16-1568

United States Court of Appeals for the Second Circuit

CONSTITUTION PIPELINE COMPANY, LLC,

Petitioner,

v.

BASIL SEGGOS, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, JOHN FERGUSON, CHIEF PERMIT ADMINISTRATOR, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents,

STOP THE PIPELINE, CATSKILL MOUNTAINKEEPER, INC., SIERRA CLUB, RIVERKEEPER, INC.,

Intervenors.

PETITION FOR REVIEW FROM THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

PROOF BRIEF FOR RESPONDENTS

BARBARA D. UNDERWOOD
Solicitor General
ANDREW B. AYERS
Senior Assistant Solicitor General
FREDERICK A. BRODIE
Assistant Solicitor General
LISA M. BURIANEK
Deputy Bureau Chief
BRIAN LUSIGNAN
Assistant Attorney General of Counsel

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Respondents
Albany, New York 12224-0341
(518) 776-2317

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PRELIMINARY STATEMENT

Petitioner Constitution Pipeline Company, LLC petitions for review of a detailed and well-reasoned determination by Respondent New York State Department of Environmental Conservation ("NYSDEC") denying Constitution's request for a water quality certification under Clean Water Act ("CWA") Section 401, 33 U.S.C. § 1341 (the "Section 401 Certification"). Following a comprehensive administrative process, NYSDEC concluded that Constitution had failed to establish that its construction of 100 miles of new natural gas pipeline in a path across undeveloped lands in central New York State, impacting and crossing more than 250 streams and more than 80 acres of wetlands, would comply with State water quality requirements.

NYSDEC exercised its broad authority under the Natural Gas Act ("NGA") and the CWA to protect the State's water quality. It conducted a thorough and transparent review of Constitution's application, solicited and considered public comments, and provided Constitution with multiple opportunities to submit necessary additional information. Rather than denying the inadequately supported application outright, NYSDEC granted Constitution numerous opportunities to submit

additional information to demonstrate that its proposed pipeline would comply with applicable water-quality-protection standards and requirements.

NYSDEC ultimately concluded that the Section 401 Certification could not be granted, because Constitution failed to establish that the large-scale project would comply with the state's water quality standards.

None of the arguments raised by Constitution provide a basis for rejecting NYSDEC's exemplary administrative review. Rather, NYSDEC's denial of Constitution's request for a Section 401 Certification was timely, rational, supported by the record, and consistent with the applicable federal and state legal standards.

ISSUES PRESENTED

1. Whether NYSDEC waived its right to deny a Section 401 Certification where it denied the Certification less than one year after Constitution voluntarily re-submitted its application.

2. Whether NYSDEC acted within its broad authority under the Clean Water Act to protect New York's waters by ensuring that permitted activities would comply with all applicable state water

quality laws and regulations, as specifically recognized and authorized by the Federal Energy Regulatory Commission ("FERC").

3. Whether NYSDEC acted arbitrarily and capriciously, abused its discretion, or failed to comply with applicable laws when it determined that Constitution had failed to demonstrate that the construction and operation of 100 miles of new fossil-fuel pipeline, crossing more than 250 streams and affecting more than 80 of acres of wetlands, would comply with state water-quality-protection standards and requirements.

LEGAL FRAMEWORK

A. Natural Gas Act

The NGA governs FERC's regulation and approval of the interstate transportation and sale of natural gas. 15 U.S.C. § 717 *et seq.* FERC has authority to issue a "certificate of public convenience and necessity" for construction and operation of a natural gas project. 15 U.S.C. § 717f(e). That certificate, however, is not the only authorization required for the project. Applicants must obtain other authorizations required by federal law. *See* 15 U.S.C. §§ 717n(a), (b). The necessary authorizations include "any permits, special use

authorizations, certifications, opinions, or other approvals as may be required under Federal law." *Id.* §§ 717n(a)(1), (2). One of these necessary authorizations is a state certification under CWA § 401 that the proposed project will comply with state water quality standards and requirements. 33 U.S.C. § 1341(a)(1); *see* pp. 5-7, *infra*. Relevant here, the NGA expressly provides that "nothing in this Act affects the rights of States" under the CWA. 15 U.S.C. § 717b(d)(3).

Under the NGA, the U.S. Court of Appeals for the circuit in which a natural gas facility is proposed has "original and exclusive jurisdiction" to review "an order or action of a . . . State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval." *Id.* § 717r(d)(1). However, the D.C. Circuit Court of Appeals has "original and exclusive jurisdiction" over any action to review a state agency's "alleged failure to act" on a permit required by federal law. *Id.* § 717r(d)(2).

B. National Environmental Policy Act

The NGA designates FERC as the lead agency "for the purposes of coordinating all applicable Federal authorizations and . . . complying with the National Environmental Policy Act

['NEPA']." 15 U.S.C. § 717n(b)(1). NEPA requires FERC to interpret and administer the NGA in accordance with NEPA's policy to protect environmental quality, including water quality. *See* 42 U.S.C. § 4332. FERC is required to prepare a "detailed statement" of the environmental impact of any major federally-permitted NGA project that would significantly affect environmental quality, including measures designed to avoid, minimize and mitigate those impacts. 42 U.S.C. § 4332(C).

In regulations implementing the NGA and NEPA, FERC recognizes that a standard condition to NGA certificates is that project activities be consistent with the CWA and other Federal environmental laws. 18 C.F.R. § 157.206(b)(2).

C. Clean Water Act

The CWA reflects a federal policy of preserving the states' primary right and responsibility to prevent, reduce, and eliminate water pollution, and to plan the development and use of water resources. 33 U.S.C. §§ 1251(b), (g). Under the CWA, States have primary responsibility and authority to protect the waters within their borders. 33 U.S.C. § 1370.

Section 401 of the CWA mandates that "[a]ny 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 . . . that any such discharge will comply" with applicable water quality requirements. 33 U.S.C. § 1341(a)(1). "No license or permit shall be granted if the certification has been denied by the State[.]" *Id.* The Section 401 Certification "shall set forth any effluent limitations and other limitations . . . necessary to assure that any applicant for a Federal license or permit will comply" with the CWA, "and with any other appropriate requirement of State law." *Id.* § 1341(d). The Certification "shall become a condition on any Federal license or permit" for which it is issued. *Id.* A State that "fails or refuses to act on a request for a certification" within a reasonable period of time, not to exceed one year, "after receipt of such request," waives the certification requirements. *Id.* § 1341(a)(1).

An applicant seeking to discharge dredged or fill material into navigable waters must also obtain a permit under CWA section 404 (a "Section 404 Permit") from the United States Army Corps of

Engineers. *Id.* § 1344(a). The Army Corps will not issue a federal Section 404 Permit until the state Section 401 Certification has been "obtained" or "waived." 33 C.F.R. § 325.2(b)(1)(ii). A Section 401 Certification and a Section 404 Permit are authorizations required by federal law that must be obtained by an applicant for a certificate of public convenience and necessity under the NGA. *See* 15 U.S.C. §§ 717n(a)(1), (2).

D. State Water Quality Standards

New York's requirements for the protection of water quality are set forth in its Environmental Conservation Law ("ECL"), including Articles 15 (stream disturbance and water withdrawal), 17 (pollution discharges to water), and 24 (wetlands protection), and implementing regulations, 6 N.Y.C.R.R. Parts 668, 700-706 and 750. ECL § 3-0301 sets forth NYSDEC's general responsibilities, some of which relate to water quality. These statutes are intended to protect the State's water resources, including water chemistry and biological functions. *See, e.g.*, ECL §§ 15-0105, 17-0103, 24-0103, 24-0105. They constitute "requirement[s] of State law," 33 U.S.C. § 1341(d), with which a project must comply before NYSDEC can issue a Section 401 Certification.

NYSDEC regulations set forth the framework for the State's issuance of a Section 401 Certification. 6 N.Y.C.R.R. § 608.9. An applicant "must demonstrate compliance" with the water quality standards identified above, as well as "state statutes, regulations and criteria otherwise applicable to such activities." *Id.* § 608.9(a)(6). Thus, in order for NYSDEC to issue a Section 401 Certification, an applicant must submit sufficient information to demonstrate compliance with all applicable water-quality-protection requirements. Among other things, state law requires an applicant to minimize environmental harms to waterbodies from the disturbance of stream beds, ECL § 15-0501, or the discharge of fill or excavation within navigable waters, *id.* § 15-0505. An applicant also must avoid any discharge of waste or increase in turbidity that will impair the best uses of a waterbody. 6 N.Y.C.R.R. §§ 701.1, 703.2

STATEMENT OF THE CASE

A. Constitution Applies to FERC, and FERC Releases an Environmental Impact Statement That Relies on NYSDEC's Anticipated Review

In 2013, Constitution applied to FERC for a certificate of public convenience and necessity authorizing construction of 124 miles of

30-inch-diameter natural gas pipeline, temporary and permanent access roads, and various associated facilities, stretching from Susquehanna County, Pennsylvania to Schoharie County, New York (collectively, "the Project"). Application at 1-2 (June 13, 2013); Second Supplemental Resource Report No. 1: General Project Description at 1-1 (November 2013) (J.A.__-__,__). The pipeline would traverse more than 99 miles across four counties in New York State. General Project Description at 1-3 (J.A.__). Even before the formal application had been received, FERC staff recognized that the Project would have significant environmental impact, and determined that an environmental impact statement ("EIS") under NEPA was required. *See* Notice of Intent to Prepare E.I.S., at 1 (Sept. 7, 2012) (J.A.__).

FERC staff released the Final EIS ("FEIS") in October 2014, detailing the "numerous impacts on the environment" caused by the Project. FEIS at ES-3 (J.A.__). FERC staff noted that 91% of the pipeline's right-of-way would be "greenfield," or "lands and vegetation, including adjacent areas, that are undisturbed or undeveloped." *Id.* at 2-1, 2-8 (J.A.__,__).

The Project would disrupt more than 1,400 acres of land in New York. FEIS, at 2-8 (J.A.__). It would also disrupt more than 80 acres of

wetlands in New York. *Id.* at 4-62 (J.A.__). It would cross 220 waterbodies in New York, and an additional 30 waterbodies would be within the construction right-of-way. *Id.* at 4-45 (J.A.__). As of the date of the FEIS, however, Constitution had submitted a site-specific crossing plan for just one of those water crossings. *Id.*

FERC staff concluded that the project would have "adverse environmental impacts," but that the impacts could be minimized if Constitution complied with various terms and conditions, including state water quality standards. FEIS at ES-13 (J.A.__). FERC staff's analysis assumed that Constitution would satisfy New York water quality standards and requirements as implemented by NYSDEC. FERC staff noted that Constitution "would be responsible for obtaining all permits and approvals required to implement the proposed project[] prior to construction," including a Section 401 Certification and other water quality permits from NYSDEC. FEIS at 1-13 to 1-16 (J.A.__-__). Indeed, a "principal reason[]" for FERC staff's conclusion that environmental impacts from the project would be acceptable was that Constitution "would be required to obtain applicable permits and provide mitigation for unavoidable impacts on waterbodies and wetlands through coordination with . . . NYSDEC." FEIS at ES-13

(J.A.__). As a mitigation measure, FERC staff recognized that Constitution, prior to starting construction, would be required to "file documentation that they have received all applicable authorizations required under federal law," which would include NYSDEC's Section 401 Certification. *Id.* at 5-20 (J.A.__).

Throughout its analysis, FERC staff relied on the NYSDEC's Section 401 Certification review process to minimize environmental impacts:

- "Construction and operation-related impacts on wetlands would be further minimized or mitigated by Constitution's compliance with the conditions imposed by" NYSDEC. FEIS at ES-5 (J.A.__);
- If "in-water blasting is required, Constitution would develop a detailed in-water blasting plan that complies with state-specific regulations and permit conditions." *Id.* at ES-6 (J.A.__);
- "Waterbody crossings would be constructed in accordance with federal, state, and local permits . . . ." *Id.* at 2-20 (J.A.__);
- Constitution "would incorporate the mitigation measures identified in [its] permit application[] as well as additional requirements of federal, state, and local agencies into their construction drawings and specifications." *Id.* at 2-29 (J.A.__);
- Constitution "would mitigate for unavoidable wetland impacts by . . . complying with the conditions of its pending Section 404 and 401 permits." *Id.* at 4-63 (J.A.__);

- "With adherence to . . . NYSDEC . . . permit requirements . . . impacts on wetlands would be minor." *Id.* at 4-68 (J.A.__);

- Constitution would minimize adverse impacts from construction and trenching by "complying with applicable federal and state permits requirements." *Id.* at 4-245 (J.A.__).

With respect to waterbody-crossing methods, the FEIS discussed the potential impacts from "dry open cut" and "trenchless" crossing methods. "Dry" crossing methods involve damming above and below the site of the pipeline crossing, and using flumes or pumps to divert the flow of water from the upriver dam to the downriver dam, outside the stream's channel. FEIS at 2-21 to 2-22 (J.A.__-__). A trench of the required depth is then dug through the now-dry stream bed, the pipe is installed, and the water is redirected into the channel. *Id.* The dry crossing method adversely affects water quality by disturbing in-stream sediments, increasing turbidity, reducing light penetration and photosynthetic oxygen production, introducing chemical and nutrient pollutants, and decreasing dissolved oxygen levels. *Id.* at 4-54 to 4-55 (J.A.__-__). As a result, mobile organisms such as fish are disturbed while some non-mobile organisms are killed. *Id.*

"Trenchless" crossing methods, on the other hand, involve drilling a tunnel under a waterbody and then installing the pipeline without disturbing the waterbody. FEIS at 2-22 to 2-25 (J.A.__-__). For trenchless methods, "[t]he potential impacts on waterbodies . . . are considered minimal when compared to other crossing methods," because "[t]he waterbody and its banks, and typically the entire immediate riparian zone, would not be disturbed by clearing or trenching; rather, the pipe would be installed below the feature." FEIS at 4-56 (J.A.__).

FERC staff noted that "[u]se of trenchless crossing methods to cross waterbodies" would "avoid or adequately minimize impacts on surface water resources." FEIS at ES-4 to ES-5 (J.A.__-__). At the time the FEIS was completed, Constitution proposed to use trenchless crossing methods at 21 of the Project's 251 waterbody crossings in New York. FEIS at 4-52 (J.A.__). However, NYSDEC had "not yet provided feedback on Constitution's proposed waterbody crossing methods." FEIS at 4-51 (J.A.___).

B. FERC Requires Constitution to Obtain Section 401 Certification

In a December 2014 order, FERC issued a certificate of public convenience and necessity to Constitution, expressly "conditioned on"

Constitution's "compliance with the environmental conditions" listed in an appendix to the Order. FERC Conditional Order (Dec. 2, 2014) at 46. FERC adopted the environmental conditions that FERC staff had written into the FEIS, including the requirement that Constitution "file documentation that they have received all applicable authorizations required under federal law" before beginning construction. *Id.* at 51. Because the Section 401 Certification is required by the Clean Water Act, *see* 33 U.S.C. § 1341(a)(1), and defined as a required authorization in the FEIS, *e.g.* FEIS at 1-16 (J.A.__), FERC required Constitution to obtain NYSDEC's Section 401 Certification before beginning construction. FERC also reiterated the FEIS's conclusion that "[c]onstruction and operation-related impacts on waterbodies and wetlands will be further mitigated by Constitution's compliance with conditions of . . . *the [NYSDEC] Section 401 permit[] required under the [CWA].*" *Id.* ¶ 79 (emphasis added).

FERC endorsed the FEIS's recognition that cumulative environmental impacts could be minimized if Constitution implemented "measures proposed or required by state and local agencies with overlapping or complementary jurisdiction." *Id.* ¶ 106. FERC concluded that the Project, "if constructed and operated as described in the final

EIS," would be "environmentally acceptable." *Id.* ¶ 146. Thus, in granting the certificate of public convenience and necessity, FERC adopted the conclusions and recommendations of the FEIS, which presupposed and relied on an independent state permit review by NYSDEC. *See, e.g.,* FEIS at ES-13, 1-13 to 1-16 (J.A.__,__-__).

Upon obtaining the Conditional Order, Constitution moved forward to obtain all of the right-of-way necessary to construct and operate the Project, including through use of eminent domain. *See* 15 U.S.C. § 717f(h); *see, e.g., Constitution Pipeline Co. v. A Permanent Easement for 1.77 Acres*, Docket No. 3:14-CV-2094 (N.D.N.Y. March 16, 2015), *available at* 2015 U.S. Dist. LEXIS 50590.

Constitution did not seek rehearing of the Conditional Order, but other parties to the FERC proceeding did. FERC denied the rehearing motions. Rehearing Order (Jan. 28, 2016) (J.A.__). FERC's Rehearing Order confirmed the important role to be played by NYSDEC's environmental review, in particular the Section 401 Certification: "until NYSDEC issues the [Section 401 Certification], Constitution may not begin an activity, i.e., pipeline construction, which may result in a

discharge into jurisdictional waterbodies." *Id.* ¶¶ 62-63.[1] Moreover, FERC recognized that "[i]f and when NYSDEC issues" a Section 401 Certification, Constitution would be "required to comply" with its conditions. *Id.* ¶ 70. FERC also acknowledged that NYSDEC had the authority to require Constitution "to materially modify its project to satisfy any conditions imposed." *Id.*

C. Constitution Applies for Section 401 Certification and NYSDEC Conducts a Comprehensive Administrative Review

In August 2013, while FERC's administrative review was still pending, Constitution submitted a Joint Application that sought both a Section 401 Certification from NYSDEC and a Section 404 Permit from the Army Corps. Joint Application Form (Aug. 22, 2013) (J.A.__). Constitution's Joint Application also sought a number of other relevant and related state permits, including permits under ECL articles 15

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[1] Notwithstanding FERC's clear instruction not to begin clearing trees in New York until a Section 401 Certification had been issued, *see* FERC Partial Notice to Proceed (Jan. 29, 2016) (J.A.__), NYSDEC obtained evidence that Constitution expressly or implicitly authorized landowners to begin clearing trees and other vegetation from its right-of-way. NYSDEC requested that FERC initiate an investigation into these violations. *See* NYSDEC Complaint and Petition, FERC Docket No. CP13-499-000, Accession No. 20160516-5191 (May 16, 2016).

(stream disturbance/water withdrawal) and 24 (wetlands). *Id.*[2] At the time of this Joint Application, Constitution did not have landowner permission to access approximately 30% of the right-of-way land, which prevented Constitution from providing detailed surveys or delineations[3] of wetlands and streams. *See* Joint Application, Attachment K: Conceptual Mitigation Plan, at 3-1 (July 2013) (J.A.__).

Following an initial, partial review of the application, NYSDEC notified Constitution that the application was incomplete, and listed a number of required additional materials. Notice of Incomplete

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[2] Constitution separately applied for coverage under NYSDEC's State Pollution Discharge Elimination System General Permit for stormwater discharges, as required by CWA Section 402, 33 U.S.C. § 1342. *See* Cover Letter (April 29, 2014) (J.A.__).

[3] The approximate boundaries of state wetlands are depicted on maps produced by NYSDEC. "Delineation" refers to the process for determining the precise boundaries of a wetland. *See* ECL §§ 24-0301(3), (8). A full delineation generally requires an on-site inspection of the wetland. NYSDEC, Freshwater Wetlands Delineation Manual 18 (July 1995) (J.A.__).

Application (Sept. 12, 2013) (J.A.__).[4] Among other things, NYSDEC asked Constitution to submit "all details for proposed stream crossings" in accordance with a sample matrix that DEC had provided earlier in 2013. NOIA Companion Letter at 2 (Sept. 12, 2013) (J.A. __); *see also* Sample Matrix, attached to May 30, 2013 e-mail (J.A.__).

Constitution submitted supplemental permit application materials in November 2013. Joint Application Supplemental Information Cover letter (Nov. 27, 2013) (J.A.__). However, Constitution refused to "provide[] scale drawings in the format provided by NYSDEC." *Id.* at 3. In February 2014, NYSDEC asked Constitution provide information related to stream crossings in an organized and coherent manner and identified necessary additional information about stream crossings. *See* Tomasik E-mail and Attachments (February 12, 2014) (J.A.__). On May 9, 2014, Constitution voluntarily withdrew and re-submitted the Joint Application. The parties understood that this

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[4] Similarly, Army Corps notified Constitution that its application for a section 404 permit was insufficient. Powell Letter (Sept. 20, 2013) (J.A.__). Army Corps issued numerous subsequent letters regarding the need for additional information. *See* Deficiency Letters (Jan. 16, 2014; May 6, 2014; Oct. 8, 2014; Nov. 6, 2014; January 13, 2015; April 6, 2015; March 21, 2016) (J.A.__,__,__,__, __,__,__).

would necessarily extend the maximum one-year review process "by which requests for certifications are to be approved or denied as set forth in in Section 401(a)(1)" of the CWA. Letter Withdrawing and Re-Submitting Joint Application (May 9, 2014) (J.A.__). Given the incomplete nature of the application at that time, if Constitution had refused to re-submit the application materials, NYSDEC would likely have denied the Section 401 Certification.

In July 2014, NYSDEC requested additional information to be included in a revised Joint Application. NYSDEC Memorandum (July 3, 2014); Tomasik Cover E-mail (July 3, 2014) (J.A.__,__). NYSDEC sought information on the a third-party environmental monitoring plan for construction, temporary and permanent impacts on streams and wetlands, and detailed information on waterbody crossings, such as "[l]ocation and type of pipeline crossing." NYSDEC Memorandum 2-3 (J.A.__-__).

Constitution submitted another supplemental Joint Application in August 2014, but included only "a portion" of the items NYSDEC had requested in the July 2014 letter. Letter, Joint Application–Supplemental Information #2, at 3 (Aug. 13, 2014) (J.A.__).

Constitution submitted further information in November 2014. Letter, Additional Information Submittal (Nov. 17, 2014) (J.A.__).

In December 2014, NYSDEC published a Notice of Complete Application, which opened a public comment period on the Joint Application until January 30, 2015—later extended to February 27, 2015. Notice of Complete Application (Dec. 24, 2014) (J.A.__); *see* ECL § 70-0109(2). NYSDEC's determination to treat the application as complete for purposes of public comment did not signal its intent to grant the permit or mean that the agency had received all materials necessary to its review. *See* 6 N.Y.C.R.R. §§ 621.6(g), 621.14(b). The agency's active review of the Joint Application continued throughout the comment period and following months. *See, e.g.*, Tomasik E-mail (Jan. 14, 2015) (setting up meeting with Constitution for "presentation on trenchless technology"); Tomasik E-mail (Jan. 27, 2015) (requesting evaluations for two trenchless stream crossings) (J.A.__,__).

NYSDEC received more than 15,000 public comments on the Joint Application. Many of the comments raised significant concerns that NYSDEC determined would need to be addressed by Constitution. Denial 5 (J.A.__).

On March 27, 2015, Constitution submitted another modified Joint Application, which still did not include all the information relating to waterbody impacts requested by NYSDEC almost a year earlier. Joint Application Supplemental Information Cover Letter, at 4 (March 27, 2015) (J.A.__). That submission required further NYSDEC review. On April 27, 2015, Constitution again voluntarily withdrew and resubmitted its Joint Application to re-start the one-year review period in CWA section 401(a), thus giving NYSDEC additional time to consider the recent supplemental submission and to complete its post-comment period review. As required by regulation, 6 N.Y.C.R.R. § 621.7, NYSDEC issued a new Notice of Complete Application and opened a new public comment period. Notice of Complete Application (April 27, 2015) (J.A.__).

During the ensuing year, NYSDEC's review of the Joint Application continued, as did active discussions with Constitution regarding geotechnical investigations, third-party environmental monitoring, and other topics relevant to the water quality of the significant number of streams and other waterbodies impacted by the Project. *See* Argument, § I.B.2.

D. DEC Denies the Section 401 Certification

On April 22, 2016, within one year of NYSDEC's April 27, 2015 receipt of Constitution's re-submitted Joint Application (and issuance of a new Notice of Complete Application on the same day), NYSDEC denied Constitution's request for a Section 401 Certification (the Denial). (J.A.__). NYSDEC concluded that Constitution had "fail[ed] in a meaningful way to address the significant water resource impacts that could occur from this Project" and "failed to provide sufficient information to demonstrate compliance with New York State water quality standards." Denial 1 (J.A.__). NYSDEC noted that the other permits sought in the Joint Application "remain[ed] pending." *Id.* at 1 n.3 (J.A.__).

NYSDEC's Denial was based on Constitution's failure to establish that four specific Project-related activities would comply with state water quality standards: (1) stream-crossing methods, (2) depth of pipeline burial under waterbodies, (3) blasting in or near waterbodies; and (4) wetland-crossing methods. NYSDEC first outlined the Project's large impact to numerous water-quality related resources, including

(1) 251 streams, 87 of which support trout or trout spawning;

(2) 85.5 acres of freshwater wetlands;

(3) regulated wetland-adjacent areas totaling 4,768 feet for crossings, 9.70 acres for construction and 4.08 acres for operation; and

(4) 500 acres of interior forest surrounding streams and wetlands.

Id. at 3 (J.A.__).

NYSDEC concluded that "[c]umulatively, within such areas, as well as the [right-of-way] generally, impacts to both small and large streams from the construction and operation of the Project can be profound and could include loss of available water body habitat, changes in thermal conditions, increased erosion, and creation of stream instability and turbidity." *Id.*

NYSDEC described the importance and sensitivity of cold-water streams. It explained that "many of the streams to be crossed present unique and sensitive ecological conditions that may be significantly impacted by construction and jeopardize best usages." *Id.* NYSDEC described the physical features of cold-water streams that support trout and other aquatic species, including the importance of trees to shade the water and maintain the integrity of banks. *Id.* It also cited the need for undisturbed spring seeps to provide clean, cold water; maintain the

integrity of the stream through stable channels; and preserve water quality. *Id.* NYSDEC wrote that "[b]iologically, these streams are vital in providing complex habitat for foraging, spawning and nursery protection by wild reproducing trout." *Id.*

NYSDEC then listed the various specific impacts that the Project would have on water resources. First, it observed that "100 per cent loss of stream and riparian habitat will occur within the ROW as it is cleared and the pipeline trenched across streams." *Id.* at 4 (J.A.__). Where trenching occurs, all in-stream habitat would be destroyed in the short term and habitat could be destroyed or degraded "for years following active construction." *Id.* Additionally, the removal of vegetation in the right-of-way would "likely increase water temperatures, further limiting habitat suitability for cold-water aquatic species such as brook trout." *Id.*

Citing NYSDEC staff's "extensive experience and technical reviews" of the Project, the agency next observed that the proposed pipeline would likely cause "destabilization of steep hillslopes and stream banks" and "may result in erosion and failure of banks," increasing waterway turbidity. *Id.* In this context, NYSDEC pointed out that the proposed pipeline would include approximately 24 miles of

steep slope or side slope construction. *Id.* Increased turbidity would have negative effects on the streams, including smothering or killing sensitive aquatic life and reducing feeding potential by decreasing visibility for trout feeding. *Id.* Additionally, chronic erosion—a result of disturbed stream banks and hill slopes—would cause the degradation of water quality, including the loss of spawning potential in some cold headwater streams and the potential reduction in long-term viability of the streams to support trout. *Id.* at 4-5 (J.A.__-__).

NYSDEC determined that the sheer number of stream crossings required by the Project could have large-scale impact on water quality. In the one-mile corridor adjacent to the Project, NYSDEC observed that the number of crossings per square mile would increase 44%, from 2.28 to 3.29, and particular basins would see a larger increase. *Id.* at 5 (J.A.__). That increase could cause "permanent degradation in stream habitat quality" and harm "associated natural resources, including aquatic species' propagation and survival." *Id.* The Project would cross the Clapper Hollow Creek and its tributaries 11 times and the Ouleout Creek and its tributaries 28 times, causing particularly significant cumulative impacts. *Id.* at 3 (J.A.__). Those streams, and many others impacted by the project, are part of an interconnected tributary network

that depends on the quality of connected streams to maintain their physical and biological water quality, including as a habitat for wild trout. *Id.*

NYSDEC determined that Constitution failed to provide sufficient information on the feasibility of trenchless crossing methods at all stream crossings. Denial at 8-9 (J.A.__,__). NYSDEC cited its numerous requests, dating back to June 2012, for technical information on the feasibility of trenchless crossings, and Constitution's failure to provide adequate and complete information. *Id.* at 8-10 (J.A.__-__). In particular, Constitution repeatedly refused to evaluate streams less than 30 feet wide for trenchless feasibility and failed to provide site-specific analyses, including geotechnical borings, for most stream crossings. *Id.* at 11-12 (J.A.__-__). Instead, Constitution provided a patchwork of insufficient information based on limited analysis to support its conclusion that only 11 of the more than 250 streams could be crossed using trenchless methods. *Id.* at 11 (J.A.__). Based on the lack of water-quality-protection information provided by Constitution, NYSDEC concluded that Constitution had failed to demonstrate that the Project would comply with water quality standards and requirements. *Id.* at 12 (J.A.__).

NYSDEC listed several additional bases for the Denial. First, NYSDEC observed that Constitution had provided limited analysis of pipe burial depth for only 21 of the more than 251 streams, and that NYSDEC could not determine whether the depth would be protective of water quality standards. *Id.* at 13 (J.A.__). This conclusion was based on NYSDEC's observations of "numerous and extensive vertical movements of streams in New York State that have led to pipe exposure and subsequent remedial projects," which "caused severe negative impacts on water quality." *Id.* at 12-13 (J.A.__-__). Further, Constitution had failed to provide site-specific information on whether and when blasting would be required in waterbodies and wetlands, which prevented NYSDEC from determining whether the Project would be "protective of State water quality standards and in compliance with applicable State statutes and standards." *Id.* at 13 (J.A.__). Finally, Constitution had failed to provide sufficient information on wetlands crossings to allow NYSDEC to determine whether they would be "subject to discharges that do not comply with applicable water quality standards." *Id.* at 13-14 (J.A.__-__).

E. Constitution's Petition for Review and its Unauthorized Attempt to Supplement the Record

Constitution commenced this proceeding by filing a Petition for Review of NYSDEC's Denial on May 16, 2016. ECF No. 1.[5] Many of the arguments in Constitution's opening Proof Brief (ECF No. 60, referred to here as "Br.") relied on three outside-the-record declarations attached to its brief. *See* Br. 9, 13-15, 18-22, 36, 46, 57-58, 63. Respondents objected to Constitution's extra-record materials, and moved to strike the declarations. ECF No. 66. This Court referred the motion to the merits panel. ECF No. 69. Constitution opposed the motion, ECF No. 91, and Respondents filed a Reply in further support of the motion, ECF No. 95. Because the motion to strike has been fully briefed and referred to this Panel, this brief incorporates its arguments by reference and does not discuss them further.[6]

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[5] Concurrently with filing the Petition for Review, Constitution sued NYSDEC in the U.S. District Court for the Northern District of New York, challenging the agency's authority to issue or deny various state permits. *See Constitution Pipeline Co. v. N.Y.S.D.E.C.*, Docket No. 1:16-cv-00568, ECF No. 1 (N.D.N.Y. May 16, 2016).

[6] Separately, several intervenors in the FERC proceeding have challenged FERC's denial of their rehearing motions. *See Catskill Mountainkeeper, Inc. v. F.E.R.C.*, Docket No. 16-345, ECF No. 1 (2d Cir. March 7, 2016).

SUMMARY OF ARGUMENT

This Court should deny the petition for review because NYSDEC's Denial was timely and not waived; because it fell within the State's broad jurisdiction under the Clean Water Act to protect water quality; and because it was supported by the record and was not arbitrary or capricious.

The issue of NYSDEC's alleged waiver of the Section 401 Certification is not properly before this Court, because neither Army Corps nor FERC determined that the Section 401 Certification was waived. Moreover, under the NGA, the D.C. Circuit has exclusive jurisdiction over questions of whether an agency failed to act in a timely manner. 15 U.S.C. § 717r(d)(2). Additionally, Constitution never raised the issue during the state administrative process below. In any case, NYSDEC did not waive the Section 401 Certification because it rendered a decision within one year of Constitution's second re-submittal of the Joint Application, and that is all that CWA § 401(a) requires. NYSDEC also did not delay "unreasonably": permit review and communications were ongoing throughout the application process, and the parties mutually agreed to the two resubmissions. Nor did NYSDEC miss a 60-day deadline set forth in Army Corps regulations

because Army Corps never determined that Constitution had submitted a valid request for certification. *See* 33 C.F.R. § 325.2(b)(1)(ii).

The Denial fell squarely within NYSDEC's broad discretion under the CWA and the Natural Gas Act to protect the State's waters from pollution. Contrary to Constitution's argument, the Supreme Court has long recognized that an agency's review under Section 401 is not limited to federally-approved water quality standards. *See S.D. Warren Co. v. Maine Bd. of Envt'l Protection*, 547 U.S. 370, 386 (2006); *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 713-14 (1994). Moreover, FERC's FEIS and orders explicitly contemplated that NYSDEC would conduct an independent review of a wide variety of adverse water quality impacts and that FERC would rely on NYSDEC's evaluation and Section 401 Certification to mitigate those impacts. To the extent Constitution objects to FERC's Conditional Order in this respect, it should have raised that issue in a motion for rehearing before FERC.

NYSDEC's Denial is fully supported by the record, rational, and not arbitrary or capricious. The record demonstrates that, despite repeated opportunities, Constitution failed to supply sufficient information on stream crossing methods for NYSDEC to conclude that

the Project would comply with state water quality standards. Constitution also failed to submit information requested by NYSDEC on the pipe depth at stream crossings, blasting, and wetlands crossing methods. There is no basis to overturn NYSDEC's well-reasoned and fully supported Denial due to unsupported allegations of political influence, departure from prior practice, or any other factor.

STANDARD OF REVIEW

Courts have applied the Administrative Procedure Act's standard of review to a state's determination to issue or deny a Section 401 Certification for a natural gas project. *See Islander East Pipeline Co. v. Conn. Dep't of Envt'l. Protection*, 482 F.3d 79, 94 (2d Cir. 2006) (*Islander East I*); *accord Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envt'l. Protection*, ___ F.3d ___, 2016 U.S. App. LEXIS 14508, *28-29 (3d Cir. Aug. 8, 2016); *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 727 (4th Cir. 2009). First, the Court reviews *de novo* whether the state agency complied with the relevant federal law. *See Islander East I*, 482 F.3d at 94. Second, if no illegality is found, a Court may set aside agency actions only if they are "arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Islander East I*, 482 F.3d at 94.

Under the arbitrary-and-capricious standard, the scope of judicial review is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins.*, 463 U.S. 29, 43 (1983); *see Islander East Pipeline Co. v. Conn. Dep't of Envt'l Protection*, 525 F.3d 141, 150-51 (2d Cir.), *cert denied,* 555 U.S. 1046 (2008) (*Islander East II*). The court need only confirm that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (internal quotation marks omitted).

ARGUMENT

POINT I

NYSDEC DID NOT WAIVE ITS RIGHT TO DENY THE SECTION 401 CERTIFICATION

This Court need not rule on NYSDEC's alleged waiver of its right to deny the Section 401 Certification, because that issue is not properly before the Court. In any case, Petitioner's vague and internally

inconsistent arguments (Br. 29-37) are without merit.[7] NYSDEC acted within one year of Constitution's re-submittal of the Joint Application, and its Denial was thus timely under Clean Water Act Section 401.

A. The Issue of Waiver Is Not Properly Before this Court

The waiver issue is not to be determined by the courts in the first instance, and neither FERC nor the Army Corps made a determination on waiver here. Case law and regulations recognize that the federal licensing authority determines the issue of waiver in the first instance. *See, e.g., Alcoa Power Generating, Inc. v. F.E.R.C.*, 643 F.3d 963, 965 (D.C. Cir. 2011) (upholding FERC's "interpretation of Section 401 in ruling that there was no waiver by the State"); *AES Sparrows*, 589 F.3d at 730 (finding no basis "to disturb the [Army] Corps' determination" that state did not waive rights under Section 401); 18 C.F.R § 4.34(b)(5)(iii) (providing circumstances in which Section 401 certification will be "deemed" waived in FERC licensing proceedings); 33 C.F.R. § 325.2(b)(1)(ii) (providing factors for Army Corps to consider

[7] Constitution points to three different waiver periods and five different events that might trigger the commencement of the waiver periods, but never indicates which deadline NYSDEC missed. Br. 29-37.

"[i]n determining whether or not a waiver period has commenced or waiver has occurred").

Here, neither Army Corps nor FERC determined that NYSDEC had waived the Section 401 Certification. *See generally Am. Petroleum Inst. v. U.S. Envt'l Protection Agency*, 906 F.2d 729, 742 (D.C. Cir. 1990) ("an agency is entitled to construe its own regulations in the first instance"). To the contrary, after receiving NYSDEC's Denial, Army Corps dismissed Constitution's Joint Application without prejudice. *See* Letter from Stephan Ryba to Lynda Schubring (May 11, 2016) (J.A.__). If Army Corps believed that NYSDEC had waived its right to deny a Section 401 Certification, it could have determined that a waiver had occurred and ignored the Denial and continued to evaluate the Joint Application. *See* 33 C.F.R. § 325.2(b)(1)(ii). Instead, Army Corps dismissed the Joint Application without prejudice. *See Ackels v. U.S.*

Envt'l Protection Agency, 7 F.3d 862, 867 (9th Cir. 1993) (EPA had discretion to accept state certification beyond regulatory deadline).[8]

Constitution cannot challenge the absence of a waiver determination here. The situation here is similar to *Weaver's Cove Energy, LLC v. Rhode Island Dep't of Environmental Management*, where an energy company sought review under the NGA of state inaction on its application for a Section 401 Certification. 524 F.3d 1330 (D.C. Cir. 2008). The company argued that, since more than a year had passed without the states issuing final determinations, the states had waived their right to deny the requested certifications. *Id.* at 1332. The D.C. Circuit held that the proper procedure would be, after receiving a state denial, to "argue to the Army Corps that the denial is void" and

[8] The Army Corps' dismissal of the Joint Application also undermines Constitution's claim that the Army Corps "was satisfied" with Constitution's submittals and prepared to issue the Section 404 permit. *See* Br. 62, citing Powell Letter (April 20, 2016) (J.A.__). If the Army Corps had been prepared to issue the Section 404 permit upon receipt of the Section 401 Certification, the appropriate process would have been to "continue processing the application to a conclusion" when it received the Denial, *see* 33 C.F.R. § 320.4(j)(1). The fact that it instead dismissed the Joint Application indicates that the Army Corps' review was ongoing.

"[i]f the Army Corps disagrees, then . . . challenge its decision in court." *Id.* at 1333.

Additionally, Constitution never objected to the timeline of NYSDEC's review during the state administrative process. In fact, Constitution manifested its acknowledgement of a one-year deadline by twice withdrawing and re-submitting the application to extend the time for NYSDEC's review under CWA § 401. *See* Withdrawal and Resubmittal Letter at 1 (May 9, 2014) (J.A.__). Constitution should not now be heard to argue that its re-submittal of the Joint Application caused NYSDEC to waive the Section 401 Certification. Thus, as in *Puerto Rico Sun Oil Co. v. United States Environmental Protection Agency*, when an energy company does not complain during administrative review of the agency's timeframe, it "would be pointlessly rigid" to strictly apply the Section 401 waiver provision to undo the agency's administrative process—especially because "courts have adequate power" under the NGA "to assure that flexibility does not become an excuse for permanent inaction." 8 F.3d 73, 80 (1st Cir. 1993).

B. NYSDEC Timely Denied the Section 401 Certification

1. NYSDEC Complied with the Clean Water Act's One-Year Deadline

In any case, NYSDEC's review and Denial complied with the one-year deadline established by Section 401 of the CWA. 33 U.S.C. § 1341(a)(1). That deadline began to run on April 27, 2015, when Constitution voluntarily re-submitted its Joint Application and NYSDEC issued a new Notice of Complete Application to allow more time to attempt to resolve outstanding water quality issues and issues raised by the public comments. Notice of Complete Application (April 27, 2015); Press Release (April 29, 2015); Denial at 5 (J.A.__, __,__). Constitution was not required to re-submit the Joint Application. It could instead have asked NYSDEC to make a decision based on the information then available. It also could have objected that NYSDEC had waived its right to issue a Section 401 Certification. Constitution apparently concluded, however, that allowing more time for communication and NYSDEC review would serve its interests. NYSDEC issued its Denial on April 22, 2016, less than one year after NYSDEC's "receipt" of the re-submittal and in full compliance with Section 401, 33 U.S.C. § 1341(a)(1).

2. NYSDEC Did Not Delay Unreasonably

NYSDEC did not fail to act "within a reasonable period of time" under Section 401. *See* 33 U.S.C. § 1341(a)(1). Contrary to Constitution's claim that NYSDEC did nothing between July 2015 and April 2016 (Br. 20-21, 36-37), the record includes at least 188 entries for that period reflecting ongoing communications between the agency and Constitution on issues related to water quality. For example, the record reflects a series of communications between Constitution and NYSDEC in late 2015 and early 2016 regarding the development of Constitution's plan for third-party environmental monitoring during construction. *See* Draft Third-Party Monitoring Plan (October 2015); NYSDEC Comments on Revised Monitoring Plan (Nov. 18, 2015); Draft Third-Party Monitoring Plan (November 2015); Responses to DEC Comments (Nov. 23, 2015); Further NYSDEC Comments (Feb. 23, 2016) (J.A.__,__,__,__,__). A primary purpose of the third-party monitoring plan was to ensure compliance with NYSDEC's Section 401 Certification and other state permits. *See* Draft Third Party Monitoring Plan (October 2015) at 2-3 to 2-4 (J.A.__-__).

Further, throughout Autumn 2015, Constitution applied for permits from NYSDEC to conduct geotechnical investigations that were

"necessary to evaluate the feasibility of implementing a trenchless installation method." Cover Letter Regarding Geotechnical Boring (Oct. 15, 2015) (J.A.__); *see also* Cover Letters Regarding Geotechnical Boring (September 14, 2015 and November 10, 2015) (J.A.__,__,__). Although NYSDEC had requested that it be provided with the geotechnical studies, E-mail from Chris Hogan to Keith Silliman (March 17, 2015) (J.A.__), and issued all the requested permits in a timely manner, *see* Geotech Temporary Access Permits (Nov. 5, 2015 and Nov. 18, 2015) (J.A.__,__,__,__), Constitution never transmitted the results of these investigations, which prevented NYSDEC from fully evaluating the feasibility of trenchless stream crossing methods at the sites studied. Denial at 11.

In September 2015, almost four months after Constitution withdrew and resubmitted its Joint Application, Constitution submitted yet another supplemental Joint Application with additional information that required further NYSDEC review—including, for the first time, "complete wetland and waterbody field survey data for lands affected by the Project." Joint Application Cover Letter at 1 (Sept. 15, 2015) (J.A.__).

In Spring 2016, Constitution continued to submit information on stream-crossing methods to the Army Corps, but did not copy NYSDEC on those submissions. *See* Army Corps E-mail Exchange (March 30, 2016) (J.A.__); Argument, § III.A. Constitution submitted plans to Army Corps for a new proposal to construct a 100-mile "travel lane" and numerous temporary bridges to allow its construction vehicles to access the ROW. Army Corps Letter (Mar. 21, 2016); *see* Table of Waterbody Crossings (March 29, 2016) (J.A.__,__). Although the information on stream-crossing feasibility and "travel lane" or temporary bridge construction directly implicated water quality issues, Constitution never submitted the information to NYSDEC, which ultimately obtained the materials from the Army Corps. *See* E-mails from Bruce to Tomasik (March 31, 2016) (J.A.__-__). Had Constitution submitted this new information to NYSDEC in Spring 2016, that submission would have necessitated additional review time and perhaps another re-submittal of the modified Joint Application.

Thus, far from reflecting an unreasonable eight-month delay, the record shows an ongoing review of issues directly relevant to NYSDEC's determination whether to grant the Section 401 Certification, marked

by Constitution's continued failure to supply relevant information to NSYDEC.

3. FERC's Scheduling Order Did Not Shorten NYSDEC's Deadline Under CWA § 401

Constitution is mistaken in asserting that NYSDEC was required to act on the Section 401 Certification by January 22, 2015, because that was the deadline for "federal authorizations" established in a FERC scheduling order. Br. 30-32, *see* Notice of Revised Schedule for Environmental Review (Aug. 18, 2014) (J.A.__).

First, this Court lacks jurisdiction over that issue. The NGA assigns to the U.S. Court of Appeals for the District of Columbia Circuit "original and exclusive jurisdiction" to review any "alleged failure to act" by "a State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit," including "[t]he failure of an agency to take action on a permit required under Federal law . . . in accordance with [FERC's] schedule." 15 U.S.C. § 717r(d)(2). This Court, in contrast, has jurisdiction to review a state agency's "order or action" to "issue, condition, or deny any permit[.]" *Id.* §717r(d)(1). It is not empowered to address a state agency's alleged failure to comply with FERC's schedule. *Compare id.* § 717r(d)(1) *with id.* § 717r(d)(2). If

Constitution thought the FERC scheduling order applied to NYSDEC's Section 401 Certification and NYSDEC's delay was unlawful, it should have followed the NGA and promptly filed a petition in the D.C. Circuit challenging NYSDEC's alleged failure to act. Instead, Constitution waited until NYSDEC had denied the Joint Application and sued here. This Court's review is accordingly limited to the propriety of NYSDEC's Denial.

In any event, the deadline in FERC's order did not apply to NYSDEC's Section 401 Certification, which remained subject to the separate deadline established by the CWA. FERC's schedule could not override federal law. *See* 15 U.S.C. § 717n(c)(1)(B); 18 C.F.R. § 157.22. CWA Section 401 gives state agencies a "reasonable period of time" of up to one year to act on requests for Section 401 Certifications. 33 U.S.C. § 1341(a)(1). FERC's regulations recognize that a Section 401 Certification is an authorization "for which a schedule for agency action is established by federal law" and that FERC scheduling orders do not alter that schedule. FERC, Regulations Implementing the Energy Policy Act of 2005, 71 Fed. Reg. 62,912, 62,915 n.18 (Oct. 19, 2006). The Army Corps has acknowledged the same principle. *See* Army Corps, Regulatory Guidance Letter No. 07-03, at ¶3(3)(e) n.3 (Sept. 19, 2007),

available at http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl07-03.pdf. Accordingly, FERC's scheduling order does not restrict the timeline of NYSDEC's Section 401 Certification review.

4. NYSDEC Did Not Miss a 60-Day Deadline under Army Corp Regulations

Constitution is also mistaken in arguing that NYSDEC was required by 33 C.F.R. § 325.2(b)(1)(ii) to act on the Joint Application within 60 days. (*See* Br. 35.)

To trigger the 60-day regulatory deadline, the Army Corps district engineer must "verify that the certifying agency has received a valid request for certification." 33 C.F.R. § 325.2(b)(1)(ii). The Army Corps made no such verification here; therefore, the waiver period never commenced. *See AES Sparrows*, 589 F.3d at 728-30*; City of Fredericksburg v. F.E.R.C.*, 876 F.2d 1109, 1111-12 (4th Cir. 1989). To the contrary, as late as March 21, 2016, the Army Corps notified Constitution of "deficiencies" in its Section 404 application that "ha[d] not been resolved." Deficiency Letter (March 21, 2016) (J.A.__). This was only the latest in a series of letters seeking additional information on the Project. *See* Statement of Case § C n.2.

Constitution's attempt to use its April 27, 2015 re-submittal as the trigger date for the 60-day regulatory deadline (Br. 35) has no basis in the regulation or the record. To trigger the 60-day period, the existence of a valid request for a Section 401 Certification must be "determined by the Corps." *AES Sparrows*, 589 F.3d at 729. The fact that a state agency treats the application as administratively complete pursuant to state regulations on a different date is irrelevant to the Army Corps' assessment under 33 C.F.R. § 325.2(b)(1)(ii). *AES Sparrows*, 589 F.3d at 728. Without a determination by Army Corps that the application was valid or notice that the Section 401 Certification would be required by a certain date, *see id.* at 728-29, NYSDEC was not bound by a 60-day deadline.

POINT II

NYSDEC Did Not Exceed Its Jurisdiction In Denying The Certification

NYSDEC acted well within its jurisdiction when it denied the Section 401 Certification. In describing NYSDEC's jurisdiction as "narrowly circumscribed" (Br. 38), Constitution undervalues the crucial role played by state agencies under CWA Section 401. "State certifications under § 401 are essential to the scheme to preserve state

authority to address the broad range of pollution[.]" *S.D. Warren*, 547 U.S. at 386. Section 401 is "[o]ne of the primary mechanisms through which the states may assert the broad authority reserved to them" under the CWA. *Keating v. F.E.R.C.*, 927 F.2d 616, 622 (D.C. Cir. 1991). NYSDEC's Denial was consistent with its broad authority under the CWA and did not infringe on FERC's jurisdiction.

Constitution asserts the existence of three limitations on state agencies' jurisdiction, but in each case its arguments are groundless. First, the denial of a Section 401 Certification is not a "collateral attack" on FERC's order. Second, NYSDEC is not limited to enforcing "federally-approved" water quality standards. And, third, NYSDEC did not exceed its jurisdiction by considering the various factors to which Constitution objects.

A. NYSDEC's Review of the Project's Impact on State Water Quality Is Consistent with the Agency's Role Under the CWA and FERC's Order

Constitution is wrong to claim that NYSDEC's denial of the Section 401 Certification is an impermissible "veto" or "collateral attack" on FERC's Conditional Order. (*See* Br. 38-39, 42.) Under CWA Section 401, NYSDEC has authority to address a "broad range of

pollution," *S.D. Warren*, 547 U.S. at 386, by ensuring that an applicant will comply with any "appropriate requirement of State law," 33 U.S.C. § 1341(d). "[T]he state, alone, decides whether to certify under section 401(a)(1)." *Keating*, 927 F.2d at 524.

If a State denies a Section 401 Certification, "[n]o license or permit shall be granted." 33 U.S.C. § 1341(a)(1). This provision "was meant to 'continu[e] the authority of the State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.'" *S.D. Warren*, 547 U.S. at 380 (*quoting* S. Rep. No. 92-414, p. 69 [1971]). Congress "intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval." *Keating*, 927 F.2d at 622.

The NGA expressly preserves the States' broad authority by providing that "nothing in this chapter affects the rights of States under" the CWA. 15 U.S.C. § 717b(d)(3). Accordingly, States may prevent the construction of natural gas projects that would not comply with state water quality standards. *See*, *e.g.*, *AES Sparrows Point LNG*, 589 F.3d at 735; *Islander East II*, 525 F.3d at 152.

Here, FERC specifically recognized, endorsed, and preserved NYSDEC's independent environmental review of the Project's impacts on water quality.[9] FERC's Conditional Order required Constitution to comply with "the [NYSDEC] Section 401 permit[] required under the [CWA]" to minimize "impacts on waterbodies and wetlands." *Id.* ¶ 79. (J.A.__.) FERC's Rehearing Order underscored the important role that NYSDEC's environmental review would play, noting that "until NYSDEC issues the [Section 401 Certification], Constitution may not begin . . . pipeline construction." *Id.* ¶¶ 62-63. FERC expressly acknowledged that NYSDEC could require Constitution to "materially modify its project" or could refuse to issue a Section 401 Certification at all. *See id.* ¶ 70 ("*If* and when NYSDEC issues a [Section 401 Certification]," Constitution will be "required to comply" with it [emphasis added]). Constitution never sought rehearing of the conditions imposed by FERC's Orders, and cannot do so now. 15 U.S.C. §§ 717r(a), (b).

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[9] For the same reason, the argument by the National Association of Manufacturers and other amici that NYSDEC infringed on FERC's authority under the NGA is without merit. (*See* ECF No. 71 at 13-37.).

The FEIS prepared by FERC staff likewise relies upon NYSDEC's independent environmental review to mitigate environmental impacts. A "principal reason[]" for FERC staff's conclusion that the Project's environmental impacts would be acceptable was that Constitution "would be required to obtain applicable permits and provide mitigation for unavoidable impacts on waterbodies and wetlands through coordination with . . . NYSDEC." FEIS at ES-13; *see also id.* at 1-13 to 1-16 (listing permits that Constitution must obtain, including Section 401 Certification) (J.A.__,__-__). The FEIS is replete with references to the independent environmental review that would be conducted by NYSDEC, and relied on that review to minimize and mitigate impacts to water quality. *See* Statement of the Case § B.

FERC's Orders and FEIS thus recognized and preserved NYSDEC's authority to ensure that the Project complied with state water quality standards. Constitution's attempt to use the FEIS as a sword to challenge NYSDEC's Denial (Br. 44-52) is therefore misguided. Furthermore, contrary to Constitution's argument (Br. 38, 46), NYSDEC was not compelled to seek rehearing before FERC, even if it disagreed with some of FERC's conclusions: FERC required Constitution to obtain and comply with a Section 401 Certification from

NYSDEC prior to commencing construction. *See* 15 U.S.C. § 717r(a).[10] Conversely, if Constitution believed then that NYSDEC lacked authority to prevent the Project from going forward by denying a Section 401 Certification, Constitution should have sought rehearing before FERC to challenge the offending license conditions. *Id.*

In any event, NYSDEC is free to reach water-quality conclusions different from FERC's based on the evidence available during the state agency's independent water-quality review. *See Islander East II*, 525 F.3d at 157. Otherwise, the primary role of protecting water quality assigned to the states by Section 401 of the Clean Water Act, which is preserved under the NGA generally and specifically by FERC in this proceeding, would be meaningless.

B. NYSDEC Is Not Limited to Enforcing "Federally-Approved" Water Quality Standards.

The law does not support Constitution's position that NYSDEC's Section 401 review is limited to whether the Project will comply with "*federally-approved* water quality standards." (Br. 9 [emphasis in

[10] NYSDEC does not concede here that FERC had authority to issue a conditional Certificate of Public Convenience and Necessity prior to the State's issuance of a Section 401 Certification.

original]; *see also id.* at 24, 25, 41, 44.) The Supreme Court squarely rejected that position in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994). There, the Court held that "pursuant to § 401, States may condition certification upon any limitations necessary to ensure compliance with state water quality standards or *any other* 'appropriate requirement of State law.'" *PUD No. 1*, 511 U.S. at 713-14 (emphasis added).[11] The Supreme Court later reiterated that "Congress provided the States with power to enforce 'any other appropriate requirement of State law,' by imposing conditions on federal licenses for activities that may result in a discharge." *S.D. Warren,* 547 U.S. at 386 (citation omitted).

Accordingly, EPA has observed in CWA guidance on Section 401 Certifications that "while EPA-approved state and tribal water quality standards may be a major consideration driving §401 decision, they are

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[11] Constitution's argument that *PUD No. 1* merely held the state has "authority to *condition*, as opposed to apply state laws" (Br. 43), is misguided. The purpose of imposing conditions related to water quality standards—even if those standards are not federally approved—is to ensure that applicants comply with "appropriate requirement[s] of State law." 33 U.S.C. § 1341(d). Here, NYSDEC concluded that Constitution failed to demonstrate the Project could comply with State water quality standards, even with conditions. Denial at 7-8 (J.A.__).

not the only consideration." CWA Section 401 Water Quality Certification at 16 (2010) (J.A.__). Potentially relevant additional considerations include whether the permitted activity would affect coastal resources, rare and endangered species, wildlife habitats, or ceremonial cultural or religious uses. *Id.* at 21.

Constitution's flagship case on this point, *Matter of Niagara Mohawk Power Corp. v. N.Y.S.D.E.C.*, 82 N.Y.2d 191 (1993), *cert denied* 511 U.S. 1141 (1994), was effectively overruled by *PUD No. 1* and *S.D. Warren*. Contrary to Constitution's claims (Br. 41-44), subsequent New York state court decisions have recognized that "the Supreme Court has [since *Niagara Mohawk*] extended the authority of state agencies under the CWA." *Matter of Eastern Niagara Project Power Alliance v. N.Y.S.D.E.C.*, 42 A.D.3d 857, 860 (3d Dep't 2007) ("*Eastern Niagara*"). *Eastern Niagara* confirmed that NYSDEC's Section 401 review must relate to water quality, but recognized that the Supreme Court in *S.D. Warren* "held that states could regulate any activity altering the integrity of water." *Id.* Constitution's reliance on NYSDEC's brief in *Eastern Niagara* (Br. 43) is equally ill-founded. There, the agency stated that its review under Section 401 was limited

to water quality issues—not that it was strictly limited to *federally-approved* water quality standards. (*See* Br. ADD11.)[12]

In short, Constitution's attempt to limit NYSDEC's review of Section 401 Certifications to federally-approved water quality standards does not reflect existing law.

C. NYSDEC Appropriately Considered the Various Specific Factors to Which Constitution Objects

Constitution's specific objections to factors considered in NYSDEC's Denial (Br. 44-52) are meritless.

First, NYSDEC's consideration of cumulative impacts of the Project on water quality, Denial at 7 (J.A.__), was consistent with its review of water quality impacts under appropriate state laws. Under ECL § 3-0301(1)(b), NYSDEC must "take into account the cumulative impact upon [water] resources in making any determination in connection with any license, order, permit certification or other similar

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[12] In a subsequent case before the New York Court of Appeals, NYSDEC recognized that the Supreme Court's decisions in *PUD No. 1* and *S.D. Warren* "interpreted section 401 of the CWA far more broadly" than the Court of Appeals in *Niagara Mohawk*. Resp.'s Br. in *Matter of Chasm Hydro v. NYSDEC*, 2009 N.Y. App. Ct. Briefs LEXIS 116, at *24-25 (Aug. 28, 2009).

action." That is the sort of "appropriate requirement of State law," 33 U.S.C. § 1341(d), that Section 401 authorizes NYSDEC to enforce. *See PUD No. 1*, 511 U.S. at 713-14.

Contrary to Constitution's argument that NYSDEC cannot consider cumulative impacts because FERC already did so (Br. 47-48), FERC's Conditional Order specifically recognized and relied upon the independent authority of "state and local agencies" to ensure that "cumulative impacts would be minimized." FERC Conditional Order ¶106 (J.A.__). Moreover, NYSDEC properly limited its evaluation of cumulative impacts to issues related to water quality—in particular, the cumulative effect of multiple crossings of the same streams and tributaries and a significant increase in the number of stream crossings per mile. Denial at 5.

Second, there was ample legal authority for NYSDEC's consideration of the effects of the depth of pipeline burial. *See* Br. at 48-50; Denial at 12-13 (J.A.__-__). The Denial noted that improperly buried pipes could become exposed due to vertical stream movements, resulting in "severe negative impacts on water quality" when they had to be reburied. *Id.* at 13 (J.A.__). Elsewhere, NYSDEC discussed the impacts of pipe installation on water quality standards related to

turbidity under 6 N.Y.C.R.R. § 703.2 and waste discharges under § 701.1. *Id.* at 12 (J.A.__). Once a Section 401 Certification is required, the certifying agency may "regulate any activity altering the integrity of water." *Eastern Niagara*, 42 A.D.3d at 860; *see PUD No. 1*, 711 U.S. at 712; *S.D Warren Co.*, 547 U.S. at 383; EPA, CWA Section 401 Water Quality Certification at 23 (2010) (J.A.__).

Although Constitution asserts that it provided site-specific information on pipe depth, it fails to cite specific record materials that would support its assertion. (Br. 49-50.) It is unclear which version or supplement of the Joint Application—if any—included the "alignment sheets" that Constitution says contained the required information. The alignment sheets in the final Joint Application supplement from September 2015 reflect a generic pipe burial depth of 60 inches, rather than a site-specific evaluation of the appropriate pipe depth. *See, e.g.*, Alignment Sheets, Attachment C to Joint Application Supplement (Sept. 2015) (J.A.__). The generic depth of 60 inches also fails to comply with NYSDEC's May 2013 direction that "pipelines should be buried at least 6' [72 inches] below a stream bottom." Desnoyers Letter at 2 (May 28, 2013) (J.A.__).

Third, Constitution is wrong in arguing that NYSDEC could not consider potential blasting activities because no water quality standard applies to them. (Br. 51.) NYSDEC properly considered impacts from blasting and required compliance with ECL article 15, which sets forth various protections applicable to streams and other waterbodies. *See, e.g.,* ECL §§ 15-0501, 15-0503, 15-0505. That statute and its implementing regulations are relevant state laws relating to water quality. (*See* Point II(B)(1).) *See Matter of Chasm Hydro, Inc. v. NYSDEC*, 58 A.D.3d 1100, 1101 (3d Dep't 2009), *aff'd,* 14 N.Y.3d 27 (2010) ("ECL articles 15 and 17 were enacted, and [NYSDEC] issued regulations relating thereto, in order to comply with the [CWA]"). For example, ECL § 15-0501(1) prohibits any unpermitted disturbance of stream beds, as would occur during in-stream blasting.

The FEIS detailed the possible deleterious effects of blasting, including potential groundwater contamination due to fractures in the bedrock. FEIS, 4-15 to 4-16 (J.A.__). The FEIS specifically recognized that Constitution would be required to "develop a detailed in-water blasting plan that complies with state-specific regulations and permit conditions." FEIS at ES-6 (J.A.__). Accordingly, FERC's Conditional Order required Constitution to develop site-specific blasting plans "in

consultation with applicable state resource agencies." Conditional Order at 54 (J.A.__).

Constitution does not contest that blasting may be required or that it failed to submit site-specific information on blasting plans—it contends instead that FERC's Conditional Order required submission of those plans to FERC prior to construction. (Br. 51.) NYSDEC's conclusion that blasting plans should have been submitted *prior to* Section 401 Certification is consistent with the requirements of FERC's Conditional Order and the conclusions reached by FERC Staff in the FEIS and simply makes sense. FEIS, ES-6, 4-15 to 4-16 (J.A.__,__-__).

Fourth, NYSDEC did not usurp FERC's authority to route natural gas pipelines by discussing the environmental benefits of an alternate route ("Alternative Route M") that would have co-located the pipeline along the existing Interstate 88 right-of-way. (Br. 44-46.) Rather, consistent with its authority to minimize and mitigate impacts to waterbodies, NYSDEC noted its conclusion—based on review of information submitted by Constitution or publicly available—that co-locating the pipeline in an existing right-of-way would reduce overall impacts to waterbodies and wetlands. Denial at 2-3 n.5 (J.A.__). That conclusion was fully supported by NYSDEC's overview of impacts

resulting from tree-clearing and construction of 100 miles of new right-of-way. *Id.* at 3-4 (J.A.__). In any event, NYSDEC did not require that the pipeline be rerouted. NYSDEC expressed dissatisfaction with Constitution's justifications for refusing to develop the Alternative M proposal further, *id.* at 2-3, & n.5 (J.A.__), as part of its overarching conclusion that Constitution failed to demonstrate that the Project, as proposed, would comply with state water quality standards and requirements.

Finally, even if Constitution were correct that one or more of the above factors were improperly considered, NYSDEC indisputably acted within its authority when it considered stream-crossing and wetland-crossing methods. As long as there is at least one basis for NYSDEC's decision that is not arbitrary and capricious, this Court must uphold it. *See Islander East II*, 525 F.3d at 158. Thus, if this Court agrees that NYSDEC properly denied the Certification based on Constitution's failure to demonstrate that the Project's stream and wetland crossings would comply with state water-quality-protection requirements, the agency's decision must stand. *See* Denial at 8-12 (J.A.__-__); *AES Sparrows*, 589 F.3d at 730. As shown below, Constitution failed to make that demonstration.

POINT III

NYSDEC'S DENIAL WAS NOT ARBITRARY OR CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE CONTRARY TO LAW

The reasons for NYSDEC's Denial are fully supported by the record, rational, and not arbitrary or capricious.

A. The Record Supports NYSDEC's Conclusion that Constitution Failed to Demonstrate that the Project's Stream and Wetland Crossings Would Comply with Applicable Water-Quality-Protection Requirements

The record establishes that, despite repeated requests, Constitution failed to evaluate fully the feasibility of trenchless crossing methods such as horizontal directional drilling.[13] During a pre-application meeting in June 2012, NYSDEC told Constitution that trenchless methods were the preferred stream-crossing method. Letter from Tomasik to Silliman, at 3 (June 21, 2012) (J.A.__). In November 2012, while the scope of the EIS was being determined, DEC commented that "[f]or streams and wetlands, the preferred method for

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[13] Horizontal directional drilling, sometimes referred to as "HDD" in the record, is a trenchless crossing method that involves drilling an arced pilot hole under the waterbody, then steadily expanding it with reamers, before pushing a pre-fabricated section of pipe through. FEIS at 2-23 (J.A.__).

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." Desnoyers Letter to Kimberly D. Bose, at 3 (Nov. 7, 2012) (J.A.__). Accordingly, NYSDEC wrote that if Constitution did not intend to use horizontal directional drilling, it "should explain why [horizontal directional drilling] will not work or is not practical for that specific crossing." *Id.* In subsequent comments to FERC, NYSDEC reiterated that its "preferred methodology for *all stream crossings* is Horizontal Directional Drill." Letter from Patricia J. Desnoyers to Kimberly D. Bose at 1 (May 28, 2013) (J.A.__) (emphasis added). Two months later, NYSDEC again expressed its preference for horizontal directional drilling and asked Constitution to explain why this method would not be used for each specific stream crossing after Constitution submitted its initial application to FERC. NYSDEC Comments to Kimberly D. Bose at 3 (July 17, 2013) (J.A.__). Thereafter, NYSDEC repeatedly asked Constitution to expand its evaluation of the feasibility of trenchless crossing methods. Denial at 9-11 (J.A.__-__).

Notwithstanding NYSDEC's clear communications regarding trenchless stream crossings, Constitution's feasibility evaluations consistently failed to consider trenchless crossing methods at streams less than 30 feet wide. In its initial Trenchless Feasibility Study, Constitution excluded streams less than 30 feet wide because trenchless crossing at those locations would "have the potential" to require greater workspace than a conventional dry crossing. *See* Trenchless Feasibility Study, at 1-1, 2-3 (November 2013) (J.A.__,__). However, Constitution did not actually evaluate the workspace needs of the streams it eliminated from consideration.

NYSDEC asked Constitution to evaluate trenchless crossing feasibility for smaller streams in November 2013, December 2014, and January 2015. Denial at 10 (J.A.__).

Nonetheless, in a February 2015 response to one of NYSDEC's requests for more information regarding crossing methods, Constitution reiterated that it did not consider horizontal directional drilling methods for streams less than 30 feet wide because "in general" the use of this method "causes greater net environmental impacts," which it asserted was an "industry recognized standard." Draft Trenchless Feasibility Study Edits, at 1 (February 2015) (J.A.__). Constitution

further argued that NYSDEC had no "regulation, formally adopted policy or guidance document that would warrant deviating from this standard." *Id.* Constitution's objection to NYSDEC's request for trenchless-feasibility review missed the mark. NYSDEC was not bound by "industry recognized standards." NYSDEC acted well within its broad authority to protect New York's water quality when it asked Constitution to conduct a site-specific evaluation of stream-crossing feasibility at all crossings.

By strategically eliminating streams less than 30 feet in width, Constitution unduly narrowed its consideration of potential sites for trenchless crossings in New York to a mere 24 streams and 2 major waterbodies. Trenchless Feasibility Study 3-1 to 3-4 (Nov. 2013) (J.A.__-__). Constitution further reduced the number of candidates for trenchless crossings to 11 streams and 2 major waterbodies, on the basis of Constitution's unilateral evaluation of non-environmental factors such as "anticipated costs, construction timelines, estimated workspace requirements and regulatory agency reviews." *Id.* at 3-1, 4-1 to 4-4 (J.A.__,__-__). Constitution therefore proposed to conduct geotechnical field studies—which are used to "determine the feasibility of trenchless crossing"—on only 13 of the more than 250 stream

crossings in New York. *Id.* at 4-1 to 4-4 (J.A.__-__). As a result of these decisions, Constitution proposed to fully evaluate trenchless feasibility for barely 5% of crossings – a number that fell far short of NYSDEC's stated expectation that trenchless methods be considered for all stream crossings.

Constitution also failed to provide sufficient information to justify refusing to use trenchless methods on the handful of crossings it actually evaluated. Denial at 11. In March 2015, NYSDEC provided a list of streams that "must be crossed" by horizontal directional drilling, and sought a "Phase 3 analysis." E-mail from Chris Hogan to Keith Silliman (March 17, 2015) (J.A.__,__). A "Phase 3 analysis" would require a full geotechnical feasibility analysis. *See* Trenchless Feasibility Study at 1-1, 4-1 to 4-6. (J.A. __,__-__). In response, in May 2015 Constitution expanded its evaluation of trenchless feasibility to 25 stream crossings—still less than 10% of the total crossings. *See* Summary of Current and Previously Proposed Trenchless Crossing Locations (May 2015); NY Stream Crossing Feasibility Analysis Table (May 20, 2015) (J.A.__,__). At that time, Constitution had not completed geotechnical analyses of most of the crossings, instead eliminating

many crossings from consideration based on general concerns. NY Stream Crossing Feasibility Analysis Table (J.A.__).

In response, NYSDEC commented that "[a] feasibility analysis should be completed" for the trenchless techniques considered and rejected by Constitution "at each of the identified stream crossings" and that the feasibility determination had to be "based solely upon technical characteristics, not cost/safety/schedule concerns." NY Stream Crossing Feasibility Analysis, with NYSDEC Comments (May 27, 2015) (J.A.__).[14] Constitution re-submitted the analysis in June 2015, but still had not completed full geotechnical evaluations and did not provide the evaluations it had completed to the State. NY Stream Crossing Feasibility Analysis, Revised (June 30, 2015) (J.A.__). Although Constitution began using eminent domain to obtain site-access after the issuance of FERC's conditional order in December 2014, 15 U.S.C. § 717f(h), and sought and obtained permits to conduct geotechnical evaluations at various sites from NYSDEC (*see* Argument § I.B.3),

[14] Although NYSDEC agreed at that time to remove four specific streams from consideration, Tomasik E-mail (May 22, 2015) (J.A.__), it did not say that Constitution had evaluated a sufficient number of streams, or that the level of review for the streams considered was sufficient. *See* Br. at 56-57.

Constitution submitted full geotechnical evaluations for only two stream crossings. *See* Geotechnical Reports (J.A.__,__).

Constitution wrongly suggests that NYSDEC was required to continue seeking information from Constitution until the Section 401 Certification could be granted (Br. at 60-62). It was Constitution's burden to submit sufficient information to demonstrate that the Project would comply with State water quality standards. *See* 33 U.S.C. § 1341(a)(1); 6 N.Y.C.R.R. § 608.9(a)(6). NYSDEC afforded Constitution repeated opportunities to supplement and explain its application, but Constitution failed to supply information sufficient to establish that the Project could comply with state water quality standards. Eventually, the Joint Application had to be judged on the information submitted. NYSDEC's conclusion that this information was insufficient to assure compliance with water quality standards was fully justified.

Contrary to Constitution's argument (Br. 54), FERC did not excuse Constitution from its obligation to evaluate trenchless feasibility. In the FEIS, FERC staff noted Constitution's position that trenchless crossing methods were not practical for crossings of less than 30 feet, but did not comment upon or endorse it. FEIS at 4-50 (J.A.__). Rather, FERC staff specifically recognized that NYSDEC had "not yet

provided feedback on Constitution's proposed waterbody crossing methods," which then included trenchless crossing of 21 streams. FEIS at 4-51, 4-52 (J.A.__,__). In fact, FERC's own construction guidelines indicate that horizontal directional drilling is an appropriate method for crossing wetlands or waterbodies less than 30 feet wide. *See* FERC, Office of Energy Projects, *Wetland and Waterbody Construction and Mitigation Procedures* at 8-9 (May 2013), *available at* https://www.ferc.gov/industries/gas/enviro/procedures.pdf. That same document notes that it is a "baseline" for mitigation procedures and that applicants must also "[a]pply for state-issued waterbody crossing permits" such as the Section 401 Certification. *Id.* at 1, 5.

Nothing in the FERC Orders limited the number of trenchless crossings to the handful chosen by Constitution. While FERC's Conditional Order noted that Constitution had "proposed" to use trenchless crossing methods at 21 crossings, it confirmed that impacts would be "further mitigated" by Constitution's compliance with NYSDEC's Section 401 Certification. FERC Conditional Order ¶¶ 77, 79 (J.A.__). Recognizing that evaluation of trenchless feasibility was ongoing, the Conditional Order required Constitution to file geotechnical feasibility studies prior to the commencement of

construction. *Id.* at 52 (J.A.__). Similarly, FERC's Rehearing Order recognized that trenchless-crossing feasibility had not been fully evaluated because Constitution had not yet obtained access to all affected parcels. FERC Rehearing Order ¶ 49 (J.A.__).

NYSDEC was not the only agency concerned over the lack of information regarding stream-crossing methods: the Army Corps repeatedly and unsuccessfully sought additional information on these same issues. In September 2013, the Army Corps noted that Constitution's "current mitigation plan [was] conceptual in nature" and sought further information on that plan, including "[p]lan-view and cross-section drawings for each proposed permanent stream crossing structure" showing that it would comply with Army Corps regulatory conditions. Army Corps Deficiency Letter, at 2-3 (Sept. 20, 2013) (J.A.__-__). In January 2014, the Army Corps observed that Constitution had still not provided the requested information, and reiterated that Constitution needed to quantify the Project's impacts and to provide drawings for each proposed crossing. Army Corps Deficiency Letter, at 1-2 (Jan. 16, 2014) (J.A.__). Over the next two years, the Army Corps continued to stress its need for more detailed

mitigation plans. *See* Army Corps Letters (May 6, 2014; Oct. 8, 2014; April 6, 2015; March 21, 2016) (J.A.__,__,__,__).

In February 2016, the Army Corps sent Constitution a list of 17 waterbody crossings for which Constitution needed to provide "final stream crossing plans" and "supporting information explaining why the specific crossing method was selected for each crossing." Draft Conditions to Evaluate (Feb. 23, 2016) (J.A.__). The Army Corps asked Constitution to "confirm these are streams under investigation for trenchless crossing methods and whether determinations have been made yet as to the type of crossing proposed." Bruce E-mail (Feb. 23, 2016) (J.A.__). Constitution confirmed that the streams listed were "under investigation." Schubring E-mail (March 28, 2016) (J.A.__). It also submitted a list of the crossings which indicated that none would be crossed by trenchless methods, but provided no further explanation. Crossing Table (March 31, 2016) (J.A.__). Although this information was directly relevant the NYSDEC's numerous requests for information on stream-crossing methods, Constitution did not send it to NYSDEC. The exchange further reflects that less than a month before NYSDEC's Denial, Constitution had not fully evaluated trenchless crossing methods for all crossings.

Constitution's submissions on wetland-crossing methods and impacts suffered from the same deficiencies as its stream-crossing submissions. The inadequate Trenchless Feasibility Study included wetland crossings. Constitution's own memorandum from June 2015 acknowledged that NYSDEC had requested "full delineation"—not just desktop evaluations—of wetlands on affected property. Memorandum from Schubring to Tomasik, at 3 (June 16, 2015) (J.A.__). However, Constitution submitted geotechnical reports for only two wetland crossings. *See* Geotechnical Reports (J.A.__,__).

Nor is there any merit in Constitution's attack on the Denial's failure to cite Constitution's Stormwater Pollution Prevention Plan (SWPPP) (Br. at 59-60). The Denial related to Constitution's application for a CWA Section 401 Certification, while the SWPPP related to Constitution's separate application for a Section 402 Certification. *See* 33 U.S.C. § 1342. The Section 402 application remains pending before NYSDEC.

Finally, Constitution has not established that NYSDEC's well-reasoned and fully-supported Denial should be vacated due to alleged political influence (*see* Br. 60-61). First, this argument impermissibly relies on outside-the-record declarations. *See* Motion to

Strike (ECF No. 66). Second, even if Constitution's declarations were considered, they do not establish that the denial resulted from improper political influence. "[P]olitical pressure invalidates agency action only when it shapes, in whole or in part, the judgment of the ultimate agency decisionmaker." *AERA Energy LLC v. Salazar,* 642 F.3d 212, 220 (D.C. Cir.), *cert denied,* 565 U.S. 883 (2011). Constitution has submitted declarations regarding hearsay statements from one NYSDEC employee indicating that he was waiting for the Governor's Office before moving forward (Silliman Decl. ¶¶ 9, 23, 24). The employee referenced in the Silliman affidavit was not the "ultimate agency decisionmaker" authorized to reach a position and bind the agency. Considering the Project's scale, the decision on whether to issue a Section 401 Certification was properly subject to multiple levels of internal agency review. The record fully supports NYSDEC's detailed, substantive and well-reasoned Denial; Constitution's vague insinuations of political

influence are insufficient to render the decision arbitrary and capricious.[15]

B. NYSDEC Did Not Arbitrarily or Capriciously Depart from Prior Practice Regarding Stream Crossing Methods or Thermal Discharges

Constitution's argument that NYSDEC bears a "heavy burden" of explaining its supposed departure from prior practices (Br. 50, 65, 67) is legally and factually wrong. None of the cases cited by Constitution imposed a "heavy burden" standard. In *Ellis v. Chao*, this Court rejected the argument that a change of position would be "per se arbitrary and capricious" and noted only that based on case law from

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[15] Likewise, the fact that draft permit conditions or full draft permits may have been prepared is of no moment (*see* Br. ADD47). A non-final permit has no legal effect. Rather, the record reflects that a draft permit was circulated to Army Corps for review and comment, with the proviso that it had been prepared by just one division of NYSDEC, was "VERY PRELIMINARY," was subject to significant changes, and had not been fully reviewed within NYSDEC. Tomasik E-Mail (July 20, 2015) (J.A.__). The existence of draft permits merely confirms the agency's good faith in considering the possibility of issuing a Section 401 Certification subject to substantial conditions—a possibility ultimately precluded by Constitution's ongoing failure to establish that the Project would comply with state water quality requirements. *See id.* at 19 (comment to draft permit notes that NYSDEC "requested details" on impact from boring pits "several times, but they have not provided").

other circuits, a "more detailed" explanation of the decision "might be necessary." 336 F.3d 114, 126 (2d Cir. 2003). Likewise, in *Doyle v. Brock* the Court stated that an agency decision-maker should explain departures from long-standing positions. 821 F.2d 778, 786 (D.C. Cir. 1987). Here, there were no departures to explain. NYSDEC applied the correct standard; the outcome was dictated by Constitution's failure to supply needed information.

Contrary to Constitution's claims (Br. 64-65) NYSDEC's Denial was not rendered arbitrary and capricious by the grant of Section 401 Certifications for two other pipeline projects. The mere fact that different permit applications had different outcomes is not determinative. *See Ellis*, 336 F.3d at 125 (rejecting claim of inconsistency because plaintiff provided "no evidence" of inconsistent reasoning).

The two permits cited by Constitution are easily distinguished. In the Algonquin Gas Transmission project, NYSDEC authorized the *replacement* of 15.7 miles of pipeline in an existing right-of-way, as well as the installation of only 2.9 miles of new pipeline (*see* Br. ADD22). Removing the existing pipeline required trenched dry crossing methods in streams that had already been disturbed. In the relatively small

stretch of new right-of-way, NYSDEC required trenchless crossing of the Hudson River. *Id.* Here, Constitution seeks to construct a pipeline in 100 miles of new right-of-way, including more than 250 waterbody crossings, fully justifying NYSDEC's request for a full evaluation of trenchless crossing methods.

The Empire Pipeline permit authorized only 17 miles of new pipeline. Empire Pipeline Inc. Permit, at 1 (Br. ADD33). While two of the nineteen streams crossed would have used HDD, *id.*, public environmental reports from the related FERC proceeding indicate that only nine of the streams—including the two that would be crossed by trenchless methods—were perennial, all streams had average quality classifications, and no streams were suitable to support trout. Environmental Assessment Report, at 24-25 (Oct. 31, 2014), FERC Docket No. CP14-112-000, Accession No. 20141031-4002. Here, in contrast, Constitution's project would require more than 250 stream crossings, including 96 crossings of perennial streams, 6 crossings of streams classified as above-average and 87 crossings of streams that support trout. FEIS, Appendix K-2 (J.A.__). As NYSDEC explained, the sheer number of stream crossings—including multiple crossings of some streams—would degrade water quality. Denial, at 3 (J.A.__).

Moreover, any departure from prior permit conditions was reasonably based on DEC's experience with prior permits. An agency may depart from prior practice "with the benefit of hindsight" to avoid "observed adverse effects" resulting from that prior practice. *Islander East II*, 525 F.3d at 157. Here, NYSDEC stated that it had "observed numerous and extensive vertical movements of streams in New York State that have led to pipe exposure and subsequent remedial projects to rebury the pipe and armor the stream channel." Denial, at 12-13. Accordingly, to the extent NYSDEC sought additional information from Constitution, that information was necessary to avoid negative impacts that NYSDEC had observed on previous occasions.

NYSDEC did not apply its thermal-discharge criteria arbitrarily or capriciously (*see* Br. 66-67). NYSDEC's Denial describes the negative impact of decreased shade resulting from the removal of riparian vegetation, which "will likely increase water temperatures, further limiting habitat suitability for cold-water aquatic species such as brook trout." Denial at 4 (J.A.__). Those impacts could be "exacerbated in the long term by climate change." *Id.* 87 of the Project's stream crossings would be of cold-water habitats that support trout. FEIS, Appendix K-2 (J.A.__). State law requires NYSDEC to minimize changes to water

temperature. *See, e.g.,* ECL § 15-0501(3)(b). By pointing out the long-term negative impacts of Constitution's ROW clearing on water quality, NYSDEC supported the need for comprehensive, site-specific information on stream crossing and mitigation methods. Denial at 3 (J.A.__); *see Eastern Niagara*, 42 A.D.3d at 860. NYSDEC did not purport to apply its thermal discharge criteria in that section of the Denial, and its prior application of thermal discharge criteria to unrelated projects is irrelevant.

In short, NYSDEC's Denial was the culmination of a careful and comprehensive administrative review of the Project's potentially major impacts to state water quality. NYSDEC's determination that Constitution failed to demonstrate that the Project would comply with applicable water-quality-protection requirements is supported by the record, rational, and not arbitrary or capricious.[16]

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[16] If this Court were to agree with Constitution that NYSDEC's Denial was improper (and it should not), the appropriate remedy would be to remand the proceeding to the agency. 15 U.S.C. § 717r(d)(3). If there is a remand, NYSDEC should also be given the opportunity to consider the other water quality permits subject to the Joint Application that remain pending. *See* Denial, at 1 n.3.

CONCLUSION

The Petition should be denied.

Dated: September 12, 2016
Albany, New York

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Respondents

By: */s/ Frederick A. Brodie*
FREDERICK A. BRODIE
Assistant Solicitor General

The Capitol
Albany, New York 12224
(518) 776-2317

BARBARA D. UNDERWOOD
Solicitor General
ANDREW B. AYERS
Senior Assistant Solicitor General
FREDERICK A. BRODIE
Assistant Solicitor General
LISA M. BURIANEK
Deputy Bureau Chief
BRIAN LUSIGNAN
Assistant Attorney General of Counsel

16-1568

United States Court of Appeals
for the Second Circuit

CONSTITUTION PIPELINE COMPANY, LLC,

Petitioner,

v.

BASIL SEGGOS, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, JOHN FERGUSON, CHIEF PERMIT ADMINISTRATOR, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents

STOP THE PIPELINE, CATSKILL MOUNTAINKEEPER, INC., SIERRA CLUB, RIVERKEEPER, INC.,

Intervenors.

PETITION FOR REVIEW FROM THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

BRIEF FOR RESPONDENTS

The undersigned attorney, Frederick A. Brodie hereby certifies that this brief complies with the type-volume limitations of FRAP 32(a)(7). According to the word processing system used by this office, this brief, exclusive of the title page, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel, contains 13,841 words.

/s/ *Frederick A. Brodie*

FREDERICK A. BRODIE
Assistant Solicitor General

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Respondents
Albany, New York 12224
(518) 776-2317