FERC Improperly Strips States of Their Legal Authority in the Certification Process

The Clean Water Act (CWA) prohibits FERC from issuing a Certificate of Public Convenience and Necessity (Certificates) prior to receiving a Clean Water Act Section 401 Certification from states impacted by a proposed project.

- Section 401 of the CWA states: “no [federal] license or permit shall be granted until the certification required by this section has been granted or waived.” 33 U.S.C. § 1341(a)(1).
- Several courts, including the Supreme Court, have elaborated on the CWA’s authority, stating:
  - “without [Section 401] certification, FERC lacks authority to issue a license.”¹ and
  - Section 401 “requires States to provide a water quality certification before a federal license or permit can be issued….”²

Despite this clear legal mandate, FERC routinely issues FERC Certificates for pipeline projects prior to state decisionmaking on CWA 401 Certification. FERC then compounds the harms inflicted by this illegal act by authorizing the use of eminent domain and construction activity (including earth moving and tree clearing) once the FERC Certificate has been issued, but prior to state CWA 401 Certification.³ FERC wastes no time in granting these approvals, sometimes issuing them just hours after receiving a request.⁴

This is a blatant and knowing violation of the law by FERC. It is a violation that deprives states of their right and ability to prevent pipeline construction activities which will result in violation of state water quality standards by rejecting a project outright or mandating modifications regarding the route, construction practices and/or mitigation obligations.

This issue plays out indiscriminately in project after project when FERC and the pipeline companies feel the state is acting too slowly in issuing its CWA 401 Certification.

Constitution Pipeline (FERC Docket CP13-499):

¹ *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir, 2006).
On December 2, 2014, FERC granted a Certificate to the Constitution Pipeline despite the fact that New York State had not issued a CWA 401 Certification. Thereafter, FERC granted the company the power of eminent domain, a power that the company began to exercise that same month, with the filing of 125 complaints in condemnation against NY and PA landowners. FERC then expressly permitted the Constitution Pipeline to begin elements of construction. For example, on January 8, 2016, the Constitution pipeline submitted a request to proceed which was quickly granted by FERC.⁵

Amongst other actions, FERC authorized the Constitution Pipeline company to seize and cut eighty percent of the trees in a forest in New Milford Township, Pennsylvania. On March 1, 2016, the Constitution Pipeline company began to cut the forest that has belonged to the Holleran family since the 1950s -- they live on the property, enjoy its natural beauty, and operated a growing maple syrup business (North Harford Maple).

On April 22, 2016, New York denied CWA 401 Certification for the pipeline, and as a result, the project is permanently stalled.⁶ If NY never grants the CWA 401 Certification, the project cannot be built and the devastation inflicted on the Hollerans and other Pennsylvania environments, communities, and homeowners was for naught. The associated exercise of eminent domain on New York residents could also have been avoided. Even if New York approval were to be granted at some future time, the Hollerans and other Pennsylvanians had to prematurely suffer the environmental, economic and personal loss inflicted.

Despite New York’s denials of Constitution’s January 14 and February 25, 2016 requests to clear cut and start earth moving activities, and despite Constitution’s lack of a New York Water Quality Certification, the company started illegally clearing trees in New York.⁷ Constitution went ahead with these activities in 2015 and 2016 in multiple towns and counties in New York, and when concerned citizens and the New York Attorney General’s Office made FERC aware of these activities, FERC did nothing to stop Constitution’s illegal acts, resulting in the permanent loss of vast amounts of trees and devastating impacts to water quality.⁸

**Other examples:**
- FERC issued a Certificate of Public Convenience and Necessity for Sabal Trail (FERC Docket No. CP15-17) in February 2016, before CWA 401 Certifications were issued by Alabama and Georgia, and before an Army Corps section 404 permit was issued. FERC

---

began approving construction in summer 2016, including through private lands for which no court date had yet been set to settle eminent domain claims.

- On March 11, 2016, FERC issued a Certificate to the Tennessee Gas Pipeline company for the Connecticut Expansion Project (FERC Docket No. CP14-529) before the state of Massachusetts issued or waived its CWA 401 Certification.\(^9\)

- On December 18, 2014, FERC issued a Certificate to Transco Pipeline Company for its Leidy Southeast project (FERC Docket No. 16-416) before the state of Pennsylvania issued or waived CWA 401 Certification.\(^10\)

**Attachments:**
State Authority Undermined Attachment 1, FERC Partial Notice to Proceed with Construction Activities, FERC Docket No. CP14-17, January 9, 2015.


State Authority Undermined Attachment 10, Merits Brief of Delaware Riverkeeper Network and the Delaware Riverkeeper (D.C. Cir. 2016).


*Sue FERC for Violating the Clean Water Act Filed by the Sandisfield Taxpayers Opposing the Pipeline*, March 21, 2016.


State Authority Undermined Attachment 10, Merits Brief of Delaware Riverkeeper Network and the Delaware Riverkeeper (D.C. Cir. 2016).


People's Dossier: FERC's Abuses of Power and Law

Undermining State Authority

State Authority Undermined Attachment 1, FERC Partial Notice to Proceed with Construction Activities, FERC Docket No. CP14-17, January 9, 2015.
January 9, 2015
Tyler R. Brown
Senior Counsel
Columbia Gas Transmission, LLC
5151 San Felipe Suite 2500
Houston, TX 77056

Re: Partial Notice to Proceed with Construction Activities

Dear Mr. Brown:

I grant your January 7, 2015 request for Columbia Gas Transmission, LLC (Columbia) to begin demolition activity at the Milford Compressor Station in Pike County, Pennsylvania, for the East Side Expansion Project. In considering your request, we have determined that Columbia’s Implementation Plan filed on December 30, 2014, included the information necessary to meet the pre-construction conditions in the Commission’s December 18, 2014 Order Issuing Certificate (Order) issued in Docket No. CP14-17-000, for this portion of the project. In addition, we have confirmed the receipt of all federal authorizations relevant to the work associated with demolition activities at the Milford Compressor Station.

We also grant Columbia’s requests to begin tree clearing activities along the interconnects to/from the Milford Compressor Station only for upland areas as Columbia has not yet received its General Permit (GP-11) for activities within the wetland and waterbody located along a portion of the interconnect workspace.

Additional workspace was requested to the north of the station in the Implementation Plan, and we approve Columbia’s request for a variance for the use of this workspace.
I remind you that Columbia must comply with all applicable terms and conditions of the Commission’s Order. If you have any questions regarding this approval, please call Ellen Saint Onge at (202) 502-6726.

Sincerely,

Shannon Jones  
Chief, Gas Branch 1  
Division of Gas – Environment and Engineering

cc: Public File, Docket No. CP14-17-000
December 14, 2012
Jacquelyne M. Rocan
Assistant General Counsel
Tennessee Gas Pipeline Company, L.L.C.
1001 Louisiana Street
Houston, TX  77002

Re: Authorization to Commence Construction, Tree Clearing, and Use of Variances

Dear Ms. Rocan:

I grant your November 30, 2012 request, as supplemented, for Tennessee Gas Pipeline Company, L.L.C. (TGP) to utilize access roads and commence construction and tree clearing for certain portions of the Northeast Upgrade Project in Pennsylvania. This approval is limited to:

- construction at Compressor Stations 319, 321, and 323 in Bradford, Susquehanna, and Pike Counties, respectively;
- pre-construction tree clearing and use of access roads along Loops 317 and 319 in Bradford County and Loop 321 in Wayne and Pike Counties; and
- use of the Wysox and Highway 6 Pipeyards in Bradford County and the Honesdale Pipeyard in Wayne County.

In considering this notice to proceed, we have reviewed TGP’s Implementation Plan, filed on August 8, 2012, as supplemented, which included the information necessary to meet the pre-construction conditions of the Commission’s Order Issuing Certificate and Approving Abandonment (Order) issued to TGP on May 29, 2012, in the above-referenced docket.

I also grant certain variance requests for additional temporary workspace and access roads as detailed in the attached table. Your requests for these additional temporary workspaces and access roads are in compliance with environmental condition 5 of the Order. In addition, we have confirmed the receipt of all federal authorizations relevant to the approved activities herein; however, use of access roads shall not involve any modification to wetlands (must be used as-is) until a permit is issued by the U.S. Army Corps of Engineers.
This authorization does not include TGP’s requested pre-construction tree clearing or use of access roads on Loop 323 in Pennsylvania. We will reconsider TGP’s request once the outstanding cultural resource consultation is completed for Loop 323.

This approval also does not grant TGP the authority to commence any additional construction activities associated with the Northeast Upgrade Project or utilize any variances that are not listed in the attached table. I remind you that TGP must comply with all applicable remaining terms and conditions of the Order. If you have any questions, please contact David Hanobic at (202) 502-8312.

Sincerely,

J. Rich McGuire  
Chief, Gas Branch 1  
Division of Gas – Environment and Engineering

cc: Public File, Docket No. CP11-161-000
## Approved Additional Temporary Workspace and Access Roads

<table>
<thead>
<tr>
<th>Loop &amp; Milepost of Variance/Line List</th>
<th>County</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Loop 317</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.10 / 457</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3.06 / 462</td>
<td>Bradford</td>
<td>Pennsylvania</td>
</tr>
<tr>
<td><strong>Loop 319</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0.42 / 490</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.00 / 503</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Loop 321</strong></td>
<td>Wayne and Pike</td>
<td></td>
</tr>
<tr>
<td>0.00 / 851</td>
<td>Wayne</td>
<td>Pennsylvania</td>
</tr>
<tr>
<td>0.2 – Permanent access to MLV 322-2A</td>
<td></td>
<td></td>
</tr>
<tr>
<td>0.26 / 856.02</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1.81 / 864</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4.00 / 872 &amp; 873.01</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4.25 / 876</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4.42 / 877</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6.19 / New Access Road L3 AR 54</td>
<td>Pike</td>
<td></td>
</tr>
<tr>
<td>6.70 / 884</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6.89 / 885</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7.96 / 889.02</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8.00 / 891</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
February 13, 2017

Ms. Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C.  20426

Re: Response to FERC Staff Questions  
Rover Pipeline LLC (Rover Pipeline Project)  
Panhandle Eastern Pipe Line Company, LP (Panhandle Backhaul Project)  
Trunkline Gas Company, LLC (Trunkline Backhaul Project)  
FERC Docket Nos. CP15-93-000, CP15-94-000, and CP15-96-000

Dear Ms. Bose:

On February 2, 2017, the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued an Order Issuing Certificate (“Order”) for the Rover Pipeline, Panhandle Backhaul, and Trunkline Backhaul Projects (collectively “Applicants”). The Applicants subsequently filed an Implementation Plan (as supplemented) in accordance with Ordering Paragraph F and Environmental Condition No. 6 of Appendix B of the Order. Provided below is supplemental information in support of the Applicants’ pending request for immediate authorization to begin tree felling and use of existing access roads.

1. Please confirm that all required surveys have been completed and all relevant data has been filed with FERC.

Response:

The Applicants confirm that all required surveys have been completed and all relevant data has been submitted to FERC.

2. Please provide the status of acquisition of easements required for the Project.

Response:

Easement status: 1,869 easements have been acquired for the Project; 807 easements remain outstanding. Of the outstanding easements, the Applicants hope to obtain as many as possible through negotiation.

3. Please provide the status of Execution of Firm Transportation Service Agreements.

Response:

The Applicants are in the process of executing Firm Transportation Service Agreements (“FTSA”) with all firm shippers. The FTSA’s will be executed prior to commencement of construction of any Project facilities by the Applicants.
4. Please update Table 8A-3 to include footnote text.

Response:

Please see updated Table 8A-3 included as Attachment 4a.

5. Please file all communication with the USCOE regarding non-mechanized tree cutting in upland areas prior to issuance of the USCOE Section 404 permits.

Response:

Please see Attachment 5a which includes e-mail correspondence from all outstanding USCOE Districts indicating that they do not oppose tree clearing in upland areas.

This filing is being submitted electronically to the Commission’s eFiling website pursuant to the Commission’s Order No. 703, Filing via the Internet Guidelines issued on November 15, 2007 in FERC Docket No. RM07-16-000. Any questions or comments regarding this filing should be directed to the undersigned at (713) 989-2024.

Respectfully submitted,

/s/ Stephen T. Veatch

____________________
Stephen T. Veatch
Senior Director, Certificates

cc: Ann Miles - FERC Office of Energy Projects
Richard McGuire - FERC Office of Energy Projects
Laurie Boros - FERC Office of Energy Projects
Kevin Bowman - FERC Office of Energy Projects

Attachments
CERTIFICATE OF SERVICE

In accordance with the requirements of Section 385.2010 of the Commission’s Rules of Practice and Procedures, I hereby certify that I have this day caused a copy of the foregoing document to be served upon each person designated on the official service list compiled by the Commission’s Secretary in this proceeding.

/s/ Kelly Allen

Mr. Kelly Allen, Manager
Regulatory Affairs Department
Rover Pipeline LLC
(713) 989-2606
<table>
<thead>
<tr>
<th>MP</th>
<th>County</th>
<th>State</th>
<th>Type of Structure</th>
<th>Direction from Centerline</th>
<th>Distance from Centerline (ft)</th>
<th>Distance from Construction Work Area (ft)</th>
<th>Residential Plan Drawing Number</th>
<th>Date of Easement Closing</th>
</tr>
</thead>
<tbody>
<tr>
<td>34.42</td>
<td>Monroe</td>
<td>OH</td>
<td>MOBILE HOME¹</td>
<td>COINCIDENT</td>
<td>0</td>
<td>0</td>
<td>OH-MO-SHC-003.000</td>
<td>6/22/16</td>
</tr>
<tr>
<td>35.8</td>
<td>Monroe</td>
<td>OH</td>
<td>Hunting Cabin</td>
<td>COINCIDENT</td>
<td>0</td>
<td>0</td>
<td>OH-MO-SC-006.000</td>
<td>8/29/16</td>
</tr>
<tr>
<td>3.39</td>
<td>Monroe</td>
<td>OH</td>
<td>LOG CABIN</td>
<td>NORTH</td>
<td>42.39</td>
<td>2.4</td>
<td>OH-MO-SCL-010.000</td>
<td>8/4/2016</td>
</tr>
<tr>
<td>7.98</td>
<td>Belmont</td>
<td>OH</td>
<td>MOBILE HOME</td>
<td>EAST</td>
<td>79.4</td>
<td>0</td>
<td>OH-BE-CC-043.000</td>
<td>8/26/2015</td>
</tr>
<tr>
<td>18.36</td>
<td>Belmont</td>
<td>OH</td>
<td>CABIN</td>
<td>WEST</td>
<td>45.4</td>
<td>5.4</td>
<td>OH-BE-CC-100.00</td>
<td>1/6/2016</td>
</tr>
<tr>
<td>7.24</td>
<td>Marshall</td>
<td>WV</td>
<td>MOBILE HOME¹</td>
<td>NORTH</td>
<td>17.4</td>
<td>0</td>
<td>WV-MA-ML-038.000_RI_EX</td>
<td>9/8/2016</td>
</tr>
<tr>
<td>11.38</td>
<td>Marshall</td>
<td>WV</td>
<td>MOBILE HOME¹</td>
<td>COINCIDENT</td>
<td>0</td>
<td>0</td>
<td>WV-MA-ML-063.310</td>
<td>4/10/2015</td>
</tr>
<tr>
<td>37.06</td>
<td>Carroll</td>
<td>OH</td>
<td>HOUSE UNDER CONSTRUCTION¹</td>
<td>NORTH</td>
<td>17.4</td>
<td>0</td>
<td>OH-CA-HL-011.100</td>
<td>4/20/2016</td>
</tr>
<tr>
<td>49.02</td>
<td>Carroll</td>
<td>OH</td>
<td>HOUSE¹</td>
<td>NORTH</td>
<td>61.7</td>
<td>0</td>
<td>OH-CA-HL-071.000</td>
<td>7/24/2015</td>
</tr>
<tr>
<td>12.36</td>
<td>Harrison</td>
<td>OH</td>
<td>HUNTING CABIN¹</td>
<td>WEST</td>
<td>22.17</td>
<td>0</td>
<td>OH-HR-035.000</td>
<td>10/24/2015</td>
</tr>
<tr>
<td>31.41</td>
<td>Tuscarawas</td>
<td>OH</td>
<td>HOUSE¹</td>
<td>EAST</td>
<td>35.4</td>
<td>0</td>
<td>OH-TU-024.000</td>
<td>6/18/2015</td>
</tr>
<tr>
<td>31.43</td>
<td>Tuscarawas</td>
<td>OH</td>
<td>MOBILE HOME¹</td>
<td>COINCIDENT</td>
<td>0.7</td>
<td>0</td>
<td>OH-TU-024.000</td>
<td>6/18/2015</td>
</tr>
<tr>
<td>69.34</td>
<td>Wayne</td>
<td>OH</td>
<td>HOUSE¹</td>
<td>NORTH</td>
<td>55.7</td>
<td>0</td>
<td>OH-WA-052.532</td>
<td>5/13/2015</td>
</tr>
<tr>
<td>71.05</td>
<td>Wayne</td>
<td>OH</td>
<td>HOUSE¹</td>
<td>NORTH</td>
<td>20.1</td>
<td>0</td>
<td>OH-WA-074.000</td>
<td>1/15/2016</td>
</tr>
<tr>
<td>73.45</td>
<td>Washtenaw</td>
<td>MI</td>
<td>HOUSE</td>
<td>EAST</td>
<td>135.1</td>
<td>5.1</td>
<td>RIP-WA-MP 073.45</td>
<td>7/22/2015</td>
</tr>
<tr>
<td>85.47</td>
<td>Livingston</td>
<td>MI</td>
<td>HOUSE</td>
<td>COINCIDENT</td>
<td>0</td>
<td>0</td>
<td>RIP-LI-MP 085.47</td>
<td>3/20/2015</td>
</tr>
<tr>
<td>88.35</td>
<td>Livingston</td>
<td>MI</td>
<td>HOUSE</td>
<td>SOUTH</td>
<td>34.3</td>
<td>0</td>
<td>RIP-LI-MP 088.35</td>
<td>2/12/2016</td>
</tr>
</tbody>
</table>

¹ Rover plans to compensate for structures.
I have no objection to cutting trees in the uplands which occur outside of the Corps permit areas.

Thanks
Josh

Agency Team,

Rover is planning to begin cutting trees using non-mechanized tree cutting methods on Monday, February 13, 2017. This activity will be limited to non-waters of the United States and will occur only in upland areas. Therefore, can you please provide a quick email concurrence that your agency does not have jurisdiction over or regulate this activity within upland areas?

Thank you for your quick response and your continued coordination on this project. It is greatly appreciated.

Thank you,

Buffy Thomason
Energy Transfer Company
1300 Main St., Houston, TX 77002
Office: 713-989-2844
Cell: 979-571-3113

Private and confidential as detailed here. If you cannot access hyperlink, please e-mail sender.
Buffy Thomason has been in contact with WVDEP regarding tree clearing in upland areas associated with the Rover Pipeline Project. The WVDEP 401 Certification Program does not have any authority regarding this activity unless actions result in material being placed in streams and/or wetlands. However, the WVDEP 401 Certification Program has advised Rover that the Individual State 401 Water Quality Certification for the project will contain a special condition requiring photographs be taken of each stream and wetland crossing prior to any impact and photographs are to be taken from the same location annually for monitoring purposes. Other than this, WVDEP 401 Certification Program does not have any issues with the clearing of trees. WVDEP 401 Certification Program; however, cannot speak for other programs within the WVDEP.

Thank you,
Nancy J. Dickson
WVDEP 401 Certification Program

---

Rover is planning to begin cutting trees using non-mechanized tree cutting methods on Monday, February 13, 2017. This activity will be limited to non-waters of the United States and will occur only in upland areas. Therefore, can you please provide a quick email concurrence that your agency does not have jurisdiction over or regulate this activity within upland areas?

Thank you for your quick response and your continued coordination on this project. It is greatly appreciated.

Thank you,

Buffy Thomason

Energy Transfer Company

1300 Main St., Houston, TX 77002
Office: 713-989-2844
Cell: 979-571-3113

Private and confidential as detailed [here](#). If you cannot access hyperlink, please e-mail sender.
Thomason, Buffy

From: todd.surrena@epa.ohio.gov
Sent: Monday, February 13, 2017 7:10 AM
To: Thomason, Buffy; Barnett, Robert W LRH (Wes.Barnett@usace.army.mil); Blohm, Shawn U LRB (Shawn.U.Blohm@usace.army.mil); Shaffer, Joshua D CIV USARMY CELRP (US); Dickson, Nancy J
Cc: Kevin Bowman; William S. Scherman (WScherman@gibsondunn.com)
Subject: RE: Tree Felling in Upland Areas

Buffy Thomason has been in contact with Ohio EPA regarding tree clearing associated with the Rover Pipeline Project. The OEPA 401 Water Quality Certification Program does not have authority regarding this activity unless actions result in fill material being placed in streams and/or wetlands. There will be requirements in the 401 WQC to take pictures of streams and wetlands before clearing for mitigation/monitoring purposes. Rover is advised to consider this requirement before felling any trees in wetland and stream areas.

Todd Surrena
401 Coordinator
Division of Surface Water
Ohio EPA – Northeast District Office
2110 East Aurora Road, Twinsburg, OH 44087
P: 330-963-1255
F: 330-487-0769
E: Todd.Surrena@epa.ohio.gov

From: Thomason, Buffy [mailto:Buffy.Thomason@energytransfer.com]
Sent: Friday, February 10, 2017 5:24 PM
To: Barnett, Robert W LRH (Wes.Barnett@usace.army.mil) <Wes.Barnett@usace.army.mil>; Blohm, Shawn U LRB (Shawn.U.Blohm@usace.army.mil) <Shawn.U.Blohm@usace.army.mil>; Shaffer, Joshua D CIV USARMY CELRP (US) <Joshua.D.Shaffer@usace.army.mil>; Surrena, Todd <todd.surrena@epa.ohio.gov>; Dickson, Nancy J <Nancy.J.Dickson@wv.gov>
Cc: Kevin Bowman <Kevin.Bowman@ferc.gov>; William S. Scherman (WScherman@gibsondunn.com) <WScherman@gibsondunn.com>
Subject: Tree Felling in Upland Areas

Agency Team,

Rover is planning to begin cutting trees using non-mechanized tree cutting methods on Monday, February 13, 2017. This activity will be limited to non-waters of the United States and will occur only in upland...
areas. Therefore, can you please provide a quick email concurrence that your agency does not have jurisdiction over or regulate this activity within upland areas?

Thank you for your quick response and your continued coordination on this project. It is greatly appreciated.

Thank you,

Buffy Thomason  
Energy Transfer Company  
1300 Main St., Houston, TX 77002  
Office: 713-989-2844  
Cell: 979-571-3113

Private and confidential as detailed here. If you cannot access hyperlink, please e-mail sender.
Thomason, Buffy

From: Blohm, Shawn U CIV USARMY CELRB (US) <Shawn.U.Blohm@usace.army.mil>
Sent: Monday, February 13, 2017 9:49 AM
To: Thomason, Buffy; Barnett, Robert W CIV USARMY CELRH (US)
Cc: Shaffer, Joshua D CIV USARMY CELRP (US); todd.surrena@epa.ohio.gov; Kevin Bowman
Subject: RE: Please

Buffy,

Under Section 10 of the Rivers and Harbors Act of 1899, and Section 404 of the Clean Water Act, the U.S. Army Corps of Engineers has regulatory authority over construction, excavation, or deposition of materials in, over, or under navigable waters of the United States. Under Section 404 of the Clean Water Act, the U.S. Army Corps of Engineers regulates the discharge of dredged or fill material into waters of the United States, including freshwater wetlands. Certain types of activities, such as landclearing using mechanized equipment and/or sidecasting, in a jurisdictional water would likely be regulated under Section 404 of the Clean Water Act. The Corps does not regulate activities that occur outside waters of the United States (i.e. uplands). A Preliminary Jurisdictional Determination identifying the waters of the U.S. within ET Rover's project corridor was completed on April 25, 2016 and on the Preliminary Jurisdictional Determination Revision submitted by ET Rover on September 12, 2016.

Please contact me if you have questions,

Shawn

Shawn U. Blohm
U.S. Army Corps of Engineers
Buffalo District - Regulatory Branch
Ohio Application Evaluation Section
Stow Field Office
1100 Graham Road Circle
Stow, OH 44224
Phone: 330-923-8214
Fax: 330-923-8146
Direct: 716-879-4436
shawn.u.blohm@usace.army.mil

-----Original Message-----
From: Thomason, Buffy [mailto:Buffy.Thomason@energytransfer.com]
Sent: Monday, February 13, 2017 10:19 AM
Any word yet, Gentlemen? It seems to be all we lack. Sorry again to push.

Thank you,
Buffy Thomason
Energy Transfer Company
O: 713-989-2844, C: 979-571-3113

-----Original Message-----
From: Blohm, Shawn U CIV USARMY CELRB (US) [mailto:Shawn.U.Blohm@usace.army.mil]
Sent: Monday, February 13, 2017 7:37 AM
To: Thomason, Buffy <Buffy.Thomason@energytransfer.com>; Barnett, Robert W CIV USARMY CELRH (US) <Wes.Barnett@usace.army.mil>
Subject: RE: Please

Buffy,

I need to run this by my Chief. A response is forthcoming shortly.

Shawn

Shawn U. Blohm
U.S. Army Corps of Engineers
Buffalo District - Regulatory Branch
Ohio Application Evaluation Section
Stow Field Office
1100 Graham Road Circle
Stow, OH 44224
Phone: 330-923-8214
Fax: 330-923-8146
Direct: 716-879-4436
shawn.u.blohm@usace.army.mil

-----Original Message-----
From: Thomason, Buffy [mailto:Buffy.Thomason@energytransfer.com]
Sent: Monday, February 13, 2017 8:21 AM
To: Barnett, Robert W CIV USARMY CELRH (US) <Wes.Barnett@usace.army.mil>; Blohm, Shawn U CIV USARMY CELRB (US) <Shawn.U.Blohm@usace.army.mil>
Subject: [EXTERNAL] Please

I am so sorry to push, but will you please respond to my other email as soon as possible this morning? FERC is maintaining that they will not give us permission to start felling trees in uplands without your responses, and I have guys pouring in from all over today to get started.

Please let me know if you have any questions.

Thank you!
Buffy Thomason
979-571-3113
Private and confidential as detailed here<http://www.energytransfer.com/mail_disclaimer.aspx>. If you cannot access hyperlink, please e-mail sender.

Private and confidential as detailed here<http://www.energytransfer.com/mail_disclaimer.aspx>. If you cannot access hyperlink, please e-mail sender.
CLASSIFICATION: UNCLASSIFIED

Ms. Thomason,

Rover is requesting clarification and concurrence from the Corps regarding activities described in the e-mail below....

The United States Army Corps of Engineers' (Corps) authority to regulate waters of the United States is based on the definitions and limits of jurisdiction contained in 33 CFR 328 and 33 CFR 329. Under Section 10 of the Rivers and Harbors Act of 1899, and Section 404 of the Clean Water Act, the Corps has regulatory authority over construction, excavation, or deposition of materials in, over, or under navigable waters of the United States. Under Section 404 of the Clean Water Act, the Corps regulates the discharge of dredged or fill material into waters of the United States, including freshwater wetlands. Certain types of activities, such as landclearing using mechanized equipment and/or sidecasting, in a jurisdictional water would likely be regulated under Section 404 of the Clean Water Act. The Corps does not regulate activities that occur outside waters of the United States (i.e. uplands). A Preliminary Jurisdictional Determination identifying waters of the U.S. for the portions of the project occurring within the Huntington District Regulatory Boundary was completed April 20, 2016 and subsequently revised on October 16, 2016

Rover has indicated the activities would occur solely within upland areas not associated with a Corps permit area characterized by the discharge of dredged and/or fill material. Based on the limitations of the Corps' jurisdictional authorities, the Corps would not regulate the described activities.

If you have any further questions please contact me.

Wes Barnett
Regulatory - Huntington District
US Army Corps of Engineers
Phone: 304-399-6905
Wes.Barnett@usace.army.mil
http://secure-web.cisco.com/1mrAc2NILmKUbIHflr-t5g9IxYIHrPPtrwe411Q77xSExfQ2cVORL9mKflYkV9cj4xXHltyt4uUWNiaSpjuIOEEX_pFDRittwpI2trmcjyuxOMnn-t6s0tkO63VRSI_10zmd41rk-mhOEaMvS3g4Ie6xde14CoHO9UKRCHTbr-QT6mOJhocPTE7TWu923hEGWzMcO-8AfdIOzTINdUq_u5GQ29WHxAGmp8itaNTE3FmorhagdEjX9R4Hh2rPL1_H2uPzW8tTN7dwDKiZ5jGZjNB6
-----Original Message-----
From: Thomason, Buffy [mailto:Buffy.Thomason@energytransfer.com]
Sent: Friday, February 10, 2017 5:24 PM
To: Barnett, Robert W CIV USARMY CELRH (US) <Wes.Barnett@usace.army.mil>; Blohm, Shawn U CIV USARMY CELRB (US) <Shawn.U.Blohm@usace.army.mil>; Shaffer, Joshua D CIV USARMY CELRP (US) <Joshua.D.Shaffer@usace.army.mil>; Todd Surrena <todd.surrena@epa.ohio.gov>; Dickson, Nancy J <Nancy.J.Dickson@wv.gov>
Cc: Kevin Bowman <Kevin.Bowman@ferc.gov>; William S. Scherman (WScherman@gibsondunn.com) <WScherman@gibsondunn.com>
Subject: [EXTERNAL] Tree Felling in Upland Areas

Agency Team,

Rover is planning to begin cutting trees using non-mechanized tree cutting methods on Monday, February 13, 2017. This activity will be limited to non-waters of the United States and will occur only in upland areas. Therefore, can you please provide a quick email concurrence that your agency does not have jurisdiction over or regulate this activity within upland areas?

Thank you for your quick response and your continued coordination on this project. It is greatly appreciated.

Thank you,
Buffy Thomason
Energy Transfer Company
1300 Main St., Houston, TX 77002
Office: 713-989-2844
Cell: 979-571-3113

Private and confidential as detailed here <http://www.energytransfer.com/mail_disclaimer.aspx>. If you cannot access hyperlink, please e-mail sender.
CLASSIFICATION: UNCLASSIFIED
In Reply Refer To:
OEP/DG2E/Gas 4
Rover Pipeline LLC
Rover Pipeline Project
Docket No. CP15-93-000
§ 375.308(x)

February 13, 2017

Kelly Allen, Manager
Regulatory Affairs Department
Rover Pipeline LLC
1300 Main Street
Houston Texas 77002

Re: Partial Notice to Proceed with Tree Felling

Dear Mr. Allen:

I grant in part your February 3, 2017 request, to conduct non-mechanized tree felling associated with the Rover Pipeline Project in upland areas only.¹ This letter does **not** approve tree felling by mechanized means nor does it approve tree felling in wetland or waterbody areas. Trees must be felled in a manner so as to avoid obstruction of flow, rutting, and sedimentation of wetlands and waterbodies, as more fully described in correspondence received from the U.S. Army Corps of Engineers, Ohio Environmental Protection Agency, and the West Virginia Department of Environmental Quality. Further, this approval is limited to tree felling through the allotted construction time window for federally-listed bats and migratory birds, which expires on March 31, 2017, as noted in the Commission’s February 2, 2017 *Order Issuing Certificate* (Order). This letter does **not** authorize tree felling in any of the workspace variances identified in Rover Pipeline LLC’s (Rover) February 3, 2017 Implementation Plan or within 500 feet of cultural resources site numbers 33ST1088 and 33WE662. Rover may **only** use those private access roads identified in Table 1-7 of its February 7, 2017 supplement.

In considering your February 3, 2016 request, we have reviewed Rover’s

¹ This partial notice to proceed has no effect on the Office of Enforcement’s investigation referred to in the Commission’s February 2, 2017 *Order Issuing Certificate* (Rover Pipeline LLC, 158 FERC ¶ 61,109, at P 249 (2017)).
Implementation Plan filed on February 3, 2017, and as supplemented on February 6, 7, 8, 9 and 13, 2017. Based on our review, Rover has provided the information necessary to meet the project’s pre-construction conditions in the Commission’s Order solely as it relates to the activities approved herein. In addition, we have documented the receipt or waiver of all required federal authorizations relevant to the approved activities herein.

There have been several filings made in the docketed proceeding alleging that tree felling or tree cutting commenced prior to Commission authorization. On February 13, 2017, Rover filed a statement denying allegations that Rover or any of its contractors had engaged in any tree felling or clearing of brush. This letter granting Rover permission to conduct non-mechanized tree felling does not preclude any appropriate enforcement action for potential unauthorized tree clearing that may have taken place.

I remind you that Rover may not conduct project activities on parcels where easements are outstanding until they have been secured, must comply with all applicable remaining terms and conditions of the Order, and implement each of its planned best-management practices and conservation plans during tree-cutting activities.

Sincerely,

Rich McGuire, Director
Division of Gas – Environment and Engineering

cc: Public File, Docket No. CP15-93-000
People's Dossier: FERC's Abuses of Power and Law
→ Undermining State Authority

January 29, 2016
Lynda Schubring, PMP
Environmental Project Manager
Constitution Pipeline Company, LLC
2800 Post Oak Boulevard
P.O. Box 1396
Houston, Texas 77251-1396

Re: Partial Notice to Proceed with Tree Felling and Variance Requests

Dear Ms. Schubring:

I grant in part your January 8, 2016 request, as preceded by the information and variance requests described in Constitution Pipeline Company’s (Constitution) Implementation Plan (IP) submitted on May 19, 2015 and as supplemented by its filings dated January 14, 2016 subject to the following stipulations:

- This letter approves limited non-mechanical tree felling in Pennsylvania only;
- This letter approves the workspace variances in Constitution’s May 19, 2015 and January 8, 2016 requests in Pennsylvania only, except for the variances listed in table 1 below; and
- For each exclusion area listed in “Attachment E – Tree felling Exclusion List,” of Constitution’s January 14, 2016 supplement, Constitution may not fell trees within 100 feet of each area and must employ qualified archaeologists to demarcate these additional areas.

Constitution has obtained the necessary federal clearances from the Pennsylvania State Historic Preservation Office, Pennsylvania Department of Environmental Protection, as well as the U.S. Fish and Wildlife Service. The U.S. Army Corps of Engineers stated in a letter to Constitution dated January 14, 2016 that the activities as proposed would not require authorization from that agency. In addition, Constitution has acquired landowner access for the approved facilities in Pennsylvania.
In considering your January 8, 2016 request, we have reviewed Constitution’s IP filed on May 19, 2015 and as supplemented on January 14, 2016. Based on our review, Constitution has provided the information necessary to meet the project pre-construction conditions in the Commission’s December 2, 2014 Order Issuing Certificates (Order) solely as it relates to the facilities and activities approved herein. In addition, we have confirmed the receipt of all required federal authorizations relevant to the approved activities herein. This letter does not authorize tree felling in New York nor does it authorize the workspace variances in Constitution’s May 19, 2015 and January 8, 2016 requests in New York at this time.

I remind you that Constitution must comply with all applicable remaining terms and conditions of the Order.

Sincerely,

Terry Turpin, Director
Division of Gas – Environment and Engineering

cc: Public File, Docket No. CP13-499-000

<table>
<thead>
<tr>
<th>Access Road / Workspace Identification</th>
<th>Milepost</th>
<th>Reason For Exclusion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pennsylvania</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TRK#949</td>
<td>2.9</td>
<td>Explanation / justification lacking for substantial additional impact to forest</td>
</tr>
<tr>
<td>TRK#950</td>
<td>2.9</td>
<td>Explanation / justification lacking for substantial additional impact to forest</td>
</tr>
<tr>
<td>PAR-2C</td>
<td>Offline east of MP 3.3</td>
<td>Explanation / justification lacking, map lacking</td>
</tr>
<tr>
<td>PAR-2D</td>
<td>3.3</td>
<td>Explanation / justification lacking</td>
</tr>
<tr>
<td>TRK#915</td>
<td>9.1</td>
<td>Explanation / justification lacking</td>
</tr>
<tr>
<td>PAR-15</td>
<td>17.8</td>
<td>Explanation / justification lacking</td>
</tr>
</tbody>
</table>
People's Dossier: FERC's Abuses of Power and Law → Undermining State Authority

April 22, 2016

Lynda Schubring, PMP
Environmental Project Manager
Constitution Pipeline Company, LLC
2800 Post Oak Boulevard
P.O. Box 1396
Houston, Texas 77251-1396

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 with 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.

**BACKGROUND**

The Federal Energy Regulatory Commission (FERC) issued a certificate approving construction and operation of the pipeline on December 2, 2014, conditioning

\(^1\) 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.
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 application4 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 I-88 access area5, proposes to include new right-of-way (ROW) construction of approximately 99

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 (NYSDOT) Interstate I-88 control of access area. On April 7, 2014, the Department provided FERC with preliminary comments on the DEIS which extensively analyzed the environmental benefits of utilizing Interstate I-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 whether Alternative M would generate fewer impacts than Constitution’s preferred route. However, using Constitution’s information, as well as publicly available information, Department Staff
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 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 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.

---

conducted a review that found that Alternative M could reduce overall impacts to water bodies and wetlands when compared to Constitution’s preferred route.
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 t 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 amount to roughly 24 per cent 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 WQC and associated permits, Constitution submitted its second request to withdraw and resubmit the WQC 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>
<thead>
<tr>
<th>Prepared by</th>
<th>Date</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>DEC</td>
<td>June 21, 2012</td>
<td>Summary of Pre-Application Meeting</td>
</tr>
<tr>
<td>DEC</td>
<td>May 30, 2013</td>
<td>Sample Matrix for Linear Projects</td>
</tr>
<tr>
<td>Constitution</td>
<td>August 28, 2013</td>
<td>401 WQC and related NYS Joint Permit application/documentation received by DEC</td>
</tr>
<tr>
<td>DEC</td>
<td>September 12, 2013</td>
<td>Notice of Incomplete Application</td>
</tr>
<tr>
<td>Constitution</td>
<td>November 27, 2013</td>
<td>Joint Permit Application - Supplemental Information</td>
</tr>
<tr>
<td>Constitution</td>
<td>May 9, 2014</td>
<td>401 WQC Application Withdrawal and Re-submittal</td>
</tr>
<tr>
<td>DEC</td>
<td>July 3, 2014</td>
<td>DEC Recommendations for Revised Joint Application</td>
</tr>
<tr>
<td>Constitution</td>
<td>August 13, 2014</td>
<td>Joint Permit Application - Supplemental Information # 2</td>
</tr>
<tr>
<td>Constitution</td>
<td>November 17, 2014</td>
<td>Additional Information Submittal</td>
</tr>
<tr>
<td>Constitution</td>
<td>November 17, 2014</td>
<td>Responses to Wetland Mitigation Plan Deficiencies</td>
</tr>
<tr>
<td>Constitution</td>
<td>November 24, 2014</td>
<td>Updated and Revised Information</td>
</tr>
<tr>
<td>Constitution</td>
<td>December 1, 2014</td>
<td>Response to Request for Additional Clarification of Wetland Impacts</td>
</tr>
<tr>
<td>DEC</td>
<td>December 24, 2014</td>
<td>Notice of Complete Application</td>
</tr>
<tr>
<td>DEC</td>
<td>December 31, 2014</td>
<td>NY Stream Crossing Feasibility Analysis Information Request</td>
</tr>
<tr>
<td>Constitution</td>
<td>January 22, 2015</td>
<td>Summary of Changes Trenchless Locations</td>
</tr>
<tr>
<td>Constitution</td>
<td>February 2, 2015</td>
<td>Revised Wetland Mitigation Plan</td>
</tr>
<tr>
<td>Constitution</td>
<td>February 6, 2015</td>
<td>Phase I Stream Analysis/Open Cut</td>
</tr>
<tr>
<td>DEC</td>
<td>February 19, 2015</td>
<td>DEC Proposed Wetland Re-route</td>
</tr>
<tr>
<td>Constitution</td>
<td>March 27, 2015</td>
<td>Joint Permit Application - Supplemental Information</td>
</tr>
<tr>
<td>Constitution</td>
<td>April 24, 2015</td>
<td>Response to DEC Preferred List of Trenchless Stream Crossings</td>
</tr>
<tr>
<td>Constitution</td>
<td>April 27, 2015</td>
<td>401 WQC Application Withdrawal and Re-submittal</td>
</tr>
<tr>
<td>DEC</td>
<td>April 27, 2015</td>
<td>Notice of Complete Application - WQC Withdrawal and Re-submittal</td>
</tr>
<tr>
<td>Constitution</td>
<td>May 13, 2015</td>
<td>Wetland Mitigation Area - Application for Pesticide Permit</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------------</td>
<td>---------------------------------------------------------</td>
</tr>
<tr>
<td>Constitution</td>
<td>May 20, 2015</td>
<td>Supplemental Information - Trenchless Crossings</td>
</tr>
<tr>
<td>DEC</td>
<td>June 1, 2015</td>
<td>Notice of Incomplete Application - Pesticide Permit</td>
</tr>
<tr>
<td>Constitution</td>
<td>June 19, 2015</td>
<td>Canadarago Lake Mitigation Area Update</td>
</tr>
<tr>
<td>Constitution</td>
<td>June 30, 2015</td>
<td>Updated Trenchless Crossing Matrix</td>
</tr>
<tr>
<td>Constitution</td>
<td>July 8, 2015</td>
<td>Joint Permit Application - Supplemental Information - Wetland Re-route</td>
</tr>
<tr>
<td>Constitution</td>
<td>July 14, 2015</td>
<td>Additional Information Submittal - Wetland Impacts and Mitigation</td>
</tr>
<tr>
<td>Constitution</td>
<td>August 5, 2015</td>
<td>Response to Notice of Incomplete Application - Pesticide Permit</td>
</tr>
<tr>
<td>Constitution</td>
<td>September 15, 2015</td>
<td>Joint Permit Application - Supplemental Information</td>
</tr>
<tr>
<td>DEC</td>
<td>October 2, 2015</td>
<td>Acknowledgement of NOI - SPDES MS GP - Contractor Yard 5B</td>
</tr>
<tr>
<td>Constitution</td>
<td>January 6, 2016</td>
<td>Wetland Mitigation Area - Application for Pesticide Permit - Betty Brook</td>
</tr>
<tr>
<td>DEC</td>
<td>February 26, 2016</td>
<td>Acknowledgement of NOT - SPDES MS GP - Contractor Yard 5B</td>
</tr>
</tbody>
</table>

**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.\(^7\)

---

\(^6\) 6 NYCRR §608.9 (2) and (6).

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

**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, trenchless methods present significantly fewer environmental impacts to the regulated resource. Because alternative trenchless 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. 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

---

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

<table>
<thead>
<tr>
<th>Prepared by</th>
<th>Date</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>NYSDEC</td>
<td>June 21, 2012</td>
<td>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).</td>
</tr>
<tr>
<td>NYSDEC</td>
<td>November 7, 2012</td>
<td>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.</td>
</tr>
<tr>
<td>FERC</td>
<td>April 9, 2013</td>
<td>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.</td>
</tr>
<tr>
<td>NYSDEC</td>
<td>May 28, 2013</td>
<td>Meeting with Constitution and NYSDEC staff at the DEC Region 4 office to review stream crossings. NYSDEC reiterates that acceptable trenchless technology was the preferred installation method and that stream crossings should be reviewed for feasibility of using those technologies.</td>
</tr>
<tr>
<td>NYSDEC</td>
<td>July 17, 2013</td>
<td>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.</td>
</tr>
</tbody>
</table>
| NYSDEC and Constitution staff | July - August 2013 | Field visits of proposed stream crossings prior to permit applications to the Department. At each crossing, NYSDEC emphasized to
<table>
<thead>
<tr>
<th>Event</th>
<th>Date</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution</td>
<td>November 2013</td>
<td>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.</td>
</tr>
<tr>
<td>NYSDEC and Constitution staff</td>
<td>December 31, 2014</td>
<td>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.</td>
</tr>
<tr>
<td>NYSDEC</td>
<td>December 31, 2014</td>
<td>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.</td>
</tr>
<tr>
<td>Constitution and NYSDEC</td>
<td>January 23, 2015</td>
<td>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.</td>
</tr>
<tr>
<td>Constitution and NYSDEC</td>
<td>January 28, 2015</td>
<td>Conference call: NYSDEC reiterated its request for a site specific analysis of trenchless stream crossings for all streams including those under 30 feet wide.</td>
</tr>
<tr>
<td>Constitution</td>
<td>February 5, 2015</td>
<td>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.</td>
</tr>
</tbody>
</table>

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 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 for trenchless 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 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.

---

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

---

10 6 NYCRR §703.2.
11 6 NYCRR §701.1.
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.\textsuperscript{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 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.

\textbf{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.

\textbf{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

\textsuperscript{12} See, Trout Stream Restoration Report, dated August 2014.
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 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,

John Ferguson
Chief Permit Administrator

Cc:
T. Berkman
W. Little
P. Desnoyers
S. Tomasik
D. Merz
F. Bifera
Y. Hennessey
K. Bowman

---

13 6 NYCRR §608.9 (2) and (6).
14 ECL 3-0301 (1)(b).
People's Dossier: FERC's Abuses of Power and Law

→ Undermining State Authority

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of:

Constitution Pipeline Company, LLC

Docket No.: CP13-499-000

COMPLAINT AND PETITION BY THE OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL AGAINST CONSTITUTION PIPELINE FOR VIOLATIONS OF LAW AND THE ORDER ISSUING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

ERIC T. SCHNEIDERMANN
Attorney General of the State of New York
Environmental Protection Bureau
New York State Department of Law
The Capitol
Albany, New York 12224

LEMUEL SROLOVIC
MAUREEN LEARY
Assistant Attorneys General
Of Counsel

May 13, 2016
# Table of Contents

I. STATUTORY AND REGULATORY FRAMEWORK .......................................................... 3  
   A. The Federal Clean Water Act .............................................................................. 3  
   B. The Natural Gas Act and the Commission’s Regulations ................................. 4  
   C. Commission Jurisdiction ............................................................................... 6  
   D. Relevant New York Real Property Law .............................................................. 8  

II. FACTUAL BACKGROUND ...................................................................................... 8  
   A. Constitution’s Application for a Certificate of Public Convenience and Necessity Pursuant to Section 7 of the Natural Gas Act.......................................................... 8  
   B. The Commission’s Final Environmental Impact Statement for the Project ................................. 10  
   C. The Commission’s Order Issuing Certificates of Public Convenience and Necessity .......................................................... 11  
   D. The Commission’s Rehearing Order .................................................................. 13  
   E. Constitution’s Implementation Plan ...................................................................... 15  
   F. Constitution’s Application to NYSDEC for a Water Quality Certification .......................................................... 15  
   G. Constitution’s Right-of-Way Agreements and Eminent Domain Proceedings .......................................................... 16  
   H. USFWS Biological Opinion .............................................................................. 16  
   I. Constitution’s Request to Clear Cut Trees/Vegetation and Begin Construction-Related Activities in New York and Pennsylvania .......................................................... 17  
   J. NY Attorney General’s January 14, 2016 Opposition to Clear-Cutting ................................. 18  
   K. Commission Staff Denial of Tree/Vegetation Clear-Cutting in New York .............................................................................. 19  
   L. Constitution’s Renewed Request to Clear Cut in New York .................................. 20
M. NY Attorney General’s Objection to Renewed Request to Clear Cut ................................................................. 21

N. Clear-Cutting and Other Ground Disturbance Construction Activities Undertaken in New York Without Commission Approval .................................................................................................. 21

O. Constitution’s Withdrawal of Its Renewed Request to Clear Cut ........................................................................ 24

P. Constitution’s Knowledge of Clear Cutting and Other Construction Activities .......................................................... 24

Q. Adverse Impacts of Clear Cutting, Tree Cutting, Road Building, Use of Heavy Equipment, and Other Construction Activities in the Right of Way .......................................................... 25

R. NYSDEC’s Denial of the Water Quality Certification .................................................................................. 27

III. CONSTITUTION’S ACTS AND OMISSIONS HAVE HARMED NEW YORK ................................................................................................................................. 28


A. Constitution’s Violation of the Order’s Environmental Conditions ........................................................................ 34

   Violation of Environmental Condition 8: Failure to Obtain Federal Authorizations and Commission Approval to Proceed With Construction .......................................................... 35

   Violation of Environmental Conditions 26 and 29: Endangered/Threatened Species .......................................................... 36

   Violation of Environmental Condition 7: Reporting .................................................................................. 37

B. Constitution’s Violation of Section 7 of the Natural Gas Act .................................................................................. 38

C. Constitution’s Violation of the Commission’s Regulations .................................................................................. 38

V. SECOND CLAIM -- ENSURE COMPLIANCE THROUGH APPROPRIATE ENFORCEMENT AND ASSESSMENT OF CIVIL PENALTIES .................................................................................. 40

VI. REQUESTED ACTION AND RELIEF .................................................................................................................. 42
In the Matter of:

Constitution Pipeline Company, LLC

Docket No.: CP13-499-000

COMPLAINT AND PETITION BY THE OFFICE OF THE NEW YORK ATTORNEY GENERAL AGAINST CONSTITUTION PIPELINE LLC FOR VIOLATIONS OF LAW AND THE ORDER ISSUING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

The Office of the New York Attorney General ("NY Attorney General") brings this complaint and petition pursuant to Sections 13, 14, 20 and 21 of the Natural Gas Act, 15 U.S.C. §§ 717l, 717m, 717s and 717t, and the Federal Energy Regulatory Commission’s regulations, 18 C.F.R. §§ 385.206 and 385.207, related to the acts and omissions of Constitution Pipeline Company, LLC ("Constitution") in the pipeline right of way in New York. The NY Attorney General requests that the Commission initiate an investigation and, based on the evidence set forth in this complaint and petition and any further evidence obtained by the Commission in its investigation, take appropriate legal enforcement action. Constitution’s acts and omission relate to significant tree and vegetation cutting and clear-cutting, and other ground disturbance and construction activities within the pipeline right of way in New York in violation of the Commission’s December 2, 2014 Order Issuing Certificates of Public Convenience and Necessity (the “Order”), and the legal requirements set forth in the Natural Gas Act and the Commission’s regulations. The Attorney General also requests that the Commission stay its Order until completion of the investigation and enforcement action, and until Constitution has obtained all authorizations required under federal law.
In essence, the Order and the governing legal requirements of the Natural Gas Act and the Commission’s regulations prohibit cutting trees and other vegetation, conducting ground disturbance activities, and commencing pipeline construction until Constitution (1) has obtained all required authorizations under federal law, including a water quality certification issued under Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341, and (2) has received written authorization to proceed from the Commission. The conduct giving rise to this complaint and petition occurred without Constitution having obtained all authorizations required under federal law and without having the Commission’s written authorization to proceed. Indeed, New York has denied Constitution’s application for the federal water quality certification and the Commission staff has denied Constitution’s request to cut trees and vegetation within the pipeline right of way in New York.

The evidence supporting this complaint and petition is summarized below and is more fully set forth in the accompanying affidavit of NY Attorney General Senior Investigator Kathleen Coppersmith. The evidence provides a reasonable basis to conclude that Constitution expressly or tacitly authorized, encouraged and/or condoned the tree and vegetation cutting, clear-cutting, and other ground disturbance activities within the pipeline right of way in New York on which Constitution holds easements for the sole purpose of constructing and operating the pipeline. Such conduct by a gas pipeline developer has been subject to enforcement action in New York.1 Enforcement action by the Commission here is therefore appropriate.

1 The New York State Public Service Commission (“NYSPSC”) instituted an investigation of acts of significant tree cutting within the Bluestone Gas Corporation’s natural gas pipeline right of way before obtaining the requisite NYSPSC authorization to construct the pipeline (NYSPSC, No. 11-G-0221, Order Instituting Proceeding, May 23, 2011). That matter, which was subject to NYSPSC’s jurisdiction rather than the Commission’s, was resolved by an order adopting an offer of settlement under which Bluestone would provide $400,000 for a public benefit fund in favor
The evidence strongly suggests that Constitution has violated the Order, the Commission’s regulations and the Natural Gas Act. Constitution’s acts and omissions also have circumvented the Order, have undercut the Commission’s environmental review on which the Order is based, and have undermined the integrity of the Section 7 certificate approval process. Accordingly, the NY Attorney General requests that the Commission fully investigate Constitution’s acts and omissions and take appropriate legal enforcement action. As explained below, the NY Attorney General is not requesting and would oppose any enforcement action against the fee landowners on whose property the conduct giving rise to this complaint and petition took place.

In light of the irreparable harm sustained by New York as a result of Constitution’s acts and omissions, the evidence submitted herewith showing the likelihood of Constitution’s violations, and the equities of this matter, the NY Attorney General also requests that the Commission issue a stay of its Order until completion of its investigation and enforcement action, and until Constitution has obtained all authorizations required under federal law.

I. STATUTORY AND REGULATORY FRAMEWORK

A. The Federal Clean Water Act

1. Section 510 of the Clean Water Act preserves the primary authority of States to protect the waters within their borders. 33 U.S.C. § 1370. Section 401(a)(1) of the Act mandates that any applicant for a federal license “to conduct any activity, including construction and operation of facilities, which may result in any discharge into the navigable waters” obtain a certification from the State indicating that such discharge will comply with applicable State water quality requirements (hereinafter “water quality certification”). 33 U.S.C. § 1341(a)(1)

of the town and/or county in which the conduct occurred (NYSPSC, No. 11-G-0221, Order Adopting Terms of Offer of Settlement and Closing Investigation, April 19, 2012).
(emphasis added). Section 401(d) provides that the certification shall set forth the limitations and monitoring requirements necessary to assure compliance with water quality requirements and that the State certification “shall become a condition on any Federal license or permit subject to this section.” 33 U.S.C. § 1341(d). Section 401(a)(1) provides that no federal license or permit “shall be granted until the certification . . . has been obtained or waived” and that “[n]o license or permit shall be granted if the certification has been denied by the State . . . .” 33 U.S.C. § 1341(a)(1).

2. The New York State Department of Environmental Conservation (“NYSDEC”) implements Section 401 within New York under an authorization from the U.S. Environmental Protection Agency, and applies the narrative and numerical water quality standards set forth in NYSDEC’s laws and regulations, Environmental Conservation Law Article 17 and New York Code of Rules and Regulations title 6, Part 703. In issuing water quality certifications, NYSDEC certifies that the activities undertaken pursuant to a federal license or permit will comply with the State’s water quality requirements and will not adversely affect water quality in New York.

B. The Natural Gas Act and the Commission’s Regulations

3. The Natural Gas Act states that no natural gas company shall undertake the construction of any facility “unless there is in force” a certificate of public convenience and necessity. 15 U.S.C. § 717(f)(1)(A). The Act provides that a certificate shall be issued “if it is found that the applicant is able and willing . . . to conform to the provisions of the Act . . . and the requirements, rules, and regulations of the Commission.” 15 U.S.C. § 717(f)(e). Otherwise, “such application shall be denied.” 15 U.S.C. § 717(f)(e). The Act gives the Commission the power “to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C. § 717(f)(e). The Commission is responsible for assuring compliance with the terms and

4. The Natural Gas Act addresses how it should be construed with other federal laws, including the Clean Water Act, and states that “nothing in this chapter affects the rights of States under— … the Federal Water Pollution Control Act…” (33 U.S.C. 1251 et seq.). 15 U.S.C. 717b(d).

5. The Natural Gas Act provides that whenever it appears to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the Act, or any rule regulation, or order issued thereunder, the Commission may bring an action to enjoin such acts and otherwise enforce compliance. 15 U.S.C. § 717s(a).

6. The Natural Gas Act provides:

   Any person that violates this Act, or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this Act, shall be subject to a civil penalty of not more than $1,000,000 per day per violation for as long as the violation continues.


7. The Commission’s Natural Gas Act regulations provide that any ground disturbance activities undertaken “shall be consistent with all applicable law,” including the Clean Water Act. 18 C.F.R. § 157.206(b)(2). The regulations further provide that any activities authorized under a blanket certificate “shall not have a significant adverse impact on a sensitive environmental area.” 18 C.F.R. § 157.206(b)(4). The term “sensitive environmental area” is defined to include, among other things, floodplains (associated with water bodies) and wetlands. 18 C.F.R. §§ 157.202(11).
C. **Commission Jurisdiction**

8. Sections 20 and 21 of the Natural Gas Act give the Commission jurisdiction to enforce the Act, the regulations, and any order issued pursuant to the Act. 15 U.S.C. §§ 717s; 717u. The Commission may take enforcement action whenever it appears that a natural gas company “is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act… or of any rule, regulation or order thereunder…” 15 U.S.C. §§ 717s; 717t. Section 14 of the Natural Gas Act empowers the Commission to “investigate any facts, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate” any provision of the Act or any rule, regulation or order issued thereunder, or to aid in the enforcement of the Act. 15 U.S.C. § 717m(a).

9. The Commission has jurisdiction over all pipeline construction activities, including those involving any ground disturbance activities within a pipeline right of way. 18 C.F.R. §§ 157.201; 157.206. The Commission’s regulations prohibit any ground disturbance activities in the pipeline right of way that are inconsistent with the Clean Water Act. 18 C.F.R. § 157.206(b)(2). Clear cutting and other related activities on the pipeline right of way constitute regulated ground disturbance and construction activities under the Natural Gas Act, the regulations and the Order, and are within the Commission’s jurisdiction.

10. The Commission has jurisdiction to investigate Constitution’s acts and omissions related to tree and vegetation cutting and other ground disturbance activities within the pipeline right of way in New York undertaken after the Commission issued the Order, and to enforce the provisions of the Natural Gas Act, the Commission’s regulations, and the Order with respect to those acts and omissions. 15 U.S.C. §§ 717m; 717s; 717u. The Commission has jurisdiction to
stay the Order issued here, which conditionally approved Constitution’s pipeline project. 15 U.S.C. § 717o.

11. Section 13 of the Natural Gas Act provides that any State complaining of anything done or omitted to be done by any natural gas company in contravention of the provisions of the act “may apply to the Commission by petition, which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such natural-gas company, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission.” 15 U.S.C. § 717l. Rule 206 of the Commission’s Rules of Practice and Procedure provide that a complaining party may proceed by filing a complaint or petition, which contains relevant facts and a cognizable claim that the Commission has the power to address. 18 C.F. R. §§ 385.206 and 385.207.

12. Under the Natural Gas Act, Constitution has the responsibility to take any action necessary to protect its rights and responsibilities regarding the use of the pipeline right of way for purposes of constructing and operating the pipeline Project in compliance with the Act, the Commission’s regulations, and the Order. 15 U.S.C. § 717u. Constitution has the responsibility to refrain from authorizing or encouraging third-parties to take actions within the pipeline right of way that Constitution itself is not authorized to take, and to refrain from condoning any such actions. Constitution may not authorize, encourage or condone the actions of third-parties and/or fail to take reasonable action to prevent activities by third-parties within the pipeline right of way of which it has knowledge that are in violation of the Natural Gas Act, the Commission’s regulations and/or the Order.

---

2 See Columbia Gas Transmission Corp. v. Burke, 768 F. Supp. 1167, 1173 (N.D.W.Va 1990) (gas company is entitled to injunction against property owner’s refusal to halt construction of home in pipeline right-of-way because company’s safety duties were being impaired);
D. **Relevant New York Real Property Law**

13. Under New York’s real property law, an easement holder has the dominant right to control the pipeline right of way, as well as the responsibility to maintain the right of way. 5-40 Warren's Weed New York Real Property, Easements, § 40.70. Constitution holds easements pursuant to right of way agreements on properties making up the pipeline right of way in New York, which have been clear cut and subject to construction activities (Coppersmith Aff., ¶¶ 4, 7-10, 12-14; Exhibits A, B and D).³ Constitution’s rights over the properties on which it holds easements are superior to those of the landowner/grantor and are governed by the terms of the agreements.⁴ Unless the agreements specifically reserves to the landowner/grantor timbering or other rights to use, such rights cannot be read into the agreements. 5-40 Warren's Weed New York Real Property, Easements, § 51.09. The easement agreements here do not reserve to the landowner/grantor such timbering or other rights to use.

II. **FACTUAL BACKGROUND**

A. **Constitution’s Application for a Certificate of Public Convenience and Necessity Pursuant to Section 7 of the Natural Gas Act**

14. On June 13, 2013, Constitution filed an application under Section 7 of the Natural Gas Act, 15 U.S.C. § 717f, for a blanket certificate of public convenience and necessity, and requested authorization to construct and operate a 125-mile natural gas pipeline project and associated facilities (the “Project”) from Susquehanna County, Pennsylvania to Schoharie.

---

³ References are to the Affidavit of Kathleen Coppersmith, which is submitted in support of this complaint and petition.

⁴ See *Paine v. Chandler*, 134 N.Y. 385, 391 (1892); *Herman v. Roberts*, 119 N.Y. 37, 43 (1890) (owner of land subject to easement has right to use only if not inconsistent with rights of easement holder and rights of easement holder are paramount); *Columbia Gas Transmission Corp. v Bishop*, 809 F. Supp. 220, 222 (W.D.N.Y. 1992) (owner of land subject to easement may not use land in any way inconsistent with easement holder’s rights).
County, New York (Application, 20130613-5078 to 5080). In its application, Constitution included a list of the authorizations required under federal law to implement the Project. The list included a Clean Water Act Section 401 water quality certification issued by NYSDEC and a Section 404 dredge and fill permit issued by the U.S. Army Corps of Engineers (Application, Exhibit J). 33 U.S.C. §§ 1341 and 1344.

15. Constitution’s application also included an Environmental Report identifying, among other things, protected water bodies, wetlands, floodplains, flood hazard zones, endangered/threatened species, and ecologically sensitive areas that would be impacted by construction and/or operation of the Project (20130613-5078: Exhibit F-1, pp. 2-54 to 2-107). Constitution’s Environmental Report indicated that a water quality certification would be required from NYSDEC for all water body and wetland crossings (p. 2-52). Constitution’s application did not propose – and the Commission did not approve – any tree cutting, clear-cutting, or other construction activities before issuance of all authorizations required under federal law, including NYSDEC’s water quality certification.

16. On July 17, 2013 the NY Attorney General filed a motion to intervene in the Commission’s Section 7 certificate proceeding under the Natural Gas Act in order to protect and advance the State’s interests, enforce applicable laws, and otherwise protect the public health, environment, and economic interests of New York citizens (20130717-5313, pp. 5-6). The Commission granted intervention and the NY Attorney General has been an active participant in the Section 7 proceeding since that time.
B. The Commission’s Final Environmental Impact Statement for the Project

17. On October 24, 2014, Commission staff issued a Final Environmental Impact Statement (“FEIS”) for Constitution’s Project (20141024-4001). The FEIS documented the Project’s potential adverse impacts on water bodies, wetlands, water use, fisheries, vegetation, and endangered/threatened species and their habitat (FEIS, pp. ES-4 to ES-6; §§ 4.3 and 4.4; Appendices K-2, L-2, and N). The FEIS specifically recognized that the Project required close environmental compliance monitoring and recommended that Constitution be required to have environmental inspectors to implement a compliance monitoring program (FEIS, pp. ES-14; 5-19 to 5-20, ¶¶ 6-7). The FEIS listed NYSDEC’s water quality certification as one of the “major permits, approvals and consultations” applicable to the project, among others (FEIS, Table 1.5.1, p. 1-16).

18. The FEIS concluded that construction and operation-related environmental impacts would be minimized or mitigated by Constitution’s compliance with numerous environmental conditions, which involved both the sequence and timing of construction activities, and the implementation of substantive mitigation measures (FEIS, p. ES-5 to ES-7). One recommended environmental condition in the FEIS required Constitution to submit to the Commission documentation showing that it had received all authorizations required under federal law before commencing pipeline construction activities (p. 5-20, ¶ 8). This necessarily included documentation that Constitution had received a water quality certification from NYSDEC (ES-5 to ES-7). Many of the other conditions in the FEIS required other action prior

---

5 On February 12, 2014, Commission staff issued a draft EIS on which New York filed extensive and detailed comments (20141024-4001, pp. S-96 to S-149). NYSDEC submitted multiple comments; and the New York Attorney General, the Public Service Commission, and the Department of Agriculture and Markets also submitted comments.
to construction and before any tree or vegetation clearing (FEIS ¶¶ 3, 6, 11-14, 19, 20, 23, 25-26, 28-38, and 42).

19. After analyzing the environmental impacts of the project, the FEIS set forth 43 recommended conditions to mitigate those impacts (§ 5.2, pp. 5-17 to 5-24). All of the FEIS’s recommended conditions were later adopted by the Commission in the Order, including the requirement that prior to commencing pipeline construction activities, Constitution submit documentation that it had received all applicable authorizations required under federal law, including a water quality certification from NYSDEC. (Compare FEIS ¶ 8, p. 5-20 with Order, Env. Cond. ¶ 8).

C. The Commission’s Order Issuing Certificates of Public Convenience and Necessity

20. On December 2, 2014, the Commission issued the Order conditionally approving the Project under Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c) (2014).6 The Order provided in part:

(E) The certificate authority issued in Ordering Paragraphs (A) and (D) shall be conditioned on the following: …

(2) Applicants’ compliance with all applicable Commission regulations under the NGA including, but not limited to, Parts 154 and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the regulations;

(3) Applicants’ compliance with the environmental conditions listed in the appendix to this order.

(Order, ¶¶ 148 (E), p. 46).

21. The Order contained the Commission’s environmental analysis, which concluded that even if the Project was constructed in accordance with applicable laws and regulations, it

---

6 Constitution Pipeline Co., LLC, 149 FERC ¶ 61,121 (2014), on reh’g, 154 FERC ¶ 61,046 (2016) (“Rehearing Order”).
would still result in some adverse environmental impacts (Order ¶ 73, p. 24). The Commission found that impacts on water bodies and wetlands would be mitigated by Constitution’s compliance with conditions in the water quality certification issued by NYSDEC (¶ 79, p. 25). The Commission further found that adverse impacts would be reduced if Constitution implemented the Environmental Conditions in the FEIS. The Commission then incorporated 43 Environmental Conditions into the Order (¶ 73, p. 24). The Order expressly stated that the certificate “shall be conditioned” upon Constitution’s compliance with the Commission’s regulations and with compliance with the Order’s Environmental Conditions (p. 46, ¶ E).

22. The Commission’s Order included the express requirement that prior to seeking Commission approval to commence pipeline construction, Constitution submit documentation to the Director of the Office of Energy Projects (“OEP”) that it had obtained all authorizations required under federal law:

Prior to receiving written authorization from the Director of OEP to commence construction of their respective project facilities, the Applicants shall file documentation that they have received all applicable authorizations required under federal law (or evidence of waiver thereof). (Order, Env. Cond. ¶ 8; emphasis in original).

23. The Order also set forth requirements to protect endangered species and migratory birds if clear cutting occurred after April 1:

Immediately prior to any vegetation clearing to be conducted between April 1 and August 31, Constitution shall conduct nest surveys for birds of conservation concern performed by qualified personnel within areas proposed for clearing. Constitution shall file the results of the surveys with the Secretary and provide a buffer around any active nests to avoid potential impacts until the young have fledged. (section 4.6.1.3)

Prior to construction, Constitution shall develop a project- and site-specific tree clearing plan for the northern myotis if clearing occurs between April 1 and September 30 that includes the location of any potential roost trees in or adjacent to the construction corridor, and as applicable incorporate the identified mitigation measures in section 4.7.2
of the final EIS. This plan shall be filed with the Secretary for review and written approval of the Director of OEP. *(section 4.7.2)*

(Order, Env. Conds. ¶¶ 26, 29). On information and belief, Constitution has not complied with these conditions. It has not conducted nest surveys for birds of conservation concern, nor filed with the Commission the results of the surveys along with buffer areas around active nests in order to avoid potential impacts, as required by Environmental Condition 26. On information and belief, the Director of OEP has not issued a written approval of the site specific tree clearing plan for the northern myotis (Northern Long-Eared Bat), as required by Environmental Condition 29.

24. The Order delegated authority to the Commission’s Director of OEP “to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the projects,” including “the design and implementation of any additional measures deemed necessary (including stop-work authority) to ensure continued compliance with the intent of the environmental conditions as well as avoidance or mitigation of adverse environmental impact resulting from construction and operation of the projects” *(Order, Env. Cond. ¶ 2)*.

D. **The Commission’s Rehearing Order**

25. Numerous stakeholders in the proceeding filed motions for rehearing of the Order. On January 27, 2015, the Commission granted rehearing, but did not rule on the claims advanced (20150127-3038). A year later, on January 28, 2016, the Commission issued an order on rehearing upholding the Order in its entirety *(Reh. Order: 20160128-3064)*.

26. In response to stakeholder rehearing challenges that the Commission could not issue the conditional Order and blanket certificate before NYSDEC issued a water quality certification, the Commission held that the Clean Water Act had “no absolute bar” to the
Commission acting to issue the certificate (Reh. Order, ¶ 63, pp. 23-24). The Commission characterized the Order as an “incipient authorization without current force or effect” because Constitution is not allowed “to begin the proposed activity before the environmental conditions are satisfied” or before NYSDEC issues the Clean Water Act 401 water quality certification (¶¶ 62-63, pp. 23-24; emphasis added). The Commission reiterated that the authority given to Constitution in the Order “is subject to the applicants’ compliance with the environmental conditions set forth in the order” (¶ 43, p. 17).

27. In response to stakeholder challenges that Constitution’s compliance with the Order’s environmental conditions would not be enforced, the Commission stated that it “takes matters of compliance seriously,” and that Constitution would be subject to sanctions and civil penalties if it fails to comply (¶¶ 54-56; pp. 21-22). The Commission stated that the environmental conditions imposed under the Order are “mandatory,” and that Constitution is required to employ environmental inspectors to monitor and ensure compliance and to identify areas of non-compliance. The Commission also stated that it will ensure that Constitution is fulfilling its duties by conducting its own monitoring (¶ 171, p. 71-72). The Commission upheld its environmental analysis under the National Environmental Policy Act, 42 U.S.C. § 4334, because the Order imposed further study of certain environmental issues and “requires the completion and review of those studies prior to commencement of construction” (¶ 53, p. 21).

28. The Commission discussed NYSDEC’s water quality certification:

If and when NYSDEC issues a WQC [water quality certification] for the projects, Constitution will be required to comply with the requirements of the WQC. If Constitution is required to materially modify its project to satisfy any conditions imposed by NYSDEC, it would file a formal variance request with the Commission for any such modification.

(¶ 70, p. 27).
E. Constitution’s Implementation Plan

29. On May 19, 2015, Constitution submitted its Implementation Plan to the Commission, which purported to comply with some of the Order’s 43 Environmental Conditions (20150519-5135). With respect to the authorizations required under federal law as set forth in Environmental Condition 8 of the Order, including the water quality certification from NYSDEC, the Plan stated:

Constitution has applied for all authorizations required under federal law for the Project. Constitution has received or will receive all such authorizations for each facility location prior to commencing construction at each location. A table listing the status of all applicable authorizations is included in the Condition 8 Attachment to this IP.

(20150519-5135, pp. 9-10; emphasis added).

30. Constitution’s Implementation Plan included an Environmental Construction Plan, in which it outlined the construction sequence, beginning with planning, surveying, and flagging the pipeline route; then cutting and clearing trees and vegetation, grading, installing sediment barriers and interceptor dikes; followed by trenching, pipe installation, dewatering, backfilling, testing, and cleanup (20150519-5135, p. 51). The Plan indicated that project-related “ground disturbance” would be limited to the right of way, workspace areas, contractor yards, borrow and disposal areas, access roads, and other certified and approved areas (p. 51). On information and belief, the Commission has approved the Implementation and Environmental Construction Plans.

F. Constitution’s Application to NYSDEC for a Water Quality Certification

31. While its Natural Gas Act Section 7 certificate application was pending before the Commission, Constitution made several incomplete submissions to NYSDEC for a water quality certification. On or about April 29, 2015, NYSDEC issued a notice of complete application for the water quality certification, which was a necessary administrative requirement to process
Constitution’s application.\textsuperscript{7} NYSDEC’s notice describes the pipeline project’s impacts on wetlands and water bodies and the agency’s jurisdiction under the Clean Water Act to avoid or mitigate those impacts.

**G. Constitution’s Right-of-Way Agreements and Eminent Domain Proceedings**

32. On information and belief, beginning in or around 2013, Constitution negotiated agreements with numerous landowners in New York to acquire the necessary right-of-way easements to construct, operate and maintain the pipeline and associated facilities. These agreements do not contain a reservation of rights for the landowners/grantors to clear cut or take any other actions on the pipeline right of way property and in fact provide that only Constitution has those rights (Coppersmith, ¶ 14, Exhibit D).

33. On information and belief, more than 50\% of the property owners refused to reach an agreement with Constitution and the company then initiated eminent domain proceedings against them in the United States District Court for the Northern District of New York. On information and belief, the Court has issued several orders granting permanent easements on the pipeline right of way. Many of those proceedings are still pending.

**H. USFWS Biological Opinion**

34. On December 31, 2015, the U.S. Fish and Wildlife Service (“USFWS”) in consultation with NYSDEC, issued a Biological Opinion analyzing the effects of the Constitution pipeline on Northern Long-Eared Bats, an endangered species protected under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 \textit{et seq}. The Opinion found that the Project

\textsuperscript{7} \textit{See} NYSDEC April 29, 2015 Environmental Notice Bulletin, available at: \url{http://www1.dec.state.ny.us/enb/101473.html}; \url{http://www1.dec.state.ny.us/enb/20150429_reg0.html#099990018100024}
would have adverse impacts on bats due to disturbance from tree/vegetation removal activities during the “active season” beginning on April 1 (Bio. Op., p. 34).

35. The USFWS determined that “individuals from an estimated seven maternity colonies may be exposed to stressors that result in take of individuals in the form of death or injury associated with the removal of 68 acres of trees during the active season and individuals within 13 acres surrounding hibernacula” (Bio. Op., p. 34). The Opinion set forth specific requirements for monitoring and reporting of injured/dead bats during construction in the active season and for minimizing/mitigating the impacts. It also set specific limits on the number of acres of trees and forest habitat that could be removed (Bio. Op. pp. 35-40).

I. Constitution’s Request to Clear Cut Trees/Vegetation and Begin Construction-Related Activities in New York and Pennsylvania

36. In letters of January 8 and 14, 2016 to the Commission, Constitution requested a “Partial Notice to Proceed” to begin clear-cutting trees and vegetation within the Project’s 100-125-foot wide right of way over the entire 124-mile length of the Project in Pennsylvania and New York (20160108-5125; 20160114-5432). Constitution proposed tree/vegetation cutting activities that traversed deep forest, steep slopes, protected wetlands, and 220 water bodies in New York. Constitution asserted that the work would be done by “non-mechanized” means without heavy equipment or deep ground rutting, and indicated that after cutting, the trees/vegetation would be left in place for an undefined period of time. Constitution asserted that it was “not requesting to proceed with construction of the Project,” but that it “will do so once applicable permits are received” (p. 2).

37. At the time of Constitution’s cutting request to the Commission, NYSDEC had not rendered a final decision on the water quality certification. Constitution claimed that the tree/vegetation clear-cutting activity did not require a water quality certification (p. 3), but
presented no evidence that NYSDEC had made such a determination. In its January 14 submission, Constitution in only general terms proposed avoiding water bodies and wetlands during clear-cutting by setting up buffer areas (20160114-5432). Constitution submitted no documentation that NYSDEC had approved clear-cutting activities near water bodies or wetlands based upon that general proposal.

38. In its request, Constitution claimed that it had developed a Third Party Environmental Compliance monitoring plan in consultation with Commission staff and NYSDEC (among others) in order to “monitor compliance with all applicable regulatory approvals and authorizations during tree felling” (20160114-5432, Attachment F, p. 4).

39. Constitution also requested approval of numerous Project changes and variances to add workspace areas, expand easements, and otherwise increase the size of the project area (20160114-5432; Attachment D). Many of the variances involved water bodies, wetlands and other ecologically sensitive areas and implicated NYSDEC’s Clean Water Act water quality certification authority. For example, Constitution proposed that the Commission approve a change to the crossing method for two protected trout streams; that work space be expanded around certain water bodies; and that additional water withdrawal be approved (Attachment D: Variances, pp. 6-14).

J. **NY Attorney General’s January 14, 2016 Opposition to Clear-Cutting**

40. On January 14, 2016, the NY Attorney General filed opposition to Constitution’s request for approval to begin clear-cutting activities (20160114-5411). The Attorney General argued that Constitution proposed to commence pipeline construction without a water quality certification having been issued by NYSDEC and cited a Constitution project manager’s

---

8 There were limited instances where Constitution eliminated work spaces, but those limited instances were insufficient to offset the overall increases to the Project area.
affidavit, which stated that tree cutting was an element of “construction” (pp. 6-7). The Attorney General further argued that the Commission’s Order prohibited commencement of construction before Constitution had obtained authorizations required under federal law, including a water quality certification from NYSDEC under the Clean Water Act (pp. 6-8). The Attorney General argued that granting approval to cut trees would be granting approval to commence construction in violation of the Order’s condition requiring a water quality certification from NYSDEC before commencing construction (pp. 6-8). Pointing to the legislative history of Section 401 of the Clean Water Act, the Attorney General asserted that the intent of that provision is the protection of water quality from the very kind of activities Constitution was proposing (p. 7).9

41. Finally, the Attorney General noted that the Commission’s environmental review did not assess the impact of leaving cut trees and vegetation in place for an indeterminate period of time, as Constitution proposed, and that the Commission’s FEIS assumed immediate removal (pp. 11-12). The Attorney General explained that a change to the construction procedure and sequence outlined in the Order may have environmental impacts, which the Commission had not assessed (pp. 11-12).

K. Commission Staff Denial of Tree/Vegetation Clear-Cutting in New York

42. In a January 29, 2016 letter, the Commission’s Director of the Division of Gas – Environment and Engineering declined to grant approval for tree and vegetation clear cutting in...

New York at that time (20160301-5098, p. 2).\textsuperscript{10} The Commission also declined to approve the numerous variances in the Project’s right of way that Constitution had requested.

L. **Constitution’s Renewed Request to Clear Cut in New York**

43. On February 25, 2016, Constitution renewed its request to commence tree and other vegetation clear-cutting in New York (20160225-5175). Constitution claimed that it had obtained all required authorizations and that the Order and the Natural Gas Act certificate were not licenses or permits subject to a Section 401 water quality certification by NYSDEC (p. 2). Constitution also argued for the first time that a separate federal authorization, the U.S. Army Corps of Engineers dredge and fill permit under Section 404 of the Clean Water Act, was the only trigger for the requirement that Constitution obtain a water quality certification from NYSDEC, and that because a Section 404 permit was not required for tree or vegetation clearing activities, a water quality certification from NYSDEC was not required for that proposed activity (pp. 2-3).\textsuperscript{11} Constitution asserted that, unlike hydroelectric licenses, a certificate under the Natural Gas Act is not a federal license or permit that is subject to a water quality certification under Section 401 of the Clean Water Act, in part because a Natural Gas Act certificate is not listed in the U.S. Environmental Protection Agency’s “Certification Handbook” (pp. 2-3).

44. Constitution also asserted that clear-cutting is not regulated under New York law and referenced NYSDEC’s web site, which generally addresses State permits for timber harvesting, but not water quality certifications for timber harvesting (p. 2). Constitution failed to

\textsuperscript{10} Although denying Constitution’s request to begin clear-cutting activities in New York, the Director did authorize such activities in Pennsylvania, involving approximately 20 percent of the pipeline route.

\textsuperscript{11} Specifically, Constitution’s letter stated: “It is critical to note that for natural gas pipeline projects regulated under the Natural Gas Act, it is the presence and necessity of the CWA Section 404 permit that triggers the requirement to obtain a Section 401 Water Quality Certification, not the Commission’s Certificate of Public Convenience and Necessity” (p. 2).
include with its renewal letter any evidence that NYSDEC had determined that clear-cutting trees and vegetation within the Constitution pipeline right of way did not implicate water quality and did not require a water quality certification.

M. **NY Attorney General’s Objection to Renewed Request to Clear Cut**

45. On February 29, 2016, the NY Attorney General renewed its objection to Constitution’s request for approval to clear cut trees and other vegetation within the pipeline right of way in New York before obtaining a water quality certification (20160301-5098). Citing the Order’s environmental conditions, the Attorney General again noted that clear-cutting and any other construction activities could not proceed under the Order in the absence of a water quality certification from NYSDEC. The Attorney General asserted that Constitution was circumventing NYSDEC’s authority under Section 401 of the Clean Water Act by requesting approval from the Commission to commence cutting trees and other vegetation without a water quality certification for the Project, and that the Commission would be circumventing NYSDEC’s authority as well if it approved that activity (p. 2). The Attorney General cited a water quality study published in the *Journal of Physical Science*, which demonstrated that clear-cutting was an activity that may result in discharges adversely impacting water quality. The Attorney General argued that a Section 401 water quality certification from NYSDEC is required when an activity associated with a federally-licensed project could impact water quality (p. 2, fn. 2).

N. **Clear-Cutting and Other Ground Disturbance Construction Activities Undertaken in New York Without Commission Approval**

46. On or about March 8, 2016, the NY Attorney General received credible evidence that clear-cutting had commenced within the pipeline right of way at several locations in New York. The Attorney General also learned that Constitution apparently was aware of the clear
cutting activities, but had not taken any action to stop such activities or to report them to the Commission. The Attorney General thereafter commenced an investigation regarding the reported clear cutting activity (Coppersmith Aff., ¶¶ 6-11).

47. The Attorney General’s investigation revealed significant clear-cutting, road building, work space clearing, heavy equipment use in wetlands and in other sensitive environmental areas, and other construction-related activities at numerous locations along the pipeline right of way in Broome, Delaware and Schoharie Counties, New York (Coppersmith Aff., ¶ 9; Exhibits A and B). The investigation also revealed that Constitution had returned to the clear cut locations after the activities took place to re-stake and re-flag the right of way and to dig test pits, and therefore was aware of these activities being undertaken within the pipeline right of way (Coppersmith Aff., ¶ 9). Constitution holds easements on the property in the pipeline right of way where the activities took place (Coppersmith Aff., ¶¶ 11-13; Exhibit D). On information and belief, Constitution did nothing to stop the activities.

48. The construction-related activities on the pipeline right of way are significant in scope and geographic size and occurred during 2015 and 2016, after the Commission issued the Order. The activities continued after April 1, 2016, during the “active season” for endangered and threatened species (Coppersmith Aff., ¶ 9). The activities have impacted State-protected streams and wetlands (Coppersmith Aff., ¶ 9; Exhibits B-1, B-2, B-3, B-4 and B-10). On information and belief, the activities on the right of way were undertaken by landowners who had granted Constitution easements, or by their agents, including area logging companies. Constitution expressly or tacitly authorized, encouraged and/or condoned the tree and vegetation cutting and clear-cutting, and other ground disturbance activities.
The locations and site observations of activities within the right of way are summarized in the accompanying Coppersmith Affidavit (Exhibit A) and are outlined below:

<table>
<thead>
<tr>
<th>Site ID.</th>
<th>Property Location</th>
<th>Site Observations</th>
</tr>
</thead>
<tbody>
<tr>
<td>B-1</td>
<td>Town of Masonville, Delaware County</td>
<td>Clear Cut of Pipeline Right of Way</td>
</tr>
<tr>
<td>B-2</td>
<td>Town of Davenport, Delaware County</td>
<td>Tree Cutting, in and/or near Posted New York State Regulated Wetlands, Use of Heavy Equipment, Evidence of Deep Ruts</td>
</tr>
<tr>
<td>B-3</td>
<td>Town of Masonville, Delaware County</td>
<td>Clear Cutting on Stream Banks, Trees Left in Stream Causing Damming, Other Stream Disturbance</td>
</tr>
<tr>
<td>B-4</td>
<td>Town of Sidney, Delaware County</td>
<td>Clear Cutting, Use of Heavy Equipment in or near Posted New York State Regulated Stream, Evidence of Deep Ruts</td>
</tr>
<tr>
<td>B-5</td>
<td>Town of Franklin, Delaware County</td>
<td>Clear Cutting, Posted Wetlands</td>
</tr>
<tr>
<td>B-6</td>
<td>Town of Sanford, Broome County</td>
<td>Clear Cutting, Multiple Logging Roads in Use, Evidence of Heavy Equipment Use</td>
</tr>
<tr>
<td>B-7</td>
<td>Town of Sanford, Broome County</td>
<td>Tree Cutting, Use of Heavy Equipment, Logging Roads</td>
</tr>
<tr>
<td>B-8</td>
<td>Town of Summit, Schoharie County</td>
<td>Clear Cutting</td>
</tr>
<tr>
<td>B-9</td>
<td>Town of Sidney, Delaware County</td>
<td>Tree Cutting</td>
</tr>
<tr>
<td>B-10</td>
<td>Town of Davenport, Delaware County</td>
<td>Tree Cutting, Posted New York State Regulated Wetlands</td>
</tr>
</tbody>
</table>
50. The clear-cutting, road building, work space clearing, heavy equipment use, and other construction-related activities were undertaken without compliance with certain the Environmental Conditions in the Commission’s Order. The activities were undertaken without Commission approval and without a NYSDEC water quality certification.

O. Constitution’s Withdrawal of Its Renewed Request to Clear Cut

51. On information and belief, on or about March 9, 2016, a NYSDEC Environmental Conservation Officer who had received information concerning clear-cutting and other activities within the pipeline the right of way contacted the Commission’s project manager and reported those activities. The following day, Constitution withdrew its February 25, 2016 renewed request for Commission approval to begin tree cutting in New York, stating it “is now moot and no longer needed,” and that it would file a new request for the necessary authorization at the appropriate time (March 10, 2016 Constitution letter to the Commission: 20160310-5043). Constitution’s letter did not disclose the extent of clear-cutting activities that had already occurred within the pipeline corridor in New York.

P. Constitution’s Knowledge of Clear Cutting and Other Construction Activities

52. On March 15 and 16, 2016, three parties filed letters with the Commission on the Project docket and indicated that “large scale” and “substantial” tree cutting activities were taking place within the pipeline right of way in New York (20160315-5015; 20160316-5006; 20160316-5124). The letters requested the Commission to investigate and to take other appropriate action.

53. Constitution had knowledge of the clear cutting and other ground disturbance and construction-related activities on the pipeline right of way in New York as a result of those letters and other information. For example, in the Project’s Weekly Summary Report for March
6 to March 12, 2016, the Project’s environmental compliance monitor acknowledged these activities, but downplayed them by terming them “selected tree cutting,” and blamed landowners and roadway maintenance crews for the activities. The monitor’s report also incorrectly stated that such activities were outside of the Commission’s jurisdiction:

The Compliance Monitor for Spread B inspected areas in New York where tree felling activities along the Project right-of-way at specific locations (i.e., Delaware and Schoharie Counties, New York) were reported by the public. The Compliance Monitor ascertained that there was no evidence that tree felling activities were conducted by Constitution’s staff or contractors based on site inspections, Constitution’s response to our inquiries about the subject, and Constitution’s reduction in work staff as noted above. It appears that the selected tree cutting conducted on the Project right-of-way was performed by individual landowners and/or roadway maintenance crews, which are activities outside of the FERC’s jurisdiction.

(20160322-5033, p. 2; emphasis added).

54. Despite the third party environmental compliance monitor’s Weekly Summary Report, Constitution’s own Weekly Report of March 15, 2016 stated: “No tree felling has occurred in New York State” and “No landowner/resident complaints that relate to compliance with the requirements of the Order have occurred. (20160315-5070). In subsequent Weekly Reports, Constitution continued to state that there were “[n]o serious violations, non-compliances, or problem areas were reported this reporting period and none are pending resolution (20160322-5033). On information and belief, Constitution has not filed any reports with the Commission disclosing the clear cutting and other activities -- or their full extent – within the pipeline right of way in New York.

Q. Adverse Impacts of Clear Cutting, Tree Cutting, Road Building, Use of Heavy Equipment, and Other Construction Activities in the Right of Way

55. The Commission’s FEIS found that the pipeline Project would cross 220 water bodies in New York, many of which are sensitive fisheries that support trout and trout spawning (FEIS, p. 4-93); that the Project would impact approximately 80 acres of protected wetlands in
New York; and that the Project crossed over 23 miles of terrain with steep (>15%) and often very steep slopes (>30%) (FEIS, Appendix G).

56. Clear-cutting disturbs soil even if trees and vegetation remain in place. During rain and storm events, depending on intensity and duration, disturbed soil can transport nutrients (nitrogen, phosphorous), organic matter, and other materials into water bodies and wetlands, particularly in areas with steep slopes. A “buffer zone” around a water body or wetland is not always effective. The migration of materials into water bodies and wetlands after construction activities can adversely impact water quality by increasing turbidity, phosphorous, nitrogen, and conductivity, and by altering pH, all of which are regulated under NYSDEC water quality standards, 6 NYCRR §§ 703.2 and 703.3, which are implemented and enforced under Section 401 of the Clean Water Act. 33 U.S.C. § 1341.

57. Clear cutting activities involve the removal of all trees, brush and other vegetation with heavy vehicles, machinery and equipment. It is done over a wide swath of land and can be for hundreds of feet or miles. It involves building access roads and work areas. Clear cutting activities are harmful to water bodies, wetlands and overall water quality, particularly on steep slopes, because of the tremendous ground disturbance activity that results.

58. A seven-year long hydrological study on water quality demonstrates that cutting trees can increase turbidity in nearby water bodies even if the trees and vegetation are left in place.12 Another study, also involving leaving cut trees/vegetation in place, demonstrates that

even five months after deforestation, nitrates had increased and pH was altered in a water body, adversely impacting water quality.\textsuperscript{13}

**R. NYSDEC’s Denial of the Water Quality Certification**

59. On April 22, 2016, NYSDEC denied Constitution’s application for a Section 401 water quality certification for the Project (Exhibit A: DEC Permit # 0-999-00181/00024 Water Quality Certification Notice of Denial). NYSDEC found that Constitution had failed to address in a meaningful way the significant water resource impacts that may occur from the Project and the agency’s water quality concerns. NYSDEC further found that Constitution had failed to provide sufficient information to demonstrate compliance with New York’s water quality standards and therefore NYSDEC could not determine whether the Project would comply with those standards, as Section 401 requires. Specifically, NYSDEC stated that Constitution had failed to provide sufficient information related to stream crossings (pp. 8-12), wetlands crossings (pp. 13-14), pipeline depth (pp. 12-13) and blasting activities (p. 13).

60. NYSDEC recounted the water quality impacts associated with the Project, particularly because it proposed “trenching,” rather than a preferred alternative, to cross 251 streams, many of which presented sensitive ecological conditions, provided fish and wildlife habitat, and supported trout or trout spawning (p. 8-9). NYSDEC stated that Constitution also had submitted only a limited analysis of pipe depth in 21 of the 251 water bodies, and that pipe exposure would cause severe negative impacts if reburying was necessary (p. 12-13). NYSDEC also recounted Constitution’s failure to demonstrate that wetland crossings would minimize discharges to waters in violation of New York’s water quality standards (Exhibit A, p. 13-14).

\textsuperscript{13} Likens, G.L. \textit{et al.}, “Effects of Forest Cutting and Herbicide Treatment on Nutrient Budgets in the Hubbard Brook Watershed-Ecosystem” 40 Ecol. Monogr. 23-47 (1970) (study also showed large increases for all major ions, except for ammonium, bicarbonate, and sulfate).
NYSDEC found Constitution’s Blasting Plan to lack site specific information about where blasting would occur, but that it essentially proposed blasting in shallow bedrock over a total of 42.77 miles, crossing 84 wetlands and 27 water bodies (p. 13).

61. In its Statement of Reasons for Denial, NYSDEC stated that Constitution was required to submit an application with sufficient information to demonstrate compliance with the water quality regulations, but had failed to do so (p. 14). NYSDEC concluded that Constitution failed to demonstrate that the Project would comply with New York’s water quality standards and denied the CWA 401 certification (Exhibit A, p. 14).

III. CONSTITUTION’S ACTS AND OMISSIONS HAVE HARMED NEW YORK

62. The commencement of significant clear cutting and other ground disturbance construction activities within the pipeline right of way without compliance with the Environmental Conditions in the Order has adversely affected the people of the State by circumventing NYSDEC’s authority under the Clean Water Act and the underlying purpose of water quality protections. The people of the State, particularly those living in the communities along the pipeline right of way, have not been given the promised strict compliance with the Environmental Conditions, which has harmed and impaired, and threaten to further harm and impair, waters bodies, wetlands and other sensitive environmental areas in New York.

63. In compliance with Rule 206(b), 18 C.F.R. § 385.206(b), the Attorney General asserts as follows:

64. Constitution’s acts and omissions: Rule 206(b)(1). As set forth above and in the claims below, Constitution has expressly or tacitly authorized, encouraged or condoned the tree and vegetation cutting and clear-cutting, and other ground disturbance activities within the
pipeline right of way. Those activities have harmed and impaired, and threaten to further harm
and impair, waters bodies, wetlands and other sensitive environmental areas in New York.

65. Constitution’s violation of statutory or regulatory requirements: Rule 206(b)(2).
Constitution’s acts and omissions have violated the Natural Gas Act, 15 U.S.C. § 717f, which
prohibits construction activities prior to having a certificate in full force and effect.
Constitution’s acts and omissions have violated the Commission’s regulations, 18 C.F.R.
§ 157.206, which require all ground disturbance activities to be consistent with the Clean Water
Act, the ESA and other applicable federal laws. The tree and vegetation clear cutting and other
activities were not consistent with the Clean Water Act because NYSDEC has not issued water
quality certification under Section 401. Those activities were not consistent with the ESA
because Constitution failed to fulfill Environmental Conditions 26 and 29 in the Order, which
require Constitution to conduct bird nest surveys, establish buffers, identify bat roost trees, and
incorporate mitigation measures.

66. Environmental and other issues presented: Rule 206(b)(3). Constitution’s actions
and omissions have resulted in activities that have impacted or threatened to impact: (i) water
bodies because trees were deposited in and dammed a water body; (ii) wetlands because the use
of heavy equipment resulted in deep ruts and destruction of wetland flora; and (iii) endangered or
threatened species or species of concern because clear cutting activities occurring after April 1
without compliance with the necessary surveys, buffers, identification and plan approvals
required under the Order. Constitution’s act and omissions have undermined the Order, the
Natural Gas Act certificate approval process, the Commission’s environmental review under the
National Environmental Policy Act, and NYSDEC’s water quality certification authority under Section 401 of the Clean Water Act.\textsuperscript{14}

67. \textit{Quantification of financial impact/burden: Rule 206(b)(4)}. Constitution’s acts and omissions precipitated an investigation and legal action at the NY Attorney General’s cost. Precise quantification of the financial impact of Constitution’s acts and omissions requires a calculation of direct and indirect personal service costs and attorney’s fees for those persons involved in the investigation and in the preparation of this complaint and petition. Those costs will be provided upon request by the Commission.

68. \textit{Non-financial impacts: Rule 206(b)(5)}. The non-financial impacts of Constitution’s acts and omissions involve irreversible cutting of trees and the alteration of a community’s environmental character before Constitution obtained all approvals required under federal law to implement the Project. Constitution has still not obtained those approvals, and in fact, NYSDEC has denied the water quality certification. (See narrative for Rule 206(b)(3) above.)

69. \textit{Issues are not Pending In Another Proceeding: Rule 206(b)(6)}. The issues set forth in this complaint and petition are not presently pending in a proceeding before the Commission or in any judicial proceeding. Certain legal issues related to the Commission’s Rehearing Order, the Commission’s NEPA review, and associated Commission action, are pending before the United States Court of Appeals for the Second Circuit in an action brought by certain stakeholders to the Natural Gas Act Section 7 certificate proceeding \textit{Catskill Mountainkeeper, et al. v Federal Energy Regulatory Commission}, Docket Nos. 16-345, 16-361).

\textsuperscript{14} See \textit{Trunkline Gas Co.}, FPC Op. No. 796-A, 58 FPC 2935, 2945 (1977) (challenged conditions in natural gas project’s certificate requiring applicant to obtain permits from State and federal agencies are necessary “to assure that this project is in the public convenience and necessity”).
Specific Relief Requested: Rule 206(b)(7). The NY Attorney General requests that the Commission fully investigate Constitution’s acts and omissions and take appropriate enforcement action, including the imposition of civil penalties. The Attorney General is not requesting, and would oppose, any enforcement action against the fee landowners on whose property the conduct giving rise to this complaint and petition took place. The Attorney General further requests an order staying the Commission’s Order pending (a) the Commission’s investigation and enforcement action, and (b) the issuance of all federal authorizations, including the NYSDEC water quality certification under Section 401 of the Clean Water Act. Finally, the Attorney General requests that the Commission issue an appropriate order to prevent any further activities within the pipeline right of way in New York.

70. Documentary evidence in support of the complaint/petition: Rule 206(b)(8). The accompanying Affidavit of Kathleen Coppersmith and appended exhibits contain the documents and evidence supporting the NY Attorney General’s complaint and petition. The Attorney General’s investigation is continuing and he reserves the right to supplement this evidence.

71. Dispute resolution: Rule 206(b)(9). This matter is not appropriate for dispute resolution in light of the ongoing violations of law and the NY Attorney General’s belief that such a process will not resolve this matter. The Commission’s Enforcement Hotline and other dispute resolution mechanisms have not been utilized in an effort to resolve this matter.

72. Notice of Complaint: Rule 206(b)(10). The accompanying Notice of Complaint complies with the specifications of 18 C.F.R. § 385.203(d) and is suitable for publication in the Federal Register.

73. The NY Attorney General repeats and realleges the foregoing paragraphs as if fully set forth here.

74. Upon issuance of the Commission’s Order, activities within the pipeline right of way became subject to the Commission’s jurisdiction and to the Order, and specifically to the Order’s Environmental Conditions. All activities undertaken on the pipeline right of way are subject to the Commission’s jurisdiction pursuant to Section 7 of the Natural Gas Act and the terms of the Order. 15 U.S.C. § 717f.

75. The Order requires Constitution to comply with the Order’s Environmental Conditions and with the Commission’s regulations (Order ¶ 148(E)(2) and (3), p. 46).

76. The Natural Gas Act requires Constitution to have a blanket certificate in full force and effect before commencing pipeline construction and further requires compliance with the Order. 15 U.S.C. § 717f(b) and (e). The Act imposes reporting requirements on the holder of a certificate. 15 U.S.C. § 717i.

77. The Commission’s regulations governing blanket certificates require any “ground disturbance” activities to be consistent with applicable laws, including the provisions of the Clean Water Act, the ESA and Executive Orders 11988 and 11990 (protecting stream floodplains and wetlands). 18 C.F.R. § 157.206(b)(2)(i), (vi), (vii), and (viii).

78. Under the Order and the Natural Gas Act, Constitution has the right of use and control of the pipeline right of way for the construction and operation of the pipeline. The Order and the Act also impose duties and responsibilities on Constitution. Constitution has the responsibility to assure compliance with the Act, the Commission’s regulations and the Order.
Constitution had the responsibility to take reasonable action to ensure that the actions of others within the right of way did not cause a violation of the Order, the Act or the regulations.

79. Constitution holds easements for the pipeline right of way properties where these activities have occurred. Under New York law, Constitution’s rights to use and control of the pipeline right of way are superior to the rights of the easement grantor and landowner. Under the easements, Constitution has enforceable rights and responsibilities associated with the use and control of the pipeline right of way, including the responsibility to prevent tree and other vegetation clearing and any other construction activities that violate the Order, the Act or the regulations.

80. Constitution has the duty not only to comply with the Order, but to ensure that others do not cause violations of the Order within the pipeline right of way property once it knows of those activities. Constitution has the right and the duty to enforce the Order’s requirements under Section 24 of the Natural Gas Act, 15 U.S.C. § 717u.15 Section 24 provides the statutory authority for Constitution to enforce its right to use and control of the pipeline right of way if another use is inconsistent with or violates the Order, the Commission’s regulations or the Act. 15 U.S.C. § 717u. Constitution has failed to enforce its rights to use and control of the right of way consistent with the Act, the Commission’s regulations and the Order.

81. Despite its knowledge of the activities on the pipeline right of way in New York, Constitution, upon information and belief, failed to take any action to stop it. During the activities spanning 2015 and 2016, Constitution failed to advise the landowners of the Order’s

---

15 See Columbia Gas Transmission Corp. v. Burke, 768 F. Supp. 1167, 1173 (N.D.W.Va 1990) (under Section 24, gas company entitled to enjoin property owner’s refusal to halt construction of home in pipeline right-of-way because company’s safety duties were being impaired). Columbia Gas Transmission Corp. v Bishop, 809 F. Supp. 220, 222 (W.D.N.Y. 1992) (landowner/grantor of easement may not use land subject to easement for septic system and trailer near gas well head because such use is inconsistent with gas company’s rights).
Environmental Conditions and of the potential that clear cutting and other activities would violate the Order. Once aware of the activities, Constitution failed to notify landowners that such activities may have violated the Order’s Environmental Conditions.

82. Constitution had the responsibility to advise New York landowners of the Commission’s denial of its request to cut trees and vegetation within the pipeline right of way in New York. Constitution failed to fulfill that responsibility by not advising New York landowners of the Commission’s denial to begin cutting trees and vegetation. Instead in a January 30, 2016 letter, Constitution stated its intention to begin pipeline construction in the Spring of 2016 (Coppersmith Aff., Exhibit C).

83. On information and belief, the Commission staff knew of the activities on the pipeline right of way and knew that Constitution was aware of such activities. Section 20 of the Natural Gas Act provides the statutory mechanism for the Commission to enjoin Constitution’s violations of the Order, the Act, or the Commission’s regulations. 15 U.S.C. 717s. On information and belief, the Commission has not taken any actions to address or enjoin Constitution’s violations of the Order, the Act or the Commission’s regulations, and has not otherwise taken any enforcement action against Constitution.

84. The Commission has a responsibility to exercise its discretion and take appropriate enforcement action against Constitution for its acts and omissions.

85. Constitution’s violation of the specific provisions of the Order, the Commission’s regulations, and the Act are set forth below.

A. Constitution’s Violation of the Order’s Environmental Conditions

86. The Order is expressly conditioned upon Constitution’s compliance with the Order’s Environmental Conditions (Order, ¶ (E)(3), p. 46). Constitution has violated several Environmental Conditions.
Violation of Environmental Condition 8: Failure to Obtain Federal Authorizations and Commission Approval to Proceed With Construction.

87. Constitution is required to obtain all authorizations for the Project required under federal law, including a water quality certification from NYSDEC, and is also required to obtain Commission approval before commencing any ground disturbance or construction-related activities on the pipeline right of way (Order, Env. Cond. ¶ 8). The Project requires a water quality certification under Section 401 of the Clean Water Act because constructing of the pipeline may result in a discharge into a water body. 33 U.S.C § 1341(a).16

88. Environmental Condition 8 provides:

Prior to receiving written authorization from the Director of OEP to commence construction of their respective project facilities, the Applicants shall filed documentation that they have received all applicable authorizations required under federal law (or evidence of waiver thereof). (Order, Env. Cond. ¶ 8; emphasis in original).

89. After the Commission issued the Order, clear cutting and other construction-related activities were undertaken within the pipeline right of way during 2015 and 2016. After the Commission denied Constitution’s request to clear cut in New York, those activities continued. Constitution did not have all of the authorizations required under federal law for the Project, including a water quality certification from NYSDEC.

16 See AES Sparrows Point LNG, LLC v. Wilson, 589 F.3d 721, 725 (4th Cir. 2009) (upholding Maryland denial of Section 401 water quality certification for a Natural Gas Act certificate); Islander East Pipeline Co. v. McCarthy, 525 F. 3d 141, 143-44 (2d Cir. 2008); Islander E. Pipeline Co., LLC v. Conn. Dep’t of Envtl. Prot., 482 F.3d 79, 84 (2d Cir. 2006); Islander East Pipeline Co., 102 F.E.R.C. 61,054, at 61,130 (2003) (order on rehearing) (state authorizations required under federal law are not preempted); see also Gunpowder Riverkeeper v. Federal Energy Regulatory Commission, 807 F. 3d 267, 271-275 (D.C. Cir. 2015) (FERC certificate conditioned on obtaining State CWA 401 certification does not allow construction to begin before State acts and once issued, challenge to certificate is not moot from judicial scrutiny challenging NEPA compliance).
90. Constitution has violated Environmental Condition 8: (a) by authorizing, encouraging and/or condoning significant tree and clear-cutting, workspace clearing, road building, the use of heavy equipment, and other construction activities by others within the pipeline right of way without first obtaining all of the authorizations required under federal law, including a NYSDEC water quality certification; and (b) by failing to obtain Commission approval to proceed – or to allow others to proceed - with such activities.

91. Constitution knowingly has achieved through its own acts and omissions what the Order prohibited, namely, commencement of pipeline construction activities before obtaining a water quality certification from NYSDEC.

Violation of Environmental Conditions 26 and 29: Endangered/Threatened Species

92. Clear-cutting, workspace clearing, road building, heavy equipment use, and other construction activities have continued on the pipeline right of way after April 1, 2016 in sensitive environmental areas where endangered or threatened species and species of special concern are believed to be located.

93. Under the Order, if construction activities occur after April 1, during the “active season” for certain species, Environmental Condition 26 requires Constitution to submit migratory bird nest surveys and to identify buffer areas around active nests. On information and belief, Constitution has not submitted the foregoing nor complied with Environmental Condition 26.

17 These conditions state: “Immediately prior to any vegetation clearing to be conducted between April 1 and August 31” Constitution is required to conduct bird nest surveys and file with the Commission the results, providing “buffer around any active nests” (Env. Cond. ¶ 26); “Prior to construction Constitution shall develop a project- and site-specific tree clearing plan for the northern myotis [bat] if clearing occurs between April 1 and September 30,” including potential roost trees and mitigation measures (Env. Cond. ¶ 29) (emphasis in original).
94. Under the Order, if construction activities occur after April 1, Environmental Condition 29 requires Constitution to identify roost trees and mitigation measures for the northern myotis (bat) and to submit to the Director of OEP for approval a project- and site-specific tree clearing plan incorporating the mitigation measures (Env. Conds. ¶ 29). On information and belief, the Director of OEP has not approved the tree clearing plan. On information and belief, Constitution has not complied with Environmental Condition 29.

95. Constitution has violated Environmental Conditions 26 and 29 of the Commission’s Order by allowing tree and clear-cutting, workspace clearing, road building, and other construction activities within the pipeline right of way after April 1, without having submitted the requisite surveys and buffer areas for migratory birds and without having obtained approval of site specific plans for the northern myotis from the Director of OEP.

Violation of Environmental Condition 7: Reporting

96. The Order requires monitoring during all phases of the pipeline project for the purpose of assuring compliance with all Environmental Conditions. The Order provides:

In addition, Constitution has agreed to use the Commission’s third-party monitoring program, which allows environmental monitors to be in the field for the duration of construction and initial restoration. These monitors report directly to the Commission staff and provide an additional level of compliance oversight. The inspection and monitoring programs will ensure compliance with Constitution’s proposed mitigation and the environmental conditions in the attached Appendix A….

(Order, p. 27; emphasis added).

97. Conditions 7(c) to (g) require Constitution to file weekly status reports setting forth any instances of non-compliance, the corrective actions implemented to address non-compliance, the effectiveness of the corrective actions, a description of landowner complaints
related to the non-compliance, and any correspondence concerning non-compliance. On
information and belief, Constitution has failed to report instances of non-compliance.

98. Constitution has failed to report the impairment and damming of streams and the
impact and/or destruction of wetlands caused by activities within the pipeline right of way
(Coppersmith Aff., Exhibits B-1 to B-4).

99. Constitution has violated Environmental Condition 7 by failing to report the
extent of tree and clear-cutting, workspace clearing, road building, the use of heavy equipment in
wetlands, and other construction activities in New York.

B. Constitution’s Violation of Section 7 of the Natural Gas Act

100. The Commission’s Order is a conditional one “without force or effect” and
Constitution is not authorized to begin the pipeline Project without satisfying the Order’s
conditions (Reh. Order ¶ 62-63, pp. 23-24). Constitution has violated Section 7 of the Natural
Gas Act by expressly or tacitly authorizing, encouraging or condoning commencement of
construction of the pipeline Project without fulfilling the conditions in the Order and without
have a certificate that is in full force and effect. 15 U.S.C. § 717f. Constitution has violated
Section 7 by failing to take reasonable action to prevent such activities. 15 U.S.C. § 717f.
Constitution also has violated Section 10 of the Act by failing to promptly report such activities
to the Commission despite its knowledge of those activities. 15 U.S.C. § 717i. At the time the
activities took place, Constitution did not have all of the necessary federal authorizations for the
Project in order to meet the Order’s conditions. When the activities occurred on the pipeline
right of way, NYSDEC had not granted the water quality certification, and has since denied it.

C. Constitution’s Violation of the Commission’s Regulations

101. The Order contains an express condition requiring Constitution’s compliance with
the Commission’s regulations (Order, ¶ (E)(2), p. 46). The regulations containing the standard
conditions in all blanket certificates require any “ground disturbance” activities to be consistent with applicable laws, including the provisions of the Clean Water Act, the ESA and Executive Orders 11988 and 11990 (protecting stream floodplains and wetlands). 18 C.F.R. § 157.206(b)(2)(i), (vi), (vii), and (viii).

102. Ground disturbance activities in the pipeline right of way within the meaning of 18 C.F.R. § 157.206(b)(2) include the clear cutting, tree cutting, road building, workspace clearing, the use of heavy equipment, and other construction activities that are evident here.

103. Constitution has violated 18 C.F.R. § 157.206(b)(2) by allowing ground disturbance activities on the pipeline right of way and in and around streams and wetlands. These activities are inconsistent with the Clean Water Act and the Executive Orders listed in the Commission’s regulations, which protect wetlands and streams, particularly when a water quality certification has not been issued.

104. Constitution has violated 18 C.F.R. § 157.206(b)(2) by allowing ground disturbance activities after April 1 in areas where endangered species are potentially or actually present. These activities are inconsistent with the ESA if Constitution has not performed the required surveying, planning, mitigating, and reporting under the Order’s Environmental Conditions (Order, Env. Cond. ¶¶ 26 and 29). Constitution cannot be deemed in compliance with the Commission’s regulations because listed species and habitat are known to be in or near the Project’s right of way.

105. The Commission’s regulations also prohibit Constitution from undertaking activities having an adverse impact on “sensitive environmental areas.” See 18 C.F.R. § 157.206(b)(4). Sensitive environmental areas are defined to include floodplains, water bodies, wetlands, endangered species, and other protected resources. 18 C.F.R. § 157.202(b)(11).
Activities have occurred in sensitive environmental areas of the pipeline right of way in violation of this regulatory provision.

106. Constitution has violated 18 C.F.R. §§ 157.202(b) and 157.206(b), and has violated the Order’s condition requiring compliance with the Commission’s regulations (Order, ¶ (E), p. 46).

V. SECOND CLAIM -- ENSURE COMPLIANCE THROUGH APPROPRIATE ENFORCEMENT AND ASSESSMENT OF CIVIL PENALTIES

107. The NY Attorney General repeats and realleges the foregoing paragraphs as if fully set forth here.

108. The Commission’s October 2008 Policy Statement on Compliance establishes that a gas company’s development and strict adherence to a rigorous compliance program is in the public interest. The Commission’s Compliance Policy requires not only preventative measures to ensure compliance, but prompt detection, cessation, and reporting of violations, followed by remediation efforts (Policy ¶ 2). To avoid an assessment of civil penalties, a party must show that it met the Policy’s criteria of “prompt detection, cessation and reporting” of violations, and that it undertook remedial measures to correct the violation (Policy ¶¶ 18-21).

109. The Commission’s Policy stresses that pipeline construction triggers “very specific mandatory compliance measures” and adherence to “project-specific requirements”

---

18 The Commission’s Compliance Policy states: “Thus, for complete elimination of a civil penalty, a company must affirmatively demonstrate (1) that its violation was not serious and (2) that its senior management has made a commitment to compliance, that the company adopted effective preventive measures, that when a violation is detected it is halted and reported to the Commission promptly, and that the company took appropriate remediation steps. All of the components must be present for complete elimination of a civil penalty; reduction of the penalty will be considered where the company meets some but not all of the requirements. The Commission retains discretion to determine whether the actions taken by a company are sufficient to meet the requirements (Policy ¶ 26).
(Policy ¶¶ 8 and 10). The Policy requires the Commission to measure not only harm posed by non-compliance, but the damage sustained to the integrity of the Commission’s regulatory program (Policy ¶ 25).

110. Here, Constitution has failed to strictly comply with the Order, the Commission’s regulations and the Natural Gas Act. Constitution did not promptly stop violations in accordance with the Policy when it became aware of clear cutting and other activities within the right of way. Constitution did not report the violations in accordance with the Policy and the Order’s reporting requirements. Constitution did not undertake remedial measures in accordance with the Policy.

111. On January 29, 2016, the Commission denied Constitution’s request to clear cut in New York (20160301-5098, p. 2). In a January 30, 2016 letter, Constitution advised New York landowners that it would begin pipeline construction in the Spring of 2016, but did not advise them that the Commission had denied the request to begin tree cutting in New York (Coppersmith Aff., Exhibit C). When Constitution sent New York landowners the January 30, 2016 letter, Constitution was fully aware that tree cutting in New York was ongoing.

112. When Constitution received the environmental monitor’s Weekly Summary report for March 5 to March 12, 2016, which reported the tree cutting activities in New York (20160322-5033, p. 2), upon information and belief it still did nothing to stop or report those activities. Instead, Constitution reported in its own March 15 compliance report that no tree cutting had occurred in New York (20160315-5070). When Constitution representatives visited the pipeline right of way in 2015 and 2016, they saw the tree clearing activities and knew or should have known that those activities violated the Order and other legal requirements, but apparently took no action to stop those activities from continuing within the pipeline corridor.
113. Constitution’s acts and omissions have caused irreversible and irreparable environmental damage from the loss of trees and vegetation and the impairment of water bodies and streams. Constitution’s acts and omissions have violated the Order, the Natural Gas Act, and the Commission’s regulations. As such, the NY Attorney General is likely to succeed on the merits of this complaint and petition and the equities balance in his favor. Constitution’s acts and omissions also have harmed the integrity of the Commission’s regulatory program under the Natural Gas Act and the Commission’s regulations. Constitution’s acts and omissions warrant further investigation, enforcement, and the imposition of an appropriate civil penalty in accordance with the Commission’s Compliance Policy. Furthermore, the likelihood of continuing harm to the environment in New York as a result of Constitution’s acts and omissions warrants a stay of the Commission’s Order pending further investigation and enforcement and, most importantly, pending issuance of all required federal authorizations, including the water quality certification from NYSDEC under Section 401 of the Clean Water Act. Constitution’s acts and omissions also warrant the Commission’s issuance of additional relief to prohibit Constitution from expressly or tacitly authorizing, encouraging or condoning tree and vegetation cutting activities on the pipeline right of way.

VI. REQUESTED ACTION AND RELIEF

For all of the foregoing reasons, the NY Attorney General respectfully requests that the Commission:

(1) Investigate Constitution’s acts and omissions related to the matters raised in this complaint and petition and take appropriate enforcement action, including assessment of civil penalties; and

(2) Issue an order staying the Commission’s Order pending the Commission’s investigation and enforcement action and pending issuance of all federal authorizations,
including the water quality certification from NYSDEC under Section 401 of the Clean Water Act; and

(3) Award other appropriate relief to prohibit Constitution from any acts or omissions that expressly or tacitly authorize, encourage or condone tree and vegetation cutting activities on the pipeline right of way.

Dated: May 13, 2016
Albany, New York

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

By: ______________________

Maureen F. Leary
Assistant Attorney General
Environmental Protection Bureau
New York State Department of Law
The Capitol
Albany, New York 12224-0341
(518) 776-2411
Maureen.Leary@ag.ny.gov
Maureen F. Leary hereby certifies that on the 13th day of May, 2016 I served a copy of the New York Attorney General’s Complaint and Petition and the Affidavit of Kathleen Coppersmith, with the attached exhibits, by electronic mail sent to each of the parties set forth on the Commission’s Master Service List maintained by the Federal Energy Regulatory Commission for this proceeding, including the parties set forth below:

**CONSTITUTION PIPELINE COMPANY, LLC**

Stephen A. Hatridge  
Vice President and Assistant General Counsel  
Williams Pipeline Services LLC, as operator of Constitution Pipeline Company, LLC  
Post Office Box 1396  
Houston, Texas 77251-1396  
stephen.a.hatridge@williams.com

Moneen Nasmith  
Earthjustice  
48 Wall Street, 19th Floor  
New York, NY 10005  
Phone: 212-845-7384  
Fax: 212-918-1556  
mnasmith@earthjustice.org

Karl S. Coplan  
Todd Ommen  
Anne Marie Garti  
Pace Environmental Litigation Clinic, Inc.  
78 North Broadway  
White Plains, NY 10603  
Telephone: (914) 422-4343  
Facsimile: (914) 422-4437  
kcoplan@law.pace.edu  
tommen@law.pace.edu  
agarti@law.pace.edu

U.S. Department of the Interior  
Andrew Tittler  
Attorney-Advisor  
U.S. Department of Interior  
One Gateway Center  
Suite 612  
Newton, MASSACHUSETTS 02458  
UNITED STATES  
andrew.tittler@sol.doi.gov
EXHIBIT A

APRIL 22, 2016 NYSDEC NOTICE OF DENIAL OF WATER QUALITY CERTIFICATION
People's Dossier: FERC's Abuses of Power and Law

→ Undermining State Authority

ORDER ISSUING CERTIFICATES AND APPROVING ABANDONMENT

(Issued February 2, 2016)

1. On September 26, 2014, Florida Southeast Connection, LLC (Florida Southeast) filed an application in Docket No. CP14-554-000, pursuant to section 7(c) of the Natural Gas Act\(^1\) (NGA) and Part 157 of the Commission’s regulations,\(^2\) for authorization to construct and operate the Florida Southeast Connection Project (Florida Southeast Project), a new 126-mile natural gas pipeline and related facilities.\(^3\) The Florida Southeast Project will provide up to 640,000 dekatherms per day (Dth/d) of firm transportation service. Florida Southeast also requests a blanket certificate under Part 157, Subpart F of the Commission’s regulations to perform certain routine construction activities and operations, and a blanket certificate under Part 284, Subpart G of the Commission's regulations to provide open access transportation services.

2. On November 18, 2014, Transcontinental Gas Pipe Line Company, LLC (Transco) filed an application in Docket No. CP15-16-000 under sections 7(b) and 7(c) of the NGA and Part 157 of the Commission’s regulations, requesting authorization to

---

\(^1\) 15 U.S.C. § 717f(c) (2012).


\(^3\) Commission staff’s draft and final Environmental Impact Statement for this proceeding refer to Florida Southeast as “FSC” and the Florida Southeast Project as “FSC Project.”
construct and operate the Hillabee Expansion Project and abandon the capacity on the Hillabee Expansion Project by lease to Sabal Trail Transmission, LLC (Sabal Trail). The Hillabee Expansion Project will include approximately 43.5 miles of pipeline looping facilities and 88,500 horsepower (hp) of compression at one new and three existing compressor stations in Alabama. Sabal Trail will utilize the project capacity to provide up to 1,131,730 Dth/d of firm transportation service.

3. On November 21, 2014, Sabal Trail filed an application in Docket No. CP15-17-000 requesting a certificate of public convenience and necessity under section 7(c) of the NGA and Part 157 of the Commission’s regulations authorizing Sabal Trail to construct and operate the Sabal Trail Project. The Sabal Trail Project will include approximately 515 miles of new pipeline, six compressor stations, and six meter stations in Alabama, Georgia, and Florida to provide up to 1,075,000 Dth/d of firm transportation service. Sabal Trail also requests authorization to lease the capacity created by the Hillabee Expansion Project; a blanket certificate pursuant to Subpart F of Part 157 of the Commission’s regulations for Sabal Trail to perform certain routine construction, operation, and abandonment activities; and a blanket certificate pursuant to Subpart G of Part 284 of the Commission’s regulations authorizing Sabal Trail to provide open access transportation services.

4. These applications propose three separate but connected natural gas transmission pipeline projects. The upstream project, Transco’s Hillabee Expansion Project, will create capacity for Sabal Trail’s customers to access upstream natural gas supplies. The middle project, the Sabal Trail Project, will extend from an interconnect with Transco’s system at the Tallapoosa Interconnection in Tallapoosa County, Alabama, to an interconnect with the downstream project, the Florida Southeast Project, near Intercession City, Florida. From there, the Florida Southeast Project will extend to a delivery point with Florida Power & Light Company (Florida Power & Light) at its Martin Clean Energy Center near Indiantown, Florida. In total, the projects will involve the construction and operation of approximately 685.5 miles of natural gas transmission pipeline and 339,400 hp of compression to provide transportation service for up to approximately 1.1 billion cubic feet per day of natural gas to markets in Florida and the southeast United States.

5. For the reasons stated below, we grant the requested authorizations, subject to conditions.

I. **Background and Proposals**

6. Transco is a natural gas pipeline company with a transmission system extending from Texas, Louisiana, and the offshore Gulf of Mexico area through Mississippi, Alabama, Georgia, South Carolina, North Carolina, Virginia, Maryland, Pennsylvania, and New Jersey, to its termini in the New York City metropolitan area.
7. Sabal Trail is a limited liability company organized and existing under the laws of the State of Delaware. Sabal Trail, a joint venture owned by Spectra Energy Partners, LP (Spectra), a newly formed NextEra Energy, Inc. (NextEra) subsidiary named US Southeastern Gas Infrastructure, LLC, and Duke Energy, is a newly formed company and currently does not own any existing pipeline facilities and is not engaged in any natural gas operations. Upon commencing the operations proposed in its application, Sabal Trail will become a natural gas company within the meaning of section 2(6) of the NGA and will be subject to the Commission’s jurisdiction. Sabal Trail states that Sabal Trail Management, LLC will operate the new proposed pipeline.

8. Florida Southeast is a limited liability company organized and existing under the laws of the State of Delaware. Florida Southeast, a wholly owned subsidiary of NextEra, is a newly formed company and currently does not own any existing pipeline facilities and is not engaged in any natural gas operations. Upon commencing the operations proposed in its application, Florida Southeast will become a natural gas company within the meaning of section 2(6) of the NGA and will be subject to the Commission’s jurisdiction.

9. Florida Southeast and Sabal Trail are outgrowths of Florida Power & Light’s request for proposals (RFP) announced in December 2012. Florida Power & Light initiated the RFP in response to a 2009 order issued by the Florida Public Service Commission, directing Florida Power & Light to hold an RFP to seek proposals for a new pipeline to accommodate Florida’s long-term natural gas needs. Of the entities showing interest in constructing a new pipeline, Florida Power & Light selected Sabal Trail to construct the upstream pipeline and Florida Southeast to construct the downstream pipeline.

10. Florida Power & Light’s RFP requested proposals for an upstream pipeline extending from Transco’s Station 85 to central Florida where a new Central Florida Hub would be created to interconnect the new upstream pipeline to the existing Gulfstream Natural Gas System, L.L.C. (Gulfstream) and Florida Gas Transmission Company, LLC (Florida Gas Transmission) pipelines, as well as to a new downstream pipeline from the Central Florida Hub to Florida Power & Light’s Martin Clean Energy Center. Of the entities showing interest in constructing a new pipeline, Florida Power & Light selected Sabal Trail to construct the upstream pipeline and Florida Southeast to construct the downstream pipeline.

---


A. **Hillabee Expansion Project**

11. Transco requests authority to construct and operate pipeline looping and compression facilities on its existing mainline to provide a total of 1,131,730 Dth/d of incremental firm transportation service. Transco proposes to lease the capacity to Sabal Trail. Because Sabal Trail seeks to lease the new capacity incrementally over three phases, Transco will construct the project facilities in three phases. Transco estimates that in total the proposed facilities will cost approximately $459,750,346.

12. In Phase I, Transco will conduct the following activities on its mainline system in order to lease capacity to Sabal Trail sufficient for Sabal Trail to provide 818,410 Dth/day of firm transportation service for its shippers commencing May 1, 2017:

- construct approximately 5.3 miles of 42-inch-diameter pipeline loop from mile post (MP) 911.12 to MP 916.455 in Coosa County, Alabama (Proctor Creek Loop);

- construct approximately 2.6 miles of 42-inch-diameter pipeline loop from MP 924.27 to MP 926.85 in Coosa County, Alabama (Hissop Loop);

- construct approximately 7.5 miles of 42-inch-diameter pipeline loop from MP 941.83 to MP 949.38 in Tallapoosa County, Alabama (Alexander City Loop);

- construct approximately 4.7 miles of 48-inch-diameter pipeline loop from MP 885.95 to MP 890.55 in Autauga and Chilton Counties, Alabama (Billingsley Loop);

- install a new 16,000 hp gas turbine driven compressor unit and rewheel two existing compressors at the existing Compressor Station No. 95 in Dallas County, Alabama (Compressor Station 95);

- install a new 20,500 hp gas turbine driven compressor unit at Transco’s existing Compressor Station No. 105 in Coosa County, Alabama (Compressor Station 105);

- construct a new compressor station at MP 782.80 in Choctaw County, Alabama, consisting of two 16,000 hp (ISO) Solar Mars 100 gas turbine driven compressor units (Compressor Station 84);

- install three pipeline taps connecting to the Sabal Trail Meter Station; and

- construct related appurtenant underground and aboveground facilities.
13. In Phase II, Transco will conduct the following activities on its mainline system in order to lease Sabal Trail capacity sufficient to provide an additional 206,660 Dth/day of incremental firm transportation service (total of 1,025,070 Dth/d), commencing May 1, 2020:

- construct approximately 6.7 miles of 42-inch-diameter pipeline loop from MP 784.68 to MP 791.40 in Choctaw County, Alabama (Rock Springs Loop);
- construct approximately 3.9 miles of 42-inch-diameter pipeline loop from MP 905.72 to MP 909.65 in Chilton County, Alabama (Verbena Loop);
- install a new 16,000 hp gas turbine driven compressor unit and rewheel three existing compressors at the existing Compressor Station 95 in Dallas County, Alabama;
- uprate an existing electric motor driven compressor unit from 42,000 hp to 46,000 hp at Transco’s existing Compressor Station No. 100 in Chilton County, Alabama (Compressor Station 100); and
- construct related appurtenant underground and aboveground facilities.

14. In Phase III, Transco will conduct the following activities on its mainline system in order to lease Sabal Trail capacity sufficient to provide an additional 106,660 Dth/day of incremental firm transportation service for its shippers (total of 1,131,730 Dth/d), commencing May 1, 2021:

- construct approximately 5.3 miles of 42-inch-diameter pipeline loop from MP 791.40 to MP 796.70 in Choctaw County, Alabama (Butler Loop);
- construct approximately 7.5 miles of 42-inch-diameter pipeline loop from MP 890.67 to MP 898.15 in Autauga and Chilton Counties, Alabama (Autauga Loop);
- rewheel an existing compressor at the existing Compressor Station 100 in Chilton County, Alabama; and
- construct related appurtenant underground and aboveground facilities.

B. Sabal Trail Project

1. Facilities and Service

15. Sabal Trail states that its proposed Sabal Trail Project will enable it to provide up to 1,075,000 Dth/d of firm transportation service. Sabal Trail states it will transport gas
from receipt points upstream of Transco’s Compressor Station 85 to a new market interconnection hub, known as the Central Florida Hub, in Osceola County, Florida, utilizing capacity on its Sabal Trail system and leased capacity from Transco.

16. Sabal Trail proposes to construct, install, and operate approximately 516.2 miles of natural gas pipeline, consisting of mainline transmission pipeline and two lateral pipelines. The 36-inch-diameter mainline transmission pipeline will extend roughly 481.6 miles from the Tallapoosa Interconnection in Tallapoosa County, Alabama, through Georgia, and terminate at the Central Florida Hub in Osceola County, Florida. There, the Sabal Trail Project will interconnect with Florida Gas Transmission’s and Gulfstream’s existing systems, and Florida Southeast’s new system.

17. Gulfstream and Florida Southeast’s interconnects will be located near Sabal Trail’s proposed Reunion Compressor Station in Osceola County. Florida Gas Transmission’s interconnect will be located at the end of the new 13.1-mile-long, 36-inch-diameter lateral (Hunter Creek Line), extending from the proposed Reunion Compressor Station at MP 474.4 to Florida Gas Transmission’s system in Orange County, Florida. All interconnections will be bidirectional.

18. Sabal Trail will also construct a 21.5-mile-long, 24-inch-diameter lateral pipeline (Citrus County Line) extending from a point in Marion County, Florida, to Duke Energy Florida’s proposed electric generation plant in Citrus County, Florida.

19. In addition, Sabal Trail proposes to construct five compressor stations in Tallapoosa County, Alabama; Dougherty County, Georgia; and Suwannee, Marion, and Osceola Counties, Florida. Sabal Trail will also construct pig launchers/receivers, mainline valves, and six meter and regulating stations. Sabal Trail estimates that the proposed facilities will cost approximately $3,220,241,225.

20. Sabal Trail will construct the proposed facilities over three phases. In Phase I, Sabal Trail will construct the following facilities to provide an initial design capacity sufficient to provide 830,000 Dth/d of firm transportation service with a proposed in service date of May 1, 2017:

- approximately 474 miles of 36-inch-diameter mainline pipeline extending from the Tallapoosa Interconnection to an interconnection with Florida Southeast’s proposed pipeline in Osceola County, Florida;

- the Hunter Creek Line, approximately 13 miles of 36-inch-diameter pipeline extending from the proposed Reunion Compressor Station at MP 474.4 to Florida Gas Transmission’s 24-inch-diameter mainline in the Hunters Creek area of Florida;
the Citrus County Line, approximately 21 miles of 24-inch-diameter pipeline extending from the proposed Dunnellon Compressor Station at MP 389.8 to an interconnection with Duke Energy Florida’s proposed electric generation facility in Citrus County, Florida;

the Alexander City Compressor Station at MP 0.00 near Alexander City in Tallapoosa County, Alabama, with a total of approximately 71,000 hp of gas turbine driven compression;

the Hildreth Compressor Station at MP 296.3 near Lake City in Suwannee County, Florida, with a total of approximately 20,500 hp of gas turbine driven compression;

the Reunion Compressor Station at MP 474.4 near Intercession City in Osceola County, Florida, with a total of approximately 36,400 hp of gas turbine driven compression;

the Transco Hillabee Meter Station in Tallapoosa County, Alabama, at mainline MP 0.0;

the Florida Gas Transmission Suwannee Meter Station in Suwannee County, Florida, at mainline MP 299.7;

the Gulfstream Meter Station in Osceola County, Florida, at mainline MP 474.4;

the Florida Southeast Meter Station in Osceola County, Florida, at mainline MP 474.4;

the Florida Gas Transmission Meter Station in Orange County, Florida, at MP 13.1 on the Hunter Creek Line; and

the Duke Energy Florida Citrus County Meter Station in Citrus County, Florida, at MP 21.4 on the Citrus County Line.

21. In Phase II, Sabal Trail will construct the following facilities to provide an additional 169,000 Dth/d of firm transportation service, for a total of 999,000 Dth/d, with a proposed in service date of May 1, 2020:

the Albany Compressor Station at MP 159.3 near Albany in Dougherty County, Georgia, with a total of approximately 20,500 hp of gas turbine driven compression; and
• the Dunnellon Compressor Station at MP 389.8 near Ocala in Marion County, Florida, with a total of approximately 20,500 hp of gas turbine driven compression.

22. In Phase III, Sabal Trail will construct the following facilities to provide an additional 76,000 Dth/d of transportation service, for a total of 1,075,000 Dth/d, with a proposed in service date of May 1, 2021:

• 20,500 hp of additional gas turbine driven compression at the Albany Compressor Station, for a station total of approximately 41,000 hp of gas turbine driven compression; and

• 20,500 hp of additional gas turbine driven compression at the Hildreth Compressor Station, for a station total of approximately 41,000 hp of gas turbine driven compression.

23. On June 26, 2013, Sabal Trail signed a precedent agreement with Florida Power & Light to provide 600,000 Dth/d of firm transportation service, with 400,000 Dth/d to be provided during Phase I increasing to 600,000 Dth/d in Phase II, for a 25-year primary term. Florida Power & Light’s precedent agreement will automatically extend for three successive periods of five years unless Florida Power provides written notice.  

24. On July 8, 2013, Sabal Trail signed a 25-year term precedent agreement with Duke Energy Florida for a total of 400,000 Dth/d of firm transportation service, of which 300,000 Dth/d will be provided during Phase I and the additional 100,000 will be provided thereafter.

25. In addition, Sabal Trail held an open season from August 26, 2013, through September 25, 2013, to solicit requests for firm transportation service. Sabal Trail states it has had discussions with potential shippers and end-users in Alabama and Georgia, and

---

7 In addition to the 600,000 Dth/d of firm transportation service that Florida Power & Light committed to, Florida Power & Light has the right to elect up to an additional 200,000 Dth/d of firm transportation service on or before January 1, 2020, and an additional 200,000 Dth/d of firm transportation service on or before January 1, 2024. See Sabal Trail Application, Exhibit I, Precedent Agreement at 14.

8 Duke Energy’s precedent agreement permits Duke Energy to select a date between May 1, 2018, and May 1, 2021, on which the incremental 100,000 Dth/d of firm transportation service will commence. See Sabal Trail Application at Exhibit I, Precedent Agreement with Duke Energy, page 8.
Sabal Trail proposes to offer cost-based firm transportation service (Rate Schedule FTS), interruptible transportation service (Rate Schedule ITS and Rate Schedule HUB), and park and loan service (Rate Schedule PAL). Sabal Trail states that these services will be provided on an open access, non-discriminatory basis pursuant to Part 284 of the Commission’s regulations and the terms and conditions of its proposed FERC Tariff. Sabal Trail states that Florida Power & Light and Duke Energy Florida have agreed to a negotiated rate for their transportation service.

2. **Blanket Certificates**

27. Sabal Trail requests a blanket certificate of public convenience and necessity pursuant to section 157.204 of the Commission’s regulations authorizing future facility construction, operation, and abandonment as set forth in Part 157, Subpart F of the Commission’s regulations.9

28. Sabal Trail requests a blanket certificate of public convenience and necessity pursuant to section 284.221 of the Commission’s regulations authorizing Sabal Trail to provide transportation service to customers requesting and qualifying for transportation service under its proposed FERC Gas Tariff, with pre-granted abandonment authorization.10

C. **Florida Southeast Connection Project**

1. **Facilities and Service**

29. The Florida Southeast Project will enable Florida Southeast to provide 640,000 Dth/d of firm transportation service. Florida Southeast proposes to construct, install, operate, and maintain the following facilities:

---


• approximately 77 miles of 36-inch-diameter pipeline extending from an interconnect with Sabal Trail at the Central Florida Hub in Osceola County, Florida, to Okeechobee, Florida;

• approximately 49 miles of 30-inch-diameter pipeline extending from Okeechobee County, Florida, to an interconnect with the Martin Clean Energy Center in Martin County, Florida;

• a meter station at the Martin Clean Energy Center; and

• pig launching and receiving facilities, mainline valves, and other appurtenant pipeline facilities.

30. Florida Southeast estimates that the proposed facilities will cost approximately $537,260,000.

31. Florida Southeast entered into a binding precedent agreement with Florida Power & Light for 400,000 Dth/d of firm transportation service beginning May 1, 2017, with Florida Power & Light having the option to increase to 600,000 Dth/d beginning May 1, 2020, for a 25-year primary contract term. Florida Southeast asserts that these commitments represent approximately 94 percent of the Florida Southeast Project’s total project design capacity. Florida Southeast also held an open season from August 26, 2013, to September 25, 2013. Florida Southeast, however, did not receive other bids.

32. Florida Southeast proposes to offer cost-based firm transportation service (Rate Schedule FT), interruptible transportation service (Rate Schedule IT), and park and loan service (Rate Schedule PAL). Florida Southeast states that these services will be provided on an open access, non-discriminatory basis pursuant to Part 284 of the Commission’s regulations and the terms and conditions of its proposed FERC Tariff. Florida Southeast states it and Florida Power have agreed to a negotiated rate for the contracted transportation service.

2. **Blanket Certificates**

33. Florida Southeast requests a blanket certificate of public convenience and necessity pursuant to section 157.204 of the Commission’s regulations authorizing future facility construction, operation, and abandonment as set forth in Part 157, Subpart F of the Commission’s regulations.

34. Florida Southeast requests a blanket certificate of public convenience and necessity pursuant to section 284.221 of the Commission’s regulations authorizing Florida Southeast to provide transportation service to customers requesting and qualifying for transportation service under its FERC Gas Tariff, with pre-granted abandonment authorization.
D. Sabal Trail’s Lease of Capacity on Transco’s System

35. Transco and Sabal Trail have entered into a Capacity Lease Agreement that provides that Transco will construct and operate the Hillabee Expansion Project facilities and abandon by lease to Sabal Trail the incremental capacity associated with the proposed facilities. In turn, Sabal Trail proposes to acquire that capacity to provide transportation service under its open access tariff. As noted above, Sabal Trail will lease capacity incrementally over three phases. In Phase I, Sabal Trail will lease capacity sufficient to provide 818,410 Dth/d of firm transportation service effective May 1, 2017; in Phase II, capacity sufficient to provide 1,025,000 Dth/d of firm transportation service effective May 1, 2020; and in Phase III, capacity sufficient to provide 1,131,730 Dth/d of firm transportation service effective May 1, 2021.

36. As proposed, the leased capacity would extend from three receipt points to the proposed interconnection between Transco and Sabal Trail in Tallapoosa County, Alabama. Also, as proposed, Sabal Trail and its shippers would not have rights to receive or deliver gas from any other points on Transco’s system. Further, Sabal Trail and its shippers would not have rights to backhaul or reverse flow gas from east to west on the Transco mainline. As discussed below, we find such provisions to be anticompetitive and require the Capacity Lease Agreement to be revised to remove them in accordance with Commission policy.

37. The Capacity Lease Agreement provides for an initial 25-year primary term and will automatically extend for three successive 5-year terms unless Sabal Trail provides prior written notice to terminate the agreement. Thereafter, the Capacity Lease Agreement will extend year to year until terminated by Transco or Sabal Trail.

38. During the primary term, Sabal Trail will pay a monthly lease charge, which is the leased capacity each day during the month multiplied by the applicable rate per dekatherm for each phase. Transco states that the revenues under the Capacity Lease Agreement are less than the Hillabee Expansion Project’s annual cost of service. However, Transco states that it will not reflect in its system rates any costs or revenues associated with the leased capacity, and that it will separately account for the costs and revenues associated with the leased capacity and segregate those costs and revenues from

---

11 The three receipt points are: (1) Transco’s existing Zone 4 point of interconnection between Transco’s mainline and the Mobile Bay Lateral (generally referred to as Transco’s Zone 4 Pool); (2) the point of interconnection between Transco and Midcontinent Express Pipeline LLC’s system; and (3) the point of interconnection between Transco and Gulf South Pipeline Company, LLC’s system. All three receipt points are located at MP 784.66 in Choctaw County, Alabama.
its other system costs. Further, Transco explains that the lease payment is no higher than a maximum recourse rate would be if Transco were to provide transportation service through the project facilities on a stand-alone basis.

II. Procedural

A. Notice, Interventions, Protests, and Answers


40. In each docket, numerous timely and late motions to intervene were filed. Timely, unopposed motions to intervene are granted automatically pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure.

41. Florida Southeast opposes all late motions to intervene in its proceeding, Docket No. CP14-554-000, other than the motion by Pivotal Utility Holdings, Inc. Florida Southeast argues that the Commission should deny these late motions to intervene because those seeking intervention demonstrate no genuine interest in the Florida Southeast Project, are not located within the project’s vicinity, and do not explain how the project affects them. Florida Southeast asserts that the late intervenors are concerned with the Sabal Trail Project, not the Florida Southeast Project. Florida Southeast adds

---

12 Transco Application at 11.

13 Commenters state that their interventions are timely up until the comment period of the draft EIS ends. Specifically, our regulations provide that interventions are timely if filed during the comment period on the notice of the application or if filed on environmental grounds during the comment period of the draft EIS. 18 C.F.R. §§ 157.10, 380.15, 214(c) (2015). Thus, if interventions are filed in between these periods, the intervention is late. See Alcoa Power Generating, Inc., 144 FERC ¶ 61,218, at n.4 (2013). As we note below, however, the Commission has a liberal policy of accepting late interventions in natural gas certificate proceedings.


15 Florida Southeast January 7, 2015 Answer at n.11.
that the late interventions fail to conform to the Commission’s standard for late interventions,\textsuperscript{16} and that allowing late intervention at this point in the proceeding would create prejudice. Specifically, Florida Southeast asserts that the late intervenors do not offer nor have an excuse, for filing late, arguing that, as active participants in the Sabal Trail Project, the late intervenors had notice that the Commission combined the environmental review of the three projects.

42. In considering late intervention requests in natural gas certificate proceedings, the Commission typically finds that, at the early stage of the proceeding, granting late intervention will neither disrupt the proceeding nor prejudice the interests of any other party. Thus, the Commission liberally allows late interventions at the early stages of such proceedings, but is more restrictive as a proceeding nears its conclusion.\textsuperscript{17}

43. While many late intervenors in Docket No. CP14-554-000 direct their comments to the Sabal Trail Project, several late intervenors note that the projects are related and request that the Commission consolidate the proceedings. Thus, we find that all individuals filing late motions to intervene have a demonstrable interest in the respective proceedings. Granting the late interventions at this stage of the proceedings will not cause undue delay or disrupt or otherwise prejudice the applicant or other parties.\textsuperscript{18} Accordingly, the Commission grants the late motions to intervene in each proceeding. All parties to each proceeding are listed in Appendix A of this order.

44. In addition to receiving interventions, we received numerous comments, both in support of the proposed projects and raising concerns on environmental and safety matters, including air quality, noise, and property value impacts. Sabal Trail filed multiple answers to the protests, comments, and other pleadings filed in response to this application.\textsuperscript{19} Although the Commission's Rules of Practice and Procedure generally do

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{16} 18 C.F.R. § 385.214(d) (2015).
  \item \textsuperscript{17} Sabine Pass Liquefaction, LLC, 139 FERC ¶ 61,039, at P 15 (2012); Cameron LNG, LLC, 118 FERC ¶ 61,019, at PP 21-22 (2007).
  \item \textsuperscript{18} 18 C.F.R. § 385.214(d) (2015).
  \item \textsuperscript{19} Sabal Trail filed answers in Docket No. CP15-17-000 on January 9, April 1, April 20, May 22, June 15, June 16, June 29, July 8, July 17, July 22, and August 14, 2015. Sabal Trail’s answers responded to comments by Kiokee-Flint et al.; Southern Natural Gas Company, L.L.C. (Southern Natural); G.B.A. Associates and Gregory K. Isaacs (G.B.A. Associates); the City of Albany, Georgia; and various landowners.
\end{itemize}
\end{footnotesize}
not permit answers to protests, we will accept Sabal Trail’s answers because they clarify the concerns raised and provide information that has assisted in our decision making.

45. The environmental and safety concerns raised in this proceeding are addressed in the final Environmental Impact Statement (final EIS), as well as the environmental section of this order.

B. Requests for a Hearing or Technical Conference, Consolidation, and Procedural Schedule for Project Review

46. On December 23, 2014, the Kiokee-Flint Group and its individual members (Kiokee-Flint), the Georgia Chapter of the Sierra Club (Sierra Club), Flint Riverkeeper, and Chattahoochee Riverkeeper (collectively, Kiokee-Flint et al.) filed a motion requesting an evidentiary, trial-type hearing, the formal consolidation of the certificate proceedings, and a new procedural schedule for review of the three certificate proceedings. Florida Southeast and Sabal Trail each filed an answer to Kiokee-Flint et al.’s motions on January 7, and January 9, 2015, respectively.

1. Formal Evidentiary Hearing and Technical Conference

47. Intervenors request an evidentiary, trial-type hearing to address disputed material facts regarding the need for the projects, Sabal Trail’s requested return on equity, subsidization of the projects by captive ratepayers, the projects’ environmental and safety impacts, and proposed alternatives. In addition, AZ Ocala Ranch LLC (AZ Ocala), a residential developer, recommended that the Commission hold a technical conference in Docket No. CP15-17-000 on Sabal Trail’s proposed pipeline route adjustments.


21 Kiokee-Flint, Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper filed separate motions to intervene and have filed separate and joint pleadings. Where these parties file joint pleadings, we refer to them as Kiokee-Flint et al.

22 Kiokee-Flint et al. December 23, 2015 Motion in Docket Nos. CP14-554-000, CP15-16-000, and CP15-17-000.

23 AZ Ocala July 1, 2015 Comments at 3. Southern Natural also requested a technical conference in Docket No. CP15-17-000 to determine the necessity of the number of Sabal Trail Project’s proposed crossings of Southern Natural’s pipeline.

(continued…)
48. An evidentiary, trial-type hearing and technical conference are necessary only where there are material issues of fact in dispute that cannot be resolved on the basis of the written record.\(^\text{24}\) Neither Kiokee-Flint et al. nor AZ Ocala has raised a material issue of fact that the Commission cannot resolve on the basis of the written record. As demonstrated by the discussion below, the existing written evidentiary record provides a sufficient basis for resolving the issues relevant to this proceeding. The Commission has satisfied the hearing requirement by giving interested parties an opportunity to participate through evidentiary submission in written form.\(^\text{25}\)

2. **Consolidation**

49. Intervenors request that the Commission should consolidate these three applications because the projects are dependent on one another. Kiokee-Flint et al. asserts that without consolidation the cumulative environmental impacts of the projects will be downplayed, the rate impacts obfuscated, and the potential to export gas concealed. Kiokee-Flint et al. adds that not consolidating the dockets hampers public participation because members of the public do not know they should intervene in all three dockets.

50. Sabal Trail and Florida Southeast argue that formal consolidation is unwarranted. While both agree that the three projects are related, they argue that there are no common issues of law or fact that cannot be adequately addressed in the individual dockets. Sabal Trail and Florida Southeast state that the projects are submitted by three different entities and have different routes, rates, pipeline sizes, tariffs, and purposes. Moreover, they state that the Commission is already evaluating the projects within the same environmental impact statement as connected actions. In addition, Sabal Trail adds that consolidation is not necessary to understand the potential export of the transported natural gas because there is no proposal to connect facilities to an LNG export terminal.

51. Although the separate applications filed by Sabal Trail, Transco, and Florida Southeast in the three proceedings raise similar issues, the existing records in the three dockets are sufficient for us to consider and address all three contemporaneously.

---

Southern Natural’s recent filing on October 26, 2015, however, indicates that it no longer is concerned with the number of pipeline crossings.


\(^\text{25}\) *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993).
Therefore, consistent with prior orders, we find no need for formal consolidation.\textsuperscript{26} Further, we see no purpose in consolidating the three certificate proceedings in view of the fact that we address all issues in each proceeding in this order without need for an evidentiary, trial-type hearing.\textsuperscript{27}

52. Our decision to not formally consolidate the dockets will not prejudice landowners as Kiokee-Flint et al. contends. Landowners have had ample notice that the three projects are connected. On February 18, 2014, Commission staff issued a notice stating its intent to prepare an environmental impact statement for all three projects. Landowners had two opportunities to timely intervene in the proceeding: during the initial comment period and during the comment period for the draft EIS. As discussed above, the Commission has also accepted late interventions. In any event, landowners’ interests are well represented in the proceeding; over seventy interventions were filed in each docket, many of them by landowners. In addition, landowners can and have participated in the proceeding without formally intervening. Commission staff considered hundreds of comments from landowners throughout the proceeding, without regard to whether the commentors had also submitted motions to intervene.

3. **Schedule**

53. Kiokee-Flint et al. requests that the Commission establish a procedural schedule for the project, including deadlines by which the parties may submit additional comments and expert testimony. Commission staff issued initial and revised procedural schedules for the draft and final EIS. No other procedural schedule is required. Moreover, the draft and final EIS, as well as this order, address timely and late comments to the extent possible.\textsuperscript{28}

\textsuperscript{26} *Williams Natural Gas Co.*, 67 FERC ¶ 61,252, at 61,826 (1994).

\textsuperscript{27} See, e.g., *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089, at P 27 (2008), *order denying reh’g and granting clarification*, 127 FERC ¶ 61,164 (2009).

\textsuperscript{28} Intervenors also requested that the Commission extend the comment period on the projects’ applications by 90 days. Commission staff considered late comments throughout the proceeding to the extent possible.
C. Completeness of Application

54. Kiokee-Flint et al. objects to Sabal Trail’s “abbreviated application” and asks that the Commission require Sabal Trail to file a “full application.”\footnote{Kiokee-Flint et al. December 22, 2014 Comments in Docket Nos. CP14-554-000, CP15-16-000, and CP15-17-000 at 25-26 (Accession No. 20141222-5162) (Kiokee-Flint et al. December 22, 2014 Filing).} Kiokee-Flint et al. states that an abbreviated application is inappropriate given the project’s substantial impacts on landowners and the environment.

55. The Commission's regulations provide that a company may file an abbreviated application and omit certain exhibits when those exhibits are not necessary to fully disclose the nature of the proposal.\footnote{18 C.F.R. § 157.7 (2015).} The applicant must only file information necessary to fully explain the proposed project, its economic justification, and its effect on the applicant's operations and on the public proposed to be served.\footnote{Id.} Sabal Trail omitted Exhibit H, which provides for information on total gas supply, specifically a description of the production areas accessible that contain existing or potential supplies for the proposed project.

56. Sabal Trail provided sufficient information relevant to each exhibit to fully disclose the nature of the project, and therefore demonstrated to Commission staff that it met the requirements set forth in the Commission's regulations. There is no question that there is sufficient natural gas accessible through Transco and its interconnected upstream pipelines to supply the proposed projects. Information on total gas supply is not necessary to complete our public convenience and necessity analysis. Moreover, since the advent of open access, natural gas shippers, not natural gas pipelines, have been responsible for obtaining natural gas supplies, and therefore, Exhibit H is not needed to determine whether adequate natural gas is available to supply the proposed project.

D. Request for Fast Tracking and Alternative Dispute Resolution

57. G.B.A. Associates and Gregory K. Isaacs (G.B.A. Associates), a commercial developer and an investor, request to use a fast tracking processing and Alternative Dispute Resolution pursuant to Rule 206 of the Commission’s Rules of Practice and Procedure in Docket No. CP15-17-000.\footnote{G.B.A. Associates April 16, 2015 Filing in Docket No. CP15-17-000 at 4.} Specifically, they seek to resolve a
disagreement regarding Sabal Trail’s rerouting its mainline pipeline from colocating with Southern Natural Gas Company, L.L.C. (Southern Natural) to being located on their property.

58. The Commission has specific regulations applicable to complaint proceedings, including a fast tracking process. The Commission also has an Alternative Dispute Resolution process. Complaints are covered under Rule 206 of the Commission’s Rules of Practice and Procedure, and the Commission’s Alternative Dispute Resolution process is covered under Rule 604.

59. Under Rule 206, entities seeking to file formal complaints must allege a contravention or violation of a statute, rule, or order, or must allege any other wrong over which the Commission may have jurisdiction. In addition, entities seeking to file formal complaints must comply with the relevant regulations that specify the contents of a complaint. G.B.A. Associates fails to satisfy a large number of these requirements. G.B.A. Associates does not allege any contravention or violation of a statute, rule, or order, or any other alleged wrong, but merely notes its disagreement regarding Sabal Trail rerouting its pipeline. In addition, G.B.A. Associates fails to set forth the business, commercial, economic, or other issues presented by the action or inaction as such relate to or affect the complainant; make a good faith effort to quantify the financial impact or burden created for the complainant as a result of the action or inaction complained of; and indicate the practical, operational, or other nonfinancial impacts imposed as a result of the action or inaction. Because G.B.A. Associates fails to comply with the Commission’s regulations for filing complaints, we conclude that it did not file a formal complaint. Consequently, we address G.B.A. Associates’ concerns as a protest to Sabal Trail’s application.

60. As for Alternative Dispute Resolution, G.B.A. Associates may submit a written proposal to the Commission to use alternative means of dispute resolution to resolve its disagreement with Sabal Trail. Our regulations, however, require that all participants to a pending matter concur in the use of alternative dispute resolution. Here, Sabal Trail has noted its opposition to such a proceeding.

---


35 Sabal Trail May 22, 2015 Answer to G.B.A. Associates.
III. Discussion

61. Since the proposed facilities will be used to transport natural gas in interstate commerce, subject to the jurisdiction of the Commission, the construction and operation of the facilities are subject to the requirements of subsections (c) and (e) of section 7 of the NGA. In addition, Transco’s proposed abandonment of capacity by lease to Sabal Trail and Sabal Trail’s acquisition of that capacity are subject to the requirements of sections 7(b) and 7(c) of the NGA, respectively.

A. Application of Certificate Policy Statement

62. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new pipeline construction. The Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission’s goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant’s responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

63. Under this policy, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant’s existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

1. **Section 7(c) Projects**

   a. **Hillabee Expansion Project**

   64. Transco’s proposal satisfies the threshold requirement that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. While the monthly lease payments Transco will charge Sabal Trail will not recover the full costs of the project, Transco states that during the term of the lease agreement it will not reflect in its system rates any costs or revenues associated with the leased capacity and that it is prepared to financially support the cost of the Hillabee Expansion Project.³⁷ Moreover, Transco will separately account for leased capacity related to fuel and lost and unaccounted-for gas costs when it makes its period tracker filings to ensure that its fuel retention costs are properly allocated between services to existing shippers and the incremental services to the Sabal Trail. As such, the proposed project will not result in any subsidization by Transco’s existing shippers.

   65. The proposed project will not adversely impact Transco’s existing customers or other pipelines and their customers. The proposed facilities are designed to increase the capacity of Transco’s system to accommodate the lease agreement with Sabal Trail without degrading the service of Transco’s existing customers. There is no evidence that service on other pipelines will be displaced or bypassed, and no pipeline companies have objected to the proposed project. We conclude that Transco’s proposal will not have adverse impacts on its existing shippers or other existing pipelines and their captive customers.

   66. We also find that Transco’s proposed project will have minimal adverse impacts on landowners and communities. Transco states that it expects to negotiate settlements with all affected landowners for all necessary easements and property rights. To the extent parties are unable to reach mutual agreement, it is for the courts to decide the appropriate levels of compensation for necessary property rights.³⁸

---

³⁷ Transco Application at 11.

b. Sabal Trail Project

67. Sabal Trail is a new pipeline company that has no existing customers. As such, there is no potential for subsidization on Sabal Trail’s system or degradation of service to existing customers.39

68. With regard to adverse economic effects on competing pipelines and such pipelines’ captive customers, the Sabal Trail Project should serve to benefit other pipelines and their customers. Through Sabal Trail’s new interconnections at the Central Florida Hub, Sabal Trail will be able to deliver gas to existing pipeline systems, i.e., Gulfstream and Florida Gas Transmission, in the event of supply or facility disruption and enhance market competition.

69. In its October 26, 2015 comments, Southern Natural states that because the Sabal Trail pipeline will cross Southern Natural’s pipeline system numerous times, Southern Natural may have to pass on to its customers substantial costs for restoration, cathodic protection systems, and maintenance activities.40 Southern Natural further indicated that it anticipates that Sabal Trail will reimburse it for such costs through a Parallel Construction Agreement, but that Southern and Sabal Trail had not yet reached agreement.41 On November 9, 2015, Sabal Trail filed comments stating that it continues to work with Southern Natural on that agreement.42 The issues that Southern Natural raises regarding economic impacts to its customers are outside the scope of this proceeding. To the extent Southern Natural and Sabal Trail are unable to reach an agreement, questions regarding damages incurred during construction are for a court of appropriate jurisdiction to adjudicate.

39 Kiokee-Flint et al. states that the Sabal Trail Project will result in subsidization because the Florida Public Service Commission issued an order stating that Florida Power & Light may pass the costs of the pipeline onto its ratepayers. See Kiokee-Flint et al. December 22, 2014 Filing at 28. The Commission does not consider it subsidization for Florida Power & Light to pay rates designed to recover the costs of a pipeline system being constructed to provide it with natural gas transportation service. The extent to which it is appropriate for Florida Power & Light to in turn pass those costs through to its rate payers is not with the Commission’s jurisdiction.

40 Southern Natural Oct. 26, 2015 Comments in Docket No. CP15-17-000 at 3.

41 Id.

42 Sabal Trail Nov. 9, 2015 Comments on Draft EIS at 15.
70. Regarding impacts on landowners and communities along the route of the project, Sabal Trail proposes to locate the pipeline within or parallel to existing rights-of-way where feasible. Sabal Trail’s proposed pipeline route collocates with existing rights-of-way or previously disturbed corridors for approximately 308.1 miles (60 percent) of the total pipeline lengths. The remaining approximately 207.5 miles (40 percent) of the pipeline route will deviate from these rights-of-way and corridors.

71. While we are mindful that Sabal Trail has been unable to reach easement agreements with some landowners, for purposes of our consideration under the Certificate Policy Statement, we find that Sabal Trail has taken sufficient steps to minimize adverse economic impacts on landowners and surrounding communities. Sabal Trail participated in the Commission’s pre-filing process in Docket No. PF14-1-000. During pre-filing and initial project planning, Sabal Trail considered 282 route variations, almost all of which were identified by landowners, government officials, and other stakeholders. Sabal Trail incorporated 214 of those route variations into its proposed route. Further, in the final EIS, Commission staff considered 12 major route alternatives, many of which were requested by landowners.

72. G.B.A. Associates requested that the Commission not grant Sabal Trail eminent domain authority over its land. The Commission itself, however, does not confer eminent domain powers. Congress gave the Commission jurisdiction to determine if the construction and operation of proposed pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination, under NGA section 7(h), a certificate holder is authorized by Congress to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain if it cannot acquire the easement by an agreement with the landowner. While the Sabal Trail Project will traverse G.B.A. Associates’ land, we note that Sabal Trail incorporated a route variation on G.B.A. Associates’ land that will closely follow property lines and reduce impacts on G.B.A. Associates’ future development activities.


44 Final EIS at 4-24.


c. **Florida Southeast Connection Project**

73. Florida Southeast is a new pipeline company that has no existing customers. As such, there is no potential for subsidization on Florida Southeast’s system or degradation of service to existing customers.

74. The Florida Southeast Project will transport gas to meet increased demand for natural gas in Florida. No transportation service provider or captive customer in the same market has protested the project. Moreover, the two existing interstate pipelines that serve central and southern Florida, i.e., Florida Gas Transmission and Gulfstream, are either fully or near fully subscribed.

75. Regarding impacts on landowners and communities along the project route, Florida Southeast proposes to locate the pipeline within or parallel to existing rights-of-way where feasible. The Florida Southeast Project pipeline route will be colocated with existing roads and utilities for approximately 101.9 miles (81 percent) of the total pipeline length. The remaining 24.5 miles (19 percent) of the pipeline route will deviate from these rights-of-way or corridors. Florida Southeast proposes to minimize the use of eminent domain to the greatest extent possible by negotiating easement agreements for permanent easements and temporary workspace required for the project. In addition, Florida Southeast participated in the Commission's pre-filing process in Docket No. PF14-2-000, during which Florida Southeast considered 19 route variations and addressed landowners’ concerns and questions. We therefore find that Florida Southeast has taken sufficient steps to minimize adverse economic impacts on landowners and surrounding communities.

d. **Need for the Projects**

76. Several intervenors challenge the public need for the projects. Many intervenors assert that project demand can be satisfied by renewable energy alternatives, such as solar and wind power, or energy efficiency gains. Intervenors also contend that other pipelines in Florida, including Florida Gas Transmission’s pipeline, are not at full capacity and can provide transportation services. In addition, many intervenors contest that the gas will not be used to satisfy demand in Florida, but will be exported to foreign markets.

77. Kiokee-Flint adds that project need for the Sabal Trail Project is overstated. Kiokee-Flint asserts that Florida Power & Light committed only to 400,000 Dth/d of firm service, with the option to subscribe an additional 200,000 Dth/d of service to be

---

47 Kiokee-Flint filed comments raising this issue both individually and jointly with Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper.
provided in Phase II of the Sabal Trail Project. Similarly, members of the Gulf Restoration Network assert that the proposed pipeline has over twice the capacity needed to meet Florida Power & Light’s projected additional demand through 2021. Kiokee-Flint also appears to allege that the projects are engaged in self-dealing, as Sabal Trail’s and Florida Southeast’s precedent agreements are with affiliates: the parent company of Florida Southeast Connection, NextEra, is also the parent of Florida Power & Light, and Duke Energy, the parent company of Duke Energy Florida, has an interest in the Sabal Trail Project. In addition, Kiokee-Flint argues that Energy Information Administration data does not indicate a need for the project nor will compliance with the Environmental Protection Agency’s Clean Power Plan regulations require the project to be built.

78. Kiokee-Flint et al. also asserts that Florida Power & Light may have inflated its demand for natural gas. In support, Kiokee-Flint et al. contends that Florida Power & Light’s reserve margin is double the generally approved standard in Florida. Kiokee-Flint et al. also points out that the Florida Public Service Commission may find there is no need for Florida Power & Light’s proposed natural gas power generating facility, the Okeechobee Clean Energy Center.

79. In addition, Kiokee-Flint argues that the Certificate Policy Statement only finds that a fully subscribed project is prima facie significant evidence of project need, which the Sabal Trail Project does not meet because it is undersubscribed at 93 percent of its total design capacity. Parties also cite various cases unrelated to the Commission’s

---


49 Gulf Restoration Network Members and Supporters October 26, 2015 Filing in Docket Nos. CP14-554-000, CP15-16-000, and CP15-17-000 at 1.

50 Kiokee-Flint Oct. 28 Filing at 8-9.

51 Id. at 10-12.


53 Kiokee-Flint October 28 Filing at 8.
Certificate Policy Statement to argue that the Commission incorrectly relies on precedent agreements to find project need.\textsuperscript{54}

80. The Certificate Policy Statement established a new policy under which the Commission would allow an applicant to rely on a variety of relevant factors to demonstrate need, rather than continuing to require that a percentage of proposed capacity be subscribed under long-term precedent or service agreements.\textsuperscript{55} These factors might include, but are not limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.\textsuperscript{56} The Commission stated that it will consider all such evidence submitted by the applicant regarding project need. Nonetheless, the Certificate Policy Statement made clear that, although precedent agreements are no longer required to be submitted, they are still significant evidence of project need or demand.\textsuperscript{57}

81. We find that Transco, Sabal Trail, and Florida Southeast have sufficiently demonstrated that there is market demand for their respective projects. Transco has entered into a pro forma lease agreement with Sabal Trail to abandon and lease the entire incremental capacity created by the Hillabee Expansion Project to Sabal Trail for a 25-year primary term. Sabal Trail has entered into precedent agreements with Florida Power & Light and Duke Energy Florida for 1,000,000 Dth/d, approximately 93 percent of the 1,075,000 Dth/d of service that will be made available by the Sabal Trail Project, also for a 25-year term. Florida Southeast has entered into a precedent agreement with Florida Power & Light for 400,000 Dth/d of service, 62.5 percent of the total design capacity that will be created by the Florida Southeast Project, with an option to subscribe to an additional 200,000 Dth/d of service, again for a 25-year term.


\textsuperscript{55} Certificate Policy Statement, 88 FERC at 61,747.

\textsuperscript{56} Id.

\textsuperscript{57} Id.
82. Kiokee-Flint mistakenly asserts that Florida Power & Light committed only to 400,000 Dth/d of service on Sabal Trail with the option to commit to 200,000 Dth/d in 2020. The precedent agreement between Florida Power & Light and Sabal Trail states that Florida Power & Light will subscribe to 600,000 Dth/d, of which 400,000 Dth/d will be provided in Phase I and the additional 200,000 Dth/d to be provided in Phase II. In addition, the precedent agreement states that Florida Power & Light has the option to subscribe to an additional 200,000 Dth/d by January 1, 2020, and another additional 200,000 Dth/d by January 1, 2024.

83. We note that Duke Energy Florida does have the option to not subscribe to its 100,000 Dth/d of Phase II service. Our finding that Sabal Trail has demonstrated need for its proposed project is not affected by whether or not Duke Energy Florida exercises its option. Even without Duke Energy Florida’s 100,000 Dth/d Phase II increment, we find subscription of 84 percent of the project’s total capacity is evidence of sufficient public benefit to outweigh the residual adverse effects on the economic interests as discussed above.

84. An affiliation between project shippers and the owners of the pipelines is not, by itself, evidence of self-dealing which might call into question the need for the projects. Sabal Trail and Florida Southeast will be required to execute firm contracts for the capacity levels and terms of service represented in the signed precedent agreements before commencing construction. Sabal Trail’s and Florida Southeast’s recourse rates will be based on the design capacity of their pipelines, thereby placing them at risk for any unsubscribed capacity.

58 Sabal Trail Application at Exhibit I, Precedent Agreement by and between Sabal Trail Transmission, LLC and Florida Power & Light Company at 12.

59 Id. at 15. We note that the proposed Sabal Trail pipeline would not, without future expansion, be able to accommodate an additional 400,000 Dth/d of incremental firm service. No such expansion of the Sabal Trail pipeline could be constructed without prior Commission authorization.


61 Cf. Turtle Bayou Gas Storage Co., LLC, 135 FERC ¶ 61,233, at P 33 (2011), which found that the applicant had not sufficiently demonstrated the need for its particular project where the applicant did not conduct an open season or submit precedent or service agreements for the project's capacity and provided only vague and generalized evidence of need for natural gas at the regional and national level.
85. We also have no reason to contest Florida Power & Light’s purported demand for natural gas. The Florida Public Service Commission issued an order finding that Florida Power & Light had demonstrated a need for additional firm capacity. Florida Power & Light has indicated that its commitments on Sabal Trail’s and Florida Southeast’s systems are to provide gas to existing natural gas-fired plants. Because the Okeechobee Clean Energy Center is not an existing plant, whether the Florida Power Service Commission approves the plant does not bear on Florida Power & Light’s specified demand for the Sabal Trail and Florida Southeast Projects set forth in its application.

86. Allegations that the projects will be used to export gas also do not persuade us to find that the applicants have not demonstrated project need. Neither Sabal Trail nor Florida Southeast has proposed to connect to any LNG export facilities. In addition, Florida Power & Light stated that it lacks legal authority to export natural gas, and that it is contracting for capacity to serve its natural gas plants. Florida Power & Light adds that it is not an owner of the Floridian LNG project in Martin County, Florida, nor is any of its affiliates. Moreover, the Commission does not have jurisdiction over the exportation and importation of natural gas. Such jurisdiction resides with the U.S. Department of Energy (DOE), which must act on any applications for natural gas export and import authority.

---

62 Florida Southeast Application at Exhibit Z-1.
63 Florida Power & Light December 23, 2014 Motion to Intervene and Comments in Docket No. CP15-17-000 at 6.
64 Id. at 4, 6.
65 Section 3(a) of the NGA provides, in part, that “no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so.” 15 U.S.C. § 717b(a) (2012). In 1977, the Department of Energy Organization Act transferred the regulatory functions of section 3 of the NGA to the Secretary of Energy. 42 U.S.C. § 7151(b) (2012). Subsequently, the Secretary of Energy delegated to the Commission authority to “[a]pprove or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports.” DOE Delegation Order No. 00-004.004 (effective May 16, 2006). The proposed facilities are not located at a potential site of exit for natural gas exports. Moreover, the Secretary of Energy has not delegated to the Commission any authority to approve or disapprove the import or export of the commodity itself, or to consider whether the exportation or importation of natural gas is consistent with the

(continued…)
As discussed above, 93 percent of the total design capacity of the Sabal Trail project is subscribed under precedent agreements with initial terms of 25 years. This is persuasive evidence of market need for this project. Even though the market, in its consideration of alternative means for addressing energy needs, could have selected renewable energy alternatives and energy efficiency gains, we find that the precedent agreements sufficiently demonstrate the need for the project. Florida Power & Light has specifically determined that it needs service from a new pipeline extending from Transco’s Station 85 to a new Central Florida Hub where it will interconnect with the existing Gulfstream and Florida Gas Transmission pipelines. The expansion of existing pipelines in Florida will not satisfy the identified need of a new transportation option.

e. Conclusion

In view of the considerations above, we find that Transco, Sabal Trail, and Florida Southeast have demonstrated a need for the Hillabee Expansion Project, Sabal Trail Project, and Florida Southeast Project, respectively, and that each project's benefits to the market will outweigh any adverse effects on other pipelines and their captive customers, and on landowners and surrounding communities. Consistent with the criteria discussed in the Certificate Policy Statement and subject to the environmental discussion below, we find that the public convenience and necessity requires approval of Transco’s, Sabal Trail’s, and Florida Southeast’s proposals, as conditioned in this order.

2. Blanket Certificate

Sabal Trail and Florida Southeast have each applied for a Part 157, Subpart F blanket construction certificate, which is generally applicable to all interstate pipelines. A Part 157, Subpart F blanket certificate will authorize Sabal Trail and Florida Southeast to perform certain routine activities and abandon certain services and facilities automatically, or pursuant to simplified prior notice requests, as is specified in sections 157.208 through 157.218 of the Commission’s regulations. Each type of blanket public interest. See Corpus Christi Liquefaction, LLC, 149 FERC ¶ 61,283, at P 20 (2014) (Corpus Christi). See also National Steel Corp., 45 FERC ¶ 61,100, at 61,332-33 (1988) (observing that DOE, “pursuant to its exclusive jurisdiction, has approved the importation with respect to every aspect of it except the point of importation” and that the “Commission's authority in this matter is limited to consideration of the place of importation, which necessarily includes the technical and environmental aspects of any related facilities”).

66 Final EIS at 4-1 to 4-2.
certificate project includes requirements for landowners to be notified before construction of the project.

90. Kiokee-Flint et al. requests that the Commission deny Sabal Trail’s request for a blanket certificate pursuant to Part 157, Subpart F because Sabal Trail is a new pipeline with no proven safety or reliability record. Kiokee-Flint et al. also requests that the Commission consider the environmental impacts, including cumulative effects, of the blanket certificate and require mitigation of such impacts in its environmental review pursuant to the National Environmental Policy Act of 1969 (NEPA). 67

91. The Commission routinely grants a pipeline company a blanket certificate along with the pipeline’s certificate to construct and operate its initial facilities. Kiokee-Flint et al. provides no adequate explanation for us to depart from Commission practice. In addition, given that Sabal Trail has not proposed to conduct any activity under a Part 157 blanket certificate, it would be premature for Commission staff to assess the environmental impacts of, or require mitigation for, such potential activities. Commission staff has no information regarding the location, scope, or timing of any potential activity on which to base its environmental review. In the event that Sabal Trail proposes to conduct under its blanket certificate an activity that causes ground disturbance or changes to operational air or noise emissions, Sabal Trail must notify landowners and adhere to the guidance set forth in section 380.15(a) and (b) of the Commission’s regulations. 68 Therefore, because Sabal Trail and Florida Southeast will become interstate pipelines with the issuance of a certificate to construct and operate the proposed facilities, we will issue to Sabal Trail and Florida Southeast the requested Part 157, Subpart F blanket certificates.

92. Sabal Trail and Florida Southeast also request Part 284, Subpart G blanket certificates to provide open access transportation services. Under a Part 284 blanket certificate, Sabal Trail and Florida Southeast will not require individual authorizations to provide transportation services to particular customers. Sabal Trail and Florida Southeast

---


68 Section 380.15(a) and (b) state that siting, construction, and maintenance of facilities shall be undertaken in a way that avoids or minimizes effects on scenic, historic, wildlife, and recreational values, and require a pipeline to take into account the desires of landowners in the planning, location, clearing, and maintenance of rights-of-way and the construction of facilities on their property. 18 C.F.R. § 380.15(a)-(b) (2015).
each filed a pro forma Part 284 tariff to provide open access transportation services. Since a Part 284 blanket certificate is required for Sabal Trail and Florida Southeast to offer these services, we will grant Sabal Trail and Florida Southeast Part 284 blanket certificates, subject to the conditions imposed in this order.

B. **Lease Agreement**

93. As explained above, Sabal Trail and Transco have entered into a Capacity Lease Agreement whereby Transco will abandon to Sabal Trail the firm capacity that will be created by Transco’s proposed Hillabee Expansion Project. In turn, Sabal Trail will acquire that capacity from Transco and use the leased capacity to provide service under the terms of its FERC Tariff.

94. Historically, the Commission views lease arrangements differently from transportation services under rate contracts. The Commission views a lease of interstate pipeline capacity as an acquisition of a property interest that the lessee acquires in the capacity of the lessor’s pipeline. To enter into a lease agreement, the lessee generally needs to be a natural gas company under the NGA and needs section 7(c) certificate authorization to acquire the capacity. Once acquired, the lessee in essence owns that capacity and the capacity is subject to the lessee’s tariff. The leased capacity is allocated for use by the lessee’s customers. The lessor, while it may remain the operator of the pipeline system, no longer has any rights to use the leased capacity.

95. The Commission’s practice has been to approve a lease if it finds that: (1) there are benefits for using a lease arrangement; (2) the lease payments are less than, or equal to, the lessor’s firm transportation rates for comparable service over the terms of the lease on a net present value basis; and (3) the lease arrangement does not adversely affect existing customers. We find that the transportation lease agreement between Sabal Trail and Transco, as modified below, satisfies these requirements.

96. First, the Commission has found that leases in general have several potential public benefits. Leases can promote efficient use of existing facilities, avoid construction of duplicative facilities, reduce the risk of overbuilding, reduce costs, and minimize

---


70 *Texas Gas Transmission, LLC*, 113 FERC ¶ 61,185, at P 10 (2005) (*Texas Gas*).

71 Id.; *Islander East Pipeline Co., L.L.C.*, 100 FERC ¶ 61,276, at P 69 (2002) (*Islander East*).
People's Dossier: FERC's Abuses of Power and Law → Undermining State Authority

State Authority Undermined Attachment 8, Carolyn Elefant, Press Release, Notice of Intent to Sue FERC for Violating the Clean Water Act Filed by the Sandisfield Taxpayers Opposing the Pipeline, March 21, 2016.
FOR IMMEDIATE RELEASE:

Notice of Intent to Sue the Federal Energy Regulatory Commission for Violating the Clean Water Act Filed By Sandisfield Taxpayers Opposing the Pipeline

Washington, DC  March, 21, 2016

Today, the Sandisfield Taxpayers Opposing the Pipeline (STOP), a group of Massachusetts property owners directly impacted by Tennessee Gas’ Connecticut Expansion Project, took the first step towards bringing a citizen suit against the Federal Energy Regulatory Commission (FERC) in federal district court for violating the Clean Water Act in connection with approval of the project by filing a required Notice of Intent setting forth the violations and giving the FERC 60 days to address them. In addition to filing a Notice of Intent against FERC, STOP has taken similar action against Tennessee Gas.

The Connecticut Expansion Project will cross, or potentially discharge into, various rivers and streams within the state of Massachusetts. Therefore, under the Clean Water Act, Tennessee Gas was required to seek certification from the state of Massachusetts that the project will not adversely impact water quality. Until this required state certification is obtained, the Clean Water Act expressly prohibits FERC from issuing a certificate authorizing the Connecticut Expansion Project. Notwithstanding the Clean Water Act’s clear directive, on March 11, 2016, FERC issued a certificate for the Connecticut Expansion Project, even though the required certification for the project by the state of Massachusetts has not yet been granted or waived.

The citizen-suit provisions of the Clean Water Act allow impacted individuals and organizations such as STOP to bring a private action to enforce the requirements of the Clean Water Act. “As owners of property that will be crossed by the Connecticut Expansion Project and residents and taxpayers in the state of Massachusetts, we have a direct interest in ensuring that FERC follows the law in granting a federal certificate for a pipeline, particularly when the certificate confers on Tennessee Gas the power to take our property through eminent domain,” said members of STOP. “In addition,” STOP continued, “because construction of the pipeline entails removal of hundreds of trees, including forestland protected by Article 97 of the Massachusetts Constitution, the project will cause significant harm to the environment and waterways of the state - and therefore, FERC’s failure to comply with the Clean Water Act, which would have at least helped to protect these resources, is particularly disturbing.”
Although FERC routinely runs afoul of the Clean Water Act through issuance of certificates conditioned on future compliance with Section 401, this case represents the first time that FERC's action will be challenged through the citizens' suit provisions of the Clean Water Act rather than through the appellate review provisions of the Natural Gas Act. “To date, challenges of FERC’s practices in federal appellate courts have been unsuccessful, either because they have been dismissed on procedural grounds or the project was completed by the time the appeal was heard.” said Carolyn Elefant, owner of the Law Offices of Carolyn Elefant PLLC, the firm that represents STOP. “The citizen suit provisions of the Clean Water Act afford a more direct avenue for impacted individuals to challenge FERC’s violations, and in addition, entitles prevailing parties to recovery of attorneys fees.” added Alexander English, an environmental and water law attorney with the firm who serves as lead counsel for STOP in their citizen suit.

STOP is an unaffiliated group of Sandisfield, Massachusetts taxpayers organized to oppose the Connecticut Expansion Project. The Law Offices of Carolyn Elefant PLLC is a boutique law firm with offices in Washington D.C. and Bethesda, Maryland focused on energy, environment and eminent domain issues. The firm has been involved in pipeline cases throughout the nation. To learn more about the firm, please visit our website at www.lawofficesofcarolynelefant.com.

CONTACT:
Alexander English
Law Offices of Carolyn Elefant PLLC
Counsel to Sandisfield Taxpayers Opposing the Pipeline (STOP)
aenglish@carolynelefant.com
301-466-4024 (Direct Line)

Relevant Documents: STOP’s Notice of Intent To FERC (March 21, 2016); STOP’s Notice of Intent To Tennessee Gas (March 21, 2016); FERC Order Issuing Certificate for Connecticut Expansion Project March 11, 2016.

###
People's Dossier: FERC's Abuses of Power and Law
→ Undermining State Authority

State Authority Undermined Attachment 9, Clarence Fanto, Berkshire Eagle, Tennessee Gas Co. Wants Court’s OK to Start Cutting Trees for Sandisfield Spur of Pipeline, March 18, 2016.
Tennessee Gas Co. wants court's OK to start cutting trees for Sandisfield spur of pipeline

By Clarence Fantocfanto@yahoo.com @BE_cfanto on Twitter

As a court confrontation looms between a Kinder Morgan affiliate and the Commonwealth of Massachusetts, a state lawmaker has issued a sharp denunciation of the energy infrastructure company's actions and the federal regulators who approved the 3.8-mile Tennessee Gas Co. pipeline spur through Otis State Forest in Sandisfield this week.

Several rapid-fire developments on Thursday included Kinder Morgan's Tennessee Gas Co. filing an injunction in Berkshire Superior Court seeking to grant the company immediate access to the state-protected land so tree-cutting can begin promptly. In connection with the Endangered Species Act, federal guidelines limit tree-clearing to a period between Oct. 1 and March 31. The company aims to put the pipeline into service next winter.

The Sandisfield Taxpayers Opposing the Pipeline group, or STOP, filed a motion to stay the Federal Energy Regulatory Commission's approval of the so-called Connecticut Expansion Project, seeking to stop any tree cutting or construction work.

"It is a violation of the [Federal Energy Regulatory Commission's] own mandate to obey applicable federal and state permitting and laws, to grant a certificate to Tennessee before Massachusetts has granted a Section 401 permit per the Clean Water Act," the filing stated.

"This license is in direct conflict with Article 97 of the Massachusetts Constitution, which does not permit private companies like Tennessee to construct on public lands without the appropriate consent of the legislature and the consent of the landowner who conveyed the land to the state for protection."

The group noted that the pipeline crosses Spectacle Pond Farm in Otis State Forest, property that was donated to the state by Mass Audubon 18 years ago.

"In essence, the commission has authorized eminent domain authority without the Commonwealth having had even the chance to negotiate an easement under Article 97," STOP contended in its motion.


"FERC is saying that because it's on an existing route, they don't have to abide by any rules and regulations," Pignatelli said.
He also declared that "there's no doubt in my mind" that the federal regulators will approve Kinder Morgan's application to build its proposed $5 billion, 412-mile pipeline through upstate New York, Western Massachusetts, including seven Berkshire County towns, and southern New Hampshire, terminating in Dracut.

"If there's no way to stop a little loop in southern Berkshire County that has no benefit to anybody in Massachusetts, how the hell are we going to stop this bigger pipeline, going through state-owned and Mass Audubon land?" he said. "This was a test, and the process failed."

However, he conceded that FERC might scrutinize the major pipeline more closely since it's a new project and does not run alongside an existing Tennessee Gas route.

Pignatelli acknowledged that the state Department of Environmental Protection approved the state forest spur back in the Gov. Deval Patrick administration.

But he accused Kinder Morgan of "stringing along" Sandisfield, one of the smallest towns in his district with about 900 residents.

"I question their ethics and their integrity," he said in an Eagle interview.

He contended that the company backed out of a $1 million verbal agreement to compensate the town by repairing town roads, restoring old stone walls and testing septic systems following construction of the pipeline spur.

The agreement was set to be approved by special town meeting voters in Sandisfield last fall until the company withdrew it at the last minute, Pignatelli said.

"I've encouraged the town to prepare for what may be inevitable, that you can't stop the pipeline, but get what you can from these folks that will benefit the community," he said. "Try to get some remediation for the roads they're going to beat up during the construction."

To put pressure on Kinder Morgan to honor the agreement, Pignatelli has contacted Lt. Gov. Karyn Polito, the state attorney general's office and U.S. Rep Richard Neal, D-Springfield, urging them to take action on behalf of Sandisfield.

Kinder Morgan spokesman Steve Crawford stated: "We continue to work with the town's representatives and we're optimistic that we can reach an agreement."

Pignatelli said legislation is still tied up on Beacon Hill that would allow the pipeline loop to cross state-owned land. He and state Sen. Benjamin Downing, D-Pittsfield, strongly opposed the bill filed last year by state Rep. Garrett Bradley of Hingham that, if passed, would convey to Tennessee Gas the necessary easements through the state forest.

Without the legislation, the forest would remain sheltered by Article 97, the amendment to the state constitution that protects and conserves designated state land.
On the injunction sought by Tennessee Gas at Berkshire Superior Court, Crawford commented: "After the completion of a full environmental review, a public comment period and the development of extensive mitigation and land protection measures, Tennessee Gas Pipeline received its environmental certificate from the state.

"Despite the issuance of that state certificate and nearly two years of working with state and local officials to coordinate and obtain approvals, the Legislature has not approved the easements for the Sandisfield loop; nor does it appear likely to do so," he added.

In its court filing, the company seeks an injunction to condemn and gain immediate access through eminent domain to more than 15 miles of permanent and temporary easements in the Otis State Forest in order to begin pipeline construction.

The document states that Tennessee Gas has owned two federally approved, underground gas pipelines for the past 30 years and has maintained a corridor above it used by the state Department of Conservation and Recreation as year-round hiking trails.

The company wrote that "it is indisputable that the DCR is unwilling to enter into a voluntary agreement to transfer the easements to Tennessee Gas unless it is approved by a two-thirds vote of the state Legislature." Since the lawmakers have not acted, the court filing emphasized, the eminent domain proceeding is necessary.

The defendants to the lawsuit include the Commonwealth of Massachusetts, the Department of Conservation and Recreation, DCR Commissioner Leo P. Roy and "unknown landowners."

Pignatelli cited the old-growth forest of eastern hemlocks in the state forest that will be affected by the pipeline construction.

"There are trees there that are 400 years old, before the Pilgrims landed on Plymouth Rock," he said.

"FERC has had total disregard for this small community," Pignatelli said. "Kinder Morgan has had total disrespect for us and the town of Sandisfield. They should be held accountable and honor this agreement. They need to be good corporate citizens and honor the agreement they've proposed to the town of Sandisfield."

He noted that in 1997, the state paid $5.2 million to acquire the state forest land, protecting it from potential development, in what he described as "the largest land acquisition dollar-wise in the history of Massachusetts at that time."

As for the federal regulators, Pignatelli charged that "clearly they don't care about Article 97 or about natural habitats."

Contact Clarence Fanto at 413-637-2551.
If you’d like to leave a comment (or a tip or a question) about this story with the editors, please email us. We also welcome letters to the editor for publication; you can do that by filling out our letters form and submitting it to the newsroom.
People's Dossier: FERC's Abuses of Power and Law
→Undermining State Authority

State Authority Undermined Attachment 10, Merits Brief of Delaware Riverkeeper Network and the Delaware Riverkeeper (D.C. Cir. 2016).
IN THE
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA

DELAWARE RIVERKEEPER NETWORK; MAYA VAN ROSSUM, the Delaware Riverkeeper, Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION, Respondent,
and,
TRANSCONTINENTAL GAS PIPE LINE COMPANY LLC, Intervenor.

Docket No. 16-1092

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR REVIEW

Aaron Stemplewicz
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19007
215-369-1188 (tel)
215-369-1181 (fax)

Counsel for Petitioners
RULE 26.1 DISCLOSURE STATEMENT

The Delaware Riverkeeper Network is a nonprofit 501(c)(3) membership organization that advocates for the Protection of the Delaware River, its tributaries, and the communities of its watershed. The Delaware Riverkeeper Network does not have any parent corporation, nor does it issue stock.

Respectfully submitted this 9th day of September 2016,

By: /s/ Aaron Stemplewicz

Aaron Stemplewicz
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, Pennsylvania 19007
Phone: 215.369.1188
Fax: 215.369.1181
aaron@delawareriverkeeper.org
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>TABLE OF AUTHORITIES</td>
<td>iii</td>
</tr>
<tr>
<td>GLOSSARY</td>
<td>viii</td>
</tr>
<tr>
<td>JURISDICTIONAL STATEMENT</td>
<td>1</td>
</tr>
<tr>
<td>STATEMENT OF THE ISSUES</td>
<td>2</td>
</tr>
<tr>
<td>STATUTES AND REGULATIONS</td>
<td>6</td>
</tr>
<tr>
<td>STATEMENT OF THE CASE</td>
<td>6</td>
</tr>
<tr>
<td>STANDING</td>
<td>13</td>
</tr>
<tr>
<td>STANDARD OF REVIEW</td>
<td>15</td>
</tr>
<tr>
<td>SUMMARY OF THE ARGUMENT</td>
<td>19</td>
</tr>
<tr>
<td>ARGUMENT</td>
<td>20</td>
</tr>
<tr>
<td>I. The Commission Violated 33 USC §1341 because it granted Intervenor’s Request to Construct and Operate its Proposed Pipeline Project Prior to the Issuance of a Section 401 Water Quality Certification</td>
<td>20</td>
</tr>
<tr>
<td>II. The Commission’s Mischaracterization of Project Impacts Fails To Provide An Adequate Baseline From Which A NEPA Review Can Proceed</td>
<td>35</td>
</tr>
<tr>
<td>a. The Commission Improperly Classified Numerous Wetlands Impacted By The Proposed Project</td>
<td>37</td>
</tr>
<tr>
<td>b. The Commission Miscalculated the Impact to Wetland Cover Type from the Proposed Project</td>
<td>44</td>
</tr>
<tr>
<td>III. The Commission Violated NEPA by Failing to Disclose or Verify Flow Velocity and Other Technical Data Necessary to Determine the Full Extent of the Project’s Inter-relatedness to Previous, Pending, and Future Projects, and also to Determine the Operational Safety of the Project</td>
<td>49</td>
</tr>
</tbody>
</table>
IV. The Commission Violated NEPA by Unlawfully Treating Similarly Situated Parties Differently ........................................57

CONCLUSION.........................................................................................................................................................60
# TABLE OF AUTHORITIES

## FERC Orders

<table>
<thead>
<tr>
<th>Order</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>149 FERC ¶ 61,258 (2014)</td>
<td>.......................................................... 5</td>
</tr>
<tr>
<td>149 FERC ¶ 61,199 (2014)</td>
<td>.......................................................... 32</td>
</tr>
<tr>
<td>154 FERC ¶ 61,166 (2016)</td>
<td>.......................................................... 5</td>
</tr>
</tbody>
</table>

## Cases

**Airport Impact Relief, Inc. v. Wykle**, 192 F.3d 197 (1st Cir. 1999) ............. 16-17


**American Rivers, Inc. v. FERC**, 201 F.3d 1186 (9th Cir. 1999) ................. 36

**Ass’n of Civilian Technicians v. FLRA**, 269 F.3d 1112 (D.C. Cir. 2001) ............. 18-19

*Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983) 26-27


**Bob Marshall Alliance v. Hodel**, 852 F.2d 1223 (9th Cir. 1998) ................. 35

*Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001) .......................................................... 27

**Cal. Trout, Inc. v. FERC**, 313 F.3d 1131 (9th Cir. 2002) ............................. 18


**City of Olmsted Falls v. FAA**, 292 F.3d 261 (D.C. Cir. 2002) ............................. 18

**City of Tacoma**, 460 F.3d 53 (D.C. Cir. 2006) ............................................. 21,29

**Cotton Petroleum Corp. ’ v. Dep’t of Interior**, 870 F.2d 1515 (10th Cir. 1989) 17


Florida Audubon Soc’y v. Bentsen, 94 F.3d 658, 669 (D.C. Cir. 1996)...............14

Friends of the Earth, Inc. v. Hall, 693 F. Supp. 904 (W.D. Wash. 1988)............52

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000).................................................................13


Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068 (1st Cir. 1980) ..............51

*Half Moon Bay Fisherman’s Mktg. Ass’n v. Carlucci, 857 F.2d 505 (9th Cir. 1988) ......................................................................................... 17,36


Inland Empire Pub. Lands v. United States Forest Serv., 88 F.3d 754 (9th Cir. 1996).................................................................................51

Keating vs. Federal Energy Regulatory Commission, 927 F.2d 616 (D.C. Cir. 1991)......................................................................................22

LaFlamme v. FERC, 852 F.2d 389 (9th Cir. 1988) ........................................37

Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008) .................................36

Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005) ..................................52


Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989) ............16

Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965) .................58

Mountain States Legal Found. v. Glickman,
92 F.3d 1228 (D.C. Cir. 1996) ......................................................... 14

N.M. ex rel. Richardson v. Bureau of Land Mgmt.,
565 F.3d 683 (10th Cir. 2009) ......................................................... 51

Natural Resources Def. Council v. Southwest Marine, Inc.,
236 F.3d 985 (9th Cir. 2000) ......................................................... 13

*New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361 (D.C. Cir. 1987) ............... 58

668 F.3d 1067 (9th Cir. 2011) ......................................................... 17-18,36

Ohio Valley Envtl. Coalition v. Aracoma Coal Co.,
556 F.3d 177 (4th Cir. 2009) ......................................................... 15-16

Oregon Natural Desert Association v. Bureau of Land Mgmt., 625 F.3d 1092 (9th Cir. 2010) ................................. 51

Pacific Coast Federation of Fisherman’s Associations v. U.S. Dept. of the Interior,
929 F.Supp.2d 1039 (E.D. Ca. 2013) ......................................................... 52

*Public Media Center v. FCC, 587 F.2d 1322 (D.C. Cir. 1978) ....................... 58

*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology,
511 U.S. 700 (1994) ................................................................. 21


Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973) ......................................................... 52

Specter v. Garrett, 971 F.2d 936 (3rd Cir. 1992) ......................................................... 16

Thompson v. Calderon, 151 F.3d 918 (9th Cir. 1998) ........................................ 24

*United States v. Deaton, 209 F.3d 331, 336 (4th Cir. 2000) ......................... 27

U.S. v. Marathon Development Corporation, 867 F.2d 96 (1st Cir. 1989) ....... 22

Warth v. Seldin, 422 U.S. 490, 515 (1975) .................................................. 15

Federal Statutes

15 U.S.C. § 717f(c)(1)(A) ........................................................................... 1

15 U.S.C. § 717r(a) .............................................................................. 1

15 U.S.C. § 717r(b) .............................................................................. 1

15 U.S.C. § 717f(e) .............................................................................. 25

33 U.S.C. § 1341(a)(1) ........................................................................ 5, 20-21, 24-25

33 U.S.C. § 1251(d) ........................................................................... 18

Federal Regulations

40 C.F.R. § 1502.22 .................................................................................. 52

40 C.F.R. § 1508.27(b)(3) ....................................................................... 36, 39

Pennsylvania Code

25 Pa. Code § 93.4a ............................................................................ 28, 39

25 Pa. Code § 96.3(b) ........................................................................... 39

25 Pa. Code § 105.1 ............................................................................... 28

25 Pa. Code § 105.15 ............................................................................ 28
25 Pa. Code § 105.17 .................................................................28

25 Pa. Code §§ 105.17(1)(2) ........................................................................39

25 Pa. Code § 105.18a(a)(1) .......................................................................28

25 Pa. Code § 105.20a ...............................................................................28


Secondary Sources


Council on Environmental Quality, Considering Cumulative Effects under the National Environmental Policy Act, at 41 (January 1997) .............................36
## GLOSSARY

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>CWA</td>
<td>Clean Water Act</td>
</tr>
<tr>
<td>Commission</td>
<td>Federal Energy Regulatory Commission</td>
</tr>
<tr>
<td>Intervenor</td>
<td>Transcontinental Pipe Line Company, LLC</td>
</tr>
<tr>
<td>NEPA</td>
<td>National Environmental Policy Act</td>
</tr>
<tr>
<td>NGA</td>
<td>Natural Gas Act</td>
</tr>
<tr>
<td>Petitioners</td>
<td>Delaware Riverkeeper Network, and the Delaware Riverkeeper</td>
</tr>
<tr>
<td>Project</td>
<td>Leidy Southeast Expansion Project</td>
</tr>
<tr>
<td>R.</td>
<td>Administrative Record as per Amended Certified Index</td>
</tr>
<tr>
<td>P[P]</td>
<td>Paragraph[s]</td>
</tr>
</tbody>
</table>
JURISDICTIONAL STATEMENT


March 3, 2016.1 R. 569, JA000701-30. Petitioners filed a petition for review on March 8, 2016, five days after the Commission’s final decision. Because Petitioners timely submitted the issues raised here to the Commission, were denied rehearing, and timely petitioned for review, this Court has jurisdiction.

STATEMENT OF THE ISSUES

1) Did the Commission violate the Clean Water Act (“CWA”) by issuing a Certificate of Convenience and Public Necessity for Transcontinental Gas Pipe Line Company’s Leidy Southeast Expansion Project prior to the Pennsylvania Department of Environmental Protection issuing a Section 401 water quality certification for the Project? (Raised at R. 445, R. 411 at 50-52, JA000640-643, JA000593-95; ruled on at R. 569 at PP41-47, JA000717-20)

2) Did the Commission violate the National Environmental Policy Act (“NEPA”) by failing to establish an accurate baseline from which to conduct its review by mischaracterizing and misclassifying wetlands impacts?

1 The Commission’s Order Denying Rehearing was issued exactly one day after the Petitioners filed a complaint in the United States District Court of the District of Columbia, Docket No. 16-416, alleging, among other things, that the Commission’s failure to take final agency action on Petitioners’ rehearing request unlawfully prevents timely judicial review of natural gas pipeline projects. The Complaint specifically identified the docket for this project, CP13-551, as an example of the Commission’s bias and failure to act.
3) Did the Commission violate the NEPA by failing to disclose or verify flow velocity and other technical data necessary to determine the full extent of the Project’s inter-relatedness to previous, pending, and future projects, and also to determine the operational safety of the Project? (Raised at R. 381 at 26-29, R. 411 at 46-48, JA000359-362, JA000589-91; ruled on at R. 569 at PP28-35, JA000714-15)

4) Did the Commission violate the NEPA by unlawfully treating similarly situated parties differently? (Raised at R. 381 at 20-21, R. 411 at 31-32, JA000353-54, JA000574-75; ruled on at R. 569 at PP28-35, JA000714-15)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

As per Circuit Rule 28(a)(1)(A), the undersigned, on behalf of Delaware Riverkeeper Network, and Maya van Rossum, hereby state that as of the date of filing the Docketing Statement, the following entities are parties, intervenors, or amici in this Court in this and all related cases:

Petitioners: Delaware Riverkeeper Network; the Delaware Riverkeeper, Maya van Rossum.

Intervenor: Transcontinental Gas Pipe Line Company L.L.C.

Applicant: Transcontinental Gas Pipe Line Company L.L.C.

Parties that have appeared before the Federal Energy Regulatory Commission in respect to the Orders at issue herein are:

Applicant: Transcontinental Gas Pipe Line Company L.L.C.

Intervenors: Agharkar, Shreeram N; Aghevli, Karleen; Altmann, Jeanne; Anadarko Energy Services Company; Atmos Energy Marketing, LLC; Barr, Christopher and Patricia Shanley Beardsley-Humphreys, Jennifer M.; Beatty, Richard; W. Blumenthal, Barbara; Cabot Oil & Gas Corporation; Calpine Energy Services, LP; Cherry, Kathleen P.; Chevron Natural Gas; Chow, Paula K.; Consolidated Edison Company of New York and Philadelphia Gas Works (jointly); Delaware Riverkeeper Network; Duke Energy Carolinas, LLC; Duke Energy Florida, Inc.; and Duke Energy Progress, Inc.; Exelon Corporation; ExxonMobil Gas & Power Marketing Company; Florida Power & Light Company; Fridman, Symon and Helen; Goldfarb, Sidney J.; Goldston, Robert J.; Grossman, Gene and Jean B.; Hoppenot, Anne and Herve; Josephson, Paul; Joshi, Rakesh; Law, Jr., Stuart A., and Karen S.; Madden, Jeanne-Anne; Municipal Gas Authority of Georgia and Transco Municipal Group; Municipality of Princeton; National Fuel Gas Distribution Corporation; National Grid Gas Delivery Companies; Neufeld, Leah; New Jersey Department of Environmental Protection; New Jersey
Natural Gas Company; NJR Energy Services Company; Noble Energy Inc.; North Carolina Utilities Commission; Pang, Myungyun; Peifer, Cynthia H.; Piedmont Natural Gas Company, Inc.; Pollard, Carol S.; Preston, Marvin IV and Candace L.; Princeton Ridge Coalition; Public Service Company of North Carolina and South Carolina Electric & Gas Company; Sierra Club, New Jersey Chapter, Environment New Jersey, and Food & Water Watch; Shapiro, Paul and Helene; Shell Offshore, Inc.; Sourland Conservancy; Stonybrook-Millstone Watershed Association; Southern Company Services, Inc.; Township of Montgomery; Township of Readington; UGI Distribution Companies; Vilko, Naomi; Waldorf School of Princeton; Washington Gas Light Company; Winant, John and Kathy; Yuan, Kaixu; Zhang, Tianyi.

Rulings Under Review

As per Circuit Rule 28(a)(1)(B), the rulings under review are Federal Energy Regulatory Commission Order 149 FERC ¶ 61,258 (2014) (December 18, 2014 order approving issuance of Certificate of Public Convenience and Necessity), 154 FERC ¶ 61,166 (2016) (March 3, 2016 order denying Petitioners’ rehearing request), and any subsequent letter orders authorized thereby.

Related Cases

As per Circuit Rule 28(a)(1)(C), the following are related cases to the present matter:


**STATUTES AND REGULATIONS**

The Addendum presents pertinent statutory and regulatory provisions.

**STATEMENT OF THE CASE**

Intervenor filed its application with the Commission on September 30, 2013, to construct and operate the Project. R. 183, JA000126-36. The Project is one of a series of related natural gas pipeline projects to upgrade Intervenor’s existing Leidy line pipeline system. In Pennsylvania, the Project involves the installation of approximately 5.29 miles of 42 inch pipe in Luzerne County, Pennsylvania (the “Dorrance Loop”), and approximately 11.47 miles of 42 inch pipe in Luzerne and
Monroe Counties, Pennsylvania (the “Franklin Loop”). See R. 183 at 5, JA000128.


In the Environmental Assessment the Commission identified the need for Intervenor to obtain a water quality certification from the Pennsylvania Department of Environmental Protection, as required by Section 401 of the Clean Water Act. R. 359 at 28, JA000171. Section 1341(a)(1) of the Clean Water Act states, in part, “[n]o 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.” See 33 U.S.C. § 1341(a)(1). On June 10, 2014 Intervenor submitted its application to the Pennsylvania Department of Environmental Protection ("Department") for the issuance of the Section 401 water quality certification. R. 484 at 1, JA000677.

On December 18, 2014, the Commission issued an order including a Finding of No Significant Impact and certificate approval for the Project. R. 406 at PP44.

---

2 Pipeline loops are new pipes placed adjacent to an existing pipeline and connected to it at both ends.

On February 12, 2015, Petitioners filed a Motion for Stay with the Federal Energy Regulatory Commission requesting a stay of any construction activity and any other land disturbance conducted under the Certificate. R. 425, JA000604-19. Petitioners specifically identified that, “the Clean Water Act clearly prohibits FERC from issuing the Order in advance of the grant of the required Section 401 Certification.” R. 425, JA000617. The motion was not addressed by the Commission until March 12, 2015, when the motion was denied. R. 468, JA000647-55.

The Commission granted Petitioners’ request for rehearing of the Commission’s order approving the Project on February 18, 2015; however, it was only granted for the sole purpose of securing additional time to consider Petitioners’ comments. R. 428, JA000620-621.

Prior to the Commission taking final action on Petitioners’ rehearing request and Petitioners’ Motion for Stay, and while the Section 401 water quality certification was still under review by the Department, the Commission began providing authorizations for various forms of construction activity to proceed on the Project. For example, on January 30, 2015, the Commission issued a letter
order granting Intervenor’s first request to begin construction activity, stating that it:

grant[s] [Transco’s] January 15, 2015 request for Transcontinental Gas Pipe Line Company, LLC’s (“Transco”) to begin construction of the meter and regulation stations and valves in Maryland and Virginia, as approved in the above-referenced docket for the Leidy Southeast Expansion Project. I also grant your request to begin construction at Compressor Station 517 in Columbia County, Pennsylvania.

R. 420, JA000600-601 (emphasis added). The Commission then issued an additional three letter orders providing Intervenor authorization to begin different aspects of construction activity. On February 5, 2015, the Commission authorized Intervenor “to begin construction at the Mt. Effort pipe yard, as approved in the above-referenced docket for the Leidy Southeast Expansion Project.” R. 422, JA000602-603.

Petitioners submitted a comment on February 26, 2015, to the Commission noting that the authorization of tree felling:

will fundamentally undermine the authority of the Section 401 Water Quality Certification by cutting the very trees that the Section 401 permit is designed to protect. This is but one example of the myriad of ways in which the remaining outstanding federal authorizations may materially alter the project such that the premature tree felling activities requested by Transco will result in unnecessary, and unlawfully, harm to the environment.

R. 445, JA000640-643. Petitioners’ February 26, 2015 comment letter was ignored by the Commission, and tree felling construction activity was allowed to proceed
as authorized in a Commission letter order dated March 9, 2015. This letter order granted Intervenor the right to:

begin non-mechanized tree felling activities in the following areas: the Dorrance and Franklin Loops in Monroe and Luzerne Counties, Pennsylvania; Compressor Stations 515 and 520 in Luzerne and Lycoming Counties, Pennsylvania; and certain upland segments of the Skillman and Pleasant Run Loops in Mercer, Somerset, and Hunterdon Counties, New Jersey, as specified in Attachment A to Transco’s February 23, 2015 request.

R. 466, JA000644-46.

Petitioners filed a Petition of Writ Under the All Writs Act in the United States Court of Appeals for the District of Columbia on March 10, 2015, because while Petitioners were waiting for the Commission to respond to its requests for a rehearing, and before Petitioners could file a petition with the Court for review of the order, the Commission was allowing construction activities to proceed harming Petitioners’ recreational and aesthetic interests by irreversibly destroying the natural beauty and environmental quality of over 140 acres of forested areas adjacent to some of Pennsylvania most valuable streams and wetland resources. See Petition for Writ, In Re The Delaware Riverkeeper Network, D.C. Cir., Docket No. 15-1052. The Court denied Petitioners’ petition in a single sentence per curium order on March 19, 2015, stating only that “Petitioner has not satisfied the stringent requirements for a stay under the All Writs Act. See, e.g., Reynolds Metals Co. v. FERC, 777 F.2d 760, 762 (D.C. Cir. 1985).”
On March 25, 2015 the Commission granted Intervenor an additional request to:

begin construction at Compressor Station 205 in New Jersey and Compressor Stations 515 and 520 in Pennsylvania. I also grant your request to begin non-mechanized tree felling of 7.63 acres of extra workspace along the Franklin Loop in Luzerne County, Pennsylvania. Lastly, I approve your variance request for use of the 20-acre Dunmore Yard in Lackawanna County, Pennsylvania for use during construction of the Dorrance Loop.

R. 474, JA000659-661.

The Department did not issue the Section 401 water quality certification until April 8, 2015, R. 484 at 1, JA000677. On May 5, 2015 Petitioners petitioned the Court of Appeals for the Third Circuit for review of the Department’s Section 401 water quality certification as being arbitrary, capricious, or otherwise not in accordance with law. See Delaware Riverkeeper Network v. Sec’y of Pennsylvania Dep’t of Env’tl. Prot., No. 15-2122 (3d. Cir. filed May 5, 2015). Petitioners contended that the Department violated Pennsylvania’s water quality standards and the Clean Water Act by unlawfully issuing a Section 401 water quality certificate to Intervenor for the Project. Briefing was completed in September 2015, and oral argument was conducted in October 2015. A decision is still pending before the Third Circuit Court of Appeals.

After sitting on Petitioners’ rehearing request for roughly a year and two months – and thereby effectively blocking Petitioners’ only viable access to

A significant amount of environmentally sensitive areas and valuable ecological resources have been, and will be in the future, degraded by the proposed Project. In Pennsylvania, the Project cut through publically accessible conservation areas and impacted at least sixteen acres of wetlands, many of which meet the classification criteria in Pennsylvania as “exceptional” value wetlands, including one of the largest and least disturbed boreal conifer wetlands in Pennsylvania. R. 411 at 2-11, JA000545-54. The Project also cut through numerous streams, tributaries, and rivers, including the Lehigh River. R. 406 at 18, JA000504. Additionally, over 375 acres of wooded mountains and pastoral landscapes were disturbed as a result of construction activity for the Project’s right-of-way and access roads. R. 406 at 70, JA000211. While much of the construction activity is complete, granting Petitioners’ the relief sought will allow proper environmental review to inform appropriate remediation, re-vegetation, soil stabilization, and other mitigation efforts that remain ongoing, and will remain ongoing for several years.
STANDING

To have standing to bring this appeal, an organization like the Delaware Riverkeeper Network must demonstrate three factors: (1) that one or more of its members have suffered or will suffer an “injury in fact”; (2) that this appeal is germane to the organization’s purpose; and (3) that participation of individual members is not necessary for the appeal. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 181 (2000); *Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 994 (9th Cir. 2000). “Injury in fact” is shown when a member suffers an injury to his or her interests that is both actual or imminent and concrete and particularized, the injury is fairly traceable to the actions of the respondent/appellee, and the injury is likely to be redressed by a favorable ruling. See *Laidlaw*, 528 U.S. at 180-81; see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Each of these elements is satisfied here.

Petitioners have standing as a not-for-profit environmental protection organization whose executive director, who is also a member, uses and enjoys the specific geographic areas affected by construction and operation of the Project, and whose recreational and aesthetic interests will be harmed by the faulty and unlawful issuance of a Certificate by the Commission for the Proposed Project. See AD017-26 (Maya van Rossum Declaration at ¶¶ 8-15); *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 342-43 (1977). The Commission’s violation of the
Clean Water Act and the National Environmental Policy Act make it substantially more likely that Petitioners will suffer the harms described in the supporting affidavit now and in the future, thus demonstrating causation. See Florida Audubon Soc’y v. Bentsen, 94 F.3d 658, 669 (D.C. Cir. 1996). The Delaware Riverkeeper Network’s stated purpose is to preserve and protect the Delaware River Basin Watershed; this purpose is directly germane to the appeal of the unlawful certification of the pipeline project by the Commission. AD017-26 (Maya van Rossum Declaration at ¶¶ 3-5). Construction and operation of the Project has harmed and will continue to harm Petitioners’ protected recreational and aesthetic interests in the environment, in particular the degradation and loss of valuable wetlands and habitat, thus constituting injury in fact within the zone of interests of the Clean Water Act, Natural Gas Act, and National Environmental Policy Act. See AD017-26 (Maya van Rossum Declaration at ¶¶ 7-15); Laidlaw, 528 U.S. at 180-81; Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1236 (D.C. Cir. 1996); Bentsen, 94 F.3d at 667.

Additionally, because Petitioners’ appeal concerns only the question of whether the Commission’s orders are lawful, it is not necessary for any individual member of the Delaware Riverkeeper Network to participate in this proceeding in order to secure effective relief for all its injured members. See Warth v. Seldin, 422 U.S. 490, 515 (1975) (“If . . . the association seeks a declaration, injunction, or
some other form of prospective relief, it can be reasonably supposed that the remedy, if granted, will inure to the benefit of those members . . . actually injured”).

The harms identified above, and in the Maya van Rossum Declaration, would be redressed by this Court rescinding the Commission’s Orders, or remanding the decision to ensure that the Orders comply with the CWA and NEPA. See Lujan, 504 U.S. at 572 n.7 (1992) (discussing relaxed redressability requirement for parties invoking procedural rights); City of Jersey City v. CONRAIL, 668 F.3d 741, 745 (D.C. Cir. 2012) (injury from increased risk of environmental harm redressable by remand requiring review where review could inform conditions imposed on underlying action); see also Delaware Riverkeeper Network v. Fed. Energy Regulatory Comm’n, 753 F.3d 1304 (D.C. Cir. 2014) (remanding to Commission for further environmental review as a result of Commission’s failure to comply with the National Environmental Policy Act). Petitioners ultimately seek to vindicate environmental concerns, and therefore Petitioners have standing.

**STANDARD OF REVIEW**

Review of the merits of Respondent’s approval of Intervenor’s application for the Project is governed by the Administrative Procedure Act (“APA”). 5 U.S.C. §§ 701 to 706; see also Ohio Valley Envtl. Coalition v. Aracoma Coal Co., 556
F.3d 177, 192 (4th Cir. 2009) (claims challenging federal agency action under the Clean Water Act are subject to judicial review under the APA). Under the APA, “a reviewing court shall ‘hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”’ Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 376 (1989); see also Specter v. Garrett, 971 F.2d 936, 944 (3rd Cir. 1992).


The standard of review requires that the agency reviewed all the relevant factors:

The task of a court reviewing agency action under the APA’s arbitrary and capricious standard is to determine whether the agency has examined the pertinent evidence, considered the relevant factors, and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.

Airport Impact Relief, Inc. v. Wykle, 192 F.3d 197, 202 (1st Cir. 1999) (quoting Penobscot Air Servs., Ltd. v. Federal Aviation Admin., 164 F.3d 713, 719 (1st Cir. 1999) (internal quotations omitted). “The reviewing court must determine whether
the decision was based on a consideration of the relevant factors and whether the agency made a clear error of judgment.” Airport Impact Relief, 192 F.3d at 202 (citing Oregon Nat. Resources Council, supra, 490 U.S. at 378).

While this is a highly deferential standard of review, it is not a rubber stamp. The reviewing court must undertake a ‘thorough, probing, in-depth review’ and a ‘searching and careful’ inquiry into the record. Only by carefully reviewing the record and satisfying itself that the agency has made a rational decision can the court ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.

Id. at 378 (citations omitted). Where important aspects of the problem are left out because standard procedures were short-circuited, the agency's resulting decision is arbitrary and capricious. Cotton Petroleum Corp.’ v. Dep’t of Interior, 870 F.2d 1515, 1525-27 (10th Cir. 1989).

The failure of an agency to obtain accurate baseline condition information for a proposed project prior to its approval prevents the decision-maker from determining the environmental impact of the project, such action is evidence of an arbitrary and capricious decision. See N. Plains Research Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067 (9th Cir. 2011) (finding that a government agency who failed to provide adequate baseline data to assess project impacts to aquatic resources failed to consider an “important aspect of the problem,” resulting in an arbitrary and capricious decision) (internal quotations omitted); see also Half Moon Bay Fisherman’s Mktg. Ass’n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988)
(“Without establishing the baseline conditions . . . there is simply no way to determine what effect the [action] will have on the environment. . .”).

The Commission’s interpretation of the Clean Water Act is not entitled to the judicial deference because the Environmental Protection Agency – not the Commission – is charged with administering the statute. See 33 U.S.C. § 1251(d) (“Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency ... shall administer this chapter”); Cal. Trout, Inc. v. FERC, 313 F.3d 1131, 1133–34 (9th Cir. 2002) (Commission's interpretation of CWA not entitled to deference); see also City of Olmsted Falls v. FAA, 292 F.3d 261, 270 (D.C. Cir. 2002) (“[W]hen we are faced with an agency's interpretation of a statute not committed to its administration, we give no deference”) (emphasis in original). Therefore the Court’s review of the Commission’s interpretation of section 401(a)(1) is de novo. See Cal. Trout, 313 F.3d at 1133–34 (Commission's interpretation of section 401(a)(1) reviewed de novo); see also Chevron v. Natural Res. Defense Council, 467 U.S. 837, 843 n. 9 (1984) (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent”); Ass’n of Civilian Technicians v. FLRA, 269 F.3d 1112, 1115–16 (D.C. Cir. 2001) (FLRA's interpretation of Travel Expenses Act—statute it does not administer—reviewed de novo).
SUMMARY OF THE ARGUMENT

This appeal is about the Commission acting in direct contravention to the plain language of the Clean Water Act, and also violating fundamental aspects of National Environmental Policy Act. The Clean Water Act clearly demands that federal approvals – such as the certificates for public convenience and necessity that are issued by the Commission – can only be issued after the appropriate state, or states, have certified a project’s compliance with their water quality standards. Here, the Commission issued its approval of the Project prior to Pennsylvania’s issuance of its Clean Water Act Section 401 water quality certificate. Under the Clean Water Act and this Circuit’s precedents, the Commission had no authority to issue the Certificate in such a circumstance. As such, the Commission’s action violated the Clean Water Act.

Additionally, the Commission violated NEPA by failing to establish an accurate baseline from which to conduct its environmental review of the Project. Specifically, the Commission grossly misidentified numerous specially protected wetlands, and miscalculated both the cover type categorization of those wetlands and the total acreage of those wetlands. The Commission’s failure to begin its environmental review process with accurate environmental resource information renders its Environmental Assessment, and the Orders that rely upon it, arbitrary, capricious, or otherwise not in accordance with the law.
The Commission also violated NEPA by failing to disclose critical information related to gas flow velocity for the proposed Project, and by failing to respond to comments and an expert report identifying significant safety and operational problems with the Project. Additionally, the Commission violated NEPA by approving the proposed Project despite the admitted existence of gas flow velocities that far exceed gas flow velocities that the Commission specifically cited as a reason for denying a project alternative for a similar pipeline project.

ARGUMENT

I. The Commission Violated 33 USC § 1341 because it Granted Intervenor’s Request to Construct and Operate its Proposed Pipeline Project Prior to the Issuance of a Section 401 Water Quality Certification

The Commission violated the Clean Water Act by issuing its Certificate of Public Convenience and Necessity for the Project prior to the Pennsylvania Department of Environmental Protection issuing a Section 401 water quality certification. The Clean Water Act specifically requires state certification of compliance with state water quality standards as a condition precedent to any federal license or permit activity. Section 401 of the Clean Water Act, 33 USC § 1341(a)(1), states in pertinent part:

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 . . . No license or permit shall be granted until the certification required by this section has been granted or waived . . .

33 USC § 1341(a)(1) (emphasis added). The meaning of this provision is that,

States are required by Section 401 of the Act to provide a water quality certification before a federal license or permit can be issued for any activity that may result in a discharge into intrastate navigable waters.

PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology, 511 U.S. 700, 707 (1994) (emphasis added). This explicit statement regarding the sequencing of the water quality certification necessarily affects the ability of a federal agency like the Commission to issue certificates of public convenience and necessity.

As this Court found in City of Tacoma v. FERC, “[the Commission’s] role is limited to awaiting, and then deferring to, the final state decision . . . [the Commission] . . . has an obligation to determine that the specific certification ‘required by [section 401] has been obtained,’ and without that certification, [the Commission] lacks authority to issue a license.” City of Tacoma, 460 F.3d 53, 68 (D.C. Cir. 2006) (emphasis added); see also Ala. Rivers Alliance v. Fed. Energy Regulatory Comm’n, 325 F.3d 290, 300 (D.C. Cir. 2003) (“[W]e conclude that section 401(a)(1) of the CWA requires Alabama Power to obtain water quality certification from the state of Alabama before [FERC] can issue a license”)

21
State of N.C. v. Fed. Energy Regulatory Comm’n, 112 F.3d 1175, 185 (D.C. Cir. 1997) (Section 401(a)(1) “clearly provides that a Federal license or permit may not be granted” until the certification required by the Clean Water act has been “obtained or has been waived”); Keating vs. Fed. Energy Regulatory Comm’n, 927 F.2d 616, 619 (D.C. Cir. 1991) (“Without [a Section 401] state certification, neither the FERC license nor the Corps permit may be issued”); United States v. Marathon Dev. Corp., 867 F.2d 96, 100 (1st Cir. 1989) (“If a state determines that discharges from a certain category of activity will not meet state water quality requirements, the federal government is prohibited from authorizing the activity by federal permit”).

Additionally, the Congressional history of Section 401(a)(1) also supports this plain reading of the statute. The predecessor of Section 401(a) of the Clean Water Act was Section 21(b) of the Water and Environmental Quality Improvement Act of 1970. When Congress enacted section 21(b), it described the provision as follows:

No Federal license or permit shall be granted unless this [state] certification has first been obtained or there has been a waiver of this requirement as provided by this subsection. Denial of certification by a State . . . results in a complete prohibition against the issuance of the Federal license or permit.

Here, the record is clear that a Section 401 water quality certification was required for the Project from the state of Pennsylvania. R. 406 at 28, JA000171. The record is also clear that the at the time the Commission issued the Certificate of Public Convenience and Necessity, the Pennsylvania Department of Environmental Protection had not yet issued the Section 401 water quality certificate for the Project. See R. 484, JA000677-684. Therefore, the Commission violated the plain meaning of the Clean Water Act, rendering its decision to certificate the Project arbitrary, capricious, or otherwise not in accordance with law.

While the Commission has the power to place conditions on its certificates under Section 7 of the Natural Gas Act, that power simply does not include the ability to re-write federal statutes. Section 401 of the Clean Water Act very clearly requires a water quality certificate to be issued by the state before any other federal approval. The Commission’s issuance of the Certificate of Public Convenience and Necessity for the Project with the requirement to obtain the Section 401 water quality certificate at some later date gets Section 401 backwards. Nothing in the Commission’s authority under the Natural Gas Act allows the Commission to blatantly ignore plain language of the Clean Water Act.

Indeed, the Natural Gas Act does not make any exceptions for licenses or permits that are conditioned on the subsequent grant of the 401 water quality
certification. Congress could have created an exception in the Natural Gas Act of 1938, which was amended as recently as 2005, but did not do so. In the decades since the Clean Water Act was passed, Congress has repeatedly chosen not to reduce or modify the power of states under Section 401 of the Clean Water Act.

Congress could also have created a specific exception for pipelines, or other linear infrastructure projects, when it enacted the Clean Water Act, or in any one of the subsequent amendments, but did not. See Thompson v. Calderon, 151 F.3d 918, 929 (9th Cir. 1998) (finding that it “is elementary that a more recent and specific statute is reconciled with a more general, older one by treating the more specific as an exception which controls in the circumstances to which it applies”).

While the Commission has authority to impose conditions in its certificates, that power does not extend to overriding an explicit Congressional mandate. When Congress speaks directly to the issue at hand, “[t]he court…must give effect to the unambiguously expressed intent of Congress.” Chevron, 467 U.S. 837, 842-43. In the case of whether a federal agency like the Commission can issue a federal license or permit before a state has issued its Section 401 water quality certification, Congress’ intent was clear: “[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived.” 33 U.S.C. § 1341(a)(1) (emphasis added). The plain language of the statute speaks for itself.
The Natural Gas Act grants the Commission an ability to attach “reasonable
terms and conditions as the public convenience and necessity may require.” See 15
U.S.C. § 717f(e). While we do not dispute the fact that the Commission may have
the ability to issue certificates with some conditions, it cannot do so until after the
state has issued or waived the Section 401 water quality certification. Otherwise
the Commission consistently risks approving or restricting certain alternatives and
other activities that violate a state’s water quality standards.

Even if Petitioners are required to demonstrate that the Commission
authorized specific activities that resulted in a discharge that triggered the
requirement of a Section 401 water quality certificate – which they are not – the
Commission still violated the Clean Water Act because the Commission authorized
tree felling activities in wetlands, thus constituting a “discharge” triggering the
standards and requirements articulated in Section 401(a)(1).

It is undeniable that tree felling in wetlands and other activities took place
along substantial portions of the Project area during the four months between when
the Commission issued its December 18, 2014 Order, and when the Department
finally issued the Section 401 water quality certification on April 8, 2015.

Specifically, the Commission authorized Intervenor to begin the following
activities: “construction at the Mt. Effort pipe yard,” “tree felling activities . . . in
the Dorrance and Franklin Loops in Monroe and Luzerne Counties,” “tree felling
activities” for “Compressor Stations 515 and 520 in Luzerne and Lycoming Counties,” “tree felling activities” for “certain upland segments of the Skillman and Pleasant Run Loops in Mercer, Somerset, and Hunterdon Counties,” “construction at Compressor Station 205 in New Jersey and Compressor Stations 515 and 520 in Pennsylvania,” and “tree felling of 7.63 acres of extra workspace along the Franklin Loop in Luzerne County.” See R. 420, 422, 466, 474, JA000600-01, JA000602-03, JA000644-46, JA000659-61.

As a result of these various authorizations, Intervenor cut trees along 73,000 feet of right-of-way for the Franklin Loop, and 28,000 feet of right-of-way along the Dorrance Loop, including trees located in wetlands. R. 478 at 7, JA000668 (Bi-weekly status report showing that “100%” of “[t]ree clearing” was completed on Franklin and Dorrance Loops by March 22, 2015). The tree felling activities included permanently converting over eight and half acres of pristine forested wetlands into non-forested emergent wetlands, forever degrading the functions and values that those wetlands are capable of providing. R. 406 at 64, JA000205.

The case law is clear, the felling of trees and other vegetation in wetlands for the Project constituted a “discharge” triggering the requirement of a Section 401 water quality certification. In Avoyelles Sportsmen’s League, Inc. v. Marsh, the Fifth Circuit Court of Appeals found that the clearing of vegetation in wetlands would “significantly alter the character of the wetlands and limit the vital
ecological functions served by the tract,” and therefore, when vegetation or other materials are “redeposited” in the wetland, the discharge language of Section 401 is triggered. *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 923-24 (5th Cir. 1983); *see also United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000) (holding that returning “seemingly benign substances like rock, sand, cellar dirt, and biological materials” to a wetland constituted a “discharge” pursuant to the Clean Water Act.); *Borden Ranch P’ship v. U.S. Army Corps of Engineers*, 261 F.3d 810, 814-15 (9th Cir. 2001) (holding that the removal of a “protective layer of soil” in a wetland triggered the “discharge” language of the Clean Water Act).

Here, the record evidence clearly shows that all tree felling activities – including tree felling in and around wetlands – were finished in Pennsylvania before the Department issued the Section 401 water quality certification. R. 485, JA000677-84. As such, the Commission violated the Clean Water Act by authorizing activities that constitute a discharge requiring a Section 401 water quality certification.

Importantly, tree felling activities are precisely the type of activities that Pennsylvania’s Section 401 water quality certification is designed to govern. Indeed, Petitioners repeatedly warned the Commission that tree felling activities should not proceed absent a Section 401 water quality certification from Pennsylvania because it is a violation of Pennsylvania’s water quality standards to
fell trees in certain types of specially protected wetlands. However, these comments were summarily ignored by the Commission. R. 445, JA000640-43.


Tree felling activities in wetlands resulting in the permanent conversion of forested wetlands to non-forested emergent wetlands therefore strikes at the core of Pennsylvania’s water quality standards, as it adversely affects both the functions and values of those wetlands. R. 445, JA000640-43.

Petitioners submitted expert reports to the Commission putting the Commission on notice that the conversion of forested wetlands to non-forested emergent wetlands results in significant decreases to “above ground biomass,” “structural diversity of the wetland,” “local climate amelioration,” “forest interior habitat,” “visual and aural screening from human activity,” “suitability of shade-
loving plant species,” and the “production of mast for wildlife.” R. 411 at Ex. G, JA000464-67. Tree felling in wetlands also results in losses related to structural diversity, species diversity, and the loss of rare/ancient trees. Id. The wetland functions of “pollution prevention” and “sediment control” can also be expected to decrease. Id. Furthermore, wetland functions relating to drainage patterns, water quantity, and water quality are also adversely impacted by tree felling in wetlands. Id. The wetlands will also provide decreased “soil stabilization,” “streambank anchoring against erosion,” “nutrient storage,” “temperature maintenance,” and storm damage shielding. Id.

Considering the Commission’s blatant violation of the Clean Water Act by authorizing tree felling activities in wetlands, and Pennsylvania’s clear regulatory commitment to prohibit precisely the type of activity that was authorized, the Commission’s actions fundamentally neutered the state of Pennsylvania’s well-established regulatory authority and “power to block the project.” See City of Tacoma, 460 F.3d at 67.

The plain language of the Clean Water Act clearly contemplated the potential sequencing of events whereby a federal agency authorizes a project and thereby obstructs state’s ability to modify or alter project plans pursuant to its rights under the Clean Water Act, which is exactly why the Clean Water Act requires the Section 401 water quality certification to be issued prior to any other
federal licenses or permits. Here, by allowing tree felling activities to be conducted prior to the issuance of the Section 401 water quality certification materially restricted and inhibited Pennsylvania’s ability to require alternative project design and resource mitigation or avoidance. In other words, by authorizing tree felling activities to begin prior to the issuance of the Section 401 water quality certification, the Commission infringed upon the right of Pennsylvania to review and place conditions on the Section 401 water quality certification that could require the project applicant to significantly change scope and design of the Project. It is impossible to know what additional conditions Pennsylvania would have conferred upon the Section 401 water quality certification had the Commission not already committed to moving the Project forward absent the review and consent of the state.

This was exactly the concern raised by the New Jersey Department of Environmental Protection when Intervenor requested to begin tree felling activities in wetlands prior New Jersey issuing its Section 401 water quality certification. Specifically, the New Jersey Department of Environmental Protection submitted a letter to the Commission which stated:

We respectfully request that FERC not issue a “Notice to Proceed” for any tree felling activities . . . until Transco has obtained all required approvals from NJDEP for the Leidy Southeast Expansion Project . . . We believe our request is extremely urgent since any tree felling activity prior to permit issuance may impact available alternatives for project design and mitigation.
R. 471, JA000656-658. A state’s interest in protecting water quality through its Section 401 water quality certification process is well established, and has been explicitly enshrined by the Supreme Court:

State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained on the floor when what is now § 401 was first proposed:

No [person] will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No [person] will be able to make major investments in facilities under a federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements.

S.D. Warren Co. v. Me. Bd. of Envtl. Protection, 547 U.S. 370, 386 (2006). The Commission’s overreach here is therefore contrary to the plain meaning of Section 401(a)(1), as it undermined the foundation upon which Pennsylvania relies to protect its water quality.

Additionally, by allowing tree felling and other activities to begin in a situation where a state later denies the water quality certificate, the Commission runs the risk of authorizing construction activity to begin for a project that the state later stops by denying the Section 401 water quality certificate. This results in irreparable harm to the environment that would have been avoided if the
Commission had simply complied with the Clean Water Act and waited to issue the approval, and/or any letter orders authorizing construction activity, until all the necessary federal approvals were acquired.

Unfortunately, this exact factual scenario recently took place with regard to the Constitution Pipeline Project. See, e.g., 149 FERC ¶ 61,199 (2014). The Constitution Pipeline project is a Commission jurisdictional 124 mile natural gas pipeline project proposed to span parts of Pennsylvania and New York. Id. at PP1. There the Commission issued its certificate for the project and authorized tree felling activities to begin in Pennsylvania before the New York Department of Environmental Conservation issued its Section 401 water quality certification for the project. Of the acres of trees that were authorized to be cut by the Commission in Pennsylvania were trees owned by a family that lost ninety percent of the trees they harvest in a commercial operation for maple syrup, thereby effectively destroying the family-run business. See https://stateimpact.npr.org/pennsylvania/2016/03/02/maple-syrup-trees-cut-to-make-way-for-the-constitution-pipeline/.

On April 20, 2016, the New York Department of Environmental Conservation denied the Section 401 water quality certification for the project pursuant to its powers to “block” the project. See AD033-46 (Joint Application: DEC Permit# 0-9999-00181/00024 Water Quality Certification/Notice of Denial, New York Department of Environmental Conservation, April 20, 2016). Therefore,
as a result of the Commission’s premature and unlawful authorization of tree felling in violation of the Clean Water Act, the family now had their entire business unnecessarily cut to pieces. Additional examples of needless tree felling litter the right of way for the Constitution pipeline in Pennsylvania, leaving a permanent scar across the northern tier of the state.

In an illuminating admission, the Commission recently conceded that it does not have the expertise to determine whether tree felling in wetlands violates a state’s Section 401 water quality certification requirements. On March 25, 2016, the Commission issued a letter to Tennessee Gas Pipeline Company (“Tennessee”) with regard to the Connecticut Expansion Project, which expressly stated that “before [the Commission] can complete [its] review” Tennessee “must” provide additional information to the Commission, including:

... evidence that the Massachusetts Department of Environmental Protection and the Connecticut Department of Energy and Environmental Protection concur that Water Quality Certificates under Section 401 of the Clean Water Act are not required for non-mechanized tree felling for the proposed Project.

AD027-30 (“Request for Additional Information in Response to the Request for Limited Notice to Proceed with Tree Felling,” FERC Docket No. CP14-529, Accession 20160325-3003). In other words, before the Commission allowed any tree felling for the Connecticut Expansion project, the Commission required that the project applicant provide proof that both Connecticut and Massachusetts agree
that tree felling will not violate either of their state specific water quality standards. The Commission therefore admitted that it simply does not have the expertise, or authority, to determine whether tree felling in wetlands is prohibited by, or materially impacts, a state’s water quality certification process.

Here, not only did the Commission approve tree felling construction activity prior to the issuance of the Section 401 water quality certificate, the Commission did not even bother to ask the Pennsylvania Department of Environmental Protection if such activities would violate Pennsylvania’s water quality standards, or require proof of the same. Clearly, the Commission has adopted two conflicting approaches for two identically situated projects without providing any reason or explanation. The Commission’s irreconcilable position is therefore further evidence of the Commission’s arbitrary actions.

The Commission’s sole duty with regard to the Section 401 water quality certification was to respect the rights of the states and their mandate to carry out the goals of the Clean Water Act. Ultimately, the Commission must follow the law, but failed to do so in issuing the December 18, 2014 Order before Pennsylvania issued its Section 401 water quality certification for the Project. The Commission’s failure to comply with Section 401 of the Clean Water Act means that the December 18, 2014 Order was issued in a manner contrary to the Clean Water Act. As such, that Order should be vacated or otherwise remanded for further review.
II. The Commission’s Mischaracterization Of Project Impacts Fails To Provide An Adequate Baseline From Which A NEPA Review Can Proceed

The Commission violated NEPA by failing to properly identify the type and extent that resources will be impacted by the construction and operation of the Project. Specifically, the Commission failed to accurately identify and classify wetlands in the Project area, and also failed to calculate and account for the type expected harms to those same wetlands. As a result, the Commission was unable to accurately establish a foundational baseline from which it could begin its NEPA review process to provide an accurate assessment of the harms associated with construction and operational activity in the wetlands. The Commission’s approach therefore subverts the full disclosure and environmental impact analysis goals of NEPA. Additionally, the Commission failed to provide a reasoned explanation as to why it did not substantively respond to Petitioners comments and expert reports regarding wetlands harms, thereby also violating the NEPA.

NEPA requires that the agency “adequately considered and disclosed the environmental impact of its actions. . .” Baltimore Gas & Electric Co. v. Natural Res. Defense Council, Inc., 462 U.S. 87, 97-98 (1983); see also Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9th Cir. 1998) (finding that the “goal of [NEPA] is to ensure that federal agencies infuse in project planning a thorough consideration of environmental values”).
A baseline is a practical requirement in a NEPA environmental analysis employed to identify the environmental consequences of a proposed agency action. See *American Rivers, Inc. v. FERC*, 201 F.3d 1186, n. 15 (9th Cir. 1999). It has been recognized that “[w]ithout establishing . . . baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA.” *Half Moon Bay*, 857 F.2d at 510; see also *N. Plains Res. Council*, 668 F.3d at 1085 (“without [baseline] data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency fails to consider an important aspect of the problem, resulting in an arbitrary and capricious decision.”) (internal quotation marks and brackets omitted); Council on Environmental Quality, Considering Cumulative Effects under the National Environmental Policy Act, at 41 (January 1997) (“The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process”); see also 40 C.F.R. § 1508.27(b)(3).

NEPA requires that the lead agency provide the data on which it bases its environmental analysis. See *Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008) (holding that an agency must support its conclusions with studies that the agency deems reliable) (overturned on other grounds). Such analyses must occur before the proposed action is approved, not afterward. See *LaFlamme v. FERC*,
852 F.2d 389, 400 (9th Cir. 1988) ("[T]he very purpose of NEPA’s requirement that an [environmental review] be prepared for all actions that may significantly affect the environment is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action") (internal citation and quotation marks omitted). This is consistent with NEPA’s twin aims of (1) ensuring that agencies carefully consider information about significant environmental impacts; and, (2) guaranteeing relevant information is available to the public. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1998).

a. The Commission Improperly Classified Numerous Wetlands Impacted By The Proposed Project

The Commission’s Environmental Assessment includes a section dedicated to the analysis of wetlands harms and mitigation. See R. 406 at 61-68, JA000202-09. This section provides an evaluation of the various types of wetlands in the Project area, and the expected impacts of construction and operational activity on those wetlands. Id. The data collected and analyzed by the Commission must be accurate to provide a useful baseline from which the Commission can generate its NEPA environmental review. However, the Commission verifiably misclassified numerous specially protected wetland resources that were to be impacted by the proposed Project.
The Commission admits that the methodology and information collected for its NEPA review regarding wetlands “enabled staff to disclose and evaluate potential impacts on wetlands and to serve as a starting point for the development of protective mitigation,” which included a “consideration of the water resource classifications for the potentially affected surface and groundwater resources.” R. 569 at P37, JA000716. Therefore, it is clear that the Commission relied on the classification information and other data it collected with regard to evaluating impacts to wetlands. However, overwhelming evidence exists on the record – including two expert reports and numerous comment letters – that the Commission improperly categorized a significant number of wetlands, which therefore prevented the Commission from making an informed decision regarding whether the Project would have a significant impact on wetlands necessitating further environmental review.

The Commission’s wetlands analysis repeatedly cites to, and relies upon, the accumulation of data and information contained in Appendix I of the Environmental Assessment. See R. 406 at 63, JA000204. Appendix I includes a variety information including wetland crossing length, the proposed construction method, and wetland disturbance acreage. R. 406 at I-1-3, JA000328-31.

Importantly, Appendix I also includes a column titled, “State Wetland Classification,” which provides the state classification for each wetland impacted
by the Project. *Id.* This is **crucial information** in the context of the Commission’s NEPA review because States such as Pennsylvania classify their wetlands in a hierarchy based on the differing functions and values that each of the wetlands provide. Some wetlands are simply more functionally valuable than others, and therefore harms to those wetlands must necessarily be given greater weight or consideration in a NEPA review. *See, e.g.*, 40 C.F.R. § 1508.27(b)(3).

For example, wetlands in Pennsylvania are either classified as “exceptional” or “other” wetlands. *See* 25 Pa. Code §§ 105.17(1)-(2). To be classified as “exceptional,” wetlands must meet strict criteria demonstrating that the wetland provides particularly important water quality, wildlife habitat, or other vital ecological services. *See* 25 Pa. Code § 96.3(b); 25 Pa. Code § 93.4a; 25 Pa. Code §§ 105.18a(a)-(1). Degraded wetlands that do not meet any of the criteria are considered “other” wetlands. The Commission’s classification of wetlands is the only information in the record that details the **quality of the functions and values that each wetland provides**.

Accurate information regarding the classification of the wetlands is therefore critical to the Commission’s understanding of the potential harms caused by the construction and operation of the Project, and ultimately whether they result in a significant impact necessitating further environmental review. *See* 40 C.F.R. § 1508.27(b)(3) (“Unique characteristics of the geographic area such as proximity to
historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.”) For example, if a pipeline project in Pennsylvania proposed to impact forty wetlands that were non-forested “other” wetlands as categorized pursuant the Pennsylvania Code, the environmental impact would be significantly less in the context of a NEPA review than if those same forty wetlands were categorized as high-value forested “exceptional” wetlands that are habitat for endangered species. This is exactly why the Commission makes a point of analyzing this data in its NEPA reviews.

Here, the Commission identified that there were a total of seven “exceptional” wetlands in Pennsylvania that would be impacted by the Project. R. 406 at I-1-3 JA000328-31. DRN notified the Commission in its comments that this determination was a significant undercounting of the number of “exceptional” value wetlands in the Project area, and that the Commission was therefore grossly underestimating the potential impact of the Project on wetlands. R. 381 at 2-11, R. 411 at 34-46, JA000335-44, JA000577-89. Indeed, the only record evidence that provides a site-specific review of the criteria for proper wetland classification was provided by Petitioners to the Commission in an expert report by a wetlands specialist. R. 381 at Ex. G, JA000464-67. This site-specific review based on Intervenor’s application materials determined that there were at least nine additional wetlands that qualified as “exceptional” that were misidentified by the
Commission as “other,” and therefore not accounted for in the Environmental Assessment. *Id.* There is no evidence in the record that any certified wetlands specialist employed by the Commission performed a similar analysis.

Of the nine wetlands identified by Petitioners that were improperly classified as “other” wetlands, at least six of them qualified as “exceptional” because they lie within a floodplain of an “exceptional value” water, these wetlands include: WW-007-002, WW-001-038, WW-001-039, WW-001-040, WW-001-041, and WW-009-002. R. 381 at 7, JA000340. The record shows that three additional wetlands qualify as “exceptional” wetlands as a result of being suitable bog turtle habitat, these include wetlands: WW-001-0169, WW-001-019, and WW-001-021. R. 381 at 7, JA000340. An on-site review of these wetlands by a certified wetlands specialist, confirmed by photographic evidence, clearly documented that each of the aforementioned wetlands were incorrectly characterized by the Commission. R. 381 at 8, JA000341.

Importantly, Petitioners’ expert evaluation was later expressly verified by *Intervenor*. Indeed, Petitioners’ analysis actually proved to be a very conservative estimate of the total number of “exceptional” wetlands in the project area. After the Commission issued its Certificate, Intervenor admitted to the Pennsylvania Department of Environmental Protection that the wetlands categorizations they initially provided to the Commission were largely inaccurate. Intervenor conceded
that all nine of the wetlands Petitioners identified were indeed “exceptional” wetlands, and added that an additional fifteen wetlands should also be evaluated as meeting the strict criteria for being “exceptional” wetlands. See AD031-32 (Wetlands Table, Chapter 105 Application). Instead of seven “exceptional” value wetlands existing in the project area – as accounted for in the Environmental Assessment generated by the Commission – there were actually thirty-one. Id.

The Commission’s miscalculation therefore represents an undercounting of roughly 340 percent. Such a drastic and widespread failure to account for the impacts to critical and specially protected wetlands is likely due to the fact that the Commission never field-verified any of the wetlands data that it relied upon in the Environmental Assessment, despite being presented uncontroverted evidence by a qualified wetlands specialist that the analysis the Commission was relying on was fatally flawed. R. 381 at 2-11, JA000335-44. Furthermore, the Commission never collected, analyzed, or reviewed any evidence relating to the criteria by which Pennsylvania determines the quality and therefore classification of its wetlands. R. 381 at 3-6, JA000336-39. Indeed, nothing of the sort appears in the record. By arbitrarily ignoring the condition and ecological importance of the impacted wetlands, the Commission failed to account for the significance of their loss in the Environmental Assessment and Finding of No Significant Impact.
This is also an excellent example of why it is so important for the Commission to follow letter of the law of the Clean Water Act, and wait to issue its Certificate of Public Convenience and Necessity until after the State has issued its Section 401 water quality certification. Otherwise the Commission risks issuing NEPA documents and other orders based on incomplete or verifiably inaccurate information, which is exactly what happened in the instant matter. This is precisely the type of flawed and incomplete analysis that NEPA and the Clean Water Act is designed to prevent, yet the Commission repeatedly allows this flawed type of analysis and improper sequencing of review to occur.

The Commission simply could not have made an informed decision regarding a baseline from which to measure the wetlands impacts of the proposed Project if the Commission failed to first properly classify the wetlands that were to be impacted in the first place. There is no doubt that this is what happened in the instant matter. The wetlands at issue here received a special classification by the state of Pennsylvania because of the higher value and ecological importance of the wetland resources. And it is these high value resources that were not properly accounted for in the Environmental Assessment. The Commission’s cavalier review renders the Environmental Assessment, and the Orders that necessarily rely upon the Environmental Assessment, legally and factually deficient. As such, the
Commission’s Orders are arbitrary, capricious, or otherwise not in accordance with law.

**b. The Commission Miscalculated the Impact to Wetland Cover Type from the Proposed Project**

The Commission also failed to accurately account for the expected ground disturbance impacts that will result from the Project’s construction and operational activity. In addition to failing to properly classify wetlands, the Commission also miscalculated the impacted acreage and cover type for many of the wetlands in the Project area. These critical mistakes provide further evidence of a failure by the Commission to determine a proper baseline for its Environmental Assessment, thus rendering its decision to certificate the Project unlawful.

The Environmental Assessment’s wetlands analysis section provides description of the cover type for each of the wetlands that will be impacted. R. 406 at 62, I-1-3, JA000203, JA000328-31. This analysis is important because the cover type of wetlands is a determinative factor regarding a wetland’s functions and values. For example, a forested wetland supports increased natural biological functions, drainage patterns, water quantity, water quality, and pollution control functions as compared to non-forested emergent wetlands. R. 381 at Ex. G, JA000464-67.

A description of each of the different types of wetlands in the project area, their associated cover types, and some of the functions they provide appeared in
the body of the Environmental Assessment section on wetlands. R. 406 at 62, JA000203. Appendix I specifically included a column for categorizing “Wetland Type,” which is designed to identify the National Wetlands Inventory designation for each wetland, which included: “PEM” = Palustrine Emergent Wetland; “PSS” = Palustrine Scrub-Shrub Wetland; and “PFO” = Palustrine Forested Wetland. R. 406 at Exhibit I-1-3, JA000328-31.

An accurate analysis of cover type is essential in the NEPA review process here because the Commission found that the “primary impact of the Project on wetlands would be an alteration of wetland value due to vegetation clearing.” R. 406 at 64, JA000205. More specifically, the Environmental Assessment states that:

The conversion from one vegetation cover type to another could result in changes in wetland functions and values by altering the amount of sunlight or other environmental conditions in the wetland, affecting wildlife habitat.

R. 406 at 64-65, JA000205-6. Indeed, the harms to trees and vegetation in wetlands were so significant that the Commission required a separate compensatory mitigation program in the application for the Project. Id. at 67-68, JA000208-09. A review of the record clearly shows that the Commission improperly categorized the cover type for numerous wetlands, and therefore the baseline from which the Commission made its determination of No Significant Impact was deficient.

Of the forty-nine wetlands in Pennsylvania identified by the Commission in Appendix I of its wetlands analysis, the cover type of at least fourteen wetlands
were incorrectly identified by the Commission, R. 381 at 8-11, JA000341-44, an error rate of nearly thirty percent. All fourteen of the wetlands whose cover type was improperly identified were “exceptional” wetlands pursuant to the Pennsylvania Code. Id. at 9, JA000342. Petitioners below cite to aerial photographs of the resources to demonstrate the Commission’s mischaracterization of wetland resource cover type, and therefore how Commission undercounted and misrepresented the amount of temporary and permanent impacts to these wetlands.

One of the many egregious examples of a mischaracterization of “Wetland Type” is the Commission’s classification of wetland WW-007-002. Wetland WW-007-002 was identified by the Commission as a PEM wetland; however, a review of the aerial photograph of this wetland clearly shows that wetland WW-007-002 is almost entirely forested in cover type, and therefore should be classified as a PFO. R. 183 at Resource Report 2, B-5 (page 15 of 43), JA000134.

The Commission misclassified wetland WW-001-038. Wetland WW-001-038 was identified by the Commission as a PEM wetland; however, a review of the aerial photograph of this wetland shows that wetland WW-001-038 has a combination of forested, shrub scrub, and emergent cover type that will be impacted by project construction and operation. Therefore, the wetland should be classified as a PFO/PSS/PEM. R. 183 at Resource Report 2, B-5 (pages 13-14 of 43), JA000132-33.
The Commission misclassified wetland WW-001-021. Wetland WW-001-021 was identified by the Commission as a PEM wetland; however, a review of the aerial photograph of this wetland shows that wetland WW-001-021 has a combination of forested, shrub scrub, and emergent cover type that will be impacted by project construction and operation. Therefore, the wetland should be classified as a PFO/PSS/PEM. R. 183 at Resource Report 2, B-5 (page 34 of 43), JA000135.

The Commission misclassified wetland WW-001-019. Wetland WW-001-019 was identified by the Commission as a PEM wetland; however, a review of the aerial photograph of this wetland shows that wetland WW-001-019 has a combination of forested, shrub scrub, open water, and emergent cover type that will be impacted by project construction and operation. Therefore, the wetland should be classified as a PFO/PSS/PEM/POW. R. 183 at Resource Report 2, B-5 (page 37 of 43), JA000136.

The Commission misclassified wetland WW-001-039. Wetland WW-001-039 was identified by the Commission as a PEM wetland; however, a review of the aerial photograph of this wetland shows that wetland WW-001-039 has a combination of forested and emergent cover type that will be impacted by project construction and operation. Therefore, the wetland should be classified as a PFO/PEM. R. 183 at Resource Report 2, B-5 (page 13 of 43), JA000132.
The Commission misclassified wetland WW-001-041, which is an Exceptional Value Wetland. Wetland WW-001-041 was identified by the Commission as a PEM wetland; however, a review of the aerial photograph of this wetland shows that wetland WW-001-041 has a combination of forested, shrub scrub, and emergent cover type that will be impacted by project construction and operation. Therefore, the wetland should be classified as a PFO/PSS/PEM. R. 183 at Resource Report 2, B-5 (page 10 of 43), JA000131.

The Commission misclassified wetland WW-009-001. Wetland WW-009-001 was identified by the Commission as a PEM wetland; however, a review of the aerial photograph of this wetland shows that wetland WW-009-001 has a combination of forested cover type and scrub shrub cover type that will be impacted by project construction and operation. Therefore, the wetland should be classified as a PFO/PSS. R. 183 at Resource Report 2, B-5 (page 4 of 43), JA000130.

Petitioners specifically identified each one of these wetlands in their comments, and had a certified wetlands specialist field verify the cover types identified above. R. 381 at 8-11, JA000341-44. Inexplicably, the Commission failed to respond to this analysis in both the Environmental Assessment and the Order Denying Rehearing, as such, there is no evidence refuting any of these cover type classifications anywhere in the administrative record. The only glimmer of
reasoning provided by the Commission justifying their improper categorizations is a brief statement that the “wetland delineations were conducted using the Corps’ Wetlands Delineation Manual,” and that this “methodology is sufficient.” R. 406 at P77, JA000514. However, this singular answer is utterly non-responsive to the conclusions in Petitioners’ expert report. The Commission failed to properly identify numerous wetlands impacts, and as a result, the Commission also failed to account for these impacts in its flawed NEPA analysis. As such, the Commission’s Order and Finding of No Significant Impact is arbitrary, capricious, or otherwise not in accordance with law.

The Commission’s blatant misidentification of wetland cover type violates NEPA’s requirement to work from an accurate baseline to determine the environmental impact of the proposed Project. NEPA was designed to ensure that important effects will “not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise case.” Robertson, 490 U.S. at 349. Unfortunately for the high-value “exceptional” wetlands here, the die was cast the minute the Commission unlawfully approved the Project and authorized tree felling.

III. The Commission Violated NEPA by Failing to Disclose or Verify Flow Velocity and Other Technical Data Necessary to Determine the Full Extent of the Project’s Inter-relatedness to Previous, Pending, and Future Projects, and also to Determine the Operational Safety of the Project
A pipeline engineering expert reviewed the gas flow velocity information in the Project application and determined that the safety and interconnectedness of the proposed Project with other Transco pipelines necessitated the disclosure of additional information that did not appear in the administrative record. R. 305, JA JA000138-42. This information is necessary to determine whether the Commission improperly segmented its review of multiple pipeline projects similar to the way in which they unlawfully reviewed the projects in Delaware Riverkeeper Network et al. v. Federal Energy Regulatory Commission. Delaware Riverkeeper Network, 753 F.3d at 1313-16.

Petitioners filed a data request for the necessary information regarding relating to gas flow velocities in March of 2014. Id. at 3-4, JA000140-41. Additional requests for this information were filed on April 2, 2014; April 10, 2014; April 17, 2014; and July 25, 2014. R. 309, R. 313, R. 316, R. 349, JA000143-44, JA000145-46, JA000147-49, JA000161-63. Petitioners never received any of information that specifically addressed the requests made in Petitioners’ letters from Intervenor or the Commission. The information requested by Petitioners therefore does not appear anywhere in the Environmental Assessment, its supporting documents, the Order, the Order Denying Rehearing, or anywhere else in the administrative record. The Commission’s failure to disclose this critical information violates the fundamental precepts of NEPA that demand
full disclosure of relevant information, and renders the Order and the Order Denying Rehearing arbitrary, capricious, or otherwise not in accordance with law.

NEPA procedures emphasize clarity and transparency of process over particular substantive outcomes. See Dep’t of Transp. v. Pub. Citizen, 541 U.S. 752, 756-57 (2004); see also Or. Natural Desert Ass’n v. Bureau of Land Mgmt., 625 F.3d 1092, 1121 n. 24 (9th Cir. 2010) (“Clarity is at a premium in NEPA because the statute . . . is a democratic decisionmaking tool”). Specifically, NEPA “guarantees” that relevant information “will be made available to the larger [public] audience.” Robertson, 490 U.S. at 349. NEPA seeks to promote informed agency decision-making by “requiring full disclosure of the basis for agency action.” Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1073 (1st Cir. 1980); see also Inland Empire Pub. Lands v. United States Forest Serv., 88 F.3d 754, 758 (9th Cir. 1996) (finding that NEPA is concerned with the process of disclosure, not any particular result).

Accordingly, agencies violate NEPA when they fail to disclose that their analysis or the record contains incomplete information. See N.M. ex rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 708 (10th Cir. 2009); see also Motor Vehicles Mfrs., 463 U.S. at 43 (holding that an agency acts arbitrarily and capriciously when it fails to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found
and the choice made”) (internal quotation marks omitted). Such required “up-front disclosures [include] relevant shortcomings in the data or models.” *Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir. 2005); *see also* 40 C.F.R. § 1502.22 (An agency “shall make clear” if there is “incomplete or unavailable information” in an NEPA environmental review document).

The very purpose of public issuance of an Environmental Assessment pursuant to NEPA is to “provid[e] a springboard for public comment.” *Public Citizen*, 541 U.S. at 768. It is well established that “where comments from responsible experts [provide] **conflicting data** or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response.” *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) (emphasis added); *see also* *Friends of the Earth, Inc. v. Hall*, 693 F. Supp. 904, 934 (W.D. Wash. 1988) (A NEPA review that fails to disclose and respond to “the opinions held by well respected scientists concerning the hazards of the proposed action is fatally deficient”); *Pacific Coast Federation of Fisherman’s Ass’ns v. U.S. Dept. of the Interior*, 929 F.Supp.2d 1039, 1056 (E.D. Ca. 2013) (“The underlying environmental data relied upon to support the expert conclusions must be made available to the public”).
For natural gas transmission pipelines, such as the Project, actual gas velocities are a “critical variable” that drive pipeline design decisions. R. 381 at Exhibit D at 2, JA000425. For example gas velocities that exceed the design specifications of a given pipeline can result in internal particulate erosion that threatens the integrity of the pipeline. Id. at Exhibit D at 4, JA000427. The Commission is well aware of the issue of gas velocity erosional limit ranges, because the Commission recently rejected a possible pipeline alternative in an application where the Commission found that “transporting the current and proposed gas volumes through only the existing pipeline would result in gas velocity significantly above TGP’s recommended maximum design velocity of approximately 40 feet per second. This increased velocity could compromise the pipeline’s integrity and safety.” R. 381 at 20, JA000353. Indeed, gas flow velocity was recently questioned as a possible culprit for the explosion of a Texas Eastern natural gas transmission line in May of 2016. See http://powersource.post-gazette.com/powersource/companies/2016/05/11/Could-faster-gas-flow-have-contributed-to-Texas-Eastern-pipeline-erosion/stories/201605110092.

Additionally, accurate gas velocity measurements are necessary to determine the functional independence or dependence of a proposed pipeline project in relation to other pipeline projects. If a pipeline project functionally relies on past or
future pipeline projects to operate, those projects must be accounted for in a NEPA review document. See Delaware Riverkeeper Network, 753 F.3d at 1304.

On March 25, 2014, Petitioners submitted a comment letter to the Commission stating that an initial review of the application material by a pipeline engineering expert “revealed that the operation of Transco’s proposed Project will result in unsafe gas velocities at several locations along Transco’s system that pose direct threats to the safety of the system; and as a result, would require additional future looping of Transco’s system.” R. 305 at 1-2, JA000138-39. The comment stated that in order to further confirm its analysis, additional information must be disclosed that is currently not part of the administrative record, and that without this information it would be impossible for Commission engineers, or the public, to accurately evaluate gas flow velocity impacts. Id. at 2, JA000139. The letter then identified nine specific questions that would provide the necessary information for this review, these questions included:

1. The pipe diameters and where they change,
2. The pipe grade and where the grade changes,
3. The pipe wall thicknesses,
4. The mileage for each pipe grade along the system,
5. Include the MAOP for each pipe segment and where it changes,
6. Identify for each pipeline segment the location of gas meters (if any) along the Transco system Loops that may be used to allocate gas flow between the various pipeline segments
7. Gas flow rates in MMSCF/D, for all stream inputs and deliveries along the systems,
8. Pressures at the respective inlet and delivery points along the system for the peak flow case, and
9. At each compressor station, include the compressor HP, fuel usage, compressor suction pressure, compressor discharge pressure, the compression ratio, gas volume compressed in MMSCF/D.

*Id.* at 3, JA000140. On April 2, 2014, April 10, 2014, and April 17, 2014, DRN submitted comment letters to the Commission stating that the Commission failed to provide responses to DRN’s March 2014 data request. *See* R. 309, R. 313, R. 316, JA000143-44, JA000145-46, JA000147-49. Each of these subsequent comment letters renewed DRN’s request for an answer to the nine questions provided in the March 2014 letter. *Id.*

The Commission submitted a letter to Intervenor on July 23, 2014 to verify that Intervenor provided DRN with the information it requested. R. 346, JA000154-57. Intervenor responded to the Commission on July 25, 2014 stating that it believed that the information contained in exhibits G and G-II combined with a quarter-page spreadsheet Intervenor provided to the Commission on July 14, 2014 sufficiently provided “the requested information.” R. 348, JA000158-60.

On July 25, 2014 Petitioners submitted a comment letter replying to the July 2014 Intervenor letter. R. 349, JA000161-63. Petitioners’ July letter made it clear that Petitioners already had access to, and indeed based its initial comments from the March 2014 letter on, the flow diagrams contained in Exhibits G and G-II, and that Intervenor’s limited additional submission of data was non-responsive to any of the nine questions. *Id.* Transco never provided the requested for information,
and therefore the information does not appear anywhere in the administrative record.

On September 10, 2014, Petitioners submitted an additional comment letter relating to the Environmental Assessment for the Project. R. 381, JA000334-486. Attached to that comment was a report generated by a pipeline engineering expert, which concluded it is likely that “[h]igh actual gas velocities suggest further expansion of the Transco system is required to bring these segments into compliance with Transco’s own design parameters and industry safe operating practices.” *Id.* at Exhibit D at 1, JA000424. Importantly, the report cautioned that the “supporting documents for the Transco Project provided under CEII Nondisclosure Agreements are very poor, lacking sufficient relevant details to reliably evaluate this system at important points where actual gas velocities may be critical.” *Id.* at Exhibit D at 3, JA000426. The report further specified that the information in the record “lack[ed] basic critical information, such as [maximum allowable operating pressures] of pipeline system, existing pipe parameters (such as grade, wall thickness and diameter), and system operating pressures along the Leidy Loop for the boundary cases.” *Id.* at Exhibit D at 8, JA000431. Lastly, the report concluded that “[a] simple hydraulic profile, critical to determining if each project is justified on its own and thus not segmented, cannot be reliably developed from the limited CEII data provided.” *Id.*, JA000431.
This analysis, based on the flow velocity diagrams in the record, is the only evaluation in the record of the gas flow velocity implications of the Project. See R. 385, JA000424-33. Therefore, this expert report, the accompanying flow velocity analysis, and the questions and concerns it raised are wholly unanswered and unrebuted by both the Commission and Intervenor.

The Commission repeatedly failed to disclose information addressing both the safety and independent viability of the Project, which are issues that strike at the core of the Commissions NEPA analysis. The Commission could have easily remedied this problem by requiring Intervenor to answer the nine questions posed by Petitioners and submitting those answers to the Commission docket; however, by failing to provide or otherwise disclose the information requested the Commission violated NEPA. Considering Petitioners’ analysis raised substantial questions about the Project, the Commission’s decision to provide a Certificate of Public Convenience and Necessity for the project was arbitrary and capricious, or otherwise not in accordance with law.

IV. The Commission Violated NEPA by Unlawfully Treating Similarly Situated Parties Differently

As noted above, the Commission is well aware of gas velocity erosional safety issues, and also the resulting design and engineering limitations caused by those gas velocity issues. However, the Commission failed to provide an explanation as to why it treated two different pipeline project proposals differently
despite the existence of identical factual circumstances. The Commission’s differing treatment, without reason or explanation, renders the Commission’s decision arbitrary, capricious, or otherwise not in accordance with law.

This Court has long held that federal agencies must provide adequate explanation before it treats similarly situated parties differently. See, e.g., New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361, 366 (D.C. Cir. 1987); Public Media Ctr. v. FCC, 587 F.2d 1322, 1331 (D.C. Cir. 1978); Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965).

In November of 2011, the Commission issued an Environmental Assessment for the Northeast Upgrade Project. As part of that analysis the Commission concluded that a project proposal was not “hydraulically feasible” because the increased velocity above the company’s recommended maximum design velocity of 40 feet per second “could compromise the pipeline’s integrity and safety.” R. 381 at 20, JA000353.

The Commission requested Intervenor to “[f]ile the maximum gas velocity that would occur at the proposed facilities.” R. 195 at 157, JA000137. Intervenor responded that the pipeline would have “a flow velocity ranging from 30 to 50 fps.” Id. After Petitioners raised concerns about flow velocity, Intervenor walked back their statement, admitting that one segment would exceed sixty feet per second. R. 406 at 174, JA000315.
Despite the fact that critical information was missing from the administrative record with regard to flow velocity data, Petitioners’ expert report was able to make a preliminary determination that “velocities are most likely exceeding 60 fps in the system[... based on the limited information in Exhibit G and associated documents supplied to me under CEII for the Project.” R. 381 Exhibit D at 3, JA000426. Petitioners’ report found that this problem is likely widespread, stating that the Commission’s “conclusions that their velocities for the Northern market only exceed 60 fps in one line, [are] not credible.” R. 381 Exhibit D at 3, JA000426. The Commission can point to no hydraulic modeling or analysis in the administrative record showing that flow velocities are consistent with Intervenor’s bare and unsupported statement. Indeed, the only analysis on the record is Petitioners expert report calling into serious question the long-term safety and operational viability of the Project.

The Commission has failed to explain why it has chosen to allow Intervenor to operate at velocities higher than its stated design threshold, while it denied Tennessee Gas and Pipeline Company for exceeding its design threshold. Despite devoting eight paragraphs to the issue of gas velocities in the Order, R. 406 at PP25-31, JA000496 -99, the Commission simply did not address the fact that for a previous pipeline project involving substantially similar facilities the Commission came to the conclusion that exceeding velocity limits was not safe; yet here, came
to the opposite conclusion that exceeding velocity thresholds was safe. This irreconcilable position provides yet another example of a dispositive deficiency with regard to the Commission’s decision to issue the Certificate of Public Convenience and Necessity for the Project.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Commission’s Order, and Order Denying Rehearing, be rescinded or remanded, and any other relief the Court deems just and equitable.

Respectfully submitted this 9th day of September, 2016,

/s/ Aaron Stemplewicz

Aaron Stemplewicz
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19107
Phone: 215.369.1188
Fax: 215.369.1181
aaron@delawareriverkeeper.org

Counsel for: Petitioners Delaware Riverkeeper Network and the Delaware Riverkeeper
CERTIFICATE OF COMPLIANCE


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

Dated: September 9th, 2016

s/Aaron Stemplewicz

Aaron Stemplewicz
Counsel for: Petitioners Delaware Riverkeeper Network and the Delaware Riverkeeper
CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the Court’s Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 9th day of September, 2016, filed the foregoing with the Court via the Court’s CM/ECF system and served the foregoing upon the counsel listed in the Service Preference Report via email through the Court’s CM/ECF system. Furthermore, eight copies will be sent to the Court on this date.

Pamela S. Goodwin, Esq.  
Direct: 215-972-8407  
Email: pgoodwin@saul.com  
Saul Ewing  
1500 Market Street  
Centre Square West, 38th Floor  
Philadelphia, PA 19102

Patrick F. Nugent, Esq.  
Direct: 215-972-7134  
Email: pnugent@saul.com  
Fax: 215-972-4157  
Saul Ewing  
1500 Market Street  
Centre Square West, 38th Floor  
Philadelphia, PA 19102

John F. Stoviak, Esq.  
Direct: 215-972-1095  
Email: jstoviak@saul.com  
Fax: 215-972-1921  
Saul Ewing  
1500 Market Street  
Centre Square West, 38th Floor  
Philadelphia, PA 19102
Elizabeth U. Witmer, Esq.
Direct: 610-251-5062
Email: ewitmer@saul.com
Fax: 610-408-4400
Saul Ewing
1200 Liberty Ridge Drive
Suite 200
Wayne, PA 19087

Karin Larson
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20406
Phone: 202-502-8236
Fax: 202-273-0901

Robert Solomon
Solicitor
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20406
Phone: 202-502-8236
Fax: 202-273-0901

s/ Aaron Stemplewicz

Aaron Stemplewicz
Counsel for: Petitioners Delaware Riverkeeper Network and the Delaware Riverkeeper
Oral Argument Not Yet Scheduled

IN THE
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA

DELAWARE RIVERKEEPER NETWORK; MAYA VAN ROSSUM, the Delaware Riverkeeper, Docket No. 16-1092

ADDENDUM

Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,
and,
TRANSCONTINENTAL GAS PIPE LINE COMPANY LLC,

Intervenor.

Aaron Stemplewicz
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19007
215-369-1188 (tel)
215-369-1181 (fax)

Counsel for Petitioners
ADDENDUM
## ADDENDUM TABLE OF CONTENTS

### Statutes

<table>
<thead>
<tr>
<th>Statute</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative Procedure Act</td>
<td>AD001</td>
</tr>
<tr>
<td>5 U.S.C. § 706. Scope of Review</td>
<td>AD001</td>
</tr>
<tr>
<td>Natural Gas Act</td>
<td>AD002</td>
</tr>
<tr>
<td>15 U.S.C. § 717r. Rehearing and Review</td>
<td>AD003</td>
</tr>
<tr>
<td>National Environmental Policy Act</td>
<td>AD005</td>
</tr>
<tr>
<td>33 U.S.C. § 1341(a)(1)</td>
<td>AD006</td>
</tr>
<tr>
<td>33 U.S.C. § 1251(d)</td>
<td>AD007</td>
</tr>
</tbody>
</table>

### Federal Regulations

<table>
<thead>
<tr>
<th>Regulation</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>40 C.F.R. § 1502.22</td>
<td>AD008</td>
</tr>
<tr>
<td>40 C.F.R. § 1508.27(b)(3)</td>
<td>AD009</td>
</tr>
</tbody>
</table>

### Pennsylvania Code

<table>
<thead>
<tr>
<th>Code Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>25 Pa. Code § 93.4a</td>
<td>AD010</td>
</tr>
<tr>
<td>25 Pa. Code § 96.3(b)</td>
<td>AD011</td>
</tr>
<tr>
<td>25 Pa. Code § 105.1</td>
<td>AD012</td>
</tr>
<tr>
<td>25 Pa. Code § 105.15(a)</td>
<td>AD013</td>
</tr>
<tr>
<td>25 Pa. Code § 105.15(b)</td>
<td>AD014</td>
</tr>
<tr>
<td>25 Pa. Code § 105.17(1-2)</td>
<td>AD015-16</td>
</tr>
</tbody>
</table>
25 Pa. Code § 105.18a(a)(1) ........................................................................................................ AD016

Standing Declaration

Declaration of Maya van Rossum .................................................................................... AD017-26

Federal Energy Regulatory Commission Docket Document

Request for Additional Information in Response to the Request for Limited Notice to Proceed with Tree Felling, FERC Docket CP14-529, Accession 20160325-3003 .......................................................................................................................... AD027-30

Pennsylvania Department of Environmental Protection Document

Wetland Table for Franklin Loop, Chapter 105 Application ....................... AD031-32

New York Department of Environmental Conservation Document

Joint Application: DEC Permit# 0-9999-00181/00024 Water Quality Certification/Notice of Denial, New York Department of Environmental Conservation, April 20, 2016 ................................................................. AD033-46
Administrative Procedure Act

5 U.S.C. § 706. Scope of review

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

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

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


(c) Certificate of public convenience and necessity.

(1)

(A) No natural-gas company or person which will be a natural gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful. (B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a
certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(B) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.


(a) Application for rehearing; time. Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act [15 USCS §§ 717 et seq.] to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act [15 USCS §§ 717 et seq.].

(b) Review of Commission order. Any party to a proceeding under this Act [15 USCS §§ 717 et seq.] aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the [circuit] court of

AD003
appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code [28 USCS § 2112]. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended [28 USCS § 1254].
National Environmental Policy Act

42 U.S.C. § 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act [42 USCS §§ 4321 et seq.], it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

33 U.S.C. § 1341(a)(1)

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 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. § 1251(d)

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called “Administrator”) shall administer this chapter.
40 C.F.R. § 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, “reasonably foreseeable” includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the Federal Register on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.
40 C.F.R. § 1508.27 Significantly.

*Significantly* as used in NEPA requires considerations of both context and intensity:

...  

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.  
(2) The degree to which the proposed action affects public health or safety.  
(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.  
(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.  
(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.  
(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.  
(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.  
(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.  
(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.  
(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.
Pennsylvania Code

25 Pa. Code § 93.4a

(a) *Scope.* This section applies to surface waters of this Commonwealth.
(b) *Existing use protection for surface waters.* Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.
(c) *Protection for High Quality Waters*—The water quality of High Quality Waters shall be maintained and protected, except as provided in § 93.4c(b)(1)(iii) (relating to implementation of antidegradation requirements).
(d) *Protection for Exceptional Value Waters*—The water quality of Exceptional Value Waters shall be maintained and protected.
25 Pa. Code § 96.3(b)

(b) Antidegradation requirements in §§ 93.4a—93.4d and 105.1, 105.15, 105.17, 105.18a, 105.20a and 105.451 shall apply to surface waters.
25 Pa. Code § 105.1

*Wetland functions*—Include, but are not limited to, the following:

(i) Serving natural biological functions, including food chain production; general habitat; and nesting, spawning, rearing and resting sites for aquatic or land species.

(ii) Providing areas for study of the environment or as sanctuaries or refuges.

(iii) Maintaining natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, natural water filtration processes, current patterns or other environmental characteristics.

(iv) Shielding other areas from wave action, erosion or storm damage.

(v) Serving as a storage area for storm and flood waters.

(vi) Providing a groundwater discharge area that maintains minimum baseflows.

(vii) Serving as a prime natural recharge area where surface water and groundwater are directly interconnected.

(viii) Preventing pollution.

(ix) Providing recreation.

*Wetlands*—Areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs and similar areas.
25 Pa. Code § 105.15(a)

§ 105.15. Environmental assessment.

(a) A person may not construct, operate, maintain, modify, enlarge or abandon the following categories of structures or activities until an Environmental Assessment has been approved in writing by the Department. The Environmental Assessment must be on a form provided by the Department and include the following information:
25 Pa. Code § 105.15(b)

(b) For structures or activities where water quality certification is required under section 401 of the Clean Water Act (33 U.S.C.A. § 1341), an applicant requesting water quality certification under section 401 shall prepare and submit to the Department for review, an environmental assessment containing the information required by subsection (a) for every dam, water obstruction or encroachment located in, along, across or projecting into the regulated water of this Commonwealth.
$25$ Pa. Code §§ 105.17(1)-(2)

§ 105.17. Wetlands.

Wetlands are a valuable public natural resource. This chapter will be construed broadly to protect this valuable resource.

(1) **Exceptional value wetlands.** This category of wetlands deserves special protection. Exceptional value wetlands are wetlands that exhibit one or more of the following characteristics:


(ii) Wetlands that are hydrologically connected to or located within 1/2-mile of wetlands identified under subparagraph (i) and that maintain the habitat of the threatened or endangered species within the wetland identified under subparagraph (i).

(iii) Wetlands that are located in or along the floodplain of the reach of a wild trout stream or waters listed as exceptional value under Chapter 93 (relating to water quality standards) and the floodplain of streams tributary thereto, or wetlands within the corridor of a watercourse or body of water that has been designated as a National wild or scenic river in accordance with the Wild and Scenic Rivers Act of 1968 (16 U.S.C.A. §§ 1271—1287) or designated as wild or scenic under the Pennsylvania Scenic Rivers Act (32 P. S. §§ 820.21—820.29).

(iv) Wetlands located along an existing public or private drinking water supply, including both surface water and groundwater sources, that maintain the quality or quantity of the drinking water supply.

(v) Wetlands located in areas designated by the Department as “natural” or “wild” areas within State forest or park lands, wetlands located in areas designated as Federal wilderness areas under the Wilderness Act (16 U.S.C.A. §§ 1131—1136) or the Federal Eastern Wilderness Act of 1975 (16 U.S.C.A. § 1132) or wetlands located in areas designated as National natural landmarks by the Secretary of the Interior under the Historic Sites Act of 1935 (16 U.S.C.A. §§ 461—467).
(2) *Other wetlands.* This category includes wetlands not categorized as exceptional value wetlands.

**25 Pa. Code §§ 105.18a(a)-(1)**

§ 105.18a. Permitting of structures and activities in wetlands.

(a) *Exceptional value wetlands.* Except as provided for in subsection (c), the Department will not grant a permit under this chapter for a dam, water obstruction or encroachment located in, along, across or projecting into an exceptional value wetland, or otherwise affecting an exceptional value wetland, unless the applicant affirmatively demonstrates in writing and the Department issues a written finding that the following requirements are met:

(1) The dam, water obstruction or encroachment will not have an adverse impact on the wetland, as determined in accordance with §§ 105.14(b) and 105.15 (relating to review of applications; and environmental assessment).
Declaration of Maya K. van Rossum
in support of
Petitioners Brief


Docket Number: 16-1092
DECLARATION OF MAYA K. VAN ROSSUM

Pursuant to 28 U.S.C. § 1746, I, Maya K. van Rossum, hereby declare:

1. I reside at 716 South Roberts Road, Bryn Mawr, Delaware County, Pennsylvania, 19010. My residence is within the Delaware River Basin.

2. I earned my J.D. from Pace University School of Law, and then earned an LL.M. in Corporate Finance from Widener University School of Law. While at Pace University, I secured a certificate for pursuing a special program focused on environmental law and participated in the Environmental Law Clinic that pursued legal work addressing River issues. While pursuing my LL.M. at Widener I worked as the staff attorney at the Widener Environmental Law Clinic which represented the Delaware Riverkeeper Network in litigation. In 1994, I came to work for the Delaware Riverkeeper Network (“DRN”) as the organization’s Executive Director. In 1996, I was appointed Delaware Riverkeeper and leader of the Delaware Riverkeeper Network. I am also a member of the Delaware Riverkeeper Network.

3. DRN was established in 1988. It is a nonprofit 501(c)(3) membership organization. DRN advocates for the protection of the Delaware River, its tributary streams, and the habitats and communities of the Delaware River watershed.
4. The DRN office is located at 925 Canal Street, Suite 3701, Bristol, PA 19007. Currently there are 20 staff members and numerous volunteers. The volunteer network is fluid, constantly changing, and project-specific. The exact number changes on a year-to-year basis. Thousands of individuals have done work for us in the past, undertaking water quality monitoring, stream clean ups, habitat restoration projects, or speaking out on issues of concern for waterway and habitat health.

5. DRN’s professional staff and volunteers work throughout the entire Delaware River Watershed and on statewide and regional issues involving the four watershed states, including in Pennsylvania, New Jersey, Delaware, and New York. DRN and its volunteers maintain a breadth of knowledge about the environment, as well as expertise specific to rivers and watersheds. DRN provides effective environmental advocacy, volunteer monitoring programs, stream restoration projects, and public education. In addition, DRN goes to court when necessary to ensure the enforcement of environmental laws.

6. Our membership provides irreplaceable participation in, and support for DRN, including engaging in our work in a variety of ways from action on issues to providing the financial support necessary for our river protection work. Basic membership is free. Membership is demonstrated in a number of different ways, including but not limited to: making donations, participating in events, signing
letters targeted to decision-makers, participating in DRN public information
sessions, helping distribute DRN information including alerts and fact sheets,
responding to DRN calls for action on projects and issues, volunteering as a water
quality monitor, assisting with DRN restoration projects or actively
communicating with DRN about our work and issues of concern in the Watershed,
signing up and/or donating financial support.
7. DRN has more than 16,000 members, the vast majority of whom live, work
and/or recreate within the Delaware River Basin and/or the four watershed states.
We represent the recreational, educational, and aesthetic interests of our members
who enjoy many outdoor activities in the Delaware River Basin, including
camping, boating, swimming, fishing, birdwatching, hunting and hiking, and who
are impacted by or benefit from the policies, programs, legal decisions and/or
precedents implemented in the four watershed states. Additionally, we represent
the economic interests of many of our members who own businesses that rely on a
clean river ecosystem, such as ecotourism activities, fishing, boating, art, and high
property values. Furthermore, DRN also represents the health interests of those
who use the Delaware River’s resources for drinking, cooking, farming,
swimming, or gardening and are impacted by the policies, programs, legal
decisions and/or precedents we help to create and advance in the four watershed
states. And we support the protection and restoration of the Delaware River, its
tributaries and watershed, and the creation and honoring of constitutional
environmental rights throughout our watershed states and the nation for the benefit
of present and future generations.

8. DRN has members who use and enjoy the areas to be crossed by Transco’s
Leidy Southeast Expansion Project (“Project”). These members will be harmed by
the impacts to wetlands as a result of their permanent conversion from forested
wetlands to emergent wetlands. The impacts resulting from this conversion
include, but are not limited to: increased groundwater and sediment discharges
from wetlands, increased erosion and sedimentation, decreased pollution
prevention, decreased wildlife species composition of both animals and plants, and
decreased landscape aesthetics. Members will be harmed by the detrimental effects
on aesthetic and recreational uses of wetlands, forests, and parks, including, but not
limited to birding, hunting, fishing, camping, nature walks and hiking.

9. Many DRN members are concerned with the proliferating number of pipelines
that have crossed, or are planned to cross, portions of the Delaware River
Watershed and the resulting impact those construction activities have on the
remaining exceptional value wetlands in the state. The permanent conversion of
these wetlands results in impacts to these members’ recreational, aesthetic,
educational, property, health, safety and commercial interests. More specifically,
individual DRN members have communicated their concerns to me and my staff
regarding the harms to their aesthetic, recreational, property and quality of life interests that they have suffered from the construction impacts they have seen from the completed Transcontinental Pipe Line Company’s Northeast Supply Link project as well as the same types of harms they will suffer from construction impacts from the proposed Project. DRN represents our members’ interests that will be negatively affected by the Project in bringing this action.

10. As the Delaware Riverkeeper and as a member of DRN, I personally have enjoyed areas that will be crossed by the Project. I have personally visited the streams, wetlands, and adjacent forested areas in the watershed, by myself, with colleagues, and have plans to return to the area with my family and friends for recreational purposes, including among other things, hiking, nature walks, wildlife observation and enjoyment as well as for professional purposes. I enjoy my visits to these areas whether in my professional or personal capacity. I often include my family in my enjoyment of the areas of the watershed, some of which we have visited during time spent at my family’s cabin owned up until July 24, 2015, and find them beautiful and unique natural areas important to share with my children for their personal and educational growth. I have a great appreciation for the public lands and scenery contained within the watershed to be affected by the Project, including but not limited to the Fern Ridge Bog Preserve.
11. In my capacity as the Delaware Riverkeeper, a mother, and a person who enjoys the out of doors, I will be personally and professionally harmed by the damage that will be inflicted by the construction activities of the Project, and will be adversely affected by the future operational impacts of the Project, including the permanent conversion of exceptional value wetlands from forested wetlands to emergent wetlands. For example, I enjoyed the trail in the area of the Fern Ridge Bog Preserve about a year ago exploring the natural systems of the region and Tunkhannock Creek. Hickory Run State Park camping visits are part of the curriculum of the summer camp my children have, and continue to enjoy, with my son visiting Hickory Run State Park for a 2 day, overnight camping trip as recently as July 23-24, 2015. My son will continue to participate in this camp for years to come. In addition, we pass by Fern Ridge Bog Preserve and Hickory Run State Park en route to our new cabin located in Sullivan County, NY and so while our annual family outings have not yet brought us to the Fern Ridge Bog Preserve specifically we do anticipate visitation in this area in the near future, as the result of the beauty that I experienced during my previous hike and this new proximity to what will become a regular travel route several times a year.

12. I fully expect my personal, professional, recreational, and family trips to the Project area will continue in the near and far future. My personal, recreational, family and professional activities in the past and future have, and will continue, to
be composed of hiking, camping, boating, and otherwise enjoying the River waters and natural scenic beauty of the region.

13. My use and enjoyment of the natural beauty of these areas and my joy in sharing them with my children and other family will be negatively affected by pipeline installation activities, including the permanent clearing of mature forest trees, resulting from construction of the Project that will cause wetlands conversions, long-term deforestation, increased water and sediment discharges from wetlands, degraded wildlife habitat, reductions in nutrient storage and soil stabilization, and other harms to the watershed. These activities will negatively affect the way I interact with these natural areas on an aesthetic, recreational, professional, and family level.

14. The permanent tree-clearing and conversion of wetlands that is proposed to occur as part of the construction of the Project, has already occurred for Transco’s Northeast Supply Link, and harmed my aesthetic and recreational interests because seeing the deforested wetland areas devoid of the mature trees that once stood there diminished my personal enjoyment of the views of these areas, and the same impacts from the Project will diminish my enjoyment of the Fern Ridge Bog Preserve. I have also witnessed firsthand the harms to wetlands and protected waterways that have resulted from erosion and sedimentation as a direct result of mature tree clearing and soil compaction leading to greater stormwater runoff that
is associated with construction, including pipeline construction activities, and expect to be harmed by those same activities for the proposed Project.

15. The tree clearing, grading, and pipeline construction for the Project and the continued maintenance of the right-of-way, including within exceptional value wetlands, as emergent wetlands as opposed to forested wetlands has harmed and will harm my aesthetic and recreational interests as well as those of DRN members who use and enjoy the areas affected by the Project. I and DRN members are harmed by the loss of the ecological services provided by these mature forested areas, a loss that will lead to erosion and sedimentation pollution of pristine streams and wetlands as well as to degradation of fish and wildlife habitat.

16. Because the Project was not properly noticed in the Pennsylvania Bulletin, I and other DRN members were deprived of the opportunity to understand the ramifications and significance of the environmental impacts to our aesthetic and recreational interests of permitting the Project, and were unable to determine the correct course of action for appealing the Section 401 Certificate. As a result, I and other DRN members were thus deprived of the opportunity to fully vindicate our legal rights.

17. The Delaware Riverkeeper Network is registered as a 501(c)(3) nonprofit organization. DRN is funded by individual charitable donations and grants from grant-making organizations and state or federal agencies that are earmarked for
specific charitable purposes. DRN’s annual budget is approximately $2 million. This annual budget is entirely committed to DRN’s ongoing programs, including payment of salaries and benefits of existing staff members, maintenance of our office, engaging legal representation for legal actions and costs of commissioning expert reports and conducting water quality testing via our volunteer watershed monitoring network.

18. DRN does not have the financial ability to post more than a nominal bond or to contribute more than a nominal bond in this litigation without laying off staff members, and/or eliminating or significantly curtailing existing programs. The imposition of a bond in this litigation would have a concrete and chilling effect on DRN’s ability not only to participate as a plaintiff in public interest environmental litigation but also to fulfill its mission as a watershed based organization committed to the protection of the Delaware River Basin.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28 day of April, 2016.

Maya K. van Rossum,
the Delaware Riverkeeper
March 25, 2016

Mosby Perrow
Assistant General Counsel
Tennessee Gas Pipeline Company, L.L.C.
1001 Louisiana Street, Suite 1000
Houston, Texas  77002

Re: Request for Additional Information in Response to the Request for Limited Notice to Proceed with Tree Felling

Dear Mr. Perrow:

Provide the information described in the enclosure to assist in our analysis of the Implementation Plan and request for a limited Notice to Proceed dated March 22, 2016 for the Connecticut Expansion Project (Project). This information must be provided before we can complete our review. File your response in accordance with the provisions of the Commission’s Rules of Practice and Procedure. In particular, 18 Code of Federal Register (CFR) 385.2010 (Rule 2010) requires that you serve a copy of the responses to each person whose name appears on the official service list for this proceeding.

**File a complete response as soon as practicable.** The response must be filed with the Secretary of the Commission at:

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, DC 20426
If certain information cannot be provided within this time frame, indicate which items will be delayed and provide a projected filing date.

When filing documents and maps, be sure to prepare separate volumes, as outlined on the Commission’s web site at [www.ferc.gov/help/filing-guide/file-ceii/ceii-guidelines.asp](http://www.ferc.gov/help/filing-guide/file-ceii/ceii-guidelines.asp). Any Critical Energy Infrastructure Information should be filed as non-public and labeled “Contains Critical Energy Infrastructure Information – Do Not Release” (18 CFR 388.112). Cultural resources material containing location, character, or ownership information and any identifying information regarding affected landowners should be marked “Contains Privileged Information – Do Not Release” and should be filed separately from the remaining information, which should be marked “Public.”

File all responses under oath (18 CFR 385.2005) by an authorized Tennessee Gas Pipeline L.L.C. representative and include the name, position, and telephone number of the respondent to each item.

Thank you for your cooperation. If you have any questions, please contact me at (202) 502-6467.

Sincerely,

Elaine Baum  
Environmental Project Manager  
Gas Branch 1  
Office of Energy Projects

Enclosure

cc: Public File, Docket No. CP14-529-000
General

1. Clarify that Tennessee would not fell trees in areas where it has not obtained an easement or purchase of property from the landowner(s) or land managing agency, including lands protected under Article 97 of the Massachusetts State Constitution. Further, provide a list by milepost (MP) ranges where Tennessee is requesting to fell trees.

2. Identify any proposed private access roads Tennessee is requesting to use and confirm that it has obtained authorization from the landowner(s) or land managing agency. If modifications or improvements for the proposed access roads are required for tree felling activities, provide the status of the applicable permits or authorizations required.

Implementation Plan for Environmental Condition 6

3. Clarify or provide a revised Project schedule (Attachment A of the Implementation Plan) reflecting tree felling activities on or before the March 31 deadline for applicable species regulated by the U.S. Fish and Wildlife Service (USFWS).

4. Clarify or provide specific information in a revised Project schedule (Attachment A of the Implementation Plan) regarding an Environmental Inspector (EI) and other crew mobilizations and the sequence of activities that will be conducted to mark the extent of approved areas of the rights-of-way, additional temporary workspaces, sensitive resources (e.g. wetlands and waterbodies), and approved access roads prior to tree felling.

   a. Clarify that environmental training will take place for all on-site Project personnel (e.g., EIs, survey, tree felling contractors) prior to tree-felling activities.

   b. Confirm that EIs will receive the appropriate training to implement the measures outlined in the construction monitoring plan. Furthermore, provide specific details assuring that the proposed number of EIs is sufficient for the Connecticut Loop to maintain compliance with this and other monitoring activities.
**Implementation Plan for Environmental Condition 9**

5. Provide evidence that the U.S. Army Corps of Engineers (USACE) New York and New England field offices concur that a permit under Section 404 of the Clean Water Act is not required for non-mechanized tree felling for the proposed Project.

6. Provide evidence that the Massachusetts Department of Environmental Protection and the Connecticut Department of Energy and Environmental Protection concur that Water Quality Certificates under Section 401 of the Clean Water Act are not required for non-mechanized tree felling for the proposed Project. Identify any wetland setback requirements for tree felling outside of wetlands.

**Implementation Plan for Environmental Condition 21**

7. Provide evidence that Tennessee received clearance for bald and golden eagles from the Connecticut Natural Diversity Database and the Massachusetts Department of Fisheries and Wildlife Natural Heritage and Endangered Species Program per the USFWS New England Field Office’s request (phone call noted on February 16, 2016 as indicated in the Implementation Plan).

**Implementation Plan for Environmental Condition 23**

8. Provide correspondence showing that the construction monitoring plan for the 23 Connecticut state-listed species was developed in coordination with, or been approved by, the Connecticut Department of Energy and Environmental Protection.

**Implementation Plan for Environmental Condition 26**

9. Provide a plan for ensuring that no ceremonial stone landscapes, including features, landscapes, and their alignments would be affected by tree felling activities in Massachusetts.
AD031


Notes:

a MP = milepost

b Crossing Length in feet is based upon distance of wetland crossed by the proposed centerline. This reflects the mileposts between which the wetland would be impacted by Project workspaces. The wetland may not be continuously impacted because the wetland boundary may vary in relation to the workspace limit.

c NWI Classification
   - PEM = Palustrine Emergent Wetland
   - PSS = Palustrine Scrub-Shrub Wetland
   - PFO = Palustrine Forested Wetland

d Total Wetland Disturbance = combined impacts of all cover types in full workspace footprint

e Emergent Wetland Disturbance = total impacts to emergent wetlands in full workspace footprint (no differentiation between existing and new permanently maintained ROW)

f Permanent Forested Wetland Disturbance = forested wetlands within new permanently maintained ROW

g Temporary Forested Wetland Disturbance = forested wetlands within workspace footprint OUTSIDE of new permanently maintained ROW (allowed to revert back to forested wetland after construction)

h WW-001-031 is an expansive wetland complex that is contiguous outside of the survey corridor. Thus, the appearance of individual wetlands on Mapping Supplements although one wetland.
April 22, 2016

Lynda Schubring, PMP
Environmental Project Manager
Constitution Pipeline Company, LLC
2800 Post Oak Boulevard
P.O. Box 1396
Houston, Texas 77251-1396

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 Act² 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 with 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.

BACKGROUND

The Federal Energy Regulatory Commission (FERC) issued a certificate approving construction and operation of the pipeline on December 2, 2014, conditioning

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.
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 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 I-88 access area, proposes to include new right-of-way (ROW) construction of approximately 99

---

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 (NYSDOT) Interstate I-88 control of access area. On April 7, 2014, the Department provided FERC with preliminary comments on the DEIS which extensively analyzed the environmental benefits of utilizing Interstate I-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 whether Alternative M would generate fewer impacts than Constitution’s preferred route. However, using Constitution’s information, as well as publicly available information, Department Staff
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 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.

---

c Conducted a review that found that Alternative M could reduce overall impacts to water bodies and wetlands when compared to Constitution’s preferred route.
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 amount to roughly 24 per cent 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 WQC and associated permits, Constitution submitted its second request to withdraw and resubmit the WQC 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>
<thead>
<tr>
<th>Prepared by</th>
<th>Date</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>DEC</td>
<td>June 21, 2012</td>
<td>Summary of Pre-Application Meeting</td>
</tr>
<tr>
<td>DEC</td>
<td>May 30, 2013</td>
<td>Sample Matrix for Linear Projects</td>
</tr>
<tr>
<td>Constitution</td>
<td>August 28, 2013</td>
<td>401 WQC and related NYS Joint Permit application/documentation received by DEC</td>
</tr>
<tr>
<td>DEC</td>
<td>September 12, 2013</td>
<td>Notice of Incomplete Application</td>
</tr>
<tr>
<td>Constitution</td>
<td>November 27, 2013</td>
<td>Joint Permit Application - Supplemental Information</td>
</tr>
<tr>
<td>Constitution</td>
<td>May 9, 2014</td>
<td>401 WQC Application Withdrawal and Re-submittal</td>
</tr>
<tr>
<td>DEC</td>
<td>July 3, 2014</td>
<td>DEC Recommendations for Revised Joint Application</td>
</tr>
<tr>
<td>Constitution</td>
<td>August 13, 2014</td>
<td>Joint Permit Application - Supplemental Information # 2</td>
</tr>
<tr>
<td>Constitution</td>
<td>November 17, 2014</td>
<td>Additional Information Submittal</td>
</tr>
<tr>
<td>Constitution</td>
<td>November 17, 2014</td>
<td>Responses to Wetland Mitigation Plan Deficiencies</td>
</tr>
<tr>
<td>Constitution</td>
<td>November 24, 2014</td>
<td>Updated and Revised Information</td>
</tr>
<tr>
<td>Constitution</td>
<td>December 1, 2014</td>
<td>Response to Request for Additional Clarification of Wetland Impacts</td>
</tr>
<tr>
<td>DEC</td>
<td>December 24, 2014</td>
<td>Notice of Complete Application</td>
</tr>
<tr>
<td>DEC</td>
<td>December 31, 2014</td>
<td>NY Stream Crossing Feasibility Analysis Information Request</td>
</tr>
<tr>
<td>Constitution</td>
<td>January 22, 2015</td>
<td>Summary of Changes Trenchless Locations</td>
</tr>
<tr>
<td>Constitution</td>
<td>February 2, 2015</td>
<td>Revised Wetland Mitigation Plan</td>
</tr>
<tr>
<td>Constitution</td>
<td>February 6, 2015</td>
<td>Phase I Stream Analysis/Open Cut</td>
</tr>
<tr>
<td>DEC</td>
<td>February 19, 2015</td>
<td>DEC Proposed Wetland Re-route</td>
</tr>
<tr>
<td>Constitution</td>
<td>March 27, 2015</td>
<td>Joint Permit Application - Supplemental Information</td>
</tr>
<tr>
<td>Constitution</td>
<td>April 24, 2015</td>
<td>Response to DEC Preferred List of Trenchless Stream Crossings</td>
</tr>
<tr>
<td>Constitution</td>
<td>April 27, 2015</td>
<td>401 WQC Application Withdrawal and Re-submittal</td>
</tr>
<tr>
<td>DEC</td>
<td>April 27, 2015</td>
<td>Notice of Complete Application - WQC Withdrawal and Re-submittal</td>
</tr>
<tr>
<td>Constitution</td>
<td>May 13, 2015</td>
<td>Wetland Mitigation Area - Application for Pesticide Permit</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------</td>
<td>----------------------------------------------------------</td>
</tr>
<tr>
<td>Constitution</td>
<td>May 20, 2015</td>
<td>Supplemental Information - Trenchless Crossings</td>
</tr>
<tr>
<td>DEC</td>
<td>June 1, 2015</td>
<td>Notice of Incomplete Application - Pesticide Permit</td>
</tr>
<tr>
<td>Constitution</td>
<td>June 19, 2015</td>
<td>Canadarago Lake Mitigation Area Update</td>
</tr>
<tr>
<td>Constitution</td>
<td>June 30, 2015</td>
<td>Updated Trenchless Crossing Matrix</td>
</tr>
<tr>
<td>Constitution</td>
<td>July 8, 2015</td>
<td>Joint Permit Application - Supplemental Information - Wetland Re-route</td>
</tr>
<tr>
<td>Constitution</td>
<td>July 14, 2015</td>
<td>Additional Information Submittal - Wetland Impacts and Mitigation</td>
</tr>
<tr>
<td>Constitution</td>
<td>August 5, 2015</td>
<td>Response to Notice of Incomplete Application - Pesticide Permit</td>
</tr>
<tr>
<td>Constitution</td>
<td>September 15, 2015</td>
<td>Joint Permit Application - Supplemental Information</td>
</tr>
<tr>
<td>DEC</td>
<td>October 2, 2015</td>
<td>Acknowledgement of NOI - SPDES MS GP - Contractor Yard 5B</td>
</tr>
<tr>
<td>Constitution</td>
<td>January 6, 2016</td>
<td>Wetland Mitigation Area - Application for Pesticide Permit - Betty Brook</td>
</tr>
<tr>
<td>DEC</td>
<td>February 26, 2016</td>
<td>Acknowledgement of NOT - SPDES MS GP - Contractor Yard 5B</td>
</tr>
</tbody>
</table>

**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. 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.

---

6 NYCRR §608.9 (2) and (6).  
7 ECL 3-0301(1)(b).
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.

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, trenchless methods present significantly fewer environmental impacts to the regulated resource. Because alternative trenchless 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. 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

---

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

<table>
<thead>
<tr>
<th>Prepared by</th>
<th>Date</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>NYSDEC</td>
<td>June 21, 2012</td>
<td>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).</td>
</tr>
<tr>
<td>NYSDEC</td>
<td>November 7, 2012</td>
<td>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.</td>
</tr>
<tr>
<td>FERC</td>
<td>April 9, 2013</td>
<td>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.</td>
</tr>
<tr>
<td>NYSDEC</td>
<td>May 28, 2013</td>
<td>Meeting with Constitution and NYSDEC staff at the DEC Region 4 office to review stream crossings. NYSDEC reiterates that acceptable trenchless technology was the preferred installation method and that stream crossings should be reviewed for feasibility of using those technologies.</td>
</tr>
<tr>
<td>NYSDEC</td>
<td>July 17, 2013</td>
<td>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.</td>
</tr>
<tr>
<td>NYSDEC and Constitution staff</td>
<td>July - August 2013</td>
<td>Field visits of proposed stream crossings prior to permit applications to the Department. At each crossing, NYSDEC emphasized to...</td>
</tr>
<tr>
<td>Date</td>
<td>Event Description</td>
<td></td>
</tr>
<tr>
<td>----------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>November 2013</td>
<td>Constitution staff that trenchless technology is preferred/most protective. 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.</td>
<td></td>
</tr>
<tr>
<td>December 31, 2014</td>
<td>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.</td>
<td></td>
</tr>
<tr>
<td>December 31, 2014</td>
<td>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.</td>
<td></td>
</tr>
<tr>
<td>January 23, 2015</td>
<td>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.</td>
<td></td>
</tr>
<tr>
<td>January 28, 2015</td>
<td>Conference call: NYSDEC reiterated its request for a site specific analysis of trenchless stream crossings for all streams including those under 30 feet wide.</td>
<td></td>
</tr>
<tr>
<td>February 5, 2015</td>
<td>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.</td>
<td></td>
</tr>
</tbody>
</table>

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 for trenchless 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 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.

\(^9\) Constitution described the Phase I analysis as “a general evaluation of Project locations meeting the basic criteria for trenchless construction methods such as crossing distances, feature classifications and potential associated impacts.”
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.  

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."  

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, 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

---

10 6 NYCRR §703.2.  
11 6 NYCRR §701.1.
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. 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 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.

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. The Department must also take into account the cumulative impact to water quality of the full complement of affected water resources in making any determination in connection with any license, order, permit or certification. 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 an applicant has a right to a public hearing on the denial of a permit, including §401 WQC. A request for hearing must be made in writing to me within 30 days of the date of this letter.

Sincerely,

John Ferguson
Chief Permit Administrator

Cc:
T. Berkman
W. Little
P. Desnoyers
S. Tomasik
D. Merz
F. Bifera
Y. Hennessey
K. Bowman

---

13 6 NYCRR §608.9 (2) and (6).
14 ECL 3-0301 (1)(b).
People's Dossier: FERC's Abuses of Power and Law → Undermining State Authority

January 11, 2016

Via Mail and Email: eric.schneiderman@ag.ny.gov, nyag.consumerbureau@ag.ny.gov

Attorney General Eric T. Schneiderman
The Capitol
Albany, NY 12224-0341

Re: OAG must protect the people, laws, and resources of NYS by objecting to the Constitution Pipeline Company’s request for a partial notice to proceed

Attorney General Schneiderman,

Our public interest group, Stop the Pipeline (STP), is directing this letter to you because the New York Attorney General’s Office has intervened in the Federal Energy Regulatory Commission (FERC) process regarding the proposed “Constitution” Pipeline project.

STP would like to make your office aware of an illegal action the Constitution Pipeline Company, LLC (the company), has proposed to FERC in a letter dated Friday, January 8, 2016.¹

The letter asks FERC for a “partial notice to proceed” so that the company can begin cutting over half a million trees along the pipeline route in New York State (NYS) starting January 22nd. The letter requests that the FERC make its decision by January 15th. This action is being requested before the NYS Department of Environmental Conservation (DEC) has decided whether or not to issue a required 401 Water Quality Certificate (WQC), and before the US Army Corps of Engineers (ACE) has decided whether or not to issue a required 404 permit.

Under the Clean Water Act, the DEC has one year from the date of the company’s application to make a decision on issuing this 401 WQC, or waive its rights.² The pipeline company supplemented its application for the third time in March 2015, and then resubmitted its application in late April 2015.³ Thus the DEC has until April 2016 to make the decision.

On December 2, 2014, FERC issued a conditional certificate of public convenience and necessity to the company,⁴ however DEC has the power to stop the project under authority which section 401 of the federal Clean Water Act grants to NYS. Section 401 states that the pipeline cannot be built unless DEC certifies that the state’s strict water quality standards will not be violated.⁵
FERC’s 12/2/14 order to the company also points out that the 401 WQC must come before any construction takes place along the pipeline route.6

Of additional concern is that in the attached FERC filing, the company claims that DEC and ACE have given permission for this “non-mechanized” activity and that “None of the other agencies expressed objection to the proposed activities.”7 However, the fact is that neither the ACE nor the DEC have agreed to the company’s proposed actions in writing. The ACE letter referred to in “Attachment A” is from a year ago and concerns a different pipeline (Leidy Southeast Expansion) by a different company (Transcontinental Gas Pipe Line Company). This letter does not concern facts specific to this case. Regarding the company’s claims that DEC has agreed to tree felling, no document stating such is supplied. A reference to a January 5, 2016 phone call without a written transcript is all that the company supplied.

Our STP group believes this is simply another example of the company bullying NYS and its agencies, this time by claiming it has agreements and documents in hand which, in fact, do not exist. For if both the ACE and DEC have agreed, why have they not put the agreements with the company in writing?

Of course it is not only our DEC and NYS officials who have been bullied by the company for the past three-plus years. The thousands of NYS landowners, citizens and communities along the proposed pipeline route who may soon have their properties and lives ripped apart by the Constitution pipeline have suffered as well. Most are typical working class Americans who feel fortunate to own their own land. They see themselves as stewards and believe the care they’ve given to their land over the years has provided environmental benefits for everyone living in what they grew up to believe was a democracy. Now these same lands are being taken by eminent domain so the gas can be exported to increase gas-company profits.

If trees are cut, the pipeline trench dug, and the land blasted, that democratic ideal would also be ripped away from each of us by an opaque and devious energy company that has no respect for the very basis of American democracy: Private Property. We find it especially disturbing that our own government, through a federal agency (FERC), would allow NYS residents and their lands to be abused. Allowing the pipeline company to cut trees before federal and state-mandated permits are granted by the appropriate agencies would not only be undemocratic; it would be government-sanctioned corporate theft.

Here, in the four NYS counties under threat from this pipeline, residents fear that their peaceful rural environment and the pristine headwaters of the region are about to be permanently industrialized by giant energy corporations, all for the purpose of increasing the profits of a multi-billion-dollar out-of-state company. The company has been able to wield great power over us simply because we are of lesser wealth and are under-represented. The weight of your Attorney General’s Office could remedy this unacceptable balance of power.
Despite the uphill battle we face, STP believes our DEC will act to defend its laws and the citizens of NY by denying the company a 401 WQC. However, to do that the DEC will need the NY Attorney General’s Office to ensure that FERC is not allowed to usurp NYS powers before the DEC’s duly mandated deadline of April 2016.

Therefore, STP is asking the Attorney General’s office to file a formal motion objecting to this request for a partial notice to proceed.

Time is of the essence. We ask that you act immediately on behalf of thousands of NYS landowners, all state residents, and in defense of NYS law with regard to this matter.

Respectfully submitted,

Stop the (Constitution) Pipeline

C: Basil Seggos - DEC Commissioner
Patricia Desnoyers - DEC Senior Attorney, Office of General Counsel
Chris Hogan - DEC Section Chief, Division of EnvironmentalPermits
Stephen Tomasik - DEC Project Manager, Division of EnvironmentalPermits


January 8, 2015

Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Attention: Kimberley D. Bose, Secretary

Reference: Constitution Pipeline Company, LLC (“Constitution”)
Constitution Pipeline Project
Docket No. CP13-499-000
Request for Partial Notice to Proceed

Ladies and Gentlemen:

The Federal Energy Regulatory Commission (Commission or FERC) issued an Order Issuing Certificate dated December 2, 2014 (Order) under Docket No. CP13-499-000 to Constitution Pipeline Company (Constitution) approving the Constitution Pipeline Project (Project). On December 3, 2014, Constitution accepted the Commission’s Order pursuant to Section 157.20(a) of the Commission’s Regulations. On May 19, 2015, Constitution filed with the Commission an Implementation Plan documenting how Constitution will comply with the Environmental Conditions provided in the Order.

In accordance with the Order and the U.S. Fish and Wildlife Service (USFWS) recommendations to avoid adverse impacts to migratory birds and ensure the Project components and conservation measures occur as outlined within the Biological Opinion for the Northern long-eared bat issued on December 31, 2015, Constitution must fell trees located within the workspace required for construction of the proposed Project between November 1 and March 31. These measures are intended to comply with USFWS recommendations and the Project specific Biological Opinion.

Constitution is therefore requesting written authorization (“Notice to Proceed”) from the Director of Office of Energy Projects to commence limited, non-mechanized tree felling activities necessary to comply with these conservation measures in the certificated...
workspace, in addition to the workspace identified in those variances requested within the Implementation Plan and described in Attachments B and C to this request.

Constitution proposes to fell trees and vegetation at or above ground level, using equipment that will not rut soils or damage root systems. The contractor will not be allowed to use mechanized clearing methods or heavy equipment. Trees will be felled in a manner so as to avoid watercourses and waterbodies. Constitution will access the approved workspace from roadways crossed by the Project. Waterbodies and wetlands will be crossed on foot. Equipment such as chainsaws and fuel may be carried in hand held carts. Mats and bridges will not be used. Felled trees will be left in place until construction begins, which will be after receipt of all applicable permits and approvals and FERC’s issuance to Constitution of a separate notice to proceed to begin construction and earth disturbance activities.

Constitution has each applicable state and federal permit required for non-mechanized tree felling as identified in the table below. Constitution is not requesting to proceed with construction of the Project; it will do so once applicable permits are received.

**Federal Permits and Authorizations Required for Non-mechanized Felling of Trees**

<table>
<thead>
<tr>
<th>Administering Agency</th>
<th>Permit or Authorization</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>FERC</td>
<td>Certificate of Public Convenience and Necessity</td>
<td>Issued December 2, 2014</td>
</tr>
<tr>
<td>USFWS</td>
<td>Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act</td>
<td>EIS and FERC Order Requirements met through Implementation Plan May 19, 2015</td>
</tr>
<tr>
<td>USFWS</td>
<td>Section 7 Consultation</td>
<td>USFWS Threatened and Endangered Species Opinion filed to FERC on September 17, 2015 concerning the Indiana bat, Dwarf Wedgemussel and northern Monkshood. USFWS Biological Opinion issued December 31, 2015.</td>
</tr>
<tr>
<td>NYSOPRHP- SHPO</td>
<td>Section 106, National Historic Preservation Act Consultation</td>
<td>Programmatic Agreement Executed November 10, 2015</td>
</tr>
<tr>
<td>PHMC - SHPO</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

NYSOPRHP- SHPO = New York State Office of Parks, Recreation and Historic Preservation – State Historic Preservation Office
PHMC - SHPO = Pennsylvania Historical and Museum Commission – State Historic Preservation Office

Non-mechanized felling of trees and vegetation above the ground surface by hand rotary cutting and chain sawing, which does not substantially disturb the root system nor involve mechanized pushing, dragging, or re-deposition of soil material (as proposed in this request) is not a federally regulated activity under Section 404 of the Clean Water Act (CWA), as this activity will not involve substantial earth disturbance or the placement of dredged or fill material in Waters of the United States.
With regard to similar proposed actions, the U.S. Army Corps of Engineers (USACE) has stated that activities that involve only the cutting or removing of vegetation above the ground surface (e.g., mowing, rotary cutting, and chain sawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redepósit excavated soil material, are not regulated under Section 404 of the Clean Water Act, as they do not involve a discharge of dredged and/or fill material, and that therefore these activities do not require a permit from the USACE.


Likewise, because this activity does not involve a discharge of dredged and/or filled material, no state certification is required for this activity, in that Section 401 of the CWA only applies to activities “which may result in any discharge into the navigable waters.” Nor is this activity subject to any other federal authorization subject to New York or Pennsylvania permitting requirements.

During the course of performing the non-mechanized tree felling, as well as any other activity associated with the Project, Constitution will avoid culturally sensitive areas as detailed within the Section 106 Programmatic Agreement. Each of these areas, as well as the physical barriers and markings demarcating “no access” will be identified to the inspectors and work crews during the environmental training and during tree felling activities.

Also, in accordance with Condition No. 5 of the Order, Constitution is providing this written request for approval of Project changes submitted since the submission of the Implementation Plan on May 19, 2015. Constitution respectfully requests the Commission review the changes identified in Attachments B and C, and provide its approval for incorporation of these changes as part of this Notice to Proceed. The tables in Attachments B and C provide a description of the existing land use/cover type, documentation of landowner approval, cultural resources potentially affected or federally listed threatened or endangered species potentially affected, and whether any other environmentally sensitive areas are within or abutting the area. The project changes are also depicted on corresponding aerial based 11x17 map sheets at a scale of 1:2,400 and identify each route realignment or facility update, contractor yards, access roads, and other areas that would be used or disturbed and have not been previously identified. In Attachment D, Constitution is also providing locations where workspace removal or reductions have occurred since filing of the May 19, 2015 Implementation Plan.

In response to Ordering Condition 6h, Constitution is providing the schedule for this activity in Attachment E. Constitution respectfully requests authorization by January 15, 2016 in order to comply with USFWS recommendation as well as the Biological Opinion and meet the Project in-service date in 2016. Constitution understands that, if granted, this Notice to Proceed would be limited to the specific activities listed in this request.
Constitution has provided notice of this request to the USFWS, the USACE lead New York District, USACE Baltimore and Buffalo Districts, Pennsylvania Department of Environmental Protection (PADEP), New York State Department of Environmental Conservation (NYSDEC), and the Susquehanna County Conservation District (SCCD). Each agency was consulted directly with respect to tree felling activities as further described in the Project background document included in Attachment F.

If you have any questions regarding this filing, please contact Lynda Schubring at 713-215-2491 or by email at lynda.schubring@williams.com.

Respectfully,

CONSTITUTION PIPELINE COMPANY, LLC
By Williams Gas Pipeline Company, LLC,
  Its Operator

Lynda Schubring, PMP
Environmental Project Manager

cc:   Kevin Bowman, Environmental Project Manager, Division of Gas – Environment and Engineering
      USFWS
      USACE
      NYSDEC
      PADEP
      SCCD

Attachment A – USACE Letters Granting Tree Felling Approvals
Attachment B – Route and Workspace Variance Requests since the May 19, 2015 Implementation Plan Submittal - Tables and Alignment Sheets
Attachment C – Access Road Variance Requests since the May 19, 2015 Implementation Plan Submittal - Tables and Alignment Sheets
Attachment D – Workspace Removal and Reductions since the May 19, 2015 Implementation Plan Submittal - Tables and Alignment Sheets
Attachment E – Tree Felling Schedule
Attachment F – Project Background and Tree Felling Activities
Attachment F

Project Background and Tree Felling Activities
Attachment F

Project Background and Tree Felling Activities

Constitution Pipeline Company LLC (“Constitution”) provides this document in connection with the request to the Federal Energy Regulatory Commission (“FERC”) for a Partial Notice to Proceed for non-mechanized tree felling activities for the length of the Project.

Project Background

Constitution filed an application with FERC under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c) on June 13, 2013. FERC conducted an extensive public process seeking comments on the application from regulatory agencies and all interested parties. Over the course of the proceedings through the issuance of the Final Environmental Impact Statement, the FERC received and considered more than 4,000 comments concerning various aspects of the Project.


The Certificate Order directs Constitution to place the facilities in service by December 2, 2016, which coincides with the start of the peak winter heating season, and which requires construction to take place starting in the early spring and through the summer of 2016. The Project will result in the delivery of up to 650,000 Dth per day of natural gas supply to meet the increased needs of customers in New York and New England. Once complete, Constitution Pipeline will immediately become a key piece of natural gas pipeline infrastructure in the Northeast, creating an important connection between consumers and reliable supplies of clean-burning, affordable natural gas. The Project will help address inadequate pipeline infrastructure that had exposed New England and New York consumers to high natural gas prices and, significantly higher electric-generation costs. It also will provide new natural gas service for areas currently without access to natural gas. In 2013, Constitution and Leatherstocking Gas Company, LLC announced plans to install delivery taps along the Project’s proposed route to facilitate local natural gas service to homes and businesses in southern New York and northern Pennsylvania. This would include service to the Amphenol Aerospace Plant in Sidney, New York, as well as service to the Raymond Corporation plant in the Village of Greene. In addition, the Project will expand access to multiple sources of natural gas supply and enhance service reliability in New York and New England for the benefit of both current and new customers.

Through January 1, 2016, Constitution has spent more than $350 million dollars in connection with the Project. After the pipeline is placed into service, Constitution will pay annual property taxes of approximately $12 million dollars and will continue paying property taxes for the life of the pipeline.

According to a study prepared for Constitution by the Center for Governmental Research in June 2013, construction of the Project is forecasted to result in a minimum of approximately:
• 1,300 direct jobs in the construction industry and 275 spillover jobs supported by additional spending activity associated with the construction phase of the Project;
• $130 million of direct labor income, $26 million going to residents of the region;
• $12 million in spillover income, about $11 million going to the region; and
• $17 million in sales and income tax revenue from increases in income (both direct and spillover) and project spending.1

Constitution’s Request for a Partial Notice to Proceed

Constitution is requesting that FERC grant Constitution’s request to begin limited activity for which Constitution has all required regulatory permits. It is critical for Constitution to begin this activity at this time to protect migratory birds and the federally listed threatened Northern long-eared bat consistent with the terms set by FERC and the United States Fish and Wildlife Service (“USFWS”). Specifically, Constitution may only fell trees during limited timelines, as set forth in the conditions of the Certificate Order and the Biological Opinion issued by the USFWS. In order to meet the required in service date, Constitution must fell trees now.

Constitution has possession of all of the right of way areas where tree felling will occur, and the affected landowners have either received agreed compensation for the rights of way, or payment of compensation has been secured by bonds filed with and approved by the United States District Court for the Northern District of New York. The areas where tree felling will occur have already been surveyed and staked. The Project does have an impact on forested lands in Pennsylvania and New York, and Constitution has agreed to voluntarily provide $8.6 million of conservation funding to USFWS for the restoration and preservation of habitats for migratory birds as a conservation measure for the direct and indirect impacts to interior forest habitat on the Project.

Constitution has provided notice of the filing of this request for Partial Notice to Proceed and has consulted with agencies directly concerned with tree felling activities, as outlined below.

Non-Mechanized Tree Felling

Felling activities will not commence unless and until the Federal Energy Regulatory Commission grants Constitution’s request for the Partial Notice to Proceed.

The following is a description of the proposed tree felling activity:

• Constitution will fell trees and brush, at or above ground level, using equipment that will not rut soils or damage root systems.

• The activity will involve only the cutting or removing of vegetation above the ground surface through rotary cutting and chain sawing, with felled trees left in place.

• The activity will be conducted by hand, and will not substantially disturb the root system nor involve mechanized pushing, dragging, skidding or other similar activities that result in soil or land disturbance or redeposit excavated soil material.

• Contractors will not be allowed to use mechanized clearing methods or heavy equipment.

• Trees and vegetation will not be felled into watercourses and waterbodies.

• Mats and bridges will not be placed within or along the banks of waterbodies or in wetlands. All crossings will be completed on foot.

• Constitution will access the certificated right-of-way and access roads from roadways crossed by the Project. Equipment such as chainsaws and fuel may be carried in hand held carts.

• Felled trees will be left in place until construction begins, which will be after Constitution receives additional pending permits and authorizations for the project and FERC issues Constitution a Notice to Proceed to begin construction and earth disturbance activities.

• No trees will be felled in or adjacent to New York State jurisdictional wetlands, and in certain areas involving stream crossings.

• No trees will be felled on lands for which easements have not been obtained, or for which payment has not been made or secured by the posting of bonds.

• All work will comply with USFWS recommendations concerning the Migratory Bird Treaty Act and the project specific Biological Opinion for the Northern long-eared bat.

• Constitution will avoid culturally sensitive areas as detailed within the Section 106 Programmatic Agreement. Each of these areas, as well as the physical barriers and markings demarcating “no access” will be identified to the inspectors and work crews during the environmental training and during tree felling activities.

• Third party compliance monitors will have access to observe and monitor tree felling activities in accordance with the Third Party Monitoring Plan for the
Project, which has been reviewed by the applicable agencies and is summarized below. All tree felling will also be closely monitored by Constitution’s environmental inspectors.

Third-Party Compliance Monitoring Program

Constitution will commit to using the FERC third-party compliance monitoring program (the “Compliance Monitoring Program”) during tree felling. Under this program, a contractor has been selected and is managed by FERC staff to provide environmental compliance monitoring services (the “Third Party Monitor”). Constitution has developed a Third Party Monitoring Plan (the “Monitoring Plan”) to facilitate environmental compliance in conjunction with FERC and memorialize the Compliance Monitoring Program. In creating this Monitoring Plan, Constitution consulted with and incorporated comments from the FERC, the U.S. Army Corps of Engineers, the New York Department of Environmental Conservation, and the Pennsylvania Department of Environmental Protection. The Monitoring Plan details the Third Party Monitoring Firm’s role and responsibilities and explains how Constitution will interact with the Third Party Monitors, as well as other federal and state regulatory agencies within their jurisdictional and permitting responsibilities.

In addition to Constitution’s environmental compliance and inspection program, the FERC Third Party Monitoring Firm will monitor compliance with all applicable regulatory approvals and authorizations during tree felling, including, for example, the Biological Opinion. FERC staff also conducts periodic compliance inspections and oversees environmental compliance with all permits and approvals. See Final Environmental Impact Statement, Docket CP13-499, Accession No. 20141024-4001 at 2-31.

Timing of the Proposed Tree Felling Activity

This work is being proposed now in order to comply with the timing restrictions established by the USFWS in its Biological Opinion, which directs Constitution to conduct felling activities between November 1 and March 31. In addition to complying with the tree felling activities set forth above, and to the extent not inconsistent with those activities, Constitution will conduct its activities in conformance with the Final Environmental Impact Statement and the Implementation Plan, including the Tree Clearing Plan and the Best Management Practices set forth in the foregoing documents. See Docket CP13-499, Accession Nos. 20141024-4001, 20150519-5135.

The table at the end of this memorandum lists the status of the key major permits, approvals, and consultations applicable to the proposed Project.

Notification to Federal and State Agencies

On the dates listed below, Constitution communicated with the following agency personnel, advising the respective agencies that Constitution is proposing to engage in the tree felling activities described above, pending FERC’s approval of Constitution’s request for Partial Notice to Proceed. USFWS agreed with the decision to proceed with tree felling this winter in
order to comply with its Biological Opinion. None of the other agencies expressed objection to the proposed activities.

**Pennsylvania Department of Environmental Protection** – Telephone call with Environmental Group, and Waterways and Wetlands Program Northeast Regional Office (January 4, 2016).

**New York Department of Environmental Conservation** – Telephone calls with counsel’s office and project management (January 5, 2016).


**United States Fish and Wildlife Service** – Telephone call with Field Supervisor (January 6, 2016).

**Susquehanna County Conservation District** – Telephone call with Conservation District Manager (January 7, 2016).
<table>
<thead>
<tr>
<th>Agency</th>
<th>Permit/Approval/Consultation</th>
<th>Agency Action</th>
<th>Constitution Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>*FERC Certificate of Public Convenience and Necessity</td>
<td>Determine whether the proposed project is in the public interest, and consider issuance of a Certificate.</td>
<td>Issued December 2, 2014 Docket #CP13-499-000</td>
</tr>
<tr>
<td></td>
<td>FERC Implementation Plan</td>
<td>Compliance with Environmental Condition No. 6 of Certificate Order stating Constitution’s proposed compliance with conditions.</td>
<td>Submitted May 19, 2015</td>
</tr>
<tr>
<td></td>
<td>FERC Contractor Yard 5B Concrete Pipe Coating Facility</td>
<td>Notice to Proceed Authorization</td>
<td>Issued September 18, 2015</td>
</tr>
<tr>
<td></td>
<td>USACE Section 404, CWA Permit</td>
<td>Issuance of a Section 404 permit for discharges of dredged or fill material into waters of the United States, including jurisdictional wetlands.</td>
<td>Consultation began in August 2012 Application submitted August 23, 2013 Final Supplements submitted September 15, 2015 (NY) and October 30, 2015 (PA)</td>
</tr>
<tr>
<td></td>
<td>*USFWS Section 7 ESA Informal Consultation</td>
<td>Concurrence with FERC’s findings of “not likely to adversely affect” three federal listed threatened and endangered species.</td>
<td>Issued September 17, 2015</td>
</tr>
<tr>
<td></td>
<td>*USFWS Section 7 ESA Formal Consultation, Biological Opinion</td>
<td>Finding of not likely to “jeopardize the continued existence” of the federally listed Northern long-eared bat and establish conditions of avoidance and incidental take.</td>
<td>Issued December 31, 2015</td>
</tr>
</tbody>
</table>
### Approvals and Consultations Applicable to the Constitution Pipeline Project

<table>
<thead>
<tr>
<th>Agency</th>
<th>Permit/Approval/Consultation</th>
<th>Agency Action</th>
<th>Constitution Status</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>USFWS</em></td>
<td>Migratory Bird Treaty Act</td>
<td>Provide comments to prevent taking or loss of habitat for migratory birds.</td>
<td>EIS and FERC Order requirements met through Implementation Plan May 19, 2015</td>
</tr>
<tr>
<td><em>USFWS</em></td>
<td>Bald &amp; Golden Eagle Protection Act</td>
<td>Provide comments to prevent taking or loss of habitat for bald and golden eagles.</td>
<td>EIS and FERC Order requirements met through Implementation Plan May 19, 2015</td>
</tr>
</tbody>
</table>

#### State of Pennsylvania

<table>
<thead>
<tr>
<th>Agency</th>
<th>Permit/Approval/Consultation</th>
<th>Agency Action</th>
<th>Constitution Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>PADEP Regional Bureaus of Watershed Management</td>
<td>Section 401 Water Quality Certification</td>
<td>Issuance of a Section 401 permit for discharge to waters of the United States.</td>
<td>Issued September 5, 2014</td>
</tr>
<tr>
<td>PADEP Regional Bureaus of Watershed Management</td>
<td>Chapter 105</td>
<td>Issuance of a Chapter 105 permit for wetlands and water obstructions.</td>
<td>Issued March 2015</td>
</tr>
<tr>
<td>PADEP Bureau of Land and Water Conservation Division of Stormwater Management and Sediment Control</td>
<td>Chapter 102</td>
<td>Issuance of a Chapter 102 permit.</td>
<td>Issued December 2014</td>
</tr>
<tr>
<td>PADEP Bureau of Water Quality Protection</td>
<td>CWA Section 402 National Pollutant Discharge Elimination System &amp; General Permit for Hydrostatic Test Water Discharges</td>
<td>Issuance of a Section 402 &amp; hydrostatic test water discharge permit.</td>
<td>Received October 21, 2015</td>
</tr>
</tbody>
</table>
# Approvals and Consultations Applicable to the Constitution Pipeline Project

<table>
<thead>
<tr>
<th>Agency</th>
<th>Permit/Approval/Consultation</th>
<th>Agency Action</th>
<th>Constitution Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>PFBC</td>
<td>Permit for Use of Explosives in Commonwealth Waters</td>
<td>Permit for blasting in waterbodies.</td>
<td>Issued August 2015</td>
</tr>
<tr>
<td>*Pennsylvania Historical and Museum Commission Bureau of Historic Preservation</td>
<td>Section 106, NHPA Consultation</td>
<td>Review and comment on the project and its effects on historic properties.</td>
<td>Issued November 2015</td>
</tr>
<tr>
<td>Susquehanna County Soil Conservation District</td>
<td>Erosion and Sediment Control General Permit (ESCGP-2)</td>
<td>Erosion and sediment control permit associated with PADEP Chapter 102</td>
<td>Issued December 2014 Major Modification approval issued December 2015</td>
</tr>
<tr>
<td><strong>State of New York</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NYSDEC</td>
<td>Joint Permit including: Article 15, Article 24, and CWA Section 401</td>
<td>Issuance of Water Quality Certification and other permits.</td>
<td>Consultation ongoing; applications submitted August 2013</td>
</tr>
<tr>
<td>NYSDEC</td>
<td>Article 15 Title 33</td>
<td>Permit hydrostatic test water withdrawal</td>
<td>Applications submitted April 29, 2014</td>
</tr>
<tr>
<td>NYSDEC</td>
<td>State Pollution Discharge Elimination System Program General Permit for Stormwater Discharges from Construction Activities (GP-0-15-002)</td>
<td>Authorization to discharge stormwater, including non-stormwater discharges incidental to construction activities (incl. hydrostatic test water discharge and trench dewatering)</td>
<td>Notice of Intent submitted April 29, 2014 (Preliminary) June 5, 2015 (Final) December 11, 2015 (Revised)</td>
</tr>
<tr>
<td>NYSDEC</td>
<td>SPDES Multi Sector General Permit for Stormwater Discharges from Industrial Activity (GP-0-12-001)</td>
<td>Authorization to discharge stormwater, including non-stormwater discharges incidental to concrete coating of pipe.</td>
<td>Permit Received October 2, 2015. Coating operations is complete.</td>
</tr>
</tbody>
</table>
## Approvals and Consultations Applicable to the Constitution Pipeline Project

<table>
<thead>
<tr>
<th>Agency</th>
<th>Permit/Approval/Consultation</th>
<th>Agency Action</th>
<th>Constitution Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>NYSDEC Division of Fish, Wildlife and Marine Resources Bureau of Wildlife’s Endangered Species Program</td>
<td>New York State Rare Species Program</td>
<td>Consultation on state-listed rare species.</td>
<td>Consultation ongoing</td>
</tr>
<tr>
<td>*New York State Office of Parks, Recreation and Historic Preservation, State Historic Preservation Office</td>
<td>Section 106, NHPA</td>
<td>Review and comment on the project and its effects on historic properties.</td>
<td>Issued November 2015</td>
</tr>
</tbody>
</table>

*Federal Permits and Authorizations Required for Non-mechanized Felling of Trees*