up a question regarding ongoing culvert discussions, Lynda asked if we could pull together technical questions for a NYSDEC response. Tomasik indicated that this is possible and Chris Van Maaren (Region 4) and Dave Lemon (Region 7) would be the department contacts.

Proposed Agenda 2/12/14

1. Review action items for last week
2. Discuss NYSDEC Regional Fisheries Questions:
    a. Have additional properties become available since the site visits last summer?
    b. Is there a list of properties (with stream crossings) where there still is not access?
    c. Is there an opportunity to tweak the stream crossing locations at inaccessible parcels, as was done with some of the crossings looked at last summer, prior to waiting for eminent domain access?
3. Application Repackaging

Exhibit 3

Resolution on Gas Infrastucture

Medical Society
State of New York

2015

MSSNY Resolution (revised HOD version)

Resolution-2015- # 159
Introduced by: Sheila Bushkin-Bedient, MD, MPH
Sandhya Malhotra MD,

Subject: Protecting Public Health from Natural Gas Infrastructure
Referred to: Public Health Committee

Whereas, after a thorough investigation by Health Commissioner Howard Zucker, MD, JD, and DEC Commissioner Joseph Martens, concerning the potential adverse public health and environmental outcomes associated with exposure to chemical and radioactive emissions and waste products from High Volume, Horizontal Hydraulic Fracturing (HVHF), Governor Andrew Cuomo determined that this energy technology posed too great a threat to the long-term health and quality of life for New Yorkers, and ultimately banned the process within the State of New York on December 17, 2014, and

Whereas, the chemical and radioactive emissions associated with HVHF are not limited to the drilling and extraction technologies at wellpads, but are also detected all along the extensive, intersecting network of natural gas pipelines, Compressor Stations, Metering Stations and other facilities associated with the entire natural gas infrastructure[1,2] ,and

Whereas, this extensive infrastructure extends into regions of New York State and other Northeastern states that are located far away from the Marcellus Shale region and from the actual drilling sites or wellpads[3], and

Whereas, the pipeline infrastructure exposes humans and animals to the same chemical and radioactive emissions as those released at drilling sites, which include dangerous mixtures of contaminants such as carcinogens, mutagens, endocrine disruptors, neurotoxins, respiratory irritants, mucocutaneous irritants and toxins, and hematological, and cardiovascular toxins, and which are especially damaging to the development of embryos, fetuses, and children, as well as reproduction and survival of livestock, poultry and wild animals[4-6,], and

Whereas, The Medical Society of the State of New York already has a policy which expresses the concern of physicians for adverse health effects related to HVHF, which states that *"The Medical Society of the State of New York supports a moratorium on natural gas extraction using high volume hydraulic fracturing in New York State until valid information is available to evaluate the process for its potential effects on human health and the environment"* (Council Action, December 9, 2010, which was reaffirmed in 2013), and

Whereas, transmission and distribution of natural gas through the extensive, far-reaching infrastructure can cause adverse health effects similar to those seen near drilling sites for HVHF, and

Whereas, there is documented evidence of frequent "accidents" involving infrastructure components, due to faulty construction, and general breakdown including, but not limited to internal and external corrosion, stress corrosion, welding failure at pipeline seams,

damage to existing pipelines during construction of nearby new pipelines, damage to existing pipelines during agricultural activities, leading to chemical leaks, explosions, and fires [7], and

Whereas these "accidents" can result in injury and death to humans, as well as damage to the homes, farms, and businesses of local residents[8], and

Whereas, pipelines and Compressor Stations have been documented to sustain damage during natural extreme weather events such as floods, tornados, hurricanes, landslides, and lightning storms[8], and result in explosions, fires and other life-threatening events, and

Whereas, the pipeline infrastructure in New York State involves between 53,542 - 89,705 miles of natural gas pipeline[9,10], with Compressor Stations located every 50-100 miles along these pipelines, and

Whereas, the compressor stations are powered by exceedingly strong engines varying from 2,250 Hp up to more than 70,000 Hp, which operate continuously, 24 hours a day, 7 days a week, 365 days per year, and routinely "vent" methane gas into the environment, and

Whereas, the permitting process to proceed with proposed expansions of various infrastructure segments depends upon the environmental risk assessment conducted by the Federal Energy Regulatory Commission (FERC), and

Whereas, FERC is considering proposals by multiple natural gas pipeline companies to expand the system of pipelines and compressor stations throughout New York State, including Rockland, Westchester, and Putnam counties (Spectra Algonguin)[11], Orange county (Millenium/Minisink)[12], Delaware county (Millenium/Hancock)[13], Schoharie county (Constitution/Wright Interconnect Project) [14], and Chemung, Madison, and Montgomery counties (Dominion/New Market Project)[15], **therefore be it**

Resolved, that the Medical Society of the State of New York (MSSNY) recognizes the potential impact on human health and the environment associated with natural gas infrastructure, and be it further

Resolved that all levels of government should urge the implementation of a comprehensive Health Impact Assessment (HIA) in order to assess the potential adverse health risks that are associated with natural gas infrastructure, including but not limited to pipelines, compressor stations and other technologies. This would also include natural gas storage facilities and liquified natural gas (LNG) offshore, deep water export terminals. and be it further

Resolved, that a copy of this resolution be transmitted to the AMA for consideration in its House of Delegates.

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