No. 17-

IN THE

Supreme Court of the United States

CONSTITUTION PIPELINE COMPANY, LLC,

Petitioner,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Energy Policy Act of 2005, amending the Natural Gas Act of 1938 ("NGA"), reaffirms Congress' clear intent to federalize the approval and regulation of interstate natural gas pipelines by providing for the comprehensive federal regulation of the transportation and sale of natural gas in interstate commerce by the Federal Energy Regulatory Commission ("FERC"). *See Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 84 (2d Cir. 2006); *see also Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 300–01 (1988). "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 . . . ." *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n,* 894 F.2d 571, 579 (2d Cir. 1990).

The NGA preempts state permitting and licensing requirements, *see Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 143 (2d Cir. 2008), expressly limiting narrowly tailored authority for states to administer three federal regulatory statutes. One of these is the Clean Water Act ("CWA"). *See* 15 U.S.C. § 717b(d)(3). Under Section 401 of the CWA ("Section 401"), any applicant seeking a federal permit for an activity that "may result in any discharge into the navigable waters" must obtain "a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with" the state's federally-approved water quality standards. 33 U.S.C. § 1341(a)(1). No applicable federal license or permit will be granted unless the certification required by Section 401 has been obtained, or the reviewing state body waives the requirement by

failing to act on an application for certification within a reasonable period of time, not to exceed one year. *Id.*

This narrowly tailored authority does not allow a state to frustrate principles of federal supremacy and impede interstate commerce because it disagrees with the FERC-approved route and location of an interstate natural gas pipeline.

The question presented is:

Whether a state's denial of a federally-approved interstate natural gas pipeline's request for certification under Section 401 of the CWA on the basis of purportedly receiving insufficient information regarding alternative routes for the interstate natural gas pipeline exceeds the state's limited authority under the Energy Policy Act of 2005 and the Natural Gas Act of 1938, interferes with FERC's exclusive jurisdiction over the routing of interstate natural gas pipelines when consideration of alternative routes is explicitly not part of the state's federally-approved water quality standards, and violates fundamental principles of federal supremacy arising from the Constitution's Supremacy Clause?

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The petitioner below was Constitution Pipeline Company, LLC. The respondents below were: the New York State Department of Environmental Conservation; Basil Seggos, then Acting Commissioner of the New York State Department of Environmental Conservation (and now its Commissioner); and John Ferguson, Chief Permit Administrator of the New York State Department of Environmental Conservation. The intervenors below, supporting the respondents, were: Stop the Pipeline; Catskill Mountainkeeper, Inc.; Sierra Club; and Riverkeeper, Inc.

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.

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Petitioner Constitution Pipeline Company, LLC ("Constitution") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 1a-34a)[1] is reported at 868 F.3d 87. The New York State Department of Environmental Conservation's letter denying Constitution's application for a water quality certification under Section 401 of the Clean Water Act is reproduced at App. 35a-65a.

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its opinion and entered judgment in this case on August 18, 2017. App. 1a. Constitution filed a petition for panel rehearing and/or rehearing en banc on September 1, 2017. The Court of Appeals denied Constitution's rehearing petition on October 19, 2017. App. 66a-67a. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.3 because it is being filed within 90 days of the date of the denial of rehearing. This Court has jurisdiction to review the Court of Appeals' judgment under 28 U.S.C. § 1254(1). Constitution originally invoked federal jurisdiction in the Second Circuit under the Natural Gas Act, 15 U.S.C. § 717r(d)(1).

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1. "App." refers to the pages of the Appendices accompanying this Petition for a Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

Section 717 of the Natural Gas Act ("NGA") provides, in relevant part:

> **(a) Necessity of regulation in public interest**
>
> As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

15 U.S.C. § 717(a).

Section 717b of the NGA provides, in relevant part:

> **(d) Construction with other laws**
>
> Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under—
>
> **(1)** the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);
>
> **(2)** the Clean Air Act (42 U.S.C. 7401 et seq.); or

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

15 U.S.C. § 717b(d).

Section 401 of the Clean Water Act ("CWA") provides, in relevant part:

> **(a) Compliance with applicable requirements; application; procedures; license suspension**
>
> **(1)** Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures

> for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

33 U.S.C. § 1341(a)(1).

INTRODUCTION

Consistent with the express intent of the NGA to federalize the regulation of interstate natural gas pipelines, the Federal Energy Regulatory Commission ("FERC") conducted a comprehensive thirty-one month review process that included consideration of nine separate letters submitted by the New York State Department of Environmental Conservation ("NYSDEC") addressing in detail NYSDEC's objections to the proposed

route for Constitution's proposed interstate natural gas pipeline project ("Interstate Project"). FERC then issued a Certificate of Public Convenience and Necessity ("Certificate Order") determining that Constitution's Interstate Project was in the national public interest.

It is noteworthy that NYSDEC did *not* file an appeal challenging FERC's issuance of the Certificate Order. Instead, NYSDEC attempted to bootstrap its limited authority to review interstate natural gas projects for compliance with federally-approved water quality standards under Section 401 of the CWA by denying a water quality certification ("Section 401 Certification"). Although a state is within its authority to deny a Section 401 Certification when its denial is timely and based on federally-approved water quality standards, here NYSDEC notably delayed issuing a denial until Earth Day (April 22, 2016), justifying its ultimate denial (the "Denial") on, *inter alia*, an alleged failure to provide NYSDEC sufficient information about an alternative route for the Interstate Project—an issue over which FERC has exclusive authority. It is undisputed that the basis for this denial is not limited to an application of federally-approved water quality standards. Nor is it disputed that Congress provided FERC with exclusive authority over the *routing* of interstate natural gas pipelines.

The NGA federalizes the regulation of interstate natural gas pipelines, though it employs narrowly tailored state determinations as part of the federally-mandated process. These determinations are linked to specific state findings under the CWA, the Coastal Zone Management Act, and the Clean Air Act. *See* 15 U.S.C. § 717b(d). By overstepping their carefully circumscribed roles under

the NGA in order to block interstate pipelines, states, like New York here, would frustrate Congress' express intent in passing the Energy Policy Act of 2005, which was to "provide a comprehensive national energy policy that balances domestic energy production with conservation and efficiency efforts to enhance the security of the United States and decrease dependence on foreign sources of fuel," S. Rep. No. 109-78, at 1 (2005).

The last point can scarcely be overstated. Domestic energy development and a robust energy supply with reliable transportation infrastructure (including interstate natural gas pipelines) are vitally important to our national security interests. At this very time, "[t]he United States is currently taking a major step forward in energy production as a result of the shale energy boom, a development that will contribute to . . . energy security."[2] "The return of the United States as a major global energy producer and exporter . . . open[s] global energy markets . . . [and] provid[es] greater resilience to those markets, which adds to the security of supply. This has already led to concrete national security benefits for the United States."[3] "[G]reater resilience undermines would-be regional hegemons who seek to use energy as a coercive

2. Elizabeth Rosenberg, *Energy Rush: Shale Production and U.S. National Security,* Ctr. for a New Am. Sec., (Feb. 2014), https://www.cnas.org/publications/reports/energy-rush-shale-production-and-u-s-national-security (follow "Download PDF" hyperlink).

3. Dr. David Gordon, et al., *Energy, Economic Growth, and U.S. National Security*, Ctr. for a New Am Sec. (Nov. 13, 2017), https://www.cnas.org/publications/reports/energy-economic-growth-and-u-s-national-security-the-case-for-an-open-trade-and-investment-regime (follow "Download PDF" hyperlink).

tool against the United States and its allies by limiting their ability to control access to their energy resources."[4] Additionally, "supporting and encouraging a strong U.S. energy production and export capability . . . can be a powerful lever to check adversaries or unwelcome aggression on the international stage."[5]

The affirmance of this Denial by the Second Circuit ultimately turned on its acceptance of NYSDEC's maneuver. The "single cognizable rationale" identified by the Second Circuit was the issue of alternative routes: "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." *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 101 (2d Cir. 2017), App. 29a.

If not corrected, this decision will have far-reaching implications for all NGA infrastructure projects. Left unchecked, states like New York, with an intent to superimpose their political, parochial interests over the interests of the nation, will use the Second Circuit's expanded reading of their narrowly tailored rights under Section 401 of the CWA to undermine FERC's routing determinations by requiring applicants to consider "a possible alternative route that would result in less

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4. *Id.*

5. Elizabeth Rosenberg, et al., *The New Great Game – Changing Global Energy Markets, The Re-Emergent Strategic Triangle, and U.S. Policy*, Ctr. for a New Am. Sec. (June 15, 2016), https://www.cnas.org/publications/reports/the-new-great-game-changing-global-energy-markets-the-re-emergent-strategic-triangle-and-u-s-policy (follow "Download PDF" hyperlink).

substantial impact," *Constitution Pipeline*, 868 F.3d at 101, App. 29a. This would effectively allow states to block federally reviewed and approved interstate natural gas pipelines for reasons entirely unrelated to the limited role Congress has provided to states in the NGA's regulatory scheme. Indeed, NYSDEC has effectively instituted a blockade of FERC-approved natural gas pipelines as evidenced by its recent denials of Section 401 water quality certifications for the Interstate Project and two other projects (Millennium Pipeline Company's Valley Lateral Project and National Fuel Gas Supply Corporation's and Empire Pipeline, Inc.'s Northern Access Project).

The Second Circuit's decision eviscerates the carefully delineated boundaries of cooperative federalism established by Congress in the NGA, as amended by the Energy Policy Act of 2005, and presents a profound threat to our national security by allowing states to intrude upon FERC's exclusive jurisdiction in an effort to prevent development of critical natural gas energy infrastructure, which, in turn, will impair the development of United States energy resources, a key priority for our nation's national security.

The Court should grant this petition because the Second Circuit's decision conflicts with the decisions of this Court and other federal Courts of Appeals on an important question of federal law that has profound implications for the development of critical energy infrastructure and national security. *See Schneidewind v. ANR Pipeline Company*, 485 U.S. 293, 300-01, 305 (1988); *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n*, 894 F.2d 571, 579 (2d Cir. 1990); *Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458, 472 (1st Cir. 2009). FERC

alone has authority to determine the routes of interstate natural gas pipelines whose environmental impact is to be assessed by the states strictly according to federal guidelines. States should not be permitted to effectively negate FERC's determinations by maneuvers that are in effect routing assessments disguised as the exercise of their limited CWA Section 401 authority. Allowing states to do so would conflict with the Supremacy jurisprudence of two centuries of Supreme Court precedent and eviscerate the NGA and amendments thereto in the Energy Policy Act of 2005. Absent a ruling from this Court, state officials will be emboldened by the Second Circuit's ruling to transform their CWA Section 401 authority into the power to block pipelines at the expense of national interests that FERC is charged to balance and protect. In essence, it would elevate the Not-In-My-Backyard temptations and pressures on state officials to an irresistible level by removing the national check on those pressures carefully crafted by Congress. Of course the problem of locating energy pipelines is not the only public policy issue whose solution cannot be thwarted by individual state action,[6] but

6. Justice Cardozo discussed these so-called "collective action" problems in his opinion for the Court in *Steward Machine Co. v. Davis,* 301 U.S. 548 (1937):

> Two consequences ensued. One was that the freedom of a state to contribute its fair share to the solution of a national problem was paralyzed by fear. The other was that in so far as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the Government of the nation.

Id. at 588.

it must be a paradigm case. How could a national critical infrastructure ever come into being if the permitting process were localized and held hostage to the political vagaries of the various states and localities?

Here, Congress has spoken unmistakably: action by the state must be part of a narrowly tailored process that does not frustrate the routing plans determined by FERC.

STATEMENT OF THE CASE

I. The Interstate Project

This case concerns NYSDEC's Denial of Constitution's application for a Section 401 Certification for a 124-mile interstate natural gas pipeline project from Pennsylvania to New York.[7] The Interstate Project is designed to provide up to 650,000 dekatherms per day of clean-burning natural gas and its capacity is fully subscribed. JA1667, JA1670.[8] The Interstate Project will transport enough natural gas to serve over 3 million homes,[9] and is designed to transport domestically-sourced gas from Pennsylvania to markets in New England and New York. Certificate Order ¶ 25, JA1674.

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7. Approximately 99 miles of the Interstate Project are located in New York State; 25 miles are located in Pennsylvania. Pennsylvania issued a Section 401 Certification on September 5, 2014.

8. "JA" refers to the Joint Appendix filed in the Second Circuit proceeding.

9. *Project Benefits*, CONST. PIPELINE, http://constitutionpipeline.com/about-the-project/project-benefits/ (last visited Jan. 11, 2018).

II. FERC's Comprehensive Review and Approval of the Interstate Project

Pursuant to Section 7 of the NGA, a natural gas company must obtain from FERC a "certificate of public convenience and necessity" before it constructs, extends, acquires, or operates any facility for the transportation or sale of natural gas in interstate commerce. 15 U.S.C. § 717f(c)(1)(A). FERC is required to issue a certificate of public convenience and necessity if it finds that the proposed project "is or will be required by the present or future public convenience and necessity," and FERC may attach "to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require." *Id.* § 717f(e).

On June 13, 2013, Constitution filed an application with FERC for a certificate of public convenience and necessity authorizing construction and operation of the Interstate Project. As the lead federal agency under the National Environmental Policy Act ("NEPA"), FERC considered extensive environmental data on the Interstate Project's potential impacts as part of the environmental impact statement process. As a consequence of this review, FERC issued a 400-page Draft Environmental Impact Statement on February 12, 2014, on which it received extensive comments (including four letters from NYSDEC), and thereafter issued a 450-page Final Environmental Impact Statement ("FEIS") on October 24, 2014. The FEIS concluded that any adverse environmental impacts that would result from the Interstate Project "would be reduced to less than significant levels with the implementation of Constitution's . . . proposed mitigation and the additional measures recommended by staff in

the final EIS." FEIS at 1, JA1006. It is important to note that as a part of its review, FERC's Final Environmental Impact Statement also considered alternative routes for the Interstate Project, as well as the anticipated impact on a host of environmental resources. *See generally* FEIS, JA1005-JA1469.

NYSDEC actively participated in FERC's review proceedings by submitting nine separate comment letters to FERC between November 2012 and May 2014.[10] In its comment letters to FERC, NYSDEC twice expressed the commitment that it "intends to rely upon the federal environmental review prepared pursuant to [NEPA] to determine if the Project will comply with the applicable New York standards." JA75-JA76, JA164. NYSDEC also expressed a strong preference for an alternative route, referred to as Alternative M, that would have moved the proposed pipeline route to a location parallel to New York Interstate 88 for a substantial portion of the route. JA223-JA224, JA496-JA515.

FERC specifically rejected NYSDEC's proposed alternative route (*see* FEIS, Volume 3, Appendix S, Part 2, SA4-2, JA1641-JA1642), expressly articulating why it did not find Alternative M to be preferable to the proposed route, and noting that FERC "completed numerous in-field reviews of the topographical constraints associated with Alternative M on foot, by car along I-88, and by helicopter." *Id*. FERC's analysis was buttressed by an explicit comparison of the impact

10. JA75-JA80, JA81-JA88, JA89-JA127, JA164-JA206, JA223-JA224, JA486-JA488, JA496-JA515, JA844-JA846, JA853-JA855.

on waterbodies and wetlands. This comparison "was one of several environmental parameters supporting [FERC's] conclusion that the Alternative M segments were not preferable to the proposed route segments." *Id.* at SA4-3, JA1643. Additionally, both the New York State Department of Transportation and the Federal Highway Administration strongly voiced their safety and operational concerns regarding the Alternative M routing advocated by NYSDEC. *See* JA225-JA293.

After conducting an extensive review for more than two years and seven months, FERC issued a Certificate of Public Convenience and Necessity on December 2, 2014 approving the Interstate Project subject to conditions, including Constitution's obtaining necessary federal authorizations. Certificate Order at 45, 51 (Environmental Condition 8), JA1711, JA1717.

NYSDEC chose not to file an appeal challenging FERC's Certificate of Public Convenience and Necessity, which set the route for the Interstate Project.

III. NYSDEC's Denial of the Section 401 Certification

Following pre-application consultations with NYSDEC in 2012 and 2013, Constitution submitted its Section 401 Certification application to NYSDEC on August 22, 2013, the same day it submitted its application to the United States Army Corps of Engineers ("U.S. Army Corps") for a permit under Section 404 of the CWA, 33 U.S.C. § 1344(a). Under Section 401, any applicant for a Section 404 permit to construct or operate a facility that may result in a discharge must provide the U.S. Army Corps with "a certification from the State in which the discharge

originates . . . that any such discharge will comply with" federally-approved state water quality standards. 33 U.S.C. § 1341(a)(1).

On Earth Day, two years and eight months after Constitution submitted its application to NYSDEC, and following a multitude of detailed technical submissions to NYSDEC, including a comprehensive summary responding to over 15,000 public comments related to Constitution's application, NYSDEC denied Constitution's application on grounds that it purportedly did not contain sufficient information to determine whether Constitution's proposed activities demonstrate compliance with New York's water quality standards. JA2870-JA2883. NYSDEC denied Constitution's application for lack of sufficient information, notwithstanding that it twice publicly acknowledged that Constitution had submitted a complete application. JA1725-JA1732, JA2074-JA2075.

It should not be overlooked that NYSDEC prepared a twenty-one page draft Section 401 Certification with extensive conditions that it sent to the U.S. Army Corps for comment on July 20, 2015, seeking its prompt review and comment in light of the apparent imminence for issuance of the Section 401 Certification. JA75-JA76, JA164, JA2219-JA2241. Nevertheless, NYSDEC shut down substantive communications with Constitution regarding the draft Section 401 Certification and made no request for additional information regarding routing of the pipeline or any of the subjects on which it would ultimately base its denial for lack of sufficient information during the eight month period leading up to the 2016 Earth Day denial by NYSDEC.

It would appear that this silence with the applicant was not inadvertent, but was an essential element in NYSDEC's finding that "Constitution's unwillingness to adequately explore the Alternative M route alternative . . . means that the Department is unable to determine whether an alternative route is actually more protective of water quality standards." Denial at 11, SPA11.[11] This is particularly significant in light of the Second Circuit's decision to uphold the Denial.

IV. The Second Circuit Denies Constitution's Petition for Review of NYSDEC's Denial of the Section 401 Certification

On May 16, 2016, Constitution filed a petition for review of NYSDEC's Denial with the United States Court of Appeals for the Second Circuit pursuant to Section 19(d)(1) of the NGA, 15 U.S.C. § 717r(d)(1). Constitution raised three primary arguments in support of its petition: (1) NYSDEC waived the Section 401 certification requirement by failing to act on Constitution's application within a reasonable period of time; (2) NYSDEC exceeded its narrow authority under Section 401 of the CWA, and intruded upon FERC's exclusive jurisdiction, by considering alternative routes for the Interstate Project; and (3) NYSDEC acted arbitrarily and capriciously in denying Constitution's application.

The Second Circuit denied Constitution's petition for review and upheld NYSDEC's Denial. First, the Second Circuit decided that it lacked jurisdiction to consider

11. "SPA" refers to the Special Appendix filed in the Second Circuit proceeding.

Constitution's waiver argument. *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 100 (2d Cir. 2017), App. 26a. Turning to the merits, the Second Circuit rejected the bulk of Constitution's arguments out of hand: "We need not address all of these contentions. . . . [W]here 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." *Id.* at 101-02 (quoting *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 158 (2d Cir. 2008)), App. 29a. The "single cognizable rationale" identified by the Second Circuit was the issue of alternative routes: "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." *Id.* at 101, App. 29a.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Decision Conflicts With the Decisions of This Court and Other Courts of Appeals on an Important Question of Federal Law That Has Profound Implications for the Development of Critical National Energy Infrastructure and U.S. National Security

The Second Circuit's decision conflicts with the decisions of this Court and federal Courts of Appeals on an important question of federal law that has material implications for the development of critical energy infrastructure in this nation. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01, 305 (1988); *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n*, 894 F.2d 571, 579 (2d Cir. 1990); *Weaver's Cove Energy, LLC v. R.I.*

Coastal Res. Mgmt. Council, 589 F.3d 458, 472 (1st Cir. 2009). Without a ruling from this Court, there is a serious risk that states will use the Second Circuit's ruling below to abuse their narrowly tailored CWA Section 401 authority in their efforts to frustrate interstate natural gas pipeline development at the expense of vital national interests, including the development of energy security by the United States and the impact on energy prices worldwide—with all the implications for the geopolitical position of the U.S. and other countries—such as Iran and Russia.[12]

A. Congress Gave FERC Exclusive Authority to Route Interstate Natural Gas Pipelines

"The NGA confers upon FERC exclusive [jurisdiction] over the transportation and sale of natural gas in interstate commerce for resale." *Schneidewind*, 485 U.S. at 300-01 (citing *N. Nat. Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 89 (1963)); *see also id.* at 305 ("Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce."). This Court has long held that "facilities of natural gas companies are" one of "the things over which FERC has comprehensive authority." *Id.* at 308; *see also Nat'l Fuel Gas Supply*, 894 F.2d at 579 ("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 . . . ."). The Second Circuit's holding that "[a] state's consideration of a possible alternative

12. *See, e.g.*, David Biello, *Can U.S. Fracked Gas Save Ukraine?*, Scientific American, Mar. 11, 2014, https://www.scientificamerican.com/article/can-us-fracked-gas-save-ukraine/.

route that would result in less substantial impact on its waterbodies is plainly within the state's authority," *Constitution Pipeline*, 868 F.3d at 101, App. 29a, squarely conflicts with this Court's decision in *Schneidewind*, as well as the Second Circuit's decision in *National Fuel* and the First Circuit's decision in *Weaver's Cove*,[13] all of which recognize FERC's exclusive authority over the siting of natural gas facilities.

The Second Circuit cites its previous decision in *Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 151-52 (2d Cir. 2008) ("*Islander East II*") as support for its ruling that a state may second-guess FERC's routing determination, but *Islander East II* says nothing to support a departure from its prior precedent in *National Fuel*. 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—much less hold—that a state agency may insist on the consideration of an alternative route

13. *Weaver's Cove* involved the regulation of a proposed liquefied natural gas ("LNG") terminal under the Coastal Zone Management Act—one of the three statutes pursuant to which states may regulate NGA-governed projects. *See* 15 U.S.C. § 717b(d). The differences between that case and this one are immaterial. Under the NGA, FERC possesses exclusive authority over the siting of facilities. That remains true irrespective of whether the proposed facilities are for a natural gas pipeline or an LNG terminal.

or reject a Section 401 Certification because it prefers a different route over the route FERC approved. The Second Circuit's endorsement of NYSDEC's improper efforts to re-evaluate alternative routes rejected by FERC is a fundamental error of law that poses a serious threat to development of interstate natural gas facilities. The Second Circuit's ruling below creates untenable conflicts within the Second Circuit and with the First Circuit's decision in *Weaver's Cove*,[14] presenting a serious risk that Courts of Appeals will continue to reach different outcomes on an issue that should be uniformly decided under the federal statutory scheme.

B. States' Limited Authority Under Section 401 of the CWA Does Not Include Routing of Interstate Natural Gas Pipelines

Section 401 of the CWA explicitly circumscribes the states' role in reviewing projects for compliance with federally-approved water quality standards. 33 U.S.C. § 1341(a)(1)[15]; *see also Millennium Pipeline Co., L.L.C.*

14. *See* note 13, *supra*.

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

Constitution Pipeline, 868 F.3d at 101, App. 27a-28a.

v. Seggos, No. 117CV1197MADCFH, 2017 WL 6397742, at *2 (N.D.N.Y. Dec. 13, 2017) ("In reviewing applications for Section 401 certification, states may apply their own EPA-approved state water quality standards."). However, "[r]eview by State agencies that would overlap or duplicate the Federal purview and prerogatives was not contemplated and would infringe on and potentially conflict with an area of the law dominated by the nationally uniform Federal statutory scheme." *Niagara Mohawk Power Corp. v. N.Y. State Dep't of Envtl. Conservation*, 624 N.E.2d 146, 148 (N.Y. 1993), *cert. denied*, 511 U.S. 1141 (1994).

"Section 401 of the Clean Water Act . . . serves as the conduit for the incorporation of relevant State water quality standards in this otherwise Federally filled universe." *Niagara Mohawk*, 624 N.E.2d at 149; *see also Niagara Mohawk Power Corp. v. N.Y. State Dep't of Envtl. Conservation*, 592 N.Y.S.2d 141, 143 (N.Y. App. Div. 1993), *aff'd*, 624 N.E.2d 146 (N.Y. 1993) ("[E]nvironmental and conservation factors of concern to a State are to be weighed at the Federal level; to allow them to serve as a predicate for a State 'veto' of the project is indefensible for it would effectively undermine the intent of Congress.").

The routing of interstate natural gas pipelines falls within the exclusive province of FERC and is scarcely a federally-approved water quality standard. *See* Section I.A., *supra*; 6 N.Y.C.R.R. §§ 700-706. The Second Circuit's ruling upholding NYSDEC's Denial on the issue of alternative routes is precisely the type of intrusion upon "an area of the law dominated by the nationally uniform Federal statutory scheme," *Niagara Mohawk*, 624 N.E.2d at 148, that is not permitted under a state's narrowly

tailored Section 401 authority, particularly when FERC rejected NYSDEC's routing comments during the NEPA review process and NYSDEC did not challenge the route chosen in FERC's Certificate of Public Convenience and Necessity for the Interstate Project.

C. Allowing States to Act Beyond the Limits of Their Authority Under Section 401 of the CWA and in an Area Reserved Exclusively for Federal Regulation Frustrates Fundamental Principles Arising from the Constitution's Supremacy Clause in Article VI and the Commitment to Congress of the Regulation of Commerce Among the Several States and with Foreign Nations in Article II

NYSDEC's denial of the Section 401 Certification for the Interstate Project on grounds outside of its limited authority under Section 401 of the CWA unlawfully frustrates principles of federal supremacy, impedes interstate commerce, deprives other states of the benefits of clean-burning and inexpensive natural gas to satisfy their energy needs, and threatens national security interests in domestic energy development and a robust energy supply with reliable and secure infrastructure.[16] In the NGA, Congress declared that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas

16. *See* Presidential Decision Directive 63 on Critical Infrastructure Protection, 63 Fed. Reg. 41804-01 (Aug. 5, 1998) (defining the nation's "critical infrastructure" to include energy infrastructure, which includes pipelines).

and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a); *see also id.* § 717(b) (Congress drafted the NGA to, among other things, "apply to the transportation of natural gas in interstate commerce"). Allowing an individual state to unilaterally accord its interests dispositive weight manipulates the balance of national interests with respect to commerce among the states and with foreign nations, of which Congress is the arbiter, and destroys the uniformity that is essential to the success of the interstate system of natural gas transportation.

Protecting interstate and foreign commerce is one of the most basic and essential functions of our national government. "The United States could not exist as a nation if each of them were to have the power to forbid imports from another state, to sanction the rights of citizens to transport their goods interstate, or to discriminate as between neighboring states in admitting articles produced therein." *Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346, 351 (1939). Congress may choose to authorize state actions that impede free trade and interstate commerce, but without Congressional legislation authorizing such actions, they are prohibited under the Commerce Clause. *See Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 422 (1855). Here, Congress has established a clear delineation of federal and state authority in the regulation of interstate natural gas pipelines. The NGA, as amended by the Energy Policy Act of 2005, allows states a limited and narrowly circumscribed authority to participate in the regulatory process by means of three statutes, one of which is the CWA. *See* 15 U.S.C. § 717b(d). In all other matters, interstate natural gas pipelines are regulated at the federal level.

It is easy to confuse a federal regulatory scheme that leaves state options intact—like Section 2 of the Constitution's XXI Amendment[17]—with one in which a federal statute uses a state determination, carefully circumscribed by Congress, as an element in a federal agency's overall final determination. But the two regulatory schemes are not the same. Treating the latter regulatory method as if it were the former permits the state "tail" to wag the federal "dog". It is not surprising that in such a politically fraught area as pipeline location, states have found this confusion very tempting indeed.

The threat to interstate commerce presented by NYSDEC's Denial and the Second Circuit's decision is reminiscent of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). "*Gibbons v. Ogden* was the needed guarantee that interstate rail, telephone and telegraph, oil and gas pipe lines might be built across state lines without the threat of local interference from state action." George L. Haskins, *John Marshall and the Commerce Clause of the Constitution*, 104 U. Pa. L. Rev. 23, 28 (1955). "The question before the Court was whether the commerce clause invalidated the act of a state purporting to grant an exclusive right to navigate the waters of that state." *Id.* at 24. The Court "held that, under the commerce clause, an act of Congress dealing with the subject matter of the clause is superior to a state statute inconsistent therewith and dealing with the same subject matter." *Id.* at 25 (citing *Gibbons*, 22 U.S. (9 Wheat.) at 221). Similar to *Gibbons*,

17. "**Section 2.** The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

here, New York is regulating subject matter Congress reserved exclusively for federal regulation by FERC. The supremacy of the essential federal prerogative must be preserved.

The Second Circuit's decision below poses a serious threat to interstate and foreign commerce by allowing states to wield power that Congress has not given them to block development of interstate energy infrastructure. The NGA thoroughly federalizes regulation of interstate natural gas pipelines. "The NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." *Schneidewind*, 485 U.S. at 300-01; *see also Islander E. Pipeline*, 482 F.3d at 90 ("Congress wholly preempted and completely federalized the area of natural gas regulation by enacting [the NGA]"). States have no authority to act beyond the limits of CWA Section 401 to second-guess FERC's determinations and regulate issues over which only FERC has power to regulate. *See Nat'l Fuel Gas Supply*, 894 F.2d at 579 ("Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review."). To hold otherwise would allow "all the sites and all the specifics to be regulated by agencies with only local constituencies," and "would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need, with the increased costs or lack of gas to be borne by utility consumers in other states." *Id.* That is precisely what is happening in New York right now with NYSDEC's recent trilogy of Section 401 Certification denials, and which may happen elsewhere as states are emboldened by the Second Circuit's ruling that states may block FERC-approved interstate natural

gas pipelines if they disagree with FERC's routing determinations.

CONCLUSION

For each of the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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January 16, 2018

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 18, 2017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

November 16, 2016, Argued; August 18, 2017, Decided

Docket No. 16-1568

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.[*]

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

Appendix A

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

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

Petition dismissed in part and denied in part.

Appendix A

KEARSE, *Circuit Judge*:

Petitioner Constitution Pipeline Company, LLC ("Constitution"), petitions pursuant to 15 U.S.C. § 717r(d)(1) for review of an April 22, 2016 decision of the New York State Department of Environmental Conservation ("NYSDEC" or the "Department") denying Constitution's application for certification pursuant to § 401 of the Federal Water Pollution Control Act, more commonly known as the Clean Water Act (or "CWA"), 33 U.S.C. § 1341 ("§ 401 certification"), that Constitution's proposed interstate natural gas pipeline would comply with New York State (or "State") water quality standards (or "WQS"). NYSDEC denied the application on the ground that Constitution had not provided sufficient information. In its petition, Constitution contends principally (1) that NYSDEC exceeded the § 401(a) time limitations for the State's review of the application and that NYSDEC must therefore be ordered to notify the United States Army Corps of Engineers ("USACE" or "Army Corps of Engineers" or "Army Corps") that the State has waived its right to act upon Constitution's § 401 certification application, thereby allowing USACE to issue a permit to petitioner under § 404 of the Clean Water Act, *see* 33 U.S.C. § 1344(a); and (2) alternatively, that Constitution submitted sufficient information and that NYSDEC's decision should be vacated on the ground that its denial of the application was arbitrary, capricious, and ultra vires, and that NYSDEC should be ordered to grant the requested § 401 certification. To the extent that Constitution challenges the timeliness of the NYSDEC decision, we dismiss the petition for lack of jurisdiction.

As to the merits, we conclude that NYSDEC's actions were within its statutory authority and that its decision was not arbitrary or capricious, and we deny the petition.

I. BACKGROUND

Constitution proposes to construct a 121-mile interstate natural gas pipeline in Pennsylvania and New York, approximately 98 miles of which would be in New York. In connection with this project (the "Project"), Constitution applied for, to the extent pertinent here, a "certificate of public convenience and necessity" from the Federal Energy Regulatory Commission ("FERC"), 15 U.S.C. § 717f(c), a CWA § 401 water quality certification (or "WQC") from New York State that the Project would comply with State water quality standards (*see* 6 N.Y.C.R.R. parts 701 to 704), and a CWA § 404 permit from the Army Corps of Engineers to allow discharges into United States navigable waters.

A. Proceedings Before FERC

In September 2012, FERC announced that it would prepare an environmental impact statement ("EIS") for Constitution's Project and asked Constitution to submit a feasibility study explaining how it would install the pipeline across waterbodies (generally using that term to refer to streams but not wetlands). For such installations, there is a trenched method--a dry open-cut crossing--which involves diverting a stream, digging a trench through the banks and stream bed, installing and burying the pipeline, and then allowing the stream to resume flowing in the stream bed. (*See, e.g.*, FERC Final Environmental

Impact Statement ("FEIS") pages 2-21 to 2-22.) There are also trenchless crossing methods--including Horizontal Directional Drill (or "HDD"), Direct Pipe (or "DP"), and conventional bore--which involve digging pits on either side of a waterbody and boring or drilling underneath the stream. FERC asked Constitution to provide information with regard to trenchless construction methods for crossing several categories of streams, including those classified by the states as sensitive or high quality and those greater than 30 feet wide where a dry construction method would not be feasible.

1. Constitution's Trenchless Feasibility Study

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

The Constitution feasibility study dealt principally with locations where the waterbody was designated by

New York or Pennsylvania as sensitive or high quality. (*See* Constitution 2013 Feasibility Study pages 2-2 to 2-3.) As a result, Constitution eliminated from consideration for trenchless crossings all but 89 of the 251 New York waterbodies that would be crossed by the pipeline or affected by pipeline construction.

The remaining 89 locations were addressed in three phases. The Study's "Phase I[] Desktop Analysis" (*id.* pt. 1.0 page 1-1) further reduced the number of New York waterbodies considered by Constitution for trenchless crossings from 89 to 26, in part by eliminating streams less than 30 feet wide, even if they were classified by New York as sensitive or high-quality (*see id.* pages 2-1, 2-3). Constitution stated that trenchless crossings for such narrower waterbodies would potentially require workspace requirements significantly greater than those generally needed for a conventional dry crossing method. (*See id.* page 2-3.) Thus, unless such a waterbody was immediately associated with a larger wetland and/or waterway complex crossed by the Project or was located in the immediate vicinity of a proposed rail or roadway crossing, "Constitution did not evaluate waterbody crossings less than 30 feet in width" (*id.*).

Phase II was a "Cost/Time/Construction Workspace Impact Analysis." (*Id.* page 3-1; *see also id.* pt. 1.0 page 1-1 ("Trenchless construction methods are limited" not only by such matters as "underlying geology, available workspace, [and] available time," but also by "available finances budgeted for a capital project.").) This phase eliminated waterways from trenchless-crossing consideration largely

on the basis of expense; as a result, there remained only 13 waterbody crossings in New York for which Constitution planned to investigate a "formal trenchless construction design." (*Id.* pages 3-2 to 3-4 & tbl.3.2-1.) The Study stated that Phase III, a "geotechnical field analysis" of each of the 13 locations, was in progress. (*Id.* page 5-1.) Constitution thus planned to use the trenched method for 238 of the 251 New York waterbodies to be crossed.

2. NYSDEC Comments and the FEIS

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

> 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.*

(November 7, 2012 Letter from NYSDEC to FERC at 3 (emphasis added).) Stating that the DEIS should identify the New York classification of each stream the proposed pipeline would cross, NYSDEC urged FERC to "evaluate cases where other methods are proposed" and have Constitution "*explain why HDD will not work or is*

not practical for that specific crossing." (*Id.* (emphasis added).)

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

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

In 2014, FERC issued its DEIS, which drew criticism from several sources including NYSDEC. (*See, e.g.*, March 24, 2014 Letter from NYSDEC to FERC and Army Corps at 1-2 (urging a revised DEIS to include "geotechnical feasibility studies for *all trenchless crossing locations*," as well as "site specific blasting plans that include protocols for in-water blasting and the protection of aquatic resources and habitats" (emphasis added)); April 7, 2014 Letter from NYSDEC to FERC and Army

Corps ("NYSDEC April 2014 Letter") at 1-5 (adding additional comments and requesting additional analysis of Alternative M which, in NYSDEC's view, would reduce the amount of disturbance of higher-quality waterbodies).)

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

The FEIS expanded on the DEIS's waterbody crossing information but repeated DEIS explanations for why relatively few crossings were slated to be crossed by trenchless techniques, stating, *inter alia*, that "[a]ccording to Constitution, trenchless crossing methods are not practical [except in limited circumstances] for waterbody crossings less than 30 feet in width" and that "Constitution indicated that such crossings would be impractical due to minimum length requirements, depth of pipeline considerations, and workspace requirements,"

and describing the areas that would be required for trenchless crossing "[a]ccording to Constitution" (FEIS page 4-50). The FEIS stated that

> *[t]he potential impacts on waterbodies associated with the use of conventional bore or Direct Pipe trenchless crossing methods are considered minimal when compared to other crossing methods.* The 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.

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

> *We concur with Constitution's assessment that it is not practicable to use trenchless crossing methods* where waterbodies were listed as ephemeral or intermittent (because these waterbodies are likely to be dry at the time of crossing) or *for waterbodies less than 30 feet in width (as extra workspaces needed would offset potential benefits*). . . .

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

B. Proceedings Before NYSDEC

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

1. Stream-Crossing Information Requests by NYSDEC

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

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

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

In response, Constitution submitted feasibility evaluations based on geotechnical studies for four locations: two wetlands crossings and two waterbody crossings. One of the waterbody feasibility evaluations concluded that using either HDD or DP was infeasible due

to subsurface soil conditions; the other did not address the feasibility of trenchless crossing methods, and instead discussed only a contingency open-cut crossing to be used if the proposed DP crossing failed.

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

> Constitution recognizes that, *in general*, performing . . . (HDD) for streams less than 30 feet in width causes greater net environmental impacts than a dry open cut method and this threshold is an *industry recognized standard*. Constitution has not identified any NYSDEC regulation, formally adopted policy or guidance document that would warrant deviating from this standard.

(*Id.* at 1 (emphases added).) It also discussed the Direct Pipe method, stating that "it is *likely* that additional forest will require clearing to perform DP for *most* of the protected stream crossings," and that "*[m]any*" streams are in valleys whose slopes make the DP method infeasible. (*Id.* at 2-3 (emphases added).) In addition, the Constitution 2015 Feasibility Draft stated that DP technology is of

"limited availability," leading Constitution to conclude that using "DP technology for . . . streams less than 30 feet in width is *not a realistic or viable expectation within a reasonable period of time*." (*Id.* at 3 (emphasis added).)

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

2. Subsequent Discussions

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

In July 2015, a member of NYSDEC's staff emailed to certain Army Corps staff members a "Confidential" message attaching a "VERY PRELIMINARY version of a Constitution permit" (July 20, 2015 email from Tomasik to Kevin J. Bruce et al., Army Corps), which included a table of 19 locations that "shall be crossed using a trenchless construction method"--unless an "experienced and qualified engineer" concludes that the techniques are "not constructible or not feasible" (Confidential Draft NYSDEC Certification Conditions

at 17). The draft, however, required Constitution, "*[p]rior to beginning construction of any trenchless stream crossing*," to "*submit a*[] . . . 'Trenchless Crossing *Plan*' *for each* trenchless stream crossing," including "detailed engineering plans" for each location. (*Id.* at 18 (emphases added).)

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

C. NYSDEC's Decision Denying § 401 Certification

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

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

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

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

Id. (emphasis in original).

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

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

Id. (footnote omitted) (emphasis added).

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

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

- On November 7, 2012, "[i]n comments to FERC, NYSDEC stated that for streams and wetlands the preferred method for crossing is trenchless technology," and that as to each crossing where another method is proposed "Constitution should explain why trenchless crossing technology

will not work or is not practical for that specific crossing."

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

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

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

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

- On December 31, 2014, at a meeting with Constitution staff, "NYSDEC indicated that *the Trenchless Feasibility Study was inadequate, e.g.* provided insufficient justification and *removed all streams less than 30 feet in width from analysis*."

NYSDEC gave Constitution "an informational request table including required technical information."

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

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

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

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

NYSDEC Decision at 9-10 (emphases added).

Although the Decision's Table 2 ended with the February 2015 entry, the Decision noted that Constitution's

"unwillingness to provide a complete and thorough[] Trenchless Feasibility Study" persisted:

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

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

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

> to demonstrate compliance with 6 NYCRR Part 701 setting forth conditions applying to best usages of all water classifications. Specifically, "the discharge of sewage, industrial waste or other wastes shall not cause impairment of the best usages of the receiving water as specified by the water classifications at the location of the discharge and at other locations that may be affected by such discharge."[11]
>
> [10] 6 NYCRR § 703.2.
>
> [11] 6 NYCRR § 701.1.

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

> [c]umulatively, impacts to both small and large streams from the construction and operation of the Project can be profound and include loss of available habitat, changes in thermal conditions, increased erosion, creation of stream instability and turbidity, impairment of best usages, as well as watershed-wide impacts resulting from placement of the pipeline across water bodies in remote and rural areas (See Project Description and Environmental Impacts Section, above). Because the Department's review concludes that Constitution did not provide sufficient detailed information including site specific project plans regarding stream crossings (*e.g.* geotechnical borings) the Department

> has determined to deny Constitution's WQC Application for failure to provide reasonable assurance that each stream crossing will be conducted in compliance with 6 NYCRR §608.9.

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

II. DISCUSSION

In its petition for review (or "Petition"), Constitution contends principally (1) that NYSDEC failed to issue its Decision within a reasonable time as required by § 401 and thus must be required to inform USACE that NYSDEC has waived its right to rule on Constitution's application for a WQC, thereby enabling the Army Corps to grant Constitution a permit for its pipeline Project, or (2) alternatively, that Constitution submitted sufficient information and that NYSDEC's decision should be vacated on the ground that its denial of the application was arbitrary, capricious, and ultra vires, and that NYSDEC should be ordered to grant the requested § 401 certification. For the reasons that follow, we (1) conclude that Constitution's first contention, which would have us treat NYSDEC's Decision as an act that is void, lies beyond the jurisdiction of this Court, and (2) conclude that NYSDEC's Decision was not ultra vires, arbitrary, or capricious.

Appendix A

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

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

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

> **(1) In general**
>
> The United States Court of Appeals for the circuit in which a facility subject to . . . section 717f of this title is proposed to be constructed . . . *shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a* Federal agency (other than [FERC]) or *State administrative agency acting*

> *pursuant to Federal law to* issue, condition, or *deny any* permit, license, concurrence, or *approval* (hereinafter collectively referred to as "permit") *required under Federal law . . . .*
>
> **(2) Agency delay**
>
> *The United States Court of Appeals for the District of Columbia shall have original and* ***exclusive*** *jurisdiction over any civil action for the review of an* ***alleged failure to act*** *by a Federal agency (other than [FERC]) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law . . . .*

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

Constitution points out that CWA § 401 provides that "[i]f" a "State . . . agency" from which an applicant for a federal permit has sought a water quality certification "fails or refuses to act on [the] request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." 33 U.S.C. § 1341(a)(1). Constitution argues that NYSDEC did not

issue its Decision until 32 months after Constitution submitted its initial application, 16 months after NYSDEC issued notice that that initial application was complete, 15 months after the deadline imposed by FERC, *nearly* a year ("359 days") after Constitution's 2015 withdrawal-and-resubmission of its application--and eight months after Constitution claims it was advised by NYSDEC that NYSDEC "had everything it needed to issue a Section 401 Certification." (Constitution brief in support of Petition at 28-29.) Constitution argues that NYSDEC "waived its right" to rule on the certification application and must be required to so notify the Army Corps. (*Id.* at 37.)

We note first that there is nothing in the administrative record to show that NYSDEC received the information it had consistently and explicitly requested over the course of several years--much less anything to support Constitution's claim that NYSDEC said "it had" all of the information it required "to issue" the requested certification (*id.* at 29). Although Constitution proffered in this Court non-record declarations from certain of its personnel, those "outside-the-record declarations and associated portions of [Constitution]'s brief" were stricken. *Constitution Pipeline Co., LLC v. Seggos*, No. 16-1568, 2016 U.S. App. LEXIS 23831 (2d Cir. Oct. 3, 2016).

Second, Constitution's "waive[r]" argument is that the NYSDEC Decision must be treated as a nullity by reason of NYSDEC's "*failing to act* within the prescribed time period under the CWA" (Constitution brief in support of Petition at 37 (emphasis added)). Such a failure-to-act claim is one over which the District of Columbia Circuit would have "exclusive" jurisdiction, 15 U.S.C. § 717r(d)

(2). *See generally Weaver's Cove Energy, LLC v. Rhode Island Department of Environmental Management*, 524 F.3d 1330, 1332, 381 U.S. App. D.C. 17 (D.C. Cir. 2008). Accordingly, we dismiss Constitution's timeliness argument for lack of jurisdiction.

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

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

1. Federal Law

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

Although NEPA requires federal-agency review of virtually any possible environmental effect that a proposed

action may have, *see generally* 40 C.F.R. § 1502.16, it does not impose substantive standards. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S. Ct. 1835, 104 L. Ed. 2d 351 (1989). "[T]hrough a set of action-forcing procedures," NEPA "require[s] that agencies take a hard look at environmental consequences," but it is "well settled that NEPA itself does not mandate particular results[; it] simply prescribes the necessary process." *Id.* (internal quotation marks omitted). Thus, NEPA states, in pertinent part, that "[n]othing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency . . . to act, or refrain from acting contingent upon the recommendations or certification of any . . . State agency." 42 U.S.C. § 4334.

We note also that while the Natural Gas Act generally preempts state laws, it states that "[e]xcept as specifically provided[,] . . . nothing" in the NGA "affects the rights of States under . . . the [CWA] (33 U.S.C. § 1251 et seq.)," 15 U.S.C. § 717b(d). CWA § 511, in turn, preserves the states' authority to determine issues of a planned project's effect on water quality. *See* 33 U.S.C. § 1371(c)(2)(A). CWA § 401(a)(1) requires that an entity such as Constitution, proposing to construct an interstate pipeline, obtain from each state in which the pipeline is to be constructed a certification that "any . . . discharge" from a proposed activity "will comply with the applicable provisions of [33 U.S.C. §§] 1311, 1312, 1313, 1316, and 1317." 33 U.S.C. § 1341(a)(1). Sections 1311, 1312, 1316, and 1317 establish, and allow the Environmental Protection Agency ("EPA") to establish, standards governing numerous aspects of water quality; and § 1313 allows states to develop their own water quality standards and submit them to the EPA

for approval. If the EPA approves a state's water quality standards, it publishes a notice of approval and they become the state's EPA-approved standards, regulating water quality in that state. *See* 33 U.S.C. §§ 1313(a), (c).

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

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

CWA § 401(a)(1), as pertinent here, states that "[n]o license or permit shall be granted if [a § 401] certification has been denied by the State," 33 U.S.C. § 1341(a)(1). Thus, we have indeed referred to § 401 as "a statutory

scheme whereby a single state agency *effectively vetoes* an energy pipeline that has *secured approval from a host of other federal and state agencies*." *Islander East II*, 525 F.3d at 164 (emphases added); *accord Keating v. FERC*, 927 F.2d 616, 622, 288 U.S. App. D.C. 344 (D.C. Cir. 1991) ("Through [the § 401 certification] requirement, *Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval*." (emphasis added)).

Constitution also argues that NYSDEC's demands for information with regard to, *e.g.*, possible alternative routes for the planned pipeline (*see, e.g.*, NYSDEC Decision at 3 (NYSDEC "asked Constitution to analyze alternative routes that could have avoided or minimized impacts to an extensive group of water resources")), as well as Constitution's planned blasting sites and the depth at which the pipe would be buried, exceeded NYSDEC's authority (Constitution brief in support of Petition at 38). 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.

2. Application of the Arbitrary-and-Capricious Standard

Under the arbitrary-and-capricious standard, "[a] reviewing court may not itself weigh the evidence or substitute its judgment for that of the agency." *Islander East II*, 525 F.3d at 150. "Rather," we "consider[] whether the agency 'relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.* at 150-51 (quoting *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) ("*State Farm*")).

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

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

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

> ♦ construction methods and site-specific project plans for stream crossings (Denial at 8-11 . . .);
>
> ♦ alternative routes (*Id.* at 11 . . .);
>
> ♦ pipeline burial depth in stream beds (*Id.* at 12-13 . . .);
>
> ♦ procedures and safety measures Constitution would follow in the event that blasting is required (*Id.* at 13 . . .);
>
> ♦ Constitution's plans to avoid, minimize, or mitigate discharges to navigable waters and wetlands (*Id.* at 13-14 . . .); and
>
> ♦ cumulative impacts (*Id.* at 3, 5, 7, 14 . . .).

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

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

In *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989), the Supreme Court considered whether a federal agency, presented with new evidence, should have been required to file a new supplemental environmental impact statement; the Court stated that the matter of whether additional information is "significant" is "a classic example of a factual dispute the resolution of which implicates substantial agency expertise," as to which the courts "must defer to the informed discretion of the responsible . . . agencies," *id.* at 376-77 (internal quotation marks omitted). We cannot conclude that any less deference is due an agency's determination that it should not grant a permit application where it has already determined that additional information is needed, and the applicant refuses to supply it. *Cf. University of Iowa Hospitals & Clinics v. Shalala*, 180 F.3d 943, 955 (8th Cir. 1999) (where agency

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

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

In sum, NYSDEC is responsible for evaluating the environmental impacts of a proposed pipeline on New York waterbodies in light of the State's water quality standards. Applying the arbitrary-and-capricious standard of review, we defer to NYSDEC's expertise as to the significance of the information requested from Constitution, given the record evidence supporting the relevance of that information to NYSDEC's certification determination.

We conclude that the denial of the § 401 certification after Constitution refused to provide relevant information, despite repeated NYSDEC requests, was not arbitrary or capricious.

CONCLUSION

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

APPENDIX B — THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S APRIL 22, 2016 DENIAL OF CONSTITUTION PIPELINE COMPANY, LLC'S APPLICATION FOR A WATER QUALITY CERTIFICATION UNDER SECTION 401 OF THE CLEAN WATER ACT FOR THE CONSTITUTION PIPELINE PROJECT

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April 22, 2016

Lynda Schubring, PMP
Environmental Project Manager
Constitution Pipeline Company, LLC
2800 Post Oak Boulevard
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Re: Joint Application: DEC Permit # 0-9999-00181/00024 Water Quality Certification/Notice of Denial

Dear Ms. Schubring,

On April 27, 2015, Constitution Pipeline Company, LLC (Constitution) submitted to the New York State Department of Environmental Conservation (NYSDEC or Department)

a Joint Application (Application)[1] to obtain a Clean Water Act[2] Section 401 Water Quality Certification (WQC) for the proposed Project and New York State Environmental Conservation law (ECL) Article 15, Title 5 (Protection of Waters) and Article 24, Title 23 Freshwater Wetlands permits. Based on a thorough evaluation of the Application as well as supplemental submissions, the Department hereby provides notice to Constitution that in accordance with Title 6 New York Codes Rules and Regulation (NYCRR) Part 621, the Application fails in a meaningful way to address the significant water resource impacts that could occur from this Project and has failed to provide sufficient information to demonstrate compliance with New York State water quality standards. Constitution's failure to adequately address these concerns limited the Department's ability to assess the impacts and conclude that the Project will comply water quality standards. Accordingly, Constitution's request for a WQC is denied.[3] As required by 6 NYCRR §621.10, a statement of the NYSDEC's rationale for denial is provided below.

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1. New York State and U.S. Army Corps of Engineers Joint Application, Constitution Pipeline, August, 2013. Constitution initially submitted its WQC application on August 28, 2013. With the Department's concurrence Constitution subsequently withdrew and re-submitted the WQC application on May 9, 2014 and April 27, 2015, each time extending the period for the Department to review the application by up to one year.

2. *See* 33 U.S.C.A. Section 1341.

3. The other permits sought by Constitution in the Joint Application remain pending before the Department and are not the subject of this letter.

Appendix B

BACKGROUND

The Federal Energy Regulatory Commission (FERC) issued a certificate approving construction and operation of the pipeline on December 2, 2014, conditioning its approval on Constitution first obtaining all other necessary approvals. Accordingly, Constitution's Application for a WQC pending with the Department must be approved before construction may commence. Constitution's Application was reviewed by NYSDEC in accordance with ECL Article 70 (Uniform Procedures Act or UPA) and its implementing regulations at 6 NYCRR Part 621, which provide a review process for applications received by NYSDEC.

Despite FERC conditioning its approval on Constitution's need to obtain a WQC, the Department has received reports that tree felling has already occurred in New York on the Project's right of way. This tree cutting, both clear cutting and selective cutting, has occurred notwithstanding the fact that Constitution has right-of-way agreements with the property owners where this cutting has occurred. The tree felling was conducted near streams and directly on the banks of some streams, and in one instance has resulted in trees and brush being deposited directly in a stream, partially damming it. As described below, this type of activity, if not properly controlled, can severely impact the best usages of the water resource.

Concurrent with its review, the Department received a Clean Air Act Title V application[4] for the Wright Compressor Station (Wright Compressor Station) from Iroquois Gas Transmission System, Inc. Additionally, Constitution is obligated to obtain coverage from NYSDEC under the SPDES Stormwater General Permit for Construction Activities (GP-0-15-002) and prepare a Stormwater Pollution Prevention Plan (SWPPP) prior to Project construction.

Proposed Project Description and Environmental Impacts

Constitution proposes construction of approximately 124.14 miles of new interstate natural gas transmission originating in northeastern Pennsylvania, proceeding into New York State through Broome, Chenango, Delaware, and Schoharie Counties, terminating at the existing Wright Compressor Station in Schoharie County. In New York State, the Project, rather than co-locating a significant portion of the pipeline on an existing New York State Department of Transportation (NYSDOT) Interstate 1-88 access area[5], proposes to include new

4. Minor Source Air Permit Modification, Wright Compressor Station, Town of Wright, Schoharie County, NY, Iroquois Gas Transmission System, July 26, 2013.

5. On September 25, 2013, NYSDEC provided FERC with comments on Constitution's Environmental Report dated June 13, 2013, supplemented in July, 2013 that concurred with the United States Army Corps of Engineers' (ACOE) comments and supported ACOE's request to FERC for additional details and documentation to support the reasons why all or some of the Project route could not be routed with the New York State Department of Transportation

right-of-way (ROW) construction of approximately 99 miles of new 30-inch diameter pipeline, temporary and permanent access roads and additional ancillary facilities.

Although the Department repeatedly asked Constitution to analyze alternative routes that could have avoided or minimized impacts to an extensive group of water resources, as well as to address other potential impacts to these resources, Constitution failed to substantively address these concerns. Constitution's failure to adequately address these concerns limited the Department's ability to assess the impacts and conclude that the Project will comply with water quality standards. Project construction would impact a total of 251 streams, 87 of which support trout or trout spawning. Cumulatively, construction would include disturbance to 3,161 linear feet of streams resulting in a total of 5.09 acres of stream disturbance impacts. Furthermore, proposed Project construction would cumulatively impact

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(NYSDOT) Interstate 1-88 control of access area. On April 7, 2014, the Department provided FERC with preliminary comments on the DEIS whieh extensively analyzed the environmental benefits of utilizing Interstate 1-88 (also referred to as Alternative "M") regarding stream, wetland, and interior forest habitats.

In June 2014, Constitution provided information about Alternative M which Department Staff found did not contain sufficient analysis to determine whcther Alternative M would generate fewer impacts than Constitution's preferred route. However, using Constitution's information, as well as publicly available information, Department Staff conducted a review that found that Alternative M could reduce overall impacts to water bodies and wetlands when compared to Constitution's preferred route.

85.5 acres of freshwater wetlands and result in impacts to regulated wetland adjacent areas totaling 4,768 feet for crossings, 9.70 acres for construction and 4.08 for acres for Project operation. Due to the large amount of new ROW construction, the Project would also directly impact almost 500 acres of valuable interior forest. Cumulatively, within such areas, as well as the ROW 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.

The individual quality and integrity of streams form the primary trophic levels that support many aquatic organisms and enable the provision of stream ecosystems at large. Under the Project's proposal, many of the streams to be crossed present unique and sensitive ecological conditions that may be significantly impacted by construction and jeopardize best usages. For a number of reasons, streams that support trout and other cold water aquatic species are typically the most sensitive. The physical features of these streams include dense riparian vegetation often composed of old-growth trees which are free of invasive species and that shade and cool streams while also maintaining the integrity of adjacent banks or hillslopes. Undisturbed spring seeps provide clean, cold water and stable yet sensitive channel forms maintain the integrity of the stream itself and further preserve water quality. Biologically, these streams are vital in providing complex habitat for foraging, spawning and nursery protection by wild reproducing trout.

Impacts to these streams are exacerbated as the cumulative negative effects of multiple crossings are added. Demonstrating this, the trout stream Clapper Hollow Creek and its tributaries would be crossed 11 times by the project. Likewise, Ouleout Creek and its tributaries will be crossed 28 times. Many of these streams are part of tributary networks that are dependent upon the contributing quality of connected streams to supply and support the physical and biological needs of a system. This is especially true in supporting the viability of wild trout populations.

Initially, 100 per cent loss of stream and riparian habitat will occur within the ROW as it is cleared and the pipeline trenched across streams. The trenching of streams will destroy all in-stream habitat in the shorter term and in some cases could destroy and degrade specific habitat areas for years following active construction. For example, highly sensitive groundwater discharge areas within streams could be disturbed, resulting in loss or degradation to critical spawning and nursery habitat. In addition, physical barriers will temporarily prevent the movement of aquatic species during active construction and changes to the stream channel will persist beyond the active construction period, creating physical and behavioral barriers to aquatic organism passage.

Changes to thermal conditions will also likely occur due to clearing of riparian vegetation. Because of the need to maintain an accessible ROW, subsequent revegetation will take considerable time to replace what was lost, notably long-lived, slow growing forest trees. Loss of

riparian vegetation that shades streams from the warming effects of the sun will likely increase water temperatures, further limiting habitat suitability for cold-water aquatic species such as brook trout. The loss of shade provided by mature riparian vegetation may be exacerbated in the long term by climate change and thus be more significant since small changes in the thermal loading of cold water trout streams could result in the long term loss of trout populations.

NYSDEC Staff's extensive experience and technical reviews have shown that destabilization of steep hillslopes and stream banks will likely occur and may result in erosion and failure of banks, causing turbid inputs to waterbodies. Specifically, Project construction would include approximately 24 miles of steep slope or side slope construction. Cumulatively, this would account for roughly 24 percent of the new cleared right-of-way. Exposed hillslopes can become less stable and, when appropriate stormwater controls are not properly implemented, erosion can result in increased sediment inputs to streams and wetlands. If these events occur they can affect the water quality and habitat quality of these streams.

Trenching of streams can also destabilize the stream bed and such conditions can temporarily cause an exceedance of water quality standards, notably turbidity. Turbidity and sediment transport caused as a result of construction can negatively impact immediate and downstream habitat, can smother or kill sensitive aquatic life stages and reduce feeding potential of all aquatic organisms. More specifically, visual predators such as

brook trout find food using visual cues. Thus, reductions in clear water conditions may reduce feeding success that can ultimately result in impacts on aquatic species' propagation and survival and corresponding reductions in the attainment of the waters' best usages.

As a result of chronic erosion from disturbed stream banks and hill slopes, consistent degradation of water quality may occur. Changes in rain runoff along ROW may change flooding intensity and alter stream channel morphology. Disturbed stream channels are at much greater risk of future instability, even if the actual work is conducted under dry conditions; long ranging stream erosion may occur up and downstream of disturbed stream crossings well beyond the time of active construction. This longer term instability and erosion can result in the degradation of spawning beds and a decrease in egg development. The loss of spawning potential in some cold headwater streams may significantly reduce the long-term viability of these streams to support trout. Constitution proposes to cross 50 known trout spawning streams which will likely result in cumulative impacts on the trout populations in these streams. More specifically, and by way of an example of cumulative impacts to a water body, Constitution proposes to cross Ouleout Creek and its tributaries a total of 28 times with 15 of these crossings occurring in trout spawning areas.

Finally, at the landscape level, impacts to streams from the ROW construction are analogous to the cumulative impacts from roads. There is an established negative correlation between road miles per watershed area and

stream quality. Thus, increases in the crossings of streams by linear features such as roads and the pipeline ROW can have cumulative impacts beyond the individual crossings. In the case of the 1 mile corridor surrounding the proposed Constitution pipeline, the pre-construction crossing/area ratio for the New York section is 2.28 crossings/square mile. However, the post-construction ratio will increase 44 per cent to 3.29 crossings/square mile. In specific basins this ratio will be higher and may cause a permanent degradation in stream habitat quality and likewise affect associated natural resources, including aquatic species' propagation and survival.

NYSDEC Application Reviews

On August 21, 2013, Constitution submitted the Application to obtain a CWA §401 WQC and NYSECL Article 15 and Article 24 permits to the Department. Due to insufficient information, NYSDEC issued a Notice of Incomplete Application on September 12, 2013, indicating that the Application was not complete for commencing review. On May 9, 2014, Constitution simultaneously withdrew and resubmitted its WQC request to the NYSDEC. Constitution supplemented the Application a number of times in 2014. A Notice of Complete Application for public review was published by NYSDEC in the Environmental Notice Bulletin (ENB) and local newspapers on December 24, 2014.

This notice commenced a public comment period ending on January 30, 2015 which was subsequently extended to February 27, 2015. To afford the Applicant

time to respond to NYSDEC's requests for information based on thousands of public comments, and to extend the time period by which NYSDEC was required to issue the WOC and associated permits, Constitution submitted its second request to withdraw and resubmit the WOC on April 27, 2015. This resubmission initiated an additional UPA comment period until May 21, 2015. A total of 15,035 individual comments were received during the two comment periods. Most of these comments related to issues surrounding the Project applications; a relative handful were related to issues specific to the Compressor Station application.

Since August 21, 2013, Constitution supplemented its Application numerous times in response to additional information requests by the Department; Table 1 below provides an easy reference of the requests and submittals associated with the Application over the past several years.

Table 1

Prepared by	Date	Summary
DEC	June 21, 2012	Summary of Pre-Application Meeting
DEC	May 30, 2013	Sample Matrix for Linear Projects
Constitution	August 28, 2013	401 WQC and related NYS Joint Permit application/ documentation received by DEC

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DEC	September 12, 2013	Notice of Incomplete Application
Constitution	November 27, 2013	Joint Permit Application - Supplemental Information
Constitution	May 9, 2014	401 WQC Application Withdrawal and Re-submittal
DEC	July 3, 2014	DEC Recommendations for Revised Joint Application
Constitution	August 13, 2014	Joint Permit Application - Supplemental Information #2
Constitution	November 17, 2014	Additional Information Submittal
Constitution	November 17, 2014	Responses to Wetland Mitigation Plan Deficiencies
Constitution	November 24, 2014	Updated and Revised Information
Constitution	December 1, 2014	Response to Request for Additional Clarification of Wetland Impacts
DEC	December 24, 2014	Notice of Complete Application

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DEC	December 31, 2014	NY Stream Crossing Feasibility Analysis Information Request
Constitution	January 22, 2015	Summary of Changes Trenchless Locations
Constitution	February 2, 2015	Revised Wetland Mitigation Plan
Constitution	February 6, 2015	Phase I Stream Analysis/Open Cut
DEC	February 19, 2015	DEC Proposed Wetland Re-route
Constitution	March 27, 2015	Joint Permit Application - Supplemental Information
Constitution	April 24, 2015	Response to DEC Preferred List of Trenchless Stream Crossings
Constitution	April 27, 2015	401 WQC Application Withdrawal and Re-submittal
DEC	April 27, 2015	Notice of Complete Application - WQC Withdrawal and Re-submittal

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Constitution	May 13, 2015	Wetland Mitigation Area - Application for Pesticide Permit
Constitution	May 20, 2015	Supplemental Information - Trenchless Crossings
DEC	June 1, 2015	Notice of Incomplete Application - Pesticide Permit
Constitution	June 19, 2015	Canadarago Lake Mitigation Area Update
Constitution	June 30, 2015	Updated Trenchless Crossing Matrix
Constitution	July 8, 2015	Joint Permit Application - Supplemental Information - Wetland Re-route
Constitution	July 14, 2015	Additional Information Submittal - Wetland Impacts and Mitigation
Constitution	August 5, 2015	Response to Notice of Incomplete Application - Pesticide Permit

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Constitution	September 15, 2015	Joint Permit Application - Supplemental Information
DEC	October 2, 2015	Acknowledgement of NOI - SPDES MS GP - Contractor Yard 5B
Constitution	January 6, 2016	Wetland Mitigation Area - Application for Pesticide Permit - Betty Brook
DEC	February 26, 2016	Acknowledgement of NOT - SPDES MS GP - Contractor Yard 5B

STATEMENT OF REASONS FOR DENIAL

The Department, in accordance with CWA §401, is required to certify that a facility meets State water quality standards prior to a federal agency issuing a federal license or permit in conjunction with its proposed operation. An applicant for a water quality certification must provide the Department sufficient information to demonstrate compliance with the water quality regulations found at 6 *NYCRR Section 608.9 (Water* Quality Certifications). Pursuant to this regulation, the Applicant must demonstrate compliance with §§301, 302, 303, 306 and 307 of the Federal Water Pollution Control Act, as implemented, by applicable water quality standards and thermal discharge criteria set forth in 6 NYCRR Parts

701,702,703,704 and 750, and State statutes, regulations and criteria otherwise applicable to such activities.[6] Denial of a WQC may occur when an application fails to contain sufficient information to determine whether the application demonstrates compliance with the above stated State water quality standards and other applicable State statutes and regulations due to insufficient information. The Department is guided by statute to take into account the cumulative impact upon all resources in making a determination in connection with any license, order, permit or certification, which in this case includes being able to evaluate the cumulative water quality impacts of ROW construction and operation on the numerous water bodies mentioned in this letter.[7]

As noted above, Constitution supplemented its Application in response to information requests issued to it by the Department but has not supplied sufficient information for the Department to be reasonably assured that the State's water quality standards would be met during construction and operation of the proposed pipeline. As a result the Department cannot be assured that the aforementioned adverse impacts to water quality and associated resources will be avoided or adequately minimized and mitigated so as not to materially interfere with or jeopardize the best usages of affected water bodies. The following are the Department's reasons for denial of Constitution's Application based on applicable sections of the New York State environmental laws, regulations or standards related to water quality.

6. 6 NYCRR §608.9 (2) and (6).

7. ECL 3-0301(1)(b).

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Stream Crossings

Project construction would disturb a total of 251 streams under New York State's jurisdiction, 87 of which support trout or trout spawning. Cumulatively, construction would disturb a total of 3,161 linear feet of streams and result in a combined total of 5.09 acres of temporary stream disturbance impacts. From inception of its review of the Application, NYSDEC directed Constitution to demonstrate compliance with State water quality standards and required site-specific information for each of the 251 streams impacted by the Project. NYSDEC informed Constitution that *all* 251 stream crossings must be evaluated for environmental impacts and that trenchless technology was the preferred method for stream crossing. This information was conveyed to Constitution and FERC on numerous occasions since November 2012; however, Constitution has not supplied the Department with the necessary information for decision making.

Deficient Trenchless Stream Crossings Information and Lack of Specific Stream Crossings Details

Staff's review of the Application includes an analysis of adverse stream crossing impacts, specifically the suitability of open trenching versus trenchless techniques or subsurface boring methods. Open trenching is a highly impactful construction technique involving significant disturbance of the existing stream bed and potential long-term stream flow disruption, destruction of riparian vegetation and establishment of a permanently cleared

corridor. Comparatively, trench less methods present significantly fewer environmental impacts to the regulated resource. Because alternative trench less techniques exist for this Project, the Department requested additional information from Constitution to evaluate their feasibility and to determine if the Application provides enough information to demonstrate compliance with water quality standards.

Since NYSDEC's most protective method for stream crossings is some form of a trenchless technology, NYSDEC directed Constitution to determine whether a trenchless technology was constructible for each stream crossing.[8] On a number of occasions NYSDEC identified the need to provide information so that it could evaluate trenchless stream installation methods (see Table 2, below); however, Constitution has not provided sufficient information to enable the Department to determine if the Application demonstrates compliance with 6 NYCRR Part 703, including, but not limited to, standards for turbidity and thermal impacts (6 NYCRR §703.2), and 6 NYCRR Part 701 (best usages).

8. NYSDEC Comments to FERC, November 7, 2012.

Table 2		
Prepared by	Date	Summary
NYSDEC	June 21, 2012	In a summary of the initial pre-application meeting with Constitution, which took place on June 7, 2012, NYSDEC stated in a letter to Constitution that for protected streams and wetlands, trenchless technology is the preferred method for crossing and should be considered for *all* such crossings (emphasis added).
NYSDEC	November 7, 2012	In comments to FERC, NYSDEC stated that for streams and wetlands the preferred method for crossing is trenchless technology. The draft EIS should evaluate cases where other methods are proposed and Constitution should explain why trenchless crossing technology will not work or is not practical for that specific crossing.

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FERC	April 9, 2013	FERC's Environmental Information Request (EIR) directed Constitution to address all of the comments filed in the public record by other agencies regarding the draft Resource Reports including all comments from the NYSDEC.
NYSDEC	May 28, 2013	Meeting with Constitution and NYSDEC staff at the DEC Region 4 office to review stream crossings. NYSDEC reiterates that acceptable trench less technology was the preferred installation method and that stream crossings should be reviewed for feasibility of using those technologies.
NYSDEC	July 17, 2013	NYSDEC comments to FERC reiterates that trenchless technology is preferred method for stream crossings. The DEIS should evaluate cases where other methods are proposed and the Project Sponsor should explain why trenchless technology will not work or is not practical for that specific crossing.

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NYSDEC and Constitution staff	July - August 2013	Field visits of proposed stream crossings prior to permit applications to the Department. At staff each crossing, NYSDEC emphasized to Constitution staff that trench less technology is preferred/most protective.
Constitution	November 2013	Trenchless Feasibility Study provided by Constitution that described its choices of stream crossing techniques. Upon review, document and justifications found insufficient and all streams less than 30' wide were arbitrarily eliminated from any consideration for trenchless crossing methods.
NYSDEC and Constitution staff	December 31, 2014	Meeting conducted with Constitution staff in which NYSDEC indicated that the Trenchless Feasibility Study was inadequate, *e.g.* provided insufficient justification and removed all streams less than 30 feet in width from analysis.

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NYSDEC	December 31, 2014	To aid in an appropriate review of stream crossing techniques and compliance with water quality standards, an informational request table including required technical information was developed by NYSDEC and provided to Constitution.
US Army Corps of EnQineers	January 13, 2015	U.S. Army Corps of Engineers letter reiterates a request for a feasibility analysis of trenchless crossings.
Constitution and NYSDEC	January 23, 2015	Meeting between Constitution and NYSDEC staff wherein Constitution stated it was unable to complete the table (described above on December 31, 2014). NYSDEC staff indicated that the justification for stream crossing methods was insufficient and that appropriate site specific information must be provided.
Constitution and NYSDEC	January 28, 2015	Conference call: NYSDEC reiterated its request for a site specific analysis of trenchless stream crossings for all streams including those under 30 feet wide.

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Constitution	Februaey 5, 2015	Constitution provided an updated example of a trench less feasibility study but that example continued to exclude streams up to 30 feet wide from analysis and did not provide detailed information of the majority of streams.

Constitution submitted a Trenchless Feasibility Study (Study) to FERC in November of 2013 which the Department has analyzed for the purpose of reviewing Constitution's WQC application. This Study did not include the information that FERC directed Constitution to supply to NYSDEC (and others) in its April 9, 2013 EIR, which incorporated NYSDEC's information requests, including NYSDEC's request to Constitution dated November 7, 2012. Moreover, the Study did not include information that NYSDEC specifically requested in meetings and site visits with Constitution throughout 2013 and did not provide a reasoned analysis to enable the Department to determine if the Project demonstrates compliance with water quality standards.

Of the 251 streams to be impacted by the Project, Constitution's Study evaluated only 87 streams, in addition to the Schoharie Creek, as part of the Phase I desktop analysis[9] which Constitution used to determine if surface installation methods warranted consideration for a trenchless design. Of the 87 streams reviewed, Constitution automatically eliminated 41 streams from consideration f9r trench less crossing because those streams were 30 feet wide or less. Constitution further eliminated 10 more streams from the Study because although they were in the proposed ROW, they would not be crossed by the Project. Accordingly, a total of 24 streams were subsequently analyzed in the Study's Phase

9. Constitution described the Phase I analysis as "a general evaluation of Project locations meeting the basic criteria for trench less construction methods such as crossing distances, feature classifications and potential associated impacts."

II analysis which evaluated construction limiting factors including available workspace, construction schedules and finances. Using its review criteria, Constitution's Study finally concluded that only 11 stream crossings of the 251 displayed preliminary evidence in support of a potentially successful trenchless design and were chosen for the Phase III geotechnical field analysis. Department staff consistently told Constitution that its November 2013 Trenchless Feasibility Study was incomplete and inadequate (See Table 2).

Constitution's continued unwillingness to provide a complete and thorough, Trenchless Feasibility Study required Department staff to engage in a dialogue with Constitution on potential trenchless crossings for a limited number of streams. On April 24, 2015, Constitution's consultant produced a revised draft list of 29 trenchless stream crossings and an example of plans that would be provided for each crossing on the proposed list. Subsequently, in May 2015, Constitution provided detailed project plans for 25 potential trenchless crossings, but only two of those plans were based on full geotechnical borings that are necessary to evaluate the potential success of a trenchless design. Detailed project plans including full geotechnical borings for the remaining stream crossings have not been provided to the Department. From May through August 2015, NYSDEC engaged in a dialogue with Constitution on potential trenchless methods for 19 streams, although NYSDEC did not form a conclusion on a crossing method for the remaining streams, including the vast majority of trout and trout spawning streams. Furthermore, as noted

above, Constitution's unwillingness to adequately explore the Alternative M route alternative, with the prospect of potentially fewer overall impacts to water bodies and wetlands when compared to Constitution's preferred route, means that the Department is unable to determine whether an alternative route is actually more protective of water quality standards. The Department therefore does not have adequate information to assure that sufficient impact avoidance, minimization or mitigation measures were considered as to each of the more than 200 streams proposed for trenched crossings.

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

Furthermore, the Application remains deficient in that it does not contain sufficient information to demonstrate compliance with 6 NYCRR Part 701 setting forth conditions applying to best usages of all water classifications. Specifically, "the discharge of sewage, industrial waste or other wastes shall not cause impairment of the best

10. 6 NYCRR §703.2.

usages of the receiving water as specified by the water classifications at the location of the discharge and at other locations that may be affected by such discharge."[11]

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

In addition, the Application lacks required site-specific information for each of the 251 stream crossings including, but not limited to the specific location of access roads, definite location of temporary stream crossing bridges, details of temporary bridges including depth of abutments in stream banks, details of proposed blasting and the location of temporary coffer dams for stream crossings. Absent this information and the information described above, the Department cannot determine whether additional water quality impact avoidance,

11. 6 NYCRR §701.1.

minimization or mitigation measures must be taken to ensure compliance with water quality standards in water bodies associated with this infrastructure.

Insufficient Site-Specific Information on Depth of Pipe

NYSDEC received numerous public comments regarding the necessary depth for pipeline burial in stream beds that would prevent inadvertent exposure of the pipe. Historically, Department staff has 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. These subsequent corrective actions caused severe negative impacts on water quality and seriously impacted the stability and ecology of the stream that could have been avoided with a deeper pipe. Department staff requested that Constitution provide a comprehensive and site-specific analysis of depth for pipeline burial, but Constitution provided only a limited analysis of burial depth for 21 of the 251 New York streams.[12] Without a site-specific analysis of the potential for vertical movement of each steam crossing to justify a burial depth, NYSDEC is unable to determine whether the depth of pipe is protective of State water quality standards and applicable State statutes and standards.

In addition to impacts to water quality described above and without proper site-specific evaluations, future

12. See, Trout Stream Restoration Report, dated August 2014.

high flow events could expose the pipeline, resulting in risks to the health, safety, and welfare of the people of New York State. Pipe exposure would require more extensive stabilization measures and in stream disturbances resulting in addition degradation to environmental quality. We note that flooding conditions from extreme precipitation events are projected to increase on the operational span of the pipeline due to climate change.

Deficient Blasting Information

Constitution's Blasting Plan, dated August, 2014, outlines the procedures and safety measures to which Constitution would adhere in the event that blasting is required for Project installation. The Blasting Plan does not provide site-specific information where blasting will occur but instead provides a list of potential blasting locations based on the presence of shallow bedrock. In New York alone, Constitution identifies 42.77 total miles where shallow bedrock occurs, or approximately 44 per cent of the route, involving 84 wetlands crossings and 27 waterbody crossings. Constitution indicates that a final determination on the need for blasting will be made at the time of construction in waterbodies and wetlands. Due to the lack of specific blasting information needed for review with respect to associated water bodies, NYSDEC is unable to determine whether this Plan is protective of State water quality standards and in compliance with applicable State statutes and standards.

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Wetlands Crossings

Wetlands provide valuable water quality protection by retaining and cleansing surface runoff to water bodies. Constitution's Application does not demonstrate that wetland crossings will be performed in a manner that will avoid or minimize discharges to navigable waters that would violate water quality standards, including turbidity. Absent detailed information for each wetland crossing that demonstrates Constitution properly avoided, minimized and mitigated impacts to wetland and adjacent areas, the Application does not supply the Department with adequate information to assure that streams and water bodies will not be subject to discharges that do not comply with applicable water quality standards.

NYSDEC Denial

Constitution was required to submit an Application providing sufficient information to demonstrate compliance with the regulations found at 6 NYCRR §608.9, Water Quality Certifications. Pursuant to this regulation, an Applicant must demonstrate compliance with §§301, 302, 303, 306 and 307 of the Federal Water Pollution Control Act, as implemented, by applicable water quality standards and thermal discharge criteria set forth in 6 NYCRR Parts 701,702,703,704 and 750, and State statutes, regulations and criteria otherwise applicable to such activities.[13] The Department must also take into account the cumulative impact to water quality of the full complement of

13. 6 NYCRR §608.9 (2) and (6).

affected water resources in making any determination in connection with any license, order, permit or certification.[14] For the reasons articulated above, the Department hereby denies Constitution's WQC Application because it does not supply adequate information to determine whether the Application demonstrates compliance with the above stated State water quality standards and other applicable State statutes and regulations.

This notice of denial serves as the Department's final determination. Should Constitution wish to address the above deficiencies, a new WQC application must be submitted pursuant to 6 NYCRR §608.9 and 6 NYCRR Part 621. Uniform Procedures Regulations, 6 NYCRR §621.10 provide that that an applicant has a right to a public hearing on the denial of a permit, including a §401 WQC. A request for hearing must be made in writing to me within 30 days of the date of this letter.

Sincerely,

/s/
John Ferguson
Chief Permit Administrator

14. ECl 3-0301 (1)(b).

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 19, 2017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 16-1568

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of October, two thousand seventeen.

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,

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

Intervenors.

ORDER

Petitioner, Constitution Pipeline Company, LLC, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/_____
Catherine O'Hagan Wolfe, Clerk