# 16-1568-ag

## United States Court of Appeals
*for the*
## Second Circuit

CONSTITUTION PIPELINE COMPANY, LLC,

*Petitioner,*

– v. –

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

**PETITION FOR PANEL REHEARING AND/OR REHEARING EN BANC OF PETITIONER CONSTITUTION PIPELINE COMPANY, LLC**

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**CORPORATE DISCLOSURE STATEMENT OF CONSTITUTION PIPELINE COMPANY, LLC**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Constitution Pipeline Company, LLC ("Constitution") makes the following disclosures:

Constitution Pipeline Company, LLC is a limited liability natural gas pipeline company organized and existing under the laws of the State of Delaware. The members of Constitution include Williams Partners Operating LLC (41 percent), Cabot Pipeline Holdings, LLC (25 percent), Piedmont Constitution Pipeline Company, LLC (24 percent), and WGL Midstream CP, LLC (10 percent). The respective members' direct and indirect parents are Williams Partners Operating LLC, Williams Partners L.P., The Williams Companies, Inc., WGL Midstream, Inc., WGL Holdings, Inc., Washington Gas Resources Corp., Duke Energy Pipeline Holding Company, LLC, and Duke Energy Corporation. The following publicly-held corporations directly or indirectly own a 10% or more interest in Constitution Pipeline Company, LLC: Williams Partners L.P., The Williams Companies, Inc., Duke Energy Corporation, and WGL Holdings, Inc. Cabot Oil & Gas Corporation is an indirect, beneficial owner of a 25% membership interest through its wholly-owned subsidiary, Cabot Pipeline Holdings, LLC. In addition, The Williams Companies Inc. owns 10% or more of the publicly-held limited partner interest in Williams Partners, L.P. Duke Energy

Corporation is an indirect owner of Duke Energy Pipeline Holding Company, LLC.

Respectfully submitted,

/s/ John F. Stoviak

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September 1, 2017

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**RULE 35(b) STATEMENT**[1]

Deviating from Supreme Court and Second Circuit precedent, and contrary to the clear mandates and limits for cooperative federalism set forth by Congress in the Natural Gas Act, as amended by the Energy Policy Act of 2005, the panel ruled that the New York State Department of Environmental Conservation's ("NYSDEC") attempted "do over" of the extensive permitting process implemented by the Federal Energy Regulatory Commission ("FERC") and its reversal of FERC's judgments and decision-making in the comprehensive Environmental Impact Statement ("EIS"), including, without limitation, FERC's choice of a route for an interstate natural gas pipeline, "*were within [NYSDEC's] statutory authority*." Slip. Op. 4 (emphasis added). The panel's opinion must be vacated, and rehearing should be granted, because the holding that "[a] state's consideration of a possible alternative route that would result in less substantial impact on its waterbodies is plainly within the state's authority," Slip. Op. 23, squarely conflicts with this Court's ruling in *National Fuel Gas Supply Corporation v. Public Service Commission of the State of New York*, 894 F.2d 571, 579 (2d Cir. 1990), as well as the Supreme Court's decision in *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293, 300-01 (1988) and the First Circuit's

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[1] Constitution Pipeline Company, LLC ("Constitution") petitions the Court for panel rehearing and/or rehearing en banc, for the reasons that follow.

decision in *Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council*, 589 F.3d 458, 472 (1st Cir. 2009), all of which recognize FERC's exclusive authority over siting of interstate natural gas facilities.

Indeed, the panel's ruling that a "state's consideration of a possible alternative route [for an *interstate* natural gas pipeline] is plainly within the state's authority" is a self-proclaimed critical part of its decision. Slip. Op. 23. The panel described it as the "single cognizable rationale" for denying Constitution's petition for review under the arbitrary and capricious standard. Slip Op. 23.[2] Significantly, however, this "single rationale" is not "cognizable" because it directly violates the principles of the 2005 Amendments to the Natural Gas Act, where Congress established clear procedures designed to avoid a series of state re-reviews of FERC "that [could] kill a project with a death by a thousand cuts." *See Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 85 (2d Cir. 2006) (internal quotations omitted). By so ruling, the panel has effectively endorsed the decision of New York State to halt the FERC-approved interstate natural gas pipeline by abusing its limited review rights under the Clean Water Act.

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[2] "We need not address all of these contentions. A state's consideration of a possible alternative route that would result in less substantial impact on its waterbodies is plainly within the state's authority. *See*, *e.g.*, *Islander East II*, 525 F.3d at 151-52. And where an agency decision is sufficiently supported by even as little as a single cognizable rationale, that rationale, 'by itself, warrants our denial of [a] petition' for review under the arbitrary-and-capricious standard of review. *See*, *e.g.*, *id*. at 158." Slip Op. 23.

The panel's opinion describes at length the comprehensive FERC review process and the development of the EIS, and acknowledges the active participation by NYSDEC in this process. Slip Op. 5-10. The panel's opinion acknowledges that the routing issue had been fully vetted and considered by FERC, noting that "NYSDEC submitted numerous letters to FERC," Slip Op. 7, including a September 2013 letter jointly submitted by NYSDEC and the United States Army Corps of Engineers requesting an analysis as to "whether the Constitution pipeline could be routed along a certain interstate highway, a route referred to as 'Alternative M'," Slip Op. 8. But then the panel effectively endorsed NYSDEC's re-review of FERC's routing decision, which directly contravenes the admonitions set forth by the Supreme Court in *Schneidewind* and the Congressional mandates set forth in the 2005 Amendments to the Natural Gas Act.

Section 401 of the Clean Water Act provides states only a limited role to review interstate projects for compliance with a state's ***federally-approved*** water quality standards, but a state may not deny a Section 401 Water Quality Certification on other grounds. Tellingly, NYSDEC twice admitted in its comments letters submitted to FERC that it "***intends to rely upon the federal environmental review prepared pursuant to the National Environmental [Policy] Act to determine if the Project will comply with the applicable New York***

***standards***."[3] Critically, NYSDEC also chose not to file an appeal challenging FERC's Certificate of Public Convenience and Necessity and the route selected for the Constitution interstate pipeline. Instead, NYSDEC changed its strategy and moved forward with its improper "do over" of the FERC process, including its re-review of the route selected by FERC as part of its decision-making to justify denial of Constitution's application for a Section 401 Certification.

The panel's decision to rule on the merits of NYSDEC's Denial, after first dismissing Constitution's waiver argument for lack of jurisdiction, was a clear

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[3] Letter from Patricia J. Desnoyers (NYSDEC) to Kimberly D. Bose (FERC) (Nov. 7, 2012), at 1-2, JA75-JA76; Letter from Patricia J. Desnoyers (NYSDEC) to Kimberly D. Bose (FERC) (July 17, 2013), at 1, JA164 (emphasis added). Despite its recognition of the comprehensive FERC process, including the federal environmental review, and NYSDEC's active involvement therein, the panel's opinion fundamentally misapprehended critical parts of the record when it erroneously found that "[n]owhere does Constitution claim to have provided" the information listed in NYSDEC's denial ("Denial") of Constitution's application for a Clean Water Act Section 401 Water Quality Certification ("Section 401 Certification"). Slip Op. 24. Contrary to this finding, Constitution expressly specified in its Opening and Reply Briefs the information it provided relevant to the categories noted in the panel's decision as areas lacking sufficient information as part of its submission of tens of thousands of pages of material to NYSDEC, comprising more than 40 gigabytes of information. Opening Brief at 16, 18-19, 21, 46, 49, 51, 54, 57-58, 60-61, 64; Reply Brief at 16-18, 23. Additionally, in claiming that Constitution failed to provide requested information, the panel failed to account for NYSDEC's detailed draft Water Quality Certification that specifically identified 19 streams to be crossed using a trenchless construction method and for submission of Trenchless Crossing Plans ***after*** issuance of the Water Quality Certification but before construction. JA2238.

error of law, in conflict with fundamental principles of justiciability articulated by this Court and the Supreme Court. *See, e.g.*, *Can v. United States*, 14 F.3d 160, 162 n.1 (2d Cir. 1994); *United States v. Sperry Corp.*, 493 U.S. 52, 66 (1989); *Sneaker Circus, Inc. v. Carter*, 566 F.2d 396, 401 (2d Cir. 1977); *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *Baur v. Veneman*, 352 F.3d 625, 632 (2d Cir. 2003); *Simmonds v. I.N.S.*, 326 F.3d 351, 359 (2d Cir. 2003); *Isaacs v. Bowen*, 865 F.2d 468, 478 (2d Cir. 1989); *Ross v. Bank of Am., N.A.(USA)*, 524 F.3d 217, 226 (2d Cir. 2008); *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002); *Am. Sav. Bank, FSB v. UBS Fin. Servs., Inc.*, 347 F.3d 436, 440 (2d Cir. 2003). Based on the lack of justiciability due to the determination that this Court did not have jurisdiction over the threshold waiver issue, the decision on the merits regarding the challenge to NYSDEC's Denial of the Section 401 Certification application should be vacated and rehearing should be granted.[4]

Rehearing of the panel's decision is critical because the panel's decision will have far-reaching implications for all Natural Gas Act infrastructure projects. Left unchecked, states, like New York, with an intent to exercise their particular

[4] In light of the panel's analysis and correct ruling that it does not have jurisdiction to decide the waiver issue which needs to go before the D.C. Circuit and FERC based on the decision in *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017), Constitution withdraws its comment in its June 28, 2017 letter to the Court regarding the authority of the Court to decide the merits of the challenge to NYSDEC's Denial of the Section 401 Certification application.

interests over the interests of the nation, will use the panel's expanded reading of Section 401 of the Clean Water Act to undermine FERC's routing determinations by requiring applicants to consider "a possible alternative route that would result in less substantial impact." Slip. Op. 23.

## REASONS FOR GRANTING REHEARING

### I. The Panel Opinion Conflicts with Decisions of This Court, the Supreme Court, and Other Courts of Appeals by Ruling That States May Consider Alternative Routes for Natural Gas Act Projects

The Supreme Court has long held that FERC exercises comprehensive authority over interstate facilities of natural gas companies. *Schneidewind*, 485 U.S. at 300-01. Consistent with this longstanding precedent, and decisions of other Courts of Appeals, this Court declared in *National Fuel Gas Supply Corporation v. Public Service Commission of the State of New York* that "***Congress placed authority regarding the location of interstate pipelines . . . in the FERC, a federal body that can make choices in the interests of energy consumers nationally.***" 894 F.2d at 579 (emphasis added); *see also Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458, 472 (1st Cir. 2009) (recognizing FERC's "exclusive authority" over siting of facilities under the Natural Gas Act).

The panel opinion's holding that "[a] state's consideration of a possible alternative route that would result in less substantial impact on its waterbodies is

plainly within the state's authority," Slip. Op. 23, deviates from these binding precedents and is erroneous. *See Nat'l Fuel*, 894 F.2d at 579; *Schneidewind*, 485 U.S. at 300-01; *see also Weaver's Cove*, 589 F.3d at 472. A state may deny a Section 401 Certification if it fails to meet a state's federally-approved water quality standards, but it may not reroute the pipeline approved by FERC.

The panel cites this Court's decision in *Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 151-52 (2d Cir. 2008) ("*Islander East II*") as support for this ruling, but *Islander East II* says nothing to support this departure from precedent. In *Islander East II*, the Connecticut Department of Environmental Protection ("CTDEP") made an affirmative determination that the FERC-approved route, not an alternative route preferred by CTDEP, would "adversely affect shellfish habitat and cause the loss of an existing and designated use, *i.e.*, shellfishing, over an unacceptably large area" and, therefore, would not comply with state water quality standards. *Id.* at 152. Nowhere did the Court in *Islander East II* suggest that a state agency may require an alternative route or reject a Section 401 Certification because it prefers a different route over the route FERC approved. The panel's endorsement of NYSDEC's improper efforts to re-evaluate alternative routes rejected by FERC is a fundamental error of law inconsistent with this Court's ruling in *National Fuel*. Slip Op. 23, 26. NYSDEC cannot require re-routing of the pipeline, particularly after FERC rejected its comments during the

EIS process and NYSDEC did not challenge the route chosen in FERC's Certificate of Public Convenience and Necessity.

The panel's decision should be vacated to avoid creating an untenable conflict with this Court's precedent, the Supreme Court's precedent, and the decisions of other Courts of Appeals which recognize FERC's ***exclusive authority*** to route an interstate natural gas pipeline project. This is critically important because FERC routing decisions bear on all interstate natural gas pipeline projects, especially those that travel through New York and require obtaining Section 401 Certifications from NYSDEC. The Second Circuit should not condone this deviation from its prior precedent (*National Fuel*) which effectively allows New York State to stop federally reviewed and approved interstate natural gas pipelines.

## II. The Panel Opinion Conflicts with Decisions of This Court, the Supreme Court, and Other Courts of Appeals by Prematurely Deciding the Merits of a Claim That Is Not Justiciable

If Constitution succeeds in its claim that NYSDEC waived the Section 401 Certification requirement by taking too long to render a decision on Constitution's application, then the Denial poses no obstacle to construction of the Project. The panel dismissed Constitution's waiver claim for lack of jurisdiction, declaring that Constitution's waiver argument should have been made to the United States Court of Appeals for the District of Columbia Circuit. Slip Op. 20. The panel expressly

decided not to make any ruling on the merits of Constitution's waiver claim. The D.C. Circuit recently ruled that waiver requests should be brought first to FERC, declaring that "[f]or any company desiring to construct a natural gas pipeline, all roads lead to FERC." *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 698 (D.C. Cir. 2017).

Despite its non-merits ruling of lack of jurisdiction over the threshold question of waiver, the panel proceeded to rule on Constitution's challenges to the Denial's merits. The panel's merits ruling may be nothing more than an advisory opinion if FERC determines that NYSDEC failed to act within a reasonable period of time and thereby waived its right to make a decision on Constitution's application for a Section 401 Certification. In essence, the panel's ruling on the merits of the Denial cannot be reconciled with fundamental principles of justiciability articulated by this Court and the Supreme Court. "[J]usticiability is . . . a 'threshold' question." *Can v. United States*, 14 F.3d 160, 162 n.1 (2d Cir. 1994) (citing *United States v. Sperry Corp.*, 493 U.S. 52, 66 (1989)). To have a justiciable case, petitioners "must be able to demonstrate that they have standing . . . [and] the case must be 'ripe' for adjudication." *Sneaker Circus, Inc. v. Carter*, 566 F.2d 396, 401 (2d Cir. 1977); *see also Flast v. Cohen*, 392 U.S. 83, 95 (1968).

To demonstrate standing, Petitioner's "injury must be actual or imminent to ensure that the court avoids deciding a purely hypothetical case in which the

projected harm may ultimately fail to occur." *Baur v. Veneman*, 352 F.3d 625, 632 (2d Cir. 2003). To demonstrate ripeness, Petitioner's injury must be "fit for judicial decision," which asks "whether the issues sought to be adjudicated are contingent on future events or may never occur." *Simmonds v. I.N.S.*, 326 F.3d 351, 359 (2d Cir. 2003) (quoting *Isaacs v. Bowen*, 865 F.2d 468, 478 (2d Cir. 1989)); *see also Ross v. Bank of Am., N.A.(USA)*, 524 F.3d 217, 226 (2d Cir. 2008) ("The requirement that a dispute must be ripe 'prevents a federal court from entangling itself in abstract disagreements over matters that are premature for review because the injury is merely speculative and may never occur.'") (quoting *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002)); *Am. Sav. Bank, FSB v. UBS Fin. Servs., Inc.*, 347 F.3d 436, 440 (2d Cir. 2003) (dismissing appeal as unripe when agency proceedings might obviate need for ruling); *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 847-49 (1st Cir. 1990) (declining to reach merits of unripe claim and affirming dismissal of action when alleged injury was contingent on outcome of separate proceeding).

The panel's decision conflicts with *Millennium* where the D.C. Circuit held that a pipeline company lacked standing to advance a Section 401 waiver claim against NYSDEC because the company is not injured by a waiver. *Millennium*, 860 F.3d at 699-701. The D.C. Circuit explained that the company may go to

FERC and seek a waiver determination, and if FERC declines to find waiver, then the company could appeal FERC's decision. *Id.* at 701.

Here, if FERC determines that NYSDEC waived the Section 401 Certification requirement by failing to act "within a reasonable period of time (which shall not exceed one year) after receipt of" Constitution's request, 33 U.S.C. § 1341(a)(1), then NYSDEC's Denial is void. "Once the Clean Water Act's requirements have been waived, the Act falls out of the equation . . . . [and] there is nothing left for [NYSDEC]—and therefore for this Court—to do." *Millennium*, 860 F.3d at 700. Until FERC decides the waiver issue, injury to Constitution is hypothetical—not actual or imminent—and the challenges to the merits of the Denial are not justiciable. The panel should not have prematurely ruled upon the merits of the Denial, but instead should have held the proceedings in abeyance pending FERC's determination on waiver. *See Authors Guild, Inc. v. Google Inc.*, 721 F.3d 132, 134-35 (2d Cir. 2013) (holding in abeyance and remanding to district court for resolution of defense that could moot issues on appeal); *CTIA-The Wireless Ass'n v. F.C.C.*, 530 F.3d 984, 987-89 (D.C. Cir. 2008) (finding case unripe and holding it in abeyance pending agency action).

## CONCLUSION

The Court should grant rehearing and/or rehearing en banc and vacate the panel's decision on the merits of Constitution's challenge to NYSDEC's Denial of the Section 401 Certification.

Respectfully submitted,

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September 1, 2017

# CERTIFICATE OF COMPLIANCE

This Petition complies with the type-volume limits of Fed. R. App. P. 35(b)(2)(A) and 40(b)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,791 words.

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

Dated: September 1, 2017

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**CERTIFICATE OF FILING AND SERVICE**

I, Julian Hadiz, hereby certify pursuant to Fed. R. App. P. 25(d) that, on September 1, 2017, the foregoing Petition for Panel Rehearing and/or Rehearing En Banc of Petitioner Constitution Pipeline Company, LLC was filed through the CM/ECF system and served electronically on all parties.

/s/Julian Hadiz
Julian Hadiz
Counsel Press Paralegal

# ADDENDUM

ADD-1



16-1568
Constitution Pipeline Co. v.
New York State Department of
Environmental Conservation

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 - - - - - -

4 August Term, 2016

5 (Argued: November 16, 2016 Decided: August 18, 2017)

6 Docket No. 16-1568

7 ______________________________

8 CONSTITUTION PIPELINE COMPANY, LLC,

9 *Petitioner*,

10 - v. -

11 NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
12 CONSERVATION; BASIL SEGGOS, Acting Commissioner, New York State
13 Department of Environmental Conservation; JOHN FERGUSON, Chief Permit
14 Administrator, New York State Department of Environmental Conservation,

15 *Respondents*,

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

18 *Intervenors*.*
19 ______________________________

20 Before: KEARSE, WESLEY, and DRONEY, *Circuit Judges*.

21 Petition for review of respondents' decision denying application for certification

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* The Clerk of Court is directed to amend the official caption to conform with the above.

CERTIFIED COPY ISSUED ON 8/18/2017

1 pursuant to § 401 of the Clean Water Act, 33 U.S.C. § 1341, that petitioner's proposed interstate
2 natural gas pipeline would comply with New York State water quality standards ("§ 401
3 certification"). Respondents denied the application on the ground that petitioner had not complied
4 with requests for relevant information. Petitioner contends (1) that respondents exceeded the statutory
5 time limitations for the State's review of the application and that they must therefore be ordered to
6 notify the United States Army Corps of Engineers ("USACE") that the State waives its right to issue
7 or deny § 401 certification, thereby allowing USACE to issue a permit to petitioner under § 404 of
8 the Clean Water Act, *see* 33 U.S.C. § 1344(a); and (2) alternatively, that respondents' decision should
9 be vacated on the ground that the denial of the application was arbitrary, capricious, and ultra vires,
10 and that respondents should be ordered to grant the requested § 401 certification. To the extent that
11 petitioner challenges the timeliness of respondents' decision, we conclude that we lack jurisdiction
12 over that challenge. As to the merits, we conclude that respondents' actions were within their
13 statutory authority and that the decision was not arbitrary or capricious.

14 Petition dismissed in part and denied in part.

15 JOHN F. STOVIAK, Philadelphia, Pennsylvania (Saul Ewing,
16 Philadelphia, Pennsylvania, Elizabeth Utz Witmer, Saul Ewing,
17 Wayne, Pennsylvania; Yvonne E. Hennessey, Barclay Damon,
18 Albany, New York, on the brief), *for Petitioner*.

19 BRIAN LUSIGNAN, Assistant Attorney General, Albany, New York
20 (Eric T. Schneiderman, Attorney General of the State of New
21 York, Barbara D. Underwood, Solicitor General, Andrew B.
22 Ayers, Senior Assistant Solicitor General, Frederick A. Brodie,
23 Assistant Solicitor General, Lisa M. Burianek, Deputy Bureau
24 Chief, Albany, New York, on the brief), *for Respondents*.

1 KARA E. PAULSEN**, White Plains, New York (Karl S. Coplan,
2 Todd D. Ommen, Anne Marie Garti, Pace Environmental
3 Litigation Clinic, Inc., White Plains, New York, on the brief),
4 *for Intervenor Stop the Pipeline*.

5 MONEEN NASMITH, New York, New York (Deborah Goldberg,
6 Christine Ernst, Earthjustice, New York, New York, on the
7 brief), *for Intervenors Catskill Mountainkeeper, Inc., Sierra*
8 *Club, and Riverkeeper, Inc.*

9 SIDLEY AUSTIN, Washington, D.C. (Roger R. Martella, Jr., Ryan C.
10 Morris, Tobias S. Loss-Eaton, Washington, D.C.; Linda E.
11 Kelly, Quentin Riegel, Leland P. Frost, Manufacturers' Center
12 For Legal Action, Washington, D.C.; Steven P. Lehotsky,
13 Sheldon B. Gilbert, U.S. Chamber Litigation Center,
14 Washington, D.C.; Kevin B. Belford, Michael L. Murray,
15 Washington, D.C.; Leslie A. Hulse, Washington, D.C.; Dena
16 E. Wiggins, Washington, D.C.; Andrea J. Chambers, Katie
17 Leesman, Ballard Spahr, Washington, D.C., of counsel), *filed*
18 *a brief for Amici Curiae National Association of*
19 *Manufacturers, Chamber of Commerce of the United States of*
20 *America, Interstate Natural Gas Association of America,*
21 *American Gas Association, American Petroleum Institute,*
22 *American Chemistry Council, Natural Gas Supply Association,*
23 *American Forest & Paper Association, and Process Gas*
24 *Consumers Group, in support of Petitioner*.

25 Kimberly Ong, New York, New York (Albert K. Butzel, New York,
26 New York, of counsel), *filed a brief for Amici Curiae Natural*
27 *Resources Defense Council, Water Defense, Waterkeeper*
28 *Alliance, Earthworks, PennEnvironment, Peconic Baykeeper,*
29 *and Chesapeake Bay Foundation, in support of Respondents*.

30 KEARSE, *Circuit Judge*:

31 Petitioner Constitution Pipeline Company, LLC ("Constitution"), petitions pursuant
32 to 15 U.S.C. § 717r(d)(1) for review of an April 22, 2016 decision of the New York State Department
33 of Environmental Conservation ("NYSDEC" or the "Department") denying Constitution's application

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** Law student appearing pursuant to Local Rule 46.1(e).

1 for certification pursuant to § 401 of the Federal Water Pollution Control Act, more commonly known
2 as the Clean Water Act (or "CWA"), 33 U.S.C. § 1341 ("§ 401 certification"), that Constitution's
3 proposed interstate natural gas pipeline would comply with New York State (or "State") water quality
4 standards (or "WQS"). NYSDEC denied the application on the ground that Constitution had not
5 provided sufficient information. In its petition, Constitution contends principally (1) that NYSDEC
6 exceeded the § 401(a) time limitations for the State's review of the application and that NYSDEC
7 must therefore be ordered to notify the United States Army Corps of Engineers ("USACE" or "Army
8 Corps of Engineers" or "Army Corps") that the State has waived its right to act upon Constitution's
9 § 401 certification application, thereby allowing USACE to issue a permit to petitioner under § 404
10 of the Clean Water Act, *see* 33 U.S.C. § 1344(a); and (2) alternatively, that Constitution submitted
11 sufficient information and that NYSDEC's decision should be vacated on the ground that its denial
12 of the application was arbitrary, capricious, and ultra vires, and that NYSDEC should be ordered to
13 grant the requested § 401 certification. To the extent that Constitution challenges the timeliness of
14 the NYSDEC decision, we dismiss the petition for lack of jurisdiction. As to the merits, we conclude
15 that NYSDEC's actions were within its statutory authority and that its decision was not arbitrary or
16 capricious, and we deny the petition.

17 I. BACKGROUND

18 Constitution proposes to construct a 121-mile interstate natural gas pipeline in
19 Pennsylvania and New York, approximately 98 miles of which would be in New York. In connection
20 with this project (the "Project"), Constitution applied for, to the extent pertinent here, a "certificate

1 of public convenience and necessity" from the Federal Energy Regulatory Commission ("FERC"),
2 15 U.S.C. § 717f(c), a CWA § 401 water quality certification (or "WQC") from New York State that
3 the Project would comply with State water quality standards (*see* 6 N.Y.C.R.R. parts 701 to 704), and
4 a CWA § 404 permit from the Army Corps of Engineers to allow discharges into United States
5 navigable waters.

6 A. *Proceedings Before FERC*

7 In September 2012, FERC announced that it would prepare an environmental impact
8 statement ("EIS") for Constitution's Project and asked Constitution to submit a feasibility study
9 explaining how it would install the pipeline across waterbodies (generally using that term to refer to
10 streams but not wetlands). For such installations, there is a trenched method--a dry open-cut crossing-
11 -which involves diverting a stream, digging a trench through the banks and stream bed, installing and
12 burying the pipeline, and then allowing the stream to resume flowing in the stream bed. (*See*, *e.g.*,
13 FERC Final Environmental Impact Statement ("FEIS") pages 2-21 to 2-22.) There are also trenchless
14 crossing methods--including Horizontal Directional Drill (or "HDD"), Direct Pipe (or "DP"), and
15 conventional bore--which involve digging pits on either side of a waterbody and boring or drilling
16 underneath the stream. FERC asked Constitution to provide information with regard to trenchless
17 construction methods for crossing several categories of streams, including those classified by the
18 states as sensitive or high quality and those greater than 30 feet wide where a dry construction method
19 would not be feasible.

1 1. *Constitution's Trenchless Feasibility Study*

2 Constitution submitted to FERC a study discussing trenchless crossing methods. (*See*
3 Constitution, Feasibility Study: Trenchless Construction Methods for Sensitive Environmental
4 Resource Crossings (Nov. 2013) ("Constitution 2013 Feasibility Study" or "Study") pages 1-3 to 1-5.)
5 Trenchless methods do not disturb soil or organisms in the stream banks, stream bed, or in the stream
6 itself, but require disturbing surrounding areas to clear space for installation pits; there are also risks
7 of mid-project drill breakage, with leakage of drill fluid into the waterbody. (*See* Constitution 2013
8 Feasibility Study page 2-3; FEIS page 2-24.) Use of the trenched method does not require as much
9 installation space or present the risk of drill failure; but it requires stream diversion and digging into
10 the stream bed and banks. (*See*, *e.g.*, FEIS pages 2-21 to 2-22.)

11 The Constitution feasibility study dealt principally with locations where the waterbody
12 was designated by New York or Pennsylvania as sensitive or high quality. (*See* Constitution 2013
13 Feasibility Study pages 2-2 to 2-3.) As a result, Constitution eliminated from consideration for
14 trenchless crossings all but 89 of the 251 New York waterbodies that would be crossed by the pipeline
15 or affected by pipeline construction.

16 The remaining 89 locations were addressed in three phases. The Study's "Phase I[]
17 Desktop Analysis" (*id*. pt. 1.0 page 1-1) further reduced the number of New York waterbodies
18 considered by Constitution for trenchless crossings from 89 to 26, in part by eliminating streams less
19 than 30 feet wide, even if they were classified by New York as sensitive or high-quality (*see id*. pages
20 2-1, 2-3). Constitution stated that trenchless crossings for such narrower waterbodies would
21 potentially require workspace requirements significantly greater than those generally needed for a
22 conventional dry crossing method. (*See id*. page 2-3.) Thus, unless such a waterbody was

1 immediately associated with a larger wetland and/or waterway complex crossed by the Project or was
2 located in the immediate vicinity of a proposed rail or roadway crossing, "Constitution did not
3 evaluate waterbody crossings less than 30 feet in width" (*id*.).

4 Phase II was a "Cost/Time/Construction Workspace Impact Analysis." (*Id*. page 3-1;
5 *see also id*. pt. 1.0 page 1-1 ("Trenchless construction methods are limited" not only by such matters
6 as "underlying geology, available workspace, [and] available time," but also by "available finances
7 budgeted for a capital project.").) This phase eliminated waterways from trenchless-crossing
8 consideration largely on the basis of expense; as a result, there remained only 13 waterbody crossings
9 in New York for which Constitution planned to investigate a "formal trenchless construction design."
10 (*Id*. pages 3-2 to 3-4 & tbl.3.2-1.) The Study stated that Phase III, a "geotechnical field analysis" of
11 each of the 13 locations, was in progress. (*Id*. page 5-1.) Constitution thus planned to use the
12 trenched method for 238 of the 251 New York waterbodies to be crossed.

13 2. *NYSDEC Comments and the FEIS*

14 In connection with FERC's announcement of a planned EIS for the Constitution
15 pipeline--and its subsequent draft EIS ("DEIS")--NYSDEC submitted numerous letters to FERC. The
16 first noted that NYSDEC's preferred method for crossing waterbodies is a trenchless method, in
17 particular

> 18 Horizontal Directional Drilling (HDD) because it has the advantages of
> 19 *minimizing land disturbance, avoiding the need for dewatering of the stream,*
> 20 *leaving the immediate stream bed and banks intact, and reducing erosion,*
> 21 *sedimentation and Project-induced watercourse instabilities*.

22 (November 7, 2012 Letter from NYSDEC to FERC at 3 (emphasis added).) Stating that the DEIS
23 should identify the New York classification of each stream the proposed pipeline would cross,

1 NYSDEC urged FERC to "evaluate cases where other methods are proposed" and have Constitution
2 "*explain why HDD will not work or is not practical for that specific crossing*." (*Id.* (emphasis
3 added).)

4 A May 2013 letter again stated that "NYSDEC's preferred methodology for *all stream*
5 *crossings* is . . . (HDD)"; that letter also stated that "[w]ithin stream crossings, pipelines should be
6 buried at least 6' below a stream bottom. Minimum cover depth is not subject to variance based on
7 field conditions." (May 28, 2013 Letter from NYSDEC to FERC ("NYSDEC May 2013 Letter")
8 at 1-2 (emphasis added).)

9 In September 2013, NYSDEC wrote to join a request by the Army Corps for additional
10 analysis of whether the Constitution pipeline could be routed along a certain interstate highway, a
11 route referred to as "Alternative M." (September 25, 2013 Letter from NYSDEC to FERC at 1.)
12 Constitution responded by arguing that Alternative M would have greater environmental impact than
13 Constitution's proposed route and noting likely difficulties in obtaining highway agencies' approvals.
14 (*See* October 22, 2013 Letter from Constitution to NYSDEC at 2-4.)

15 In 2014, FERC issued its DEIS, which drew criticism from several sources including
16 NYSDEC. (*See*, *e.g.*, March 24, 2014 Letter from NYSDEC to FERC and Army Corps at 1-2 (urging
17 a revised DEIS to include "geotechnical feasibility studies for *all trenchless crossing locations*," as
18 well as "site specific blasting plans that include protocols for in-water blasting and the protection of
19 aquatic resources and habitats" (emphasis added)); April 7, 2014 Letter from NYSDEC to FERC and
20 Army Corps ("NYSDEC April 2014 Letter") at 1-5 (adding additional comments and requesting
21 additional analysis of Alternative M which, in NYSDEC's view, would reduce the amount of
22 disturbance of higher-quality waterbodies).)

1 FERC issued its FEIS in 2014 without significantly expanding on several aspects of
2 the DEIS. It did not address NYSDEC's concern that Constitution had not developed site-specific
3 blasting plans. (*See* FEIS pages 4-15 to 4-16; DEIS page 4-16.) The FEIS added discussion of two
4 new versions of Alternative M proposed by NYSDEC (*see* FEIS pages 3-46 to 3-47), but rejected
5 them without analyzing disturbances to high-quality waterbodies (*compare id*. pages 3-32 to 3-47 *with*
6 NYSDEC April 2014 Letter at 3-4). And the FEIS stated that the pipeline would be buried 60 inches
7 below streams in normal soil conditions and 24 inches in areas of "consolidated rock" (FEIS
8 page 2-16), as contrasted with the NYSDEC May 2013 Letter's statement that the pipe needed to be
9 buried "at least 6' below a stream bottom" (NYSDEC May 2013 Letter at 2).

10 The FEIS expanded on the DEIS's waterbody crossing information but repeated DEIS
11 explanations for why relatively few crossings were slated to be crossed by trenchless techniques,
12 stating, *inter alia*, that "[a]ccording to Constitution, trenchless crossing methods are not practical
13 [except in limited circumstances] for waterbody crossings less than 30 feet in width" and that
14 "Constitution indicated that such crossings would be impractical due to minimum length requirements,
15 depth of pipeline considerations, and workspace requirements," and describing the areas that would
16 be required for trenchless crossing "[a]ccording to Constitution" (FEIS page 4-50). The FEIS stated
17 that

> 18 *[t]he potential impacts on waterbodies associated with the use of conventional*
> 19 *bore or Direct Pipe trenchless crossing methods are considered minimal when*
> 20 *compared to other crossing methods*. The waterbody and its banks, and
> 21 typically the entire immediate riparian zone, would not be disturbed by
> 22 clearing or trenching; rather, the pipe would be installed below the feature.

23 (*Id*. page 4-56 (emphasis added).) FERC added:

> 24 *We concur with Constitution's assessment that it is not practicable to use*
> 25 *trenchless crossing methods* where waterbodies were listed as ephemeral or

1 intermittent (because these waterbodies are likely to be dry at the time of
2 crossing) or *for waterbodies less than 30 feet in width (as extra workspaces*
3 *needed would offset potential benefits)*. . . .

4 (FEIS, App'x S, page S-52 (emphases added).) The FEIS noted that Constitution had completed
5 geotechnical feasibility studies at only two New York sites. (*See* FEIS page 4-4.)

6 B. *Proceedings Before NYSDEC*

7 While its application to FERC for a certificate of public convenience and necessity was
8 pending, Constitution submitted an application to the Army Corps for a CWA § 404 permit for the
9 discharge of dredged or fill material while constructing the pipeline and to NYSDEC for a CWA
10 § 401 certification that the Project would comply with State water quality standards. In December
11 2014, NYSDEC issued a notice that Constitution's application was complete; but on December 31,
12 it asked Constitution for more information about stream crossings. In January-March 2015,
13 Constitution submitted more information to NYSDEC, and on April 27, 2015, at NYSDEC's request,
14 Constitution withdrew and resubmitted its § 401 application. (Constitution had also withdrawn and
15 resubmitted its § 401 application at NYSDEC's request in May 2014.)

16 1. *Stream-Crossing Information Requests by NYSDEC*

17 On January 23, 2015, staff from Constitution and NYSDEC met to discuss trenchless
18 stream-crossing methods (*see* January 14, 2015 email from NYSDEC Project Manager Stephen M.
19 Tomasik to Constitution engineering consultant Keith Silliman; January 27, 2015 email from Tomasik
20 to Constitution Environmental Project Mananger Lynda Schubring ("NYSDEC January 27, 2015
21 email")). Prior to that meeting, Constitution wrote to NYSDEC stating that it had

1 conducted subsurface geotechnical investigations at the majority of the
2 proposed . . . (HDD) and . . . (DP) trenchless locations. Results of the
3 subsurface geotechnical investigations revealed crossing locations that present
4 a high risk of failure if a trenchless method is used. As a result, trenchless
5 crossing locations with a high risk of failure are not feasible and have been
6 modified to a dry open cut design. Since the last . . . submissions to the
7 USACE, three (3) HDD or DP locations affecting six (6) wetlands or
8 waterbodies have changed to an open cut construction method . . . .

9 (January 22, 2015 Letter from Schubring to Tomasik at 1.) Constitution also stated that six other
10 originally proposed trenchless crossings would be crossed by a trenched method, "to address various
11 concerns raised by [state and local] authorities relative to the trenchless crossings of specific public
12 roadways and associated infrastructure." (*Id*. at 2.) After the January 23 meeting, NYSDEC
13 requested additional documents that Constitution personnel had said informed its decision to use the
14 trenched crossing method at two locations, as well as "information about stream crossings that we
15 requested on 12/31/2014." (NYSDEC January 27, 2015 email).

16 In response, Constitution submitted feasibility evaluations based on geotechnical
17 studies for four locations: two wetlands crossings and two waterbody crossings. One of the
18 waterbody feasibility evaluations concluded that using either HDD or DP was infeasible due to
19 subsurface soil conditions; the other did not address the feasibility of trenchless crossing methods, and
20 instead discussed only a contingency open-cut crossing to be used if the proposed DP crossing failed.

21 In February 2015, Constitution submitted to NYSDEC a document titled "Draft
22 Trenchless Feasibility Study Edits" ("Constitution 2015 Feasibility Draft") that appears to be a version
23 of part of the 2013 trenchless feasibility study that Constitution had submitted to FERC, merely
24 expanding on the manner in which each trenchless method operates. Again there was no discussion
25 of stream crossings site-by-site. The Constitution 2015 Feasibility Draft stated that

26 Constitution recognizes that, *in general*, performing . . . (HDD) for streams

1 less than 30 feet in width causes greater net environmental impacts than a dry
2 open cut method and this threshold is an *industry recognized standard*.
3 Constitution has not identified any NYSDEC regulation, formally adopted
4 policy or guidance document that would warrant deviating from this standard.

5 (*Id*. at 1 (emphases added).) It also discussed the Direct Pipe method, stating that "it is *likely* that
6 additional forest will require clearing to perform DP for *most* of the protected stream crossings," and
7 that "*[m]any*" streams are in valleys whose slopes make the DP method infeasible. (*Id*. at 2-3
8 (emphases added).) In addition, the Constitution 2015 Feasibility Draft stated that DP technology is
9 of "limited availability," leading Constitution to conclude that using "DP technology for . . . streams
10 less than 30 feet in width is *not a realistic or viable expectation within a reasonable period of time*."
11 (*Id*. at 3 (emphasis added).)

12 In March 2015, NYSDEC sent Constitution a list of 20 waterbody locations that
13 NYSDEC "wants crossed via HDD," stating that NYSDEC "is *still expecting an evaluation as to*
14 *whether an HDD is technically feasible for each of these streams*." (March 17, 2015 email from
15 NYSDEC Major Project Management Unit Chief Christopher M. Hogan to Silliman (emphasis
16 added).) In April 2015, as indicated above, Constitution withdrew and resubmitted its § 401 WQC
17 request.

18 2. *Subsequent Discussions*

19 In May 2015, NYSDEC noted that it had agreed to "eliminate" four streams from
20 "further consideration for trenchless crossing methods." (May 22, 2015 email from Tomasik to
21 Schubring, Silliman, et al.)

22 In July 2015, a member of NYSDEC's staff emailed to certain Army Corps staff
23 members a "Confidential" message attaching a "VERY PRELIMINARY version of a Constitution

1 permit" (July 20, 2015 email from Tomasik to Kevin J. Bruce et al., Army Corps), which included a
2 table of 19 locations that "shall be crossed using a trenchless construction method"--unless an
3 "experienced and qualified engineer" concludes that the techniques are "not constructible or not
4 feasible" (Confidential Draft NYSDEC Certification Conditions at 17). The draft, however, required
5 Constitution, "*[p]rior to beginning construction of any trenchless stream crossing*," to "*submit a*[]
6 . . . 'Trenchless Crossing *Plan*' *for each* trenchless stream crossing," including "detailed engineering
7 plans" for each location. (*Id*. at 18 (emphases added).)

8 In September 2015, Constitution submitted to NYSDEC an Environmental
9 Construction Plan, attached to which was a Blasting Plan. (*See* Constitution, Environmental
10 Construction Plan 50 (Aug. 2015).) This plan listed 253 "[a]reas of shallow depth to bedrock crossed
11 by the [pipeline]" in New York, but stated that "[a] final determination on the need for blasting will
12 be made at the time of construction." (Constitution, Blasting Plan (Aug. 2015) ("Blasting Plan")
13 pages 1-1, 1-2 & tbl.1.2-2, 4-1.) The Blasting Plan identified regulations and a permit that would
14 govern blasting in Pennsylvania, but stated that "[a]ll blasting operations in New York will be
15 conducted in accordance with an in-stream b[l]asting protocol *to be prepared* by Constitution." (*Id*.
16 page 4-1 (emphasis added).)

17 C. *NYSDEC's Decision Denying § 401 Certification*

18 In a 14-page letter to Constitution dated April 22, 2016, NYSDEC denied
19 Constitution's application for CWA § 401 certification ("NYSDEC Decision" or "Decision"), stating
20 that "the Application fails in a meaningful way to address the significant water resource impacts that
21 could occur from this Project and has failed to provide sufficient information to demonstrate

1 compliance with New York State water quality standards," NYSDEC Decision at 1. Although also
2 noting the lack of adequate information as to such issues as the feasibility of the Alternative M route,
3 blasting information, pipe burial depth, and wetlands crossings, *see*, *e.g.*, *id.* at 11-14, the Decision
4 focused principally on Constitution's failure to provide information with respect to stream crossings.

5 NYSDEC noted that Constitution's Project "would disturb a total of 251 streams . . . ,
6 87 of which support trout or trout spawning," and that "[c]umulatively, construction would disturb
7 a total of 3,161 linear feet of streams and result in a combined total of 5.09 acres of temporary stream
8 disturbance impacts." NYSDEC Decision at 8. It stated that although

> 9 [f]rom inception of its review of the Application, NYSDEC directed
> 10 Constitution to demonstrate compliance with State water quality standards and
> 11 required site-specific information for each of the 251 streams impacted by the
> 12 Project[, and] NYSDEC informed Constitution that *all 251* stream crossings
> 13 must be evaluated for environmental impacts and that trenchless technology
> 14 was the preferred method for stream crossing[, and that t]his information was
> 15 conveyed to Constitution and FERC on numerous occasions since November
> 16 2012[,] . . . Constitution has not supplied the Department with the necessary
> 17 information for decision making.

18 *Id.* (emphasis in original).

19 The Decision stated that because some form of trenchless technology is the "most
20 protective method for stream crossings,"

> 21 NYSDEC directed Constitution to determine whether a trenchless technology
> 22 was constructible *for each stream crossing*. On a number of occasions
> 23 NYSDEC identified the need to provide information so that it could evaluate
> 24 trenchless stream installation methods (see Table 2, below); however,
> 25 Constitution has not provided sufficient information . . . .

26 *Id.* (footnote omitted) (emphasis added).

27 Table 2 in the Decision principally chronicled NYSDEC's requests of Constitution--
28 both directly and indirectly in its submissions to FERC--and noted Constitution's resistance, including

1 the following:

2 ■ In June 2012, "NYSDEC stated in a letter to Constitution that for protected
3 streams and wetlands, trenchless technology is the preferred method for crossing and
4 should be considered for *all* such crossings (emphasis added)."

5 ■ On November 7, 2012, "[i]n comments to FERC, NYSDEC stated that for
6 streams and wetlands the preferred method for crossing is trenchless technology," and
7 that as to each crossing where another method is proposed "Constitution should
8 explain why trenchless crossing technology will not work or is not practical for that
9 specific crossing."

10 ■ On April 9, 2013, "FERC[] . . . directed Constitution to address all of the
11 comments filed in the public record by other agencies . . . including all comments from
12 the NYSDEC."

13 ■ On May 28, 2013, at a "[m]eeting" of "Constitution and NYSDEC staff . . .
14 NYSDEC reiterate[d] that acceptable trenchless technology was the preferred
15 installation method and that stream crossings should be reviewed for feasibility of
16 using those technologies."

17 ■ In July and August 2013, on "[f]ield visits of proposed stream crossings
18 prior to permit applications to the Department[, a]t each crossing, NYSDEC
19 emphasized to Constitution staff that trenchless technology is preferred/most
20 protective."

21 ■ **In its November 2013 Trenchless Feasibility Study, Constitution**
22 **"arbitrarily eliminated from any consideration for trenchless crossing methods"**
23 **"all streams less than 30' wide."**

24 ■ On December 31, 2014, at a meeting with Constitution staff, "NYSDEC
25 indicated that *the Trenchless Feasibility Study was inadequate*, *e.g.* provided
26 insufficient justification and *removed all streams less than 30 feet in width from*
27 *analysis*." NYSDEC gave Constitution "an informational request table including
28 required technical information."

29 ■ On January 13, 2015, an "Army Corps of Engineers letter reiterate[d] a
30 request for a feasibility analysis of trenchless crossings."

31 ■ At a January 23, 2015 "[m]eeting between Constitution and NYSDEC staff
32 . . . **Constitution stated it was unable to complete the [informational request] table**
33 **[it received from NYSDEC] on December 31, 2014[].** NYSDEC staff indicated that
34 the justification for stream crossing methods was insufficient and that appropriate site
35 specific information must be provided."

1 ■ In a January 28, 2015 "[c]onference call[,] *NYSDEC reiterated its request*
2 *for a site specific analysis* of trenchless stream crossings *for all streams including*
3 *those under 30 feet wide*."

4 ■ **On February 5, 2015, "Constitution provided an updated example** of
5 a trenchless feasibility study **but that example continued to exclude streams up to**
6 **30 feet wide from analysis and did not provide detailed information of the**
7 **majority of streams."**

8 NYSDEC Decision at 9-10 (emphases added).

9 Although the Decision's Table 2 ended with the February 2015 entry, the Decision

10 noted that Constitution's "unwillingness to provide a complete and thorough[] Trenchless Feasibility

11 Study" persisted:

12 [I]n May 2015, Constitution provided detailed project plans for 25 potential
13 trenchless crossings, **but only two of those plans were based on full**
14 **geotechnical borings that are necessary to evaluate the potential success**
15 **of a trenchless design. Detailed project plans including full geotechnical**
16 **borings for the remaining stream crossings have not been provided to the**
17 **Department.**

18 *Id*. at 11 (emphasis added). The NYSDEC Decision stated that

19 [d]ue to the lack of detailed project plans, including geotechnical
20 borings, the Department has determined to deny Constitution's WQC
21 Application because the supporting materials supplied by Constitution do not
22 provide sufficient information for each stream crossing to demonstrate
23 compliance with applicable narrative water quality standards for turbidity and
24 preservation of best usages of affected water bodies. Specifically, the
25 Application lacks sufficient information to demonstrate that the Project will
26 result in no increase that will cause a substantial visible contrast to natural
27 conditions.[10]

28 Furthermore, the Application remains deficient in that it does not
29 contain sufficient information to demonstrate compliance with 6 NYCRR Part
30 701 setting forth conditions applying to best usages of all water classifications.
31 Specifically, "the discharge of sewage, industrial waste or other wastes shall
32 not cause impairment of the best usages of the receiving water as specified by
33 the water classifications at the location of the discharge and at other locations

1 that may be affected by such discharge."[11]

2 [10] 6 NYCRR § 703.2.
3 [11] 6 NYCRR § 701.1.

4 NYSDEC Decision at 12 & nn.10-11. The Decision added that

5 [c]umulatively, impacts to both small and large streams from the
6 construction and operation of the Project can be profound and include loss of
7 available habitat, changes in thermal conditions, increased erosion, creation of
8 stream instability and turbidity, impairment of best usages, as well as
9 watershed-wide impacts resulting from placement of the pipeline across water
10 bodies in remote and rural areas (See Project Description and Environmental
11 Impacts Section, above). Because the Department's review concludes that
12 Constitution did not provide sufficient detailed information including site
13 specific project plans regarding stream crossings (*e.g.* geotechnical borings)
14 the Department has determined to deny Constitution's WQC Application for
15 failure to provide reasonable assurance that each stream crossing will be
16 conducted in compliance with 6 NYCRR §608.9.

17 NYSDEC Decision at 12; *see* 6 N.Y.C.R.R. § 608.9(a)(2) ("The applicant" for a CWA § 401
18 certification "must demonstrate compliance with sections 301-303, 306 and 307 of the Federal Water
19 Pollution Control Act, as implemented by . . . water quality standards and thermal discharge criteria
20 set forth in Parts 701, 702, 703 and 704 of this Title . . . .").

21 II. DISCUSSION

22 In its petition for review (or "Petition"), Constitution contends principally (1) that
23 NYSDEC failed to issue its Decision within a reasonable time as required by § 401 and thus must be
24 required to inform USACE that NYSDEC has waived its right to rule on Constitution's application
25 for a WQC, thereby enabling the Army Corps to grant Constitution a permit for its pipeline Project,
26 or (2) alternatively, that Constitution submitted sufficient information and that NYSDEC's decision

1 should be vacated on the ground that its denial of the application was arbitrary, capricious, and ultra
2 vires, and that NYSDEC should be ordered to grant the requested § 401 certification. For the reasons
3 that follow, we (1) conclude that Constitution's first contention, which would have us treat NYSDEC's
4 Decision as an act that is void, lies beyond the jurisdiction of this Court, and (2) conclude that
5 NYSDEC's Decision was not ultra vires, arbitrary, or capricious.

6 A. *Constitution's Argument that NYSDEC Waived Its § 401 Authority*

7 The Natural Gas Act (or "NGA"), 15 U.S.C. §§ 717-717z, sets out provisions with
8 respect to, *inter alia*, the construction of transportation facilities for natural gas, *see id*. § 717f. Such
9 projects are also subject to restrictions under other federal statutes, including provisions of the Clean
10 Water Act, *see*, *e.g.*, *id*. § 717b(d)(3). Section 401 of the CWA requires an applicant for a federal
11 permit to conduct any activity that "may result in any discharge into the navigable waters" of the
12 United States to obtain "a certification from the State in which the discharge . . . will originate . . . that
13 any such discharge will comply with," *inter alia*, the state's water quality standards. 33 U.S.C.
14 § 1341(a)(1).

15 As to petitions for review relating to such applications, § 717r of the NGA divides
16 jurisdiction between the Circuit in which the facility is proposed to be constructed and the United
17 States Court of Appeals for the District of Columbia Circuit. It states, in pertinent part, as follows:

18 **(1) In general**

19 The United States Court of Appeals for the circuit in which a facility
20 subject to . . . section 717f of this title is proposed to be constructed . . . *shall*
21 *have original and exclusive jurisdiction over any civil action for the review of*
22 *an order or action of a* Federal agency (other than [FERC]) or *State*
23 *administrative agency acting pursuant to Federal law to* issue, condition, or
24 *deny any* permit, license, concurrence, or *approval* (hereinafter collectively

1 referred to as "permit") *required under Federal law* . . . .

2 **(2) Agency delay**

3 *The United States Court of Appeals for the District of Columbia shall*
4 *have original and* ***exclusive*** *jurisdiction over any civil action for the review of*
5 *an* ***alleged failure to act*** *by a* Federal agency (other than [FERC]) or *State*
6 *administrative agency acting pursuant to Federal law to issue, condition, or*
7 *deny any permit required under Federal law* . . . .

8 15 U.S.C. §§ 717r(d)(1)-(2) (emphases added). We regard subsection (2)--titled "Agency delay"--as
9 encompassing not only "an alleged failure to act" but also an allegation that a failure to act within a
10 mandated time period should be treated as a failure to act. This is the nature of Constitution's first
11 argument.

12 Constitution points out that CWA § 401 provides that "[i]f" a "State . . . agency" from
13 which an applicant for a federal permit has sought a water quality certification "fails or refuses to act
14 on [the] request for certification, within a reasonable period of time (which shall not exceed one year)
15 after receipt of such request, the certification requirements of this subsection shall be waived with
16 respect to such Federal application." 33 U.S.C. § 1341(a)(1). Constitution argues that NYSDEC did
17 not issue its Decision until 32 months after Constitution submitted its initial application, 16 months
18 after NYSDEC issued notice that that initial application was complete, 15 months after the deadline
19 imposed by FERC, *nearly* a year ("359 days") after Constitution's 2015 withdrawal-and-resubmission
20 of its application--and eight months after Constitution claims it was advised by NYSDEC that
21 NYSDEC "had everything it needed to issue a Section 401 Certification." (Constitution brief in
22 support of Petition at 28-29.) Constitution argues that NYSDEC "waived its right" to rule on the
23 certification application and must be required to so notify the Army Corps. (*Id.* at 37.)

24 We note first that there is nothing in the administrative record to show that NYSDEC

1 received the information it had consistently and explicitly requested over the course of several years--
2 much less anything to support Constitution's claim that NYSDEC said "it had" all of the information
3 it required "to issue" the requested certification (*id*. at 29). Although Constitution proffered in this
4 Court non-record declarations from certain of its personnel, those "outside-the-record declarations and
5 associated portions of [Constitution]'s brief" were stricken. *Constitution Pipeline Co. v. Seggos*, No.
6 16-1568 (2d Cir. Oct. 3, 2016).

7 Second, Constitution's "waive[r]" argument is that the NYSDEC Decision must be
8 treated as a nullity by reason of NYSDEC's "*failing to act* within the prescribed time period under the
9 CWA" (Constitution brief in support of Petition at 37 (emphasis added)). Such a failure-to-act claim
10 is one over which the District of Columbia Circuit would have "exclusive" jurisdiction, 15 U.S.C.
11 § 717r(d)(2). *See generally Weaver's Cove Energy, LLC v. Rhode Island Department of*
12 *Environmental Management*, 524 F.3d 1330, 1332 (D.C. Cir. 2008). Accordingly, we dismiss
13 Constitution's timeliness argument for lack of jurisdiction.

14 B. *Constitution's Challenge to the Merits of NYSDEC's Decision*

15 Judicial review of an administrative agency's denial of a CWA § 401 certificate is
16 limited to grounds set forth in the Administrative Procedure Act, 5 U.S.C. §§ 701-706. We review
17 the agency's interpretation of federal law *de novo*; if the agency correctly interpreted federal law, we
18 review its factual determinations under the arbitrary-and-capricious standard, *see id*. § 706(2)(A);
19 *Islander East Pipeline Co. v. McCarthy*, 525 F.3d 141, 150 (2d Cir. 2008) ("*Islander East II*");
20 *Islander East Pipeline Co. v. Connecticut Department of Environmental Protection*, 482 F.3d 79, 94
21 (2d Cir. 2006) ("*Islander East I*").

1 1. *Federal Law*

2 Constitution argues that as a matter of law, NYSDEC's "jurisdiction to review"--and
3 "in effect, veto"--FERC determinations is preempted by FERC's performance of its obligations under
4 the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h, to prepare a DEIS and
5 a FEIS. (Constitution brief in support of Petition at 37, 39.) We disagree that NYSDEC's action was
6 preempted.

7 Although NEPA requires federal-agency review of virtually any possible
8 environmental effect that a proposed action may have, *see generally* 40 C.F.R. § 1502.16, it does not
9 impose substantive standards. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350
10 (1989). "[T]hrough a set of action-forcing procedures," NEPA "require[s] that agencies take a hard
11 look at environmental consequences," but it is "well settled that NEPA itself does not mandate
12 particular results[; it] simply prescribes the necessary process." *Id.* (internal quotation marks omitted).
13 Thus, NEPA states, in pertinent part, that "[n]othing in section 4332 or 4333 of this title shall in any
14 way affect the specific statutory obligations of any Federal agency . . . to act, or refrain from acting
15 contingent upon the recommendations or certification of any . . . State agency." 42 U.S.C. § 4334.

16 We note also that while the Natural Gas Act generally preempts state laws, it states that
17 "[e]xcept as specifically provided[,] . . . nothing" in the NGA "affects the rights of States under . . .
18 the [CWA] (33 U.S.C. § 1251 et seq.)," 15 U.S.C. § 717b(d). CWA § 511, in turn, preserves the
19 states' authority to determine issues of a planned project's effect on water quality. *See* 33 U.S.C.
20 § 1371(c)(2)(A). CWA § 401(a)(1) requires that an entity such as Constitution, proposing to construct
21 an interstate pipeline, obtain from each state in which the pipeline is to be constructed a certification
22 that "any . . . discharge" from a proposed activity "will comply with the applicable provisions of [33

1 U.S.C. §§] 1311, 1312, 1313, 1316, and 1317." 33 U.S.C. § 1341(a)(1). Sections 1311, 1312, 1316,
2 and 1317 establish, and allow the Environmental Protection Agency ("EPA") to establish, standards
3 governing numerous aspects of water quality; and § 1313 allows states to develop their own water
4 quality standards and submit them to the EPA for approval. If the EPA approves a state's water
5 quality standards, it publishes a notice of approval and they become the state's EPA-approved
6 standards, regulating water quality in that state. *See* 33 U.S.C. §§ 1313(a), (c).

7 The New York State water quality standards, approved by the EPA, *see generally* 42
8 Fed. Reg. 56,786, 56,790 (Oct. 28, 1977), are found in 6 N.Y.C.R.R. parts 701 to 704, and were
9 invoked by the NYSDEC Decision, which stated that "[d]enial of a WQC may occur when an
10 application fails to contain sufficient information to determine whether the application demonstrates
11 compliance with the above stated State water quality standards and other applicable State statutes and
12 regulations due to insufficient information." NYSDEC Decision at 7; *see also id.* at 12 nn.10-11 and
13 accompanying text (quoted in Part I.C. above). The State standards classify waterbodies in terms of,
14 *inter alia*, potability and their suitability for various activities such as swimming and fishing, *see* 6
15 N.Y.C.R.R. pt. 701; they set standards for characteristics such as water odor, color, and turbidity, *see*
16 *id.* pt. 703; and they regulate thermal discharges into waterbodies, *see id.* pt. 704.

17 Thus, the relevant federal statutes entitled NYSDEC to conduct its own review of the
18 Constitution Project's likely effects on New York waterbodies and whether those effects would
19 comply with the State's water quality standards.

20 CWA § 401(a)(1), as pertinent here, states that "[n]o license or permit shall be granted
21 if [a § 401] certification has been denied by the State," 33 U.S.C. § 1341(a)(1). Thus, we have indeed
22 referred to § 401 as "a statutory scheme whereby a single state agency *effectively vetoes* an energy

1 pipeline that has *secured approval from a host of other federal and state agencies*." *Islander East II*,
2 525 F.3d at 164 (emphases added); *accord Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991)
3 ("Through [the § 401 certification] requirement, *Congress intended that the states would retain the*
4 *power to block, for environmental reasons, local water projects that might otherwise win federal*
5 *approval*." (emphasis added)).

6 Constitution also argues that NYSDEC's demands for information with regard to, *e.g.*,
7 possible alternative routes for the planned pipeline (*see*, *e.g.*, NYSDEC Decision at 3 (NYSDEC
8 "asked Constitution to analyze alternative routes that could have avoided or minimized impacts to an
9 extensive group of water resources")), as well as Constitution's planned blasting sites and the depth
10 at which the pipe would be buried, exceeded NYSDEC's authority (Constitution brief in support of
11 Petition at 38). We need not address all of these contentions. A state's consideration of a possible
12 alternative route that would result in less substantial impact on its waterbodies is plainly within the
13 state's authority. *See*, *e.g.*, *Islander East II*, 525 F.3d at 151-52. And where an agency decision is
14 sufficiently supported by even as little as a single cognizable rationale, that rationale, "by itself,
15 warrants our denial of [a] petition" for review under the arbitrary-and-capricious standard of review.
16 *See*, *e.g.*, *id.* at 158.

17 2. *Application of the Arbitrary-and-Capricious Standard*

18 Under the arbitrary-and-capricious standard, "[a] reviewing court may not itself weigh
19 the evidence or substitute its judgment for that of the agency." *Islander East II*, 525 F.3d at 150.
20 "Rather," we "consider[] whether the agency 'relied on factors which Congress has not intended it to

1 consider, entirely failed to consider an important aspect of the problem, offered an explanation for its
2 decision that runs counter to the evidence before the agency, or is so implausible that it could not be
3 ascribed to a difference in view or the product of agency expertise.'" *Id.* at 150-51 (quoting *Motor*
4 *Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance*
5 *Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*")).

> 6 [W]ithin the prescribed narrow sphere, judicial inquiry must be searching and
> 7 careful. . . . Notably, a court must be satisfied from the record that the agency
> 8 . . . examine[d] the relevant data and articulate[d] a satisfactory explanation for
> 9 its action. . . . Further, the agency's decision must reveal a rational connection
> 10 between the facts found and the choice made.

11 *Islander East II*, 525 F.3d at 151 (internal quotation marks omitted). If there is "sufficient evidence
12 in the record to provide rational support for the choice made by the agency," we must uphold its
13 decision. *Id.* at 152.

14 Usually, the agency's choice concerns whether the applicant's submission of the
15 relevant information warrants the granting of the application. In the present case, as summarized in
16 Part I.C. above, NYSDEC denied Constitution's application because Constitution refused to provide
17 information that NYSDEC had repeatedly requested with regard to, *inter alia*, issues such as those
18 just discussed in Part II.B.1. above, and issues as to the feasibility, site-by-site, of trenchless methods
19 for most of the 251 stream crossings planned in New York. Constitution does not contend that those
20 requests were not made. Indeed, in its own brief in this Court, Constitution acknowledges that the
21 NYSDEC Decision (the "Denial") explained that NYSDEC had requested but had not received
22 sufficient information with regard to:

23 ♦ construction methods and site-specific project plans for stream crossings
24 (Denial at 8-11 . . .);

25 ♦ alternative routes (*Id.* at 11 . . .);

1 ♦ pipeline burial depth in stream beds (*Id*. at 12-13 . . .);

2 ♦ procedures and safety measures Constitution would follow in the event that
3 blasting is required (*Id*. at 13 . . .);

4 ♦ Constitution's plans to avoid, minimize, or mitigate discharges to navigable
5 waters and wetlands (*Id*. at 13-14 . . .); and

6 ♦ cumulative impacts (*Id*. at 3, 5, 7, 14 . . .).

7 (Constitution brief in support of Petition at 21-22.) Nowhere does Constitution claim to have
8 provided the above categories of information; rather, it insists that it provided NYSDEC with
9 "sufficient" information (*id*. at 52-62) because use of trenchless crossing methods for streams less than
10 30 feet wide is not "an industry recognized standard" (Constitution 2015 Feasibility Draft at 1).

11 However, in order to show that an agency's decision--or its request for additional
12 information as to alternative methods--is arbitrary and capricious, "it is not enough that the regulated
13 industry has eschewed a given [technology]." *State Farm*, 463 U.S. at 49. Industry preferences do
14 not circumscribe environmental relevance.

15 In *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989), the Supreme
16 Court considered whether a federal agency, presented with new evidence, should have been required
17 to file a new supplemental environmental impact statement; the Court stated that the matter of whether
18 additional information is "significant" is "a classic example of a factual dispute the resolution of
19 which implicates substantial agency expertise," as to which the courts "must defer to the informed
20 discretion of the responsible . . . agencies," *id*. at 376-77 (internal quotation marks omitted). We
21 cannot conclude that any less deference is due an agency's determination that it should not grant a
22 permit application where it has already determined that additional information is needed, and the
23 applicant refuses to supply it. *Cf. University of Iowa Hospitals & Clinics v. Shalala*, 180 F.3d 943,

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1 955 (8th Cir. 1999) (where agency regulations required substantiation of costs for which
2 reimbursement was sought, denial of reimbursement based on inadequate documentation was not
3 arbitrary and capricious); *Mendoza v. Secretary, DHS*, 851 F.3d 1348, 1356 (11th Cir. 2017) (denial
4 of visa application where applicants declined to answer relevant questions relating to eligibility was
5 not arbitrary and capricious; the applicants "were free to refuse to answer [the agency's] questions
6 . . . but they did so at their own peril"). Indeed, an agency's decision may be found "arbitrary and
7 capricious" for "*issuing* a permit with insufficient information." *Utahns For Better Transportation*
8 *v. United States Department of Transportation*, 305 F.3d 1152, 1192 (10th Cir. 2002) (emphasis
9 added).

10 Here, the record amply shows, *inter alia*, that Constitution persistently refused to
11 provide information as to possible alternative routes for its proposed pipeline or site-by-site
12 information as to the feasibility of trenchless crossing methods for streams less than 30 feet wide--*i.e.*,
13 for the vast majority of the 251 New York waterbodies to be crossed by its pipeline--and that it
14 provided geotechnical data for only two of the waterbodies.

15 In sum, NYSDEC is responsible for evaluating the environmental impacts of a
16 proposed pipeline on New York waterbodies in light of the State's water quality standards. Applying
17 the arbitrary-and-capricious standard of review, we defer to NYSDEC's expertise as to the
18 significance of the information requested from Constitution, given the record evidence supporting the
19 relevance of that information to NYSDEC's certification determination. We conclude that the denial
20 of the § 401 certification after Constitution refused to provide relevant information, despite repeated
21 NYSDEC requests, was not arbitrary or capricious.

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1 CONCLUSION

2 We have considered all of Constitution's arguments and have found in them no basis
3 for granting the petition for review. Insofar as the petition contends that the NYSDEC Decision is
4 a nullity on the ground that it was untimely, the petition is dismissed for lack of jurisdiction; to the
5 extent that the petition challenges the NYSDEC Decision on the merits, the petition is denied.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit