

16-345, 16-361

Oral Argument Not Yet Scheduled

In the United States Court of Appeals for the Second Circuit

Catskill Mountainkeeper, Inc.; Clean Air Council; Delaware-Otsego
Audubon Society, Inc.; Riverkeeper, Inc.; and Sierra Club,

Petitioners

Stop the Pipeline,

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

Constitution Pipeline Co., LLC; Iroquois Gas Transmission System, L.P.;
and Natural Gas Supply Association,

Intervenors

BRIEF OF PETITIONER STOP THE PIPELINE IN SUPPORT OF ITS PETITION FOR REVIEW OF THE FEDERAL ENERGY REGULATORY COMMISSION ORDERS 149 FERC ¶ 61,199, 154 FERC ¶ 61,046, AND JANUARY 27, 2015 TOLLING ORDER

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CORPORATE DISCLOSURE STATEMENT

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

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GLOSSARY

ACE	United States Army Corps of Engineers
APA	Administrative Procedure Act
Application	Company's June 13, 2013 application to FERC
Cabot	Cabot Oil & Gas Corporation, Cabot Pipeline Holdings LLC
Certificate Order	149 ¶ FERC 61,199 (Dec. 2, 2014)
Commission	Federal Energy Regulatory Commission
Company	Constitution Pipeline Company, LLC
CWA	Clean Water Act
DEC	New York State Department of Environmental Conservation
DEIS	Draft Environmental Impact Statement
Dth/d	Decatherm per day
EIS	Environmental Impact Statement
FAA	Federal Aviation Administration
FEIS	Final Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
Iroquois	Iroquois Gas Transmission System, L.P.; Iroquois Pipeline
JA	Joint Appendix
LDC	Local Distribution Company
NDNY	Northern District of New York

NEPA	National Environmental Policy Act
NED	Northeast Energy Direct Project, Tennessee Gas Pipeline
NGA	Natural Gas Act
NHPA	National Historic Preservation Act
R	Record
Rehearing Order	Order denying request for rehearing. 154 FERC ¶ 61,046.
SA	Sealed appendix for privileged and CEII documents
SoNo	South to North Project by Iroquois
STP	Stop the Pipeline
Tennessee	Tennessee Gas Pipeline, LLC
TGP	Tennessee Gas Pipeline
Tolling Order	Order Granting Rehearing for Further Reconsideration
WIP	Wright Interconnect Project
WQC	Water Quality Certification
WQS	Water quality standards

JURISDICTION

Pursuant to the Natural Gas Act (“NGA”), this Court has jurisdiction to review an order issued by the Federal Energy Regulatory Commission (“FERC” or “Commission”) if an aggrieved party is denied rehearing and petitions for review of the same issues within sixty days of a final order. 15 U.S.C. §§ 717r(a), (b) (2012). Stop the Pipeline (“STP”) requested rehearing on January 2, 2015, within thirty days of FERC’s December 2, 2014 Order granting a certificate of public convenience and necessity (“Certificate Order”) to the Constitution Pipeline Company, LLC (“Company”). R.2076, 2094, 2096, JA____. STP filed a petition for review on February 5, 2016, within sixty days of FERC’s January 28, 2016 final order (“Rehearing Order”). R.2298, 2309, JA____. Since STP timely requested rehearing from FERC, was denied, and timely petitioned for review of the same issues, this Court has jurisdiction.

STATEMENT OF ISSUES

1. Whether FERC violated the Clean Water Act (“CWA”) by issuing the Certificate Order and the Rehearing Order under the NGA before the New York State Department of Environmental Conservation (“DEC”) issued a section 401 water quality certification (“WQC”) under the CWA. (Raised at R.2096 at PP8-11, JA____; ruled on at R.2298 at ¶¶57-72, JA ____).

2. Whether FERC violated the due process clause of the Fifth Amendment of the United States Constitution and Section 717r(a) of the NGA, 15 U.S.C. § 717r(a), by issuing the January 27, 2015 Order Granting Rehearing for Further Reconsideration (“Tolling Order”), instead of a final order, within thirty days of STP’s request for rehearing, thereby denying STP and its members judicial review of the Certificate Order and allowing eminent domain proceedings to be initiated and real property to be taken from STP’s members prior to judicial review, without due process. (Raised at R.2096 at PP11-14, 50-51, JA____, ____; ruled on at R.2298 at ¶¶8-9, 61-62, 71 JA ____, ____).

3. Whether FERC violated the NGA by issuing the Certificate Order without substantial evidence to support: (1) the need for the project and (2) project benefits, including (a) how the project would increase reliability, (b) how the project would reduce prices and price volatility, and (c) how the project would eliminate constraints in the Iroquois and Tennessee Gas Pipelines that inhibit the flow of gas between Wright, NY and the purported target markets in New York City and New England. (Raised at R.2096 at PP14-25, JA____; ruled on at R.2298 at ¶¶15-23, JA____).

4. Whether the Commission violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347, and its implementing regulations, 40 C.F.R. Parts 1500-1508, in issuing the Certificate Order and Rehearing Order based on an

environmental impact statement that illegally segmented consideration of the impacts of the proposed project from other projects that would be required to move the gas to the purported markets relied on as justification for the proposed project. (Raised at R.2096 at PP25-35, JA____; ruled on at R.2298 at ¶¶88-98, JA____).

STATUTES AND REGULATIONS

Statutory and regulatory provisions are set forth in Addendum A.

STATEMENT OF CASE

STP seeks review of the Commission's Certificate Order and Rehearing Order under the CWA, NGA, and NEPA and review of FERC's Tolling Order under the NGA and Fifth Amendment of the United States Constitution. The Certificate Order was issued by Commission Chairwoman Cheryl LaFleur and Commissioners Philip Moeller, Tony Clark, and Norman Bay; the Tolling Order by Deputy Secretary Nathaniel Davis, Sr.; and the Rehearing Order by Commission Chairman Norman Bay and Commissioners Cheryl LaFleur, Tony Clark, and Colette Honorable.

The Company pre-filed in April 2012, and filed an Application on June 13, 2013, for a 30-inch diameter, 124-mile long interstate gas transmission pipeline that would run from Susquehanna County, Pennsylvania, through Broome, Chenango, Delaware, and Schoharie Counties, New York. R.1-001, JA____. FERC

assigned docket numbers PF12-9 and CP13-499, respectively. STP filed a timely motion to intervene and analyzed the Company's lack of response to issues raised by the DEC and United States Army Corps of Engineers ("ACE"). R.396, 1544, JA____. FERC released its Draft Environmental Impact Statement ("DEIS") on February 21, 2014, noting that 24% of the properties the pipeline would cross had not been surveyed. R.1560, JA____. Six federal and state agencies characterized the DEIS as insufficient, and requested a revised or supplemental DEIS on which to comment. R.1798, 1904, 1918, 1924, 1959, 2149, JA____, JA____, JA____, JA____, JA____, JA____. STP documented missing information and other deficiencies and requested a thorough analysis of all issues and compliance with all laws. R.1914, JA____. STP members, whose comments were incorporated by reference in STP's submission, supplemented this critique. *See, e.g.*, R.1606, 1656, 1746, 1748, 1752, 1914 at PP3, 31, JA____, JA____, JA____, JA____, JA____, JA____. No gas customers in the purported end markets were identified, no market studies were included, and although the Company claimed the project was "fully subscribed," there was no requirement to ship any gas. R.1560 at PP1-1 – 1-3, JA____. The Final EIS ("FEIS"), issued on October 24, 2014, did not cure problems noted by the agencies, STP, or its members. R.2057, JA____. STP repeatedly requested a Supplemental DEIS in which FERC could conduct one environmental review for all required licenses, permits, and consultations, for all connected projects. R.2047,

2053, 2196, JA____, JA____, JA____. The Commission issued the Certificate Order, which included ten pages of environmental conditions, on December 2, 2014.

R.2076, JA____. STP filed a request for rehearing within thirty days. R.2094, 2096, SA4, JA____. FERC issued the Tolling Order on January 27, 2015, which did not address any of the issues raised in STP's request for rehearing but merely purported to forestall FERC's obligation to rule on the petition for rehearing.

R.2103, JA____. One year later, on January 28, 2016, FERC denied STP's request for rehearing and issued the Rehearing Order. R.2298, JA____. STP petitioned for review of FERC's Orders on February 5, 2016. R.2309 , JA____.

The project would require the clearing of 1,872 acres of land, including the destruction of approximately 700,000 trees on 1,034 acres of forest. R.2057 at P.4-118, 2269 at N.4, JA____, JA____. It would cross 289 bodies of water, most of them cold-water trout streams, and impact over 95 acres of wetlands, of which 34 acres are irreplaceable forested wetlands. R.2057 at PP ES-6, 4-62, JA____. Additionally, over 35 miles of the proposed route are located on steep slopes, and 45.5 miles are over shallow bedrock. R.2057, App.G, P4-15, JA____. Twenty-four percent of this land had not been surveyed when the DEIS and FEIS were issued. R.1560 at P1-3, 2057 at P1-5, JA____, JA____.

The proposed route is located in an area that has experienced the devastation of extreme storms, and STP members who live along the route have witnessed

catastrophic floods near their homes. R.1703, 2259, JA____, JA____. As Governor Andrew Cuomo stated, "[t]here is a 100 year flood every two years now." R.1565, JA____. On August 28, 2011, Hurricane Irene caused extensive flooding, and was followed several days later by Tropical Storm Lee, which dropped almost a foot of rain along the proposed route. R.2057 at P4-14, JA____.

The Commission issued its Certificate Order prior to the Company obtaining a 401 WQC from DEC. R.2150, Att. A, JA____. The day after the Certificate Order was issued, the Company sent letters threatening the use of eminent domain to approximately 350 landowners who had refused to sign easement agreements. R.2080, 2298 at ¶22, JA____, JA____. STP objected to these letters, and to FERC's issuance of the Certificate Order prior to the Company obtaining a 401 WQC. R.2096 at PP11-14, Ex.2-3, JA____. By the end of December, 125 complaints in condemnation had been filed in the Northern District of New York ("NDNY"). R.2269, Ex.1, JA____. STP members opposed the use of FERC's Certificate Order to take their land, but the NDNY held the issues had to be reviewed by a circuit court. *Constitution Pipeline Co. v. A Permanent Easement for 1.80 Acres & Temporary Easement for 2.09 Acres Davenport, Del. Cnty., N.Y.*, 3:14-cv-02049-NAM-RFT (N.D.N.Y., Feb. 21, 2015), ECF # 20, at 5. However, STP was blocked from petitioning this Court for a full year because FERC issued the Tolling Order, instead of a final order, which is a condition precedent for seeking judicial review.

R.2121, 2309, JA____, JA____. The NDNY granted the Company access to STP members' land and signed easements that were recorded in the County Clerks' Offices. R.2269, Ex.2, JA____. This allowed the Company to enter private property to conduct surveys and mark easements for tree clearing. R.2269, Ex.5, Brignoli ¶10, Stack ¶¶9-11, JA____. On January 29, 2016, FERC granted the Company's request to cut trees along twenty-fives miles in Pennsylvania, over the objections of property owners. R.2299, 2302, JA____, JA____. On April 22, 2016, DEC denied the Company's application for a 401 WQC, stopping the project from proceeding.

STANDING

To establish Article III standing, the petitioner must have suffered, or soon suffer, a concrete and particular injury that is "fairly traceable" to the defendant, which can be redressed by a favorable decision of the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here FERC issued its Certificate Order – a federal license – before the Company obtained the required 401 WQC. R.2150, Att.A, JA____. The Commission's premature issuance of the Certificate Order, compounded by the Tolling Order, caused economic injury to STP members who lost property and property rights. Addendum B, Bertrand Aff. at ¶¶1-7, Brignoli Aff. at ¶¶1-12, Lidsky aff. at ¶¶1-7, Stack Aff. at ¶¶1-11. The taking of STP members' property and the subsequent entrance onto their land by the Company to perform surveys and mark areas for destruction was unnecessary as DEC

subsequently denied the 401 WQC. *Id.*, Ex.2. FERC's actions also caused environmental, aesthetic, water quality and recreational injuries to STP members, which would escalate if the project proceeds. *Id.*, Bertrand Aff. at ¶¶8-12, Att.1, Brignoli Aff. at ¶¶5, 12-15, Att.1, Lidsky Aff. at ¶¶6-8, Att.1, Pezatti Aff. at ¶¶1-2, 8-11, Stack Aff. at ¶¶4-5, Attachment.1, Ex1. All of these injuries were the direct result of FERC's three orders.

FERC's Tolling Order blocked STP from obtaining judicial review of the Certificate Order while allowing the harm described above to take place, thereby depriving STP and its members of property and property rights without due process. Addendum B, Bertrand Aff. at ¶¶5-6, Brignoli Aff. at ¶¶7-12, Lidsky Aff. at ¶¶7, 10, Pezatti Aff. at ¶¶7, 11, Stack Aff. at ¶¶9-10. STP demanded that FERC issue a final order in March 2015, but the Commission refused to act. R.2121, JA____. STP petitioned this Court for relief, but the Court held that STP did not meet the high standard required for the issuance of a writ of mandamus. *In re Stop the Pipeline*, 15-926, (2d Cir. 2015).

STP has standing as it is an organization dedicated to preserving the rural heritage and pristine environment of the region through which the pipeline would be built. Addendum B, Pezatti Aff. at ¶¶3-6. Thus, "the interests at stake are germane to the organization's purpose. . . ." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000). Members of STP would have the

right to sue as individuals as they had their land taken, properties devalued, landscape defaced, trees cut, privacy invaded, water quality degraded, and their ability to recreate diminished as a direct result of FERC's orders. *Id.*; *B&J Oil and Gas v. FERC*, 353 F.3d 71, 75 (D.C. Cir. 2004); Addendum B (sworn statements of STP members). Their harms can be redressed by the relief requested, as this Court can: (1) vacate FERC's Certificate Order and order that all easement agreements acquired as a result of that order be rescinded and court ordered easements nullified; (2) declare that the Commission's failure to issue a final order within thirty days of STP's request for rehearing was contrary to law and a violation of STP members' due process rights; and, (3) remand this matter for evidentiary hearings on the need for the project under the NGA and for a supplemental EIS under NEPA, if so decided. Each of these remedies can be achieved without the individual participation of STP's members. *Friends of the Earth*, 528 U.S. at 180-81. Thus, STP has Article III standing. *Lujan*, 504 U.S. at 560-61.

STP members' injuries are ongoing as the easements obtained since December 2, 2014 remain in force. Addendum B, Bertrand Aff., Attachments 2,3, Brignoli Aff., Attachments 2,3, Lidsky Aff., Attachments 2,3, Stack Aff., Attachments 2,3. On May 23, 2016, the Company told landowners it expects to complete the pipeline in 2018. *Id.*, Ex.3. To overcome the DEC's denial of the 401

WQC, the Company petitioned this Court for review (Docket 16-1568) and filed a separate complaint in the NDNY (Docket 16-cv-0568).

Even if the Company withdraws its Application to FERC and rescinds the easement agreements, or if this Court upholds DEC's denial of the 401 WQC thereby effectively stopping the project, STP would retain standing as these injuries are capable of repetition, yet evading review. FERC routinely issues certificates without a 401 WQC and tolling orders that block petitioners from seeking judicial review while property is taken and construction activities begin. *See e.g.*, 139 FERC 61,161 at ¶53, App.B at ¶4. Here, landowners who suffered injury could be subject to the same treatment in the near future as the Company could reapply to FERC or Tennessee Gas Pipeline, LLC ("Tennessee") could revive the Northeast Energy Direct ("NED"), a parallel pipeline planned along the same route. Addendum B, Bertrand Aff. at ¶¶13-15, Brignoli Aff. at ¶¶16-18, Lidsky Aff. at ¶¶9-12, Stack Aff. at ¶¶12-14. Thus, these issues are capable of repetition, yet FERC could continue to evade review through the same process it used here. *See Roe v. Wade*, 410 U.S. 113, 125 (1973).

STANDARD OF REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

While the four issues presented for review have nuances in their standard of review that will be discussed below, all share a violation of the Administrative

Procedure Act (“APA”). This Court shall set aside any agency order that is arbitrary, capricious, not in accordance with law, contrary to constitutional right, or not supported by substantial evidence. 5 U.S.C. §§ 706(2)(A), (B), (E) (2012). If an agency “entirely failed to consider an important aspect of the problem,” or failed to comply with legal requirements, the action must be set aside. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”). Legal issues, such as Constitutional due process and unambiguous statutory interpretation are reviewed *de novo*. See *Chevron U.S.A. v. Natural Res. Def. 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.”).

SUMMARY OF ARGUMENT

Issue I

FERC violated the CWA by issuing its Certificate Order before the Company obtained a 401 WQC from DEC. The statutory language in the CWA is unambiguous – a 401 WQC is required before the issuance of *any* federal license or permit. In addition, under the NGA, FERC is required to comply with schedules established in other federal laws. Finally, the NGA does not preempt the CWA.

The principal case on which FERC has relied is inapposite. Unlike here, it was decided under the National Historic Preservation Act (“NHPA”), which has an

implementing regulation that specifically allows nondestructive planning activities to proceed before the consultation required under section 106 of the NHPA is complete. There are no exceptions in the CWA regulations allowing “conditional” licenses to be issued *before* a 401 WQC.

Issue II

FERC violated the NGA and the Due Process Clause of the Fifth Amendment by issuing a Tolling Order, instead of a final order, within thirty days of STP’s request for rehearing. This blocked STP from obtaining any judicial review of the validity of FERC’s order or the public need for the project while the Company took property through eminent domain. As a result, STP and its members were deprived of real property and property interests without due process.

The NGA strikes an equitable balance between parties and FERC: (1) a party must request rehearing within thirty days of an order; (2) FERC is given thirty days to reconsider; and (3) a party must petition for review within sixty days of a final order. However, instead of issuing a final order, FERC issued the Tolling Order, which “granted” a rehearing for the sole purpose of giving itself an indefinite period of time in which to “act.” This deprived STP of a property interest – a statutory right to an adjudicatory hearing.

FERC violated the Due Process Clause, as a hearing must occur at a meaningful time. In *Brody*, this Court found that a *judicial* hearing must occur before someone is deprived of real property through eminent domain. *Brody v. Village of Port Chester*, 434 F.3d 121, 128-129 (2d Cir. 2005). FERC's Tolling Order prevented *any* judicial review here, in violation of STP's due process rights. All three factors in the *Mathews*' balancing test weigh in STP's favor. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Issue III

FERC violated the NGA by issuing the Certificate Order without substantial evidence to support its public use determination. The Company listed several purported benefits of the project, but none of them were substantiated. FERC adopted and embellished the Company's marketing points in a two-page summary in the DEIS, again without any evidence in support. In contrast, STP submitted substantial evidence to show that some of the purported "benefits" were entirely fictional and others self-contradictory. For example, while the Company claimed the market for the gas was in New York City and New England, when asked how much would be delivered to those areas, it stated it could not "*forecast the ultimate delivery markets.*" The Company also claimed it would reduce prices, but FERC stated that pipelines need to be expanded "in the proposed delivery areas" to meet future demand and reduce price volatility. There are well-know constraints in the

system downstream of the termination point of this pipeline, and it is undisputed that this pipeline does not increase capacity in those areas.

FERC relies entirely on the contracts between the shippers and transporters of the gas (“precedent agreements”) to justify the public need for the project. However, the contract for most of the gas is between a subsidiary of a gas driller, which is a partner in the Company, and the Company. In other words, these entities are just selling gas to themselves. No end users were identified, except for a few speculative franchises for a mere 0.6% of the gas. FERC cites cases that are inapposite, as there were contracts for local distribution in those instances, while here there are none. Finally, FERC’s policy statement is not a substitute for the statutory requirement for substantial evidence.

Issue IV

FERC violated NEPA by failing to study Iroquois Gas Transmission System, L.P.’s (“Iroquois”) South to North (“SoNo”) project, which is a reasonably foreseeable, connected project that would reverse the flow of gas in the Iroquois pipeline. Without SoNo, this project lacks a significant purpose, substantial independent utility, and a logical terminus. This project would not add capacity to the interconnecting pipelines, which are already constrained, and there is minimal potential use of the gas along the length of this project. However, by reversing the flow of the Iroquois, gas in this project could be sold in Canada, and pipeline

bottlenecks would be eliminated. In contrast, all that could be accomplished without SoNo is the displacement of one shipper's gas with another shipper's gas, which does not fulfill the stated purpose of this pipeline.

This project has a physical, functional, temporal, and financial nexus with SoNo, as the Company has a fifteen-year lease on Iroquois' Wright Interconnect Project ("WIP") and an owner of the Company would pay Iroquois to transport its gas. SoNo is reasonably foreseeable because Iroquois is simply waiting for construction to start on this project to file its application to export the gas.

ARGUMENT

I. FERC VIOLATED THE CLEAN WATER ACT BY FAILING TO WAIT FOR THE REQUIRED SECTION 401 WATER QUALITY CERTIFICATION BEFORE ISSUING ITS CERTIFICATE ORDER

A. Standard of Review

This Court shall set aside any agency order that is arbitrary, capricious or not in accordance with law. 5 U.S.C. § 706(2)(A) (2012). FERC's interpretation of the CWA receives *de novo* review because EPA, not FERC, is charged with administering the statute. 33 U.S.C. § 1251(d) (2012). *Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) ("FERC's interpretation of § 401... receives no judicial deference..., because the Commission is not Congressionally authorized to administer the CWA."). The EPA has vested its authority under section 401 with

DEC, which must make its determination before FERC issues a certificate. *Ala. Rivers Alliance*, 325 F.3d at 300 (vacating FERC’s order as a 401 WQC from the state was required before FERC could issue its license).

B. FERC Issued the Certificate Order in Violation of the Clean Water Act’s Express Prohibition of any Federal License Being Granted Prior to the Applicant Obtaining a 401 WQC.

The plain language of the CWA requires FERC to wait for a 401 WQC before granting a certificate of public convenience and necessity. 33 U.S.C. § 1341(a)(1) (“[n]o license or permit shall be granted until the [401 WQC] . . . has been obtained or has been waived”). Instead of complying with this mandate, FERC issued its Certificate Order over sixteen months before DEC *denied* the Company’s application for a 401 WQC.¹ R.2076, JA____. Thus, FERC’s issuance of its Certificate Order was contrary to law.

Congress passed the CWA to “restore and maintain the chemical, physical, and biological integrity” of waters within the United States, and stated that the unpermitted “discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1251(a); 33 U.S.C. § 1311(a). To attain the goals of the statute, Congress “recognize[d], preserve[d], and protect[ed]” the rights and responsibilities of the states, including the right to establish water quality standards (“WQS”) within their borders. 33 U.S.C. § 1251(b); 33 U.S.C § 1313. The role of states was considered

¹ DEC, 401 WQC denial (April 22, 2016), http://www.dec.ny.gov/docs/administration_pdf/constitutionwc42016.pdf.

so vital to the success of the CWA that Congress expressly required a state WQC *prior* to the grant of any federal license:

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. .

. .

33 U.S.C. § 1341(a)(1); *see also S.D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 547 U.S. 370, 374 (2006). Congress further mandated that: “[n]o license or permit shall be granted until the certification . . . has been obtained or has been waived . . .” 33 U.S.C § 1341(a)(1). Thus, the plain language of the CWA requires that the 401 WQC must be obtained or waived before any federal agency grants a license or permit. *Id.*; *see also Pub. Util. Dist. No.1 of Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 707-08 (1994) (“PUD”). Without this requirement, states would not have the ability to block projects that would violate water quality standards or impose conditions necessary to protect the water quality in the state. *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006); *see also United States v. Puerto Rico*, 721 F.2d 832, 838 (1st Cir. 1983) (states remain “prime bulwark” in effort to abate water pollution). Therefore, the primary role of water protection is given to states, and FERC is “limited to awaiting, and then deferring to, the final decision” by the state. *City of Tacoma*, 460 F.3d at 67. In addition, FERC “may not

act based on any certification that the state *might* submit,” rather it is obligated to determine that the certification has been obtained or waived, and without it “FERC lacks authority to issue a license.” *Id.* at 68; *see also Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir 1991) (stating that applicant for a federal license must first obtain state approval as primary mechanism for state authority is the certification requirement of Section 401).

FERC does not dispute that the pipeline project “may” result in discharge to waters of New York, and that a 401 WQC is required. R.2057 at P1-16, JA____. However, as discussed in the next section, the Commission asserts a right to condition its orders on the future acquisition of a 401 WQC, and assumed that a 401 WQC would be granted. R.2057 at ES-5, JA____. (“Construction and operation-related impacts on wetlands would be further minimized or mitigated by Constitution’s compliance with the conditions imposed by the...NYSDEC.”) Issuing a “conditional” Certificate Order is not valid, though, as it reverses the priority Congress has established in protecting water and allows the project to proceed before a 401 WQC is obtained. R.2299, 2302, JA____, JA____. In *Islander East*, this Court acknowledged that the NGA does not preempt the CWA, and held that a state has the right to deny a 401 WQC. *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 143-44, 164 (2d Cir. 2008). Nor is preemption implied, as the NGA explicitly acknowledges states’ rights under the CWA and requires FERC to

“comply with applicable schedules established by Federal law.” 15 U.S.C. §§ 717b(d)(3), 717n(c)(1)(B). Yet, FERC ignored its obligations and exceeded its authority by granting the Certificate Order – the “license” at issue here – *before* the Company obtained a 401 WQC from DEC.² Thus FERC violated the plain language of the CWA and the Certificate Order is contrary to law.

C. FERC Is Not Authorized to Condition Its Certificate Order on the Applicant Obtaining a 401 WQC Sometime in the Future.

The NGA grants FERC the right to attach “such reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C. § 717f(e). This limited authority is not a *carte blanche* and does not extend to overriding an explicit Congressional mandate by preempting the express rights of states under the CWA. In fact, the NGA requires FERC to “comply with applicable schedules established by Federal law.” 15 U.S.C. § 717n(c)(1)(B). FERC ignored this mandate by issuing its Certificate Order before the 401 WQC had been obtained.

FERC supports its claim that it can condition its orders on future federal authorizations by drawing parallels with the NHPA, even though that law has little in common with the CWA. R.2298 at ¶¶62-71, JA____. The NHPA is a “procedural

² *License*, *Black’s Law Dictionary* (9th ed. 2009) (“1. A permission, usu. revocable, to commit some act that would otherwise be unlawful; 2. The certificate or document evidencing such permission.”).

statute” that requires consideration of impacts on historic resources and coordination with other reviews, such as an Environmental Impact Statement (“EIS”) under NEPA. *City of Alexandria v. Slater*, 198 F.3d 862, 871 (D.C. Cir. 1999); 36 C.F.R. §§ 800.3(b), 800.8. In contrast, the CWA is a substantive statute meant to “restore and maintain the chemical, physical, and biological integrity” of waters within the United States, and empowers states to condition or block federal projects. 33 U.S.C §§ 1251(a), 1341. Unlike the CWA, the implementing regulations of the NHPA explicitly allow “*nondestructive project planning activities*” to proceed prior to the authorization of federal funds or the issuance of a license. 36 C.F.R. § 800.1(c) There are no such provisions for “conditional” approvals in the CWA. 33 U.S.C § 1341(a)(1).

FERC states that “[t]he order is an ‘incipient authorization without current force or effect’ because it does not allow the pipeline to begin the proposed activity before the environmental conditions are satisfied.” R.2298 at ¶62, JA____.

However, the Certificate Order allowed both the taking of property and the clear-cutting of a 100-125-foot swath of trees along twenty percent of the pipeline route without a 401 WQC from DEC. R.2299, JA____. This was in direct contravention of FERC’s own Certificate and Rehearing Orders, which state that no vegetation would be cut before all required federal authorizations have been obtained. R.2076 at PP45-46, 51, 2298 at ¶71, JA____, JA____. The day after the Commission issued

this statement in its Rehearing Order, it authorized tree clearing on land acquired through eminent domain. R.2299, 2302, JA____, JA____.

FERC relies on *Grapevine* , but it is inapposite. R.2298 at ¶¶65-67, JA____. In *Grapevine*, the Federal Aviation Administration’s (“FAA”) issuance of a conditional approval of the project did *not* allow what the statute forbade. *City of Grapevine v. U.S. Dep’t of Transp.*, 17 F.3d 1502, 1509 (D.C. Cir. 1994) (“Throughout these events the FAA followed the procedure prescribed by the ACHP’s regulations.”). The FAA’s “conditional” approval did not permit the expenditure of any federal funds prior to “tak[ing] into account the effect of the undertaking on historic properties” as the FAA did not contribute to any pre-authorization activities. 36 C.F.R. § 800.1(a). Also, the NHPA’s implementing procedures specifically allow conditional approvals for nondestructive planning activities. *Id.* at § 800.1(c). Unlike the FAA in *Grapevine*, FERC violated what the CWA forbids by granting its Certificate Order prior to the Company obtaining the 401 WQC. Accordingly, *Grapevine* does not support FERC here.

The Company is likely to argue that FERC can condition its Certificate Order on future acquisition of a 401 WQC because states’ rights under the CWA are limited. However, the Supreme Court has held that a state’s authority under the CWA is extremely broad and includes the right to impose conditions far from the

actual discharge to water. *PUD*, 511 U.S. at 708–09, 723. To reach this decision, the Court reviewed all of section 401.

Section 401 . . . also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project. Section 401(d) provides that any certification shall set forth ‘any effluent limitations and other limitations ... necessary to assure that *any applicant*’ will comply with various provisions of the Act and appropriate state law requirements. 33 U.S.C. 1341(d) (emphasis added).

Id. at 711. The Court thus upheld state-imposed conditions that required minimum stream flows in an undisturbed part of the water body, even though minimum stream flows did not implicate the “discharge” that triggered the 401 certification requirement. For DEC, the “appropriate state law requirements” include, but are not limited to, fish and wildlife laws, and protections of endangered or threatened species, and species of concern. N.Y. Env'tl. Conserv. Law §§ 11-0105, 11-0535 (McKinney 2016). As a result, FERC cannot predetermine what conditions a state may impose as part of a future 401 WQC, and those conditions could negate activities that FERC authorizes in the interim. Thus FERC must comply with the CWA by waiting for states to issue, condition, waive, or deny a 401 WQC.

II. FERC VIOLATED THE NATURAL GAS ACT AND THE FIFTH AMENDMENT DUE PROCESS CLAUSE BY BLOCKING JUDICIAL REVIEW OF ITS CERTIFICATE ORDER

A. Standard of Review

“No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V. Due process claims require a two-step inquiry: (1) whether there has been a deprivation of a protected interest; and, if so (2) determining what process is due. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Three factors are considered in determining what process is required prior to a taking: (1) the private interest that will be affected; (2) the risk of an erroneous deprivation; and (3) the Government’s interest. *Mathews*, 424 U.S. at 335. Whether there was a deprivation of property without due process is reviewed *de novo*. 5 U.S.C. § 706(2)(B).

“[D]ue process requires an opportunity for a hearing before a deprivation of property takes effect.” *Fuentes v. Shevin*, 407 U.S. 67, 88 (1972). “[T]he Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. . . . Conversely, if a government action is found to be impermissible—for instance because it fails to meet the ‘public use’ requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.” *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 543 (2005). Thus,

the courts serve “as an arbiter of a constitutional limitation on the sovereign's power to seize private property.” *Brody*, 434 F.3d at 129.

Timing requirements for review of FERC’s orders are established in the NGA. If FERC does not comply with statutory timeframes, the delay functions as a denial of due process because a party cannot petition for judicial review until FERC issues a final order. 15 U.S.C. § 717r(a), (b). The right to challenge the validity of an order granting eminent domain is a property interest protected by the Due Process Clause. *Logan*, 455 U.S. at 428. Whether FERC’s Tolling Order is an impermissible failure to act under the NGA, and a deprivation of a property interest under the Due Process Clause, are legal questions that are reviewed *de novo*. 5 U.S.C. § 706(2)(A), (B). *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1135 (5th Cir. 1986); *Alexander v. FERC*, 609 F.2d 543, 546 (D.C. Cir. 1979). Application of the unambiguous terms of section 717r(a) of the NGA is also addressed by this Court *de novo*. *Cajun Elec. Power Coop., Inc. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991).

B. FERC’s Certificate Order Authorizes the Deprivation of Property.

The Commission has two roles as it considers an application for an interstate gas pipeline. One is to determine whether the project qualifies for a certificate of public convenience and necessity and the second is to act as lead agency for the environmental review triggered by the project. 15 U.S.C. §§ 717f(c), 717n(b)(1). In

these roles, the Commission must ensure compliance with the schedules established by federal law. 15 U.S.C. § 717n(c)(1)(B). The Certificate Order synthesizes FERC's determinations of public need and statutory compliance and, upon issuance, authorizes a pipeline company to acquire land through the use of eminent domain. 15 U.S.C. § 717f(h). Thus the Commission's public use determination is intertwined with its decisions regarding other statutes, such as the CWA. In this case, FERC's Certificate Order was conditioned upon obtaining a federally required 401 WQC; without it, the project could not proceed.

When FERC issued the Certificate Order on December 2, 2014, approximately half of the landowners had not signed easement agreements. R.2298 at ¶22, JA____. The next day, the Company sent letters to these landowners, threatening to enter their land within ten days and initiate eminent domain proceedings if they did not sign easement agreements. R.2080 at PP4-5, JA____. STP objected, stating the Company did not have the right to take property prior to the issuance of a 401 WQC. *Id.* at PP1-3. Instead of responding to these concerns, the Company initiated a legal blitzkrieg against landowners, most of whom had no legal representation. Addendum B, Brignoli Aff. at ¶8-9. By the end of December 2014, 125 complaints in condemnation were filed in the NDNY, with additional cases in Pennsylvania. R.2269, Ex.1, JA____. The Company obtained title to the land and filed Court ordered easements in the County Clerks' Offices. R.2269,

Ex.2, JA____. This allowed them to enter otherwise private property, conduct surveys, and mark easements for tree cutting. R.2269, Ex.5, Brignoli ¶10, Stack ¶¶9-11, JA____. On January 29, 2016, FERC allowed the Company to cut trees in Pennsylvania. R.2299, JA____. Three months later, DEC denied the 401 WQC, which stopped the project from proceeding. *Islander East*, 525 F.3d at 164. Thus there have been erroneous deprivations of property by the federal government.

C. The Validity of FERC’s Certificate Order Cannot Be Challenged in Condemnation Proceedings.

STP questioned the validity of the Certificate Order, including the public need for the project, in its request for rehearing, and STP members objected to the taking of their land on similar grounds. R.2096, JA____. Addendum B, Brignoli Aff. at ¶11, Lidsky Aff. at ¶10. However, the district court found that it must assume the validity of the Certificate Order, and challenges to it must be made in circuit court.

Defendants contend that the FERC Order herein is invalid or insufficient because a certificate under section 401(a)(1) of the CWA (CWA 401 certificate) has not yet been obtained or waived; indeed, it is undisputed that Constitution’s reapplication for a CWA 401 certificate is still pending. In response to defendants’ argument, plaintiff correctly points out that **once a FERC certificate is issued, judicial review of the FERC certificate itself is only available in the circuit court.**

Constitution Pipeline Co., 3:14-cv-02049-NAM-RFT at 1-2, 5 (emphasis added).

Thus, title passed from property owner to pipeline company without a judicial pre-deprivation hearing on the validity of FERC's Certificate Order.

D. FERC's Tolling Order Caused a Deprivation of a Property Interest.

The right to challenge the validity of an order granting the power of eminent domain is a discrete property interest protected by the Due Process Clause. *Logan*, 455 U.S. at 428. “[The] Due Process Clause has been interpreted as preventing the [government] from denying potential litigants use of established adjudicatory procedures, when such an action would be ‘the equivalent of denying them an opportunity to be heard upon their claimed [rights].’ ” *Id.* at 429-30 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)). Here, FERC's Tolling Order deprived STP of a property interest – the statutory right to an adjudicatory procedure prior to the taking of property. STP was unable to challenge the validity and public use determination of FERC's Certificate Order for a full year longer than Congress intended because a final order is required to seek judicial review. 15 U.S.C. §717r(b). By blocking judicial review while empowering the Company to take private property, FERC undermined the courts' role “as an arbiter of a constitutional limitation on the sovereign's power to seize private property.” *Brody*, 434 F.3d at 129.

In *Brody*, this Court held that due process requires judicial scrutiny of a public use determination in the context of eminent domain:

The Village argues that . . . public use is essentially a legislative decision not subject to the requirements of due process. We disagree with the Village's characterization of the issue. . . . While we agree that due process rights do not attach to legislative actions, the issue here is whether such rights attach to a judicial proceeding established to allow aggrieved persons to assert a constitutionally prescribed limitation on a legislative action, i.e., the review procedure for challenging a public use determination. . . . “[T]he question [what is a public use] remains a judicial one . . . which [the courts] must decide in performing [their] duty of enforcing the provisions of the Federal Constitution.”

Brody, 434 F.3d at 128-9 (internal citations omitted).

As discussed below, in Issue III, STP is challenging FERC’s public use determination, which provided the basis for the Company’s right to eminent domain. 15 U.S.C. § 717f(h). However, by issuing the Tolling Order, the Commission prevented *any* judicial review of FERC’s Certificate Order by a circuit court as the Tolling Order did not go to the merits, and could not be deemed final and reviewable.³ 15 U.S.C. § 717r(b). In this manner, the Tolling Order deprived STP and its members of their property interests without due process.

³ In March 2015, STP petitioned this Court for relief, but the Court held that STP did not meet the high standard required for the issuance of a writ of mandamus. *In re Stop the Pipeline*, 15-926, (2d Cir. 2015).

E. A Judicial Pre-deprivation Hearing Is Required.

The question before this Court is what process is due, and when it must occur. In *Mathews*, the Court established a three-factor balancing test to guide such determinations. *Mathews*, 424 U.S. at 335. In *Brody*, this Court applied the *Mathews* test, and found that a public use determination should be subject to judicial review prior to the taking of property through eminent domain. *Brody*, 434 F.3d at 129, 134-5. Like in *Brody*, a pre-deprivation judicial hearing is needed here, and, in fact, is already required.

FERC has implied that due process and the taking of real property are irrelevant, as the Company “will not be allowed to construct any facilities on subject property unless and until there is a favorable outcome on all outstanding requests for necessary federal approvals.... Further, Constitution will be required to compensate landowners for any property rights it acquires.” R.2298 at ¶71, JA____. FERC’s position misconstrues due process and ignores property owners’ right to exclude. In *Lingle*, the Court stated that a lack of bona fide public use, or an arbitrary decision, cannot be cured through compensation. *Lingle*, 544 U.S. at 543. FERC also stated there would be minimal impact on landowners and no property damage, “[b]ecause Constitution may go so far as to survey and designate the bounds of an easement but no further, e.g., it cannot cut vegetation or disturb ground, any impacts on landowners will be minimized.” R.2298 at ¶71, JA____.

The day after issuing this order, FERC violated it by authorizing tree clearing on properties taken through eminent domain prior to acquiring all federal authorizations. R.2299, 2302, JA____, JA____.

The Supreme Court has repeatedly stated, “[a] fundamental requirement of due process is ‘the opportunity to be heard.’ It is an opportunity which must be granted at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (internal citation omitted). In *Fuentes*, a case involving replevin statutes in two states, the Court held, “[i]f the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. . . . [N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.” *Fuentes*, 407 U.S. at 81-82. Over thirty years later, this Court reiterated that right. “The general rule is ‘due process requires an opportunity for a hearing before a deprivation of property takes effect.’” *Brody*, 434 F.3d at 135 (quoting *Fuentes*, 407 U.S. at 88). Although *Brody*’s hearing was post-deprivation, it occurred before title was transferred. *Id.* at n.9. In that case, as here, a *judicial* pre-deprivation hearing was required to ensure compliance with the Fifth Amendment. *Id.* at 128-9.

1. Real Property Interests Are Significant.

According to the test in *Mathews*, the first factor to be considered is the significance of the deprivation of the private interest. *Mathews*, 424 U.S. at 335. Here, “the right to exclude others” is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). This right is fundamental to our social values and jurisprudence. For example, Blackstone defined property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”⁴ *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (“The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.”).

In *Mathews*, the issue was whether the termination of disability benefits was a deprivation of property that required a prior hearing. *Mathews*, 424 U.S. at 340-343. In making its determination, the Court noted that disability benefits were temporary and not based on financial need. *Id.* This case can be distinguished, as it is real property that has been taken, including the bundle of sticks that define property rights – the right to exclude, the right to quiet use and enjoyment, and the right to determine when to sell and at what price. Here, landowners who had their

⁴ 2 William Blackstone, *Commentaries on the Laws of England* *2 (Univ. of Chicago Press 1979) (1766).

property taken through eminent domain can no longer exclude strangers who work for the Company from coming on their land, use it as the landowners choose, or quietly enjoy it as before. R.2269, Ex.5, Brignoli ¶10, 15, Lidsky ¶4-7, 10, Stack ¶¶5-11, JA____. Some landowners were forced to live like nomads, as they could not build their retirement home where they planned. R.2269, Ex.5, Stack ¶¶5-8, JA____. Others wonder if they can still count on harvesting timber, or sap from maple trees, during their retirement. R.2269, Ex.5, Bertrand ¶¶4-7, JA____. Many feel the loss of their home and property as a safe haven, even outside of the easement area. For example, some are fearful for their safety, or for the safety of their children and grandchildren, and say they would have to abandon their homes, as the pipeline would be highly explosive and could incinerate anyone within 800-900 feet of it, well beyond the easement area. R.2269, Ex.5, Bertrand ¶10, Brignoli ¶¶7, 11-13, Lidsky ¶5, JA____. The majority of landowners opposed the project, and more than half of them refused to sign easement agreements. R.2298 at ¶22, JA____.

The significance of the deprivation weighs in STP's favor. Unlike the temporary disability benefits in *Mathews*, these easements are permanent (unless vacated by this Court). Unlike *Brody*, property rights were transferred before FERC's determination of public need could be challenged. This "render[s] meaningless the court's role as an arbiter of a constitutional limitation on the

sovereign's power to seize private property.” *Brody*, 434 F.3d at 129. While landowners will be compensated, they will never be paid for their loss of rights associated with ownership.⁵ See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006) (“[T]he creation of a right is distinct from the provision of remedies for violations of that right.”). Since full relief will never be obtained, a pre-deprivation hearing is required. *Mathews*, 424 U.S. at 331 (“A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing.”). “In sum, the private interests at stake in the seizure of real property weigh heavily in the *Mathews* balance.” *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 54-55 (1993).

2. There Were Erroneous Deprivations of Property.

The second factor in *Mathews* is “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards[.]” *Mathews*, 424 U.S. at 335. In *Fuentes*, the Court elaborated on the purpose of due process, which is “to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of

⁵ In condemnation proceedings, fair market value is set through “comparable” prices based on transactions by *willing sellers*. Here landowners are forced to relinquish their land, and are not compensated for losing their right to decide.

property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes*, 407 U.S. at 80-81. What the Court warned of in *Fuentes* happened here, but involved the loss of real property, which is more significant than deprivation of personal possessions. *James Daniel Good*, 510 U.S. at 54. The Company applied to FERC to build a pipeline of questionable public use, was granted the right, and took property before STP could obtain judicial review of the Certificate Order because FERC issued the Tolling Order, instead of a final order. R.1-001, 2076, 2103, 2269, Ex.2, JA____, JA____, JA____. Sixteen months after FERC issued its conditional Certificate Order, DEC denied the 401 WQC, which stopped the project. Thus, there were erroneous deprivations of real property as a direct result of FERC's procedures, which means additional safeguards are needed. *Mathews*, 424 U.S. at 341.

The second procedural problem was FERC's issuance of the Tolling Order, which deprived STP of judicial review of the Certificate Order. 15 U.S.C. § 717r(a), (b); *Logan*, 455 U.S. at 428. FERC's delay in issuing the Rehearing Order is fundamentally unfair, as it blocked STP from challenging the validity of the Certificate Order before property was taken. As discussed below, in Issue III, FERC failed to provide substantial evidence to support the need for the project. Whether STP prevails in its challenge of the public use determination is irrelevant

to the need for due process. *Fuentes*, 407 U.S. at 87 (“The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing.”).

FERC’s administrative process to determine public use is also unreliable, which adds weight to the need for a pre-deprivation hearing. *Mathews*, 424 U.S. at 343. In response to comments questioning the need for the project, FERC stated, “[w]e also received comments on the draft EIS requesting additional information regarding need of the projects and whether it serves the public convenience and necessity. A project’s need is established by the FERC when it determines whether a project is required by the public convenience and necessity, i.e., the Commission’s decision is made.” R.2257 at P1-3, JA____. Thus, FERC admitted that it makes its public use determination outside of NEPA, at the very end of the administrative review. R.2298 at n.24, JA____. At that point, the only process available is to request rehearing of FERC’s Certificate Order, which STP did. However, FERC blocked judicial review by issuing the Tolling Order.

There would be great value in prohibiting the use of tolling orders. By requiring FERC to issue a final order within thirty days of a request for rehearing, judicial review of FERC’s orders could be initiated prior to the taking of property. This safeguard, which is already required by the NGA, might have prevented the erroneous deprivations in this case.

3. The Fiscal and Administrative Burdens on FERC in Providing Due Process Are Low.

The third factor under *Mathews* is “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335. Here the Government has three distinct interests: (1) facilitating the interstate transmission of gas, under the 1938 NGA; (2) “restor[ing] and maintain[ing]” the Nation’s water, under the 1972 CWA; and (3) ensuring the right to due process prior to the taking of property under the Fifth Amendment. 15 U.S.C. § 717(a); 33 U.S.C. § 1251(a). Congress has indicated that the preservation of water quality is more important than the transportation of gas, as the 401 WQC must be issued prior to FERC’s license. 33 U.S.C. § 1341(a). Congress could have created an exception for pipelines when it enacted the CWA, or in any one of the subsequent amendments, but did not. “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.” *Thompson v. Calderon*, 151 F.3d 918, 929 (9th Cir. 1998) (citing 2B *Sutherland on Statutory Construction* § 51.02 (5th ed. 1992)). The government’s interest in preserving Constitutional rights is even higher than protecting statutory rights.

There should be no additional burdens on FERC to provide due process, as STP is merely asking this Court to enforce existing procedures, not add new ones.

Even if that were not true, the fiscal and administrative burdens on FERC would be low. FERC is reimbursed for its efforts by the industry it regulates, so if staff has to be hired to issue timely orders on requests for rehearing, those costs could be recouped. 42 U.S.C. § 7178. In addition, unlike *Mathews*, where millions of people apply for disability benefits and could technically request judicial review, the number of parties who request rehearing of FERC's orders is low. *Mathews*, 424 U.S. at 347. Here, nearly 500 people and groups intervened, but only five requested rehearing. R.2057 at P1-9, 2298 at ¶10, JA____, JA____. It is unlikely that there would be an increase in these numbers. *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 617 (2d Cir. 1965) (“Our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken.”). In any event, all that STP seeks is the judicial review *already required* under the NGA. That review should take place before eminent domain proceedings have been completed, not after, as is happening here because of FERC's Tolling Order. Put simply, STP does not seek to impose *any* additional burdens on the government, so this factor also weighs in STP's favor.

In sum, all three of the *Mathews* factors weigh in STP's favor. There can be no question here that judicial review of the Certificate Order, including the public use determination therein, was required before land could be taken by eminent

domain. FERC deprived STP and its members of that right, and thereby violated the due process rights guaranteed by the Fifth Amendment.

E. FERC’s Tolling Order Violates the Natural Gas Act.

In addition to violating the Fifth Amendment, FERC’s Tolling Order is also contrary to the NGA. “In construing a statute, we begin with the plain language, giving all undefined terms their ordinary meaning.” *Fed. Hous. Fin. Agency v. UBS Ams. Inc.*, 712 F.3d 136, 141 (2d Cir. 2013). Congress struck an equitable balance in the NGA, giving an aggrieved party thirty days to object to FERC’s decision, the agency thirty days to correct an error, and the aggrieved party sixty days to seek judicial review. 15 U.S.C. § 717r(a), (b). The third sentence of section 717r(a) enumerates the specific actions FERC must take in response to a request for rehearing. “Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing.” 15 U.S.C. § 717r(a). The fourth sentence specifies the timeframe within which these enumerated actions may be taken: “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.” *Id.* The word “acts” in the fourth sentence refers to the specific *acts* that Congress authorized in the third (“grant or deny rehearing or [] abrogate or modify its order...”). *Id.* Instead of complying with the ordinary meaning of these words, FERC habitually “grants” a request for rehearing for the

sole purpose of giving itself an indefinite amount of time to issue a final order, as it did in this case. R.2103, JA____. Delaying a decision was not an “act” Congress intended. *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 370 (2d Cir. 2006) (“[T]he express statutory mention of certain things impliedly excludes others not mentioned . . . [I]t ‘applies only when the statute identifies a series of two or more terms or things that should be understood to go hand in hand, thus raising the inference that a similar unlisted term was deliberately excluded.’” (quoting *United States v. City of New York*, 359 F.3d 83, 98 (2d Cir. 2004)).⁶

Instead of following its Congressional mandate, FERC unfairly – and illegally – shifts power to itself, first by issuing conditional orders, and then by preventing meaningful challenges to its orders by delaying action on requests for rehearing. Here FERC’s Certificate Order prematurely enabled the Company to take property, while its Tolling Order denied STP the “use of established adjudicatory procedures” to challenge the validity of the Certificate Order. *Logan*,

⁶ STP acknowledges that the First, Fifth, and D.C. Circuits have accepted FERC’s use of tolling orders, but the cases can be distinguished. In both *California Co. v. Fed. Power Comm’n*, 411 F.2d 720 (D.C. Cir. 1969) and *Gen. Am. Oil Co. of Tex. v. Fed. Power Comm’n*, 409 F.2d 597 (5th Cir. 1969), the subject matter of the FERC orders involved rate proceedings, and in *Kokajko v. FERC*, 837 F.2d 524 (1st Cir. 1988), the relevant complaint involved “unreasonable fees” charged by a utility for access to a particular water body. In the context of economic regulation, agency delays may be acceptable, but such holdings do not extend to situations where the delay results in deprivation of constitutionally protected property rights without due process. *See Am. Broad. Co. v. FCC*, 191 F.2d 492, 501 (D.C. Cir. 1951) (“Agency inaction can be as harmful as wrong action.”).

455 U.S. at 429-30. As a result, two deprivations of property took place: (1) land was seized and (2) STP was denied a statutory right to be heard.

III. FERC VIOLATED THE NATURAL GAS ACT BY FAILING TO PROVIDE SUBSTANTIAL EVIDENCE OF THE NEED FOR THE PROJECT.

A. Standard of Review

Under the NGA, “[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.” 15 U.S.C. § 717r(b). In a dispute regarding a similarly worded standard under the National Labor Relations Act, 29 U.S.C. §§ 151-169, the Court held that the entire record must be considered in such a determination. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-88 (1951). The meaning of substantial evidence is the same as that used in the APA, 5 U.S.C. § 706(2)(E); *Id.* at 481-82, 487; *Mobil Oil Corp. v. Fed. Power Comm’n*, 483 F.2d 1238, 1258 (D.C. Cir. 1973) (“The phrase ‘substantial evidence’ is a term of art well recognized in administrative law. This requirement imposes a considerable burden on the agency and limits its discretion in arriving at a factual predicate.”). Applying this standard, the Court has upheld decisions to overturn certificates issued by FERC. *See Atlantic Refining Co. v. Public Service Comm’n of State of N.Y.*, 360 U.S. 378, 392-94 (1959). “[T]he rule that the ‘whole record’ be considered - both evidence for and against - means that the procedures must provide some mechanism for interested parties to introduce adverse evidence

and criticize evidence introduced by others.” Mobil Oil Corp, 483 F.2d at 1258 (emphasis in original). Regardless of any internal decision-making process, the statutory requirements for substantial evidence must be satisfied. Id. at 1257; 15 U.S.C. § 717r(b).

B. STP Repeatedly Questioned the Evidence.

STP and its members questioned the need for this project in 2012, submitted reports and comments after the Company filed its Application, and objected when the Commission granted a conditional certificate. R. 1606; 1746; 1752; 1914 at 3, 4, 31, 42-45, 47-48, 51-62; 2026; 2047; 2094 at 14-27; 2096 at 14-25; JA____, JA____, JA____, JA____, SA4, JA____. The determination of need allowed private property to be taken through eminent domain, eliminated the right to exclude Company staff and subcontractors from otherwise private property, and led to environmental destruction, even before conditions required by other federal laws, and by the Certificate Order, were satisfied. R.2096 at 11-14, Ex.2, 2299, 2302, JA____, JA____, JA____.

C. The Company’s Application and FERC’s DEIS Provide Marketing Points, Not Evidence.

1. Introduction

The purported benefits of the project mentioned in the Application resemble a sales pitch, and lack substantiating evidence and analysis. The Company states there is a need for the gas even though no sales contracts are in the record. R.1-002

at PP4, 16-17, JA___. It says it would serve certain markets, but when questioned, changes its story and says it doesn't know where the gas would go. R.1-036 at P4, 1514-027 at PP63-64, JA ___, JA___. The Company states the pipeline would increase reliability, yet admits it would not expand existing capacity. R.1-002 at PP7-8, 1514-027 at PP64, JA ___, JA___. It claims it would increase competition and lower costs, but provides no analysis as to how. R.1-002 at PP16-17, JA _____. FERC repeats the purported benefits of the pipeline put forth by the Company, and ignores contrary facts. R.1560 at PP1-1-1-3, JA _____. Thus the record does not include the evidence required to support FERC's findings. *Atlantic Refining Co.*, 360 U.S. at 392-94.

2. The Company Failed to Substantiate Its Claims.

The Company claims its project would provide several benefits, but doesn't substantiate these claims with evidence. The pipeline would begin in Susquehanna County, Pennsylvania, and end in Wright, New York, where new compressors would push up to 650,000 decatherms per day ("Dth/d") of gas into the existing Iroquois Pipeline ("Iroquois") and Tennessee Gas Pipeline ("TGP"). R.1-002 at PP4-5, JA___. The Company states it would be able to transport this gas "to major, high-demand markets, including New York and New England." R.1-002 at P16, JA___. This claim was repeated in materials prepared for government officials.

R.1-036 at 4, JA____. However, when FERC asked how much gas would be delivered to those markets, the Company refused to give an answer.

FERC: “Estimate the individual volumes of natural gas that would be delivered to New York City from Constitution via the Iroquois system and to the New England area via the [TGP] 200 system.”

Company: “Constitution’s proposed delivery points will deliver natural gas into *existing pipeline capacity* via proposed interconnections with Iroquois and/or Tennessee Gas Pipeline. *Constitution cannot forecast the ultimate delivery markets of the natural gas transported by Constitution’s shippers.*”

R.1514-027 at PP63-64, JA ____ (emphasis added). Thus, after claiming one thing, the Company then admitted that it would not be increasing the amount of gas delivered via Iroquois and TGP, and might never serve markets in New York City and New England.

The Company states the project *might* provide economic benefits to the region, and *might* increase reliability and diversity of the natural gas supply. R.1-002 at P8, JA____. The Company also says that this project “may ultimately lead to lower costs to consumers.” R.1-002 at PP16-17, JA____. By using conditional auxiliary verbs (might and may) to describe these three benefits (reliability, diversity, and lower cost), the Company admits that the possibility of actually achieving them is small. Even so, *no evidence* is presented to support these speculative goals. According to historic documents, existing pipelines should be providing reliability and diversity at a competitive price. For example, the Iroquois pipeline was approved after years of regulatory proceedings held at all levels of

evidence it submitted that show that all of the pipes leading out of Wright are already full of gas and much of it is already coming from Pennsylvania. There is no evidence showing the gas the Company would transport would be any cheaper. In any event, it would be hard to prove, as Tennessee already transports competitively priced gas from Pennsylvania. R.1752, Att.1 at 19, JA____. As noted in the next section, FERC admitted that additional capacity is needed in the end market (New York City and New England) to end price volatility. R.1560 at 3-2, JA _____. Since this project ends at Wright, it does not increase capacity in those areas.

3. FERC Merely Repeats the Company's Claims.

In spite of these contradictions and lack of substantiating evidence, FERC reiterates the Company's claims about market benefits in five points. R.1560 at PP1-1-1-3, JA _____. FERC expands point two, regarding "new natural gas service for areas currently without access to natural gas;" but fails to provide details on the amount of gas that could be delivered to these small rural towns, the cost of installing such service, or the economic risks involved. R.1560 at 1-2, JA _____. Leatherstocking, the start-up LDC that would be delivering this gas, revealed the insignificance of potential local use when it admitted that if all of its non-binding franchise agreements came to fruition, it would amount to a mere 0.6% of the gas in the pipeline. R.1817 at N8, JA _____. In point three, FERC repeats the Company's

claim that the project would increase “reliability in the New York and New England market areas[,]” but fails to show how. R.1560 at 1-2, JA _____. FERC also neglects to mention that the Company admitted that the gas might never be delivered to New York City or New England. R.1514-027 at PP63-64, JA _____. In point four, FERC echoes the unsubstantiated statement that the project would “reduce[] price volatility, and lower prices[.]” R.1560 at 1-2, JA _____. However, this claim was contradicted elsewhere when FERC admitted that pipeline constraints in the proposed delivery areas are the cause of price volatility. R.1560 at 3-2 – 3-3, JA _____. This project does not add capacity to those pipelines, so it would merely replace gas that is currently under contract to be transported. R.1-004, Ex.G at P1, GII, SA1, SA2. FERC failed to mention that fact until it issued its orders. R.2076 at ¶115, JA _____. As discussed below, in Section D and Issue IV, pipeline constraints downstream of Wright, NY are the crux of the problem, and the project cannot decrease price volatility until downstream capacity is increased. R.1746 at 6-9, 1752, Att.1, 33-34, JA____, JA____. Finally, FERC converted the Company’s statements of mere possibility (what *might* happen), into conclusive statements. R.1560 at 1-2, JA _____. As the D.C. Circuit has found before, FERC can be overly generous toward the companies it is responsible for regulating: “Why the Commission would be so tender-hearted to the pipeline is unclear.” *Colo. Interstate Gas Co. v. FERC*, 146 F.3d 889, 892 (D.C. Cir. 1998).

The only materials prepared by FERC on which the public could comment are a few pages in the DEIS. R.1560 at PP1-1-1-3, 3-2, JA _____. Statements made by FERC in its orders should not contribute to the weight of the evidence because members of STP were not allowed an opportunity to critique the material. *Mobil Oil Corp.*, 483 F.2d at 1258.

D. FERC Ignored STP's Evidence, Which Outweighs the Sales Points Made by the Company and FERC.

STP, and its members, submitted substantial amounts of factual information, analysis, and industry reports that show a lack of benefit and need for the project. *See* R. 1606; 1746; 1752; 1914 at PP3, 4, 31, 42-45, 47-48, 51-62; 2026; 2047; R.2094 at PP14-27; 2096 at PP14-25; JA____, JA____, JA____, JA____, JA____, SA4, JA____. These include: (1) industry reports documenting constraints in the system that would inhibit the delivery of additional gas to markets south and east of Wright, NY; (2) lists of other pipelines bringing gas from Pennsylvania to New York City and New England; (3) absence of sales contracts either along the route or elsewhere; (4) insignificant potential use and exorbitant costs associated with delivering gas to sparsely populated rural areas; (5) trends to move gas stranded in Pennsylvania out of the country; and (6) recent reports indicating lack of market need. *Id.* These points, which are elaborated upon below, diminish the weight of the already insubstantial evidence in the record. *Universal Camera Corp.*, 340 U.S.

at 488 (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”).

According to an industry report, “New York State’s natural gas infrastructure is large, dynamic and more than adequate to serve the requirements of entitlement holders.” R.1752, Att.1 at 20, JA____. It explains that the main reason for higher gas prices in New York City and New England is pipeline congestion, which causes price spikes during a few hot and cold weeks of the year. R.1746 at PP6-9, 1752, Att.1 at PP32-34, JA____, JA____.⁷ The project would not solve this problem as it is not increasing capacity and adds gas upstream of the bottlenecks. R.1514-027 at PP63-64; 1746 at PP6-9, 1752, Att.1 at PP58-66, 72-77, JA____, JA____, JA____. Because of these physical limitations, the project could not significantly lower costs or increase reliability, goals that FERC stated establish the need for the project. R.1560 at 3-2, JA____.

As for bringing Pennsylvania gas to New York City and the Northeast, those areas already consume gas from Pennsylvania. R.1746 at PP21-23, 1752, Att.1 at PP18-19, 72-73, 134, JA____, JA____. Since 2010, about twenty projects have been built to increase delivery of Pennsylvania gas to New York and New England. *Id.* Densely populated areas are already well served by the pipeline network, and six

⁷ STP incorporated this report into its comments. R.1914 at PP3, 31, JA____.

major pipelines, with many points of intersection, already run through, or near, the gas fields of Pennsylvania. R.1560 at P3-14, JA____.

In terms of supplying gas to areas along the route, gas service exists where the population density justifies the cost of installing it. R.1606 at P1, JA____.

Sparsely populated areas cannot afford gas infrastructure, and new transmission lines will not change that. R.1746 at PP25-26, JA____. The truth of this is bolstered by the lack of sales contracts in the record.

FERC states the market for the gas is in New York City and New England, but recent reports conclude there is no need for additional gas in those locations. R.1746 at PP6, 20-23, 1752, Att.1 at P20; 2026, Att.14; 2236 at P2, n.1; 2238 at PP1, 4; JA____, JA____, JA____, JA____, JA____. Instead of market demand, this project is being driven by an excess supply of gas, with the goal of exporting it. R.1746 at PP19-20, JA____. Cabot Oil & Gas Corporation (“Cabot”) promoted its export plans to investors in 2013, but the Company told FERC a few months later that it didn’t know where the gas was going. R.1752, Att.2 at PP1, 18; 1514-027 at PP63-64, JA____, JA____.⁸ Cabot’s presentation included a graphic showing the

⁸ SA Transcripts, Cabot Oil & Gas (COG) Dan O. Dinges on Q2 2015 Results - Earnings Call Transcript (July 24, 2015), <http://seekingalpha.com/article/3355855-cabot-oil-and-gas-cog-dan-o-dinges-on-q2-2015-results-earnings-call-transcript?part=single>. Two years later, Cabot CEO, Dan Dinges, discussed the need to move gas to higher priced markets, and stated, “Constitution, as an

flow of the gas in the Iroquois pipeline being reversed at Wright, with text that the gas would be transferred to TransCanada Pipeline. R.1752, Att.2 at P18, JA____.

Iroquois will facilitate Cabot's goal of reaching higher priced markets when it reverses the flow of its pipeline from south to north, exporting gas to Canada (the "SoNo" project). R.1746 at PP9-18, 1752, Att. 3, JA____, JA____. The project manager for Iroquois' SoNo project stated Iroquois is waiting for Constitution to put pipes in the ground before it proceeds.⁹ Once in Canada, the gas could be moved to the Maritimes and shipped overseas. R.1746 at PP10-18, 2026, Att.9-13, JA____, JA____. The goal of shipping the gas to Canada contradicts the record, which states the end markets are in New York City and New England. Even if there is a need for gas in Canada, exporting it raises Constitutional questions about whether citizens' property can be taken for "public use" in other countries.

However, those serious concerns were not addressed here. As discussed below, in Issue IV, FERC refused to include SoNo in its EIS.

example, we're going to be able to move gas, not only south from Wright Station, but we're also going to be able to move gas north into Canada from that position."

⁹ Brian Nearing, *Pro-gas pipeline supporters push Cuomo to greenlight project*, TIMES UNION (April 18, 2016), <http://www.timesunion.com/tuplus-business/article/Pro-gas-pipeline-supporters-push-Cuomo-to-7256065.php>. (This article is not in the record as it was published after the record was closed.)

E. Contracts Between Parties Are Not Substantial Evidence.

A certificate of public convenience and necessity is required for new pipelines, and the decision to grant one must be based upon substantial evidence. 15 U.S.C. §§ 717f(c), 717r(b). In 1999, the Commission developed policy guidelines to help determine whether a project should be granted such a license. R.2076 at ¶22, n.22, JA____. Deference should not be given to FERC based upon these policy statements. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (“Interpretations . . . contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law - do not warrant *Chevron*-style deference.”). The role of this Court is to ensure that the weight of the evidence substantially supports the determination made. *Scenic Hudson*, 354 F.2d at 612. If it doesn’t, then FERC’s decision must be reversed. *Atlantic Refining*, 360 U.S. at 392-93 (“Our examination of the record here indicates that there was insufficient evidence to support a finding of public convenience and necessity. . . .”).

In recent challenges of need for pipelines, there was evidence of market demand. *See Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015) (“[T]he Project would ensure ‘the ability of two local distribution companies . . . to meet the needs of their overall 1.5 million customers during periods of peak demand (i.e., the winter heating season). . . .’”) (internal

citations omitted). While FERC cited *Myersville*, it is inapplicable here, as the Company has no sales contracts. R.2298 at ¶21, n.30-31, JA____. Instead, the shippers are drillers, selling gas to themselves. R.1-002 at P5, JA____. Cabot, which would be supplying over 75% of the gas in the pipeline, owns 25% of the Company, and signed a precedent agreement in which it agreed to pay a set fee for the shipment of its own gas. R.1-002 at P5, 1-003, Ex.A, 1-004, Ex.I, 1746 at P19, JA____, JA____, SA3, JA____. This enables Cabot to buy gas at a lower rate, divert gas from other pipelines to this one, and earn transportation fees for the gas it ships. These self-serving contracts are not arms-length transactions, and do not establish *market* need. Yet FERC relied on them to approve the project, which empowered the Company take people's property and cut trees. R. 1-004, Ex.I; 2096 at PP11-14, Ex.2; 2269, Ex.1, 2; 2298 at ¶21; 2299; 2302; SA3, JA____, JA____, JA____. In sum, the record on which FERC bases its determination of public use fails to provide substantial evidence of the purported benefits, including local use, market demand, increased reliability, or decreased costs. *Mo. Public Serv. Comm'n v. FERC*, 215 F.3d 1, 7 (D.C. Cir. 2000) ("It could hardly satisfy the Natural Gas Act's requirement of substantial evidence for facts found by the Commission.") (internal citations omitted).

IV. FERC VIOLATED NEPA BY ILLEGALLY SEGMENTING A REASONABLY FORESEEABLE PROJECT.

A. Standard of Review

Under NEPA, and its implementing regulations, agencies must analyze connected, cumulative, and similar actions in an EIS. 40 C.F.R. §§ 1500.1, 1502.9, 1508.7, 1508.25(a). *See Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 87-90 (2d Cir. 1975); *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1309-1310, 1313-1314 (D.C. Cir. 2014). NEPA requires a “hard look” and strict compliance with procedures to ensure the goals of the statute are achieved. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Projects that lack a logical terminus and substantial independent utility may be illegally segmented. *Del. Riverkeeper Network*, 753 F.3d at 1313-18. An EIS must include “other connected, closely related, and interdependent projects.” *Id.* at 1309.

FERC’s interpretation of NEPA and its implementing regulations is not entitled to *Chevron* deference as NEPA applies to all federal agencies and is not administered by FERC. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984); *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.”). If an agency fails to provide an adequate rationale, its decisions can be overturned as arbitrary and capricious. 5 U.S.C. § 706(2)(A); *State Farm*, 463 U.S. at 43. Interpretation of contracts is a

legal question, to be reviewed *de novo*. 5 U.S.C. § 706(2)(A). *Pennzoil*, 789 F.2d at 1136.

B. FERC Refused to Study Impacts of Other Projects.

STP repeatedly requested studies of connected projects and cumulative impacts. R.1914, PP56-57, 2027, 2047, 2053, 2096 at PP25-35, 2196 at 1, 2227, JA____, JA____, JA____, JA____, JA____, JA____, JA____. FERC refused to revise or supplement its EIS in spite of many requests and delays in the start of this project. Instead, in a post hoc rationalization, the Commission attempted to change the purpose of the project, from increasing capacity to displacing other shippers' gas. R.2057 at 3-3, 2076 at ¶¶114-117, 2298 at ¶¶95-97, JA____, JA____, JA____.

C. The Project Lacks a Significant Purpose, Substantial Independent Utility, and a Logical Terminus.

Illegal segmentation of highway and pipeline projects is determined through similar factors because both systems are interconnected and built in sections. *See Village of Westbury v. Dep't of Transp.*, 75 N.Y.2d 62, 65-71 (1989); R.2298 at ¶89, JA____. The pipeline at issue here ends at Wright, NY, where it would interconnect with two already congested pipelines. R.1746 at PP6-9, 1752, Att.1 at PP58-66, 72-77, JA____, JA____. This is comparable to building a new highway that ends at an intersection of two highways that have no room for more vehicles. Until the existing highways are expanded or the flow of traffic diverted, cars that are

traveling down the existing highways would be blocked by the flow of traffic from the new interchange, or vice versa.

To avoid illegal segmentation, a project should serve a significant purpose even if related projects are not built. *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987) (“The proper question is whether one project will serve a significant purpose even if a second related project is not built.”). Projects that facilitate movement by decreasing congestion have been found to have significant purpose. *Id.* (“[T]he... projects...are expected to result in less congestion at interchanges, facilitate local traffic, and provide access to mass transit.”). Although FERC cited this case, for this principle, all that would be accomplished here is the replacement of one shipper’s gas with another’s. R.2076 at ¶115, 2298 at ¶95, JA____, JA____. To achieve a *significant* purpose when there are constraints in the system, capacity has to be increased. That would not occur here.

This project also lacks substantial independent utility, as there are no firm contracts for the gas along the route. Even if all of Leatherstocking’s speculative franchise agreements came to fruition, a mere 0.6% of the pipeline’s capacity would be utilized. R.1817 at n.8, JA _____. Instead, almost all of the gas would be transferred to the Iroquois and Tennessee pipelines, which are already full of gas. R.1746 at PP6-9, 1752, Att.1 at PP58-66, 72-77, JA____, JA____. FERC stated that

new pipelines are needed in the New York City and New England areas to meet an increase in market demand. R.2057 at 3-3, JA____. However, this project cannot increase supply in those areas, as it does not add capacity to the already constrained pipelines with which it interconnects. R.1514-027 at PP63-64, JA ____.

In addition, Wright, NY is not a logical terminus, as it is located far to the north and west of the intended markets, and upstream of the congestion in the Iroquois and Tennessee Pipelines. R.2096 at PP32-35, JA____. As such, the project would perpetuate pipeline constraints and the volatile prices they cause. The stated objectives of this project can only be achieved by moving the point of interconnection closer to the intended markets or adding capacity between Wright, NY and the end markets.

For all of these reasons, without SoNo, which would provide an avenue for gas in the Company's pipeline, this project has no purpose and serves no need.

D. The Project Is Physically, Functionally, Temporally, and Financially Connected to SoNo.

Physical, functional, temporal, and financial connections between projects may also establish illegal segmentation. *Del. Riverkeeper Network*, 753 F.3d at 1308. Here the new compressors at the WIP would increase the pressure of the gas in the Constitution pipeline so it could flow into the Iroquois and Tennessee pipelines. R.2076 at ¶12, JA____. The interconnection between the Constitution and

Iroquois pipelines, enabled by WIP, establishes the required physical and functional nexus.

This project would be “completed within the same general time frame” as SoNo, and therefore meets the required temporal nexus. *Del. Riverkeeper Network*, 753 F.3d at 1309-1310 (“Between 2010 and 2013, Tennessee Gas commenced four upgrade projects along the Eastern Leg.”). Here the Company filed in June 2013, and Iroquois held its Open Season for SoNo six months later. R.1752, Att.3, JA____. WIP is the major facility needed to push gas transported by the Company into Iroquois, and WIP is part of this project. That means no major construction would be required to reverse the flow of gas in Iroquois, so Iroquois does not have to file an application with FERC for SoNo until construction begins on this project.

Robert Perless, project development manager for the Iroquois South-North project, said that project remains on hold until the Constitution project moves forward. “We need to see some construction by Constitution. They need to put some pipe into the ground,” he said. Without Constitution, there is no need to reverse the Iroquois pipeline, Perless added. If Constitution is built, the Iroquois pipeline could be reversed by 2018 or 2019, he said.¹⁰

Thus, Iroquois can postpone its application to FERC and move Cabot’s gas north into Canada once this project is completed. However, this Court should not allow

¹⁰ Brian Nearing, *Pro-gas pipeline supporters push Cuomo to greenlight project*, TIMES UNION (April 18, 2016), <http://www.timesunion.com/tuplus-business/article/Pro-gas-pipeline-supporters-push-Cuomo-to-7256065.php>. (This article is not in the record as it was published after the record was closed.)

the avoidance of environmental reviews through tactical delay of proposals. *Del. Riverkeeper Network*, 753 F.3d at 1310.

The required financial nexus is established through the interrelated contracts between: (1) the Company and Iroquois, (2) the Company and Cabot, and (3) Cabot and Iroquois. The Company has a fifteen-year, \$1,083,333 fixed monthly lease with Iroquois for use of WIP, and WIP would enable the gas transported by the Company to flow into the Iroquois. R.2076 at ¶¶12-15, JA____. Cabot Pipeline Holdings LLC, which owns 25% of the Company, is a wholly owned subsidiary of Cabot Oil & Gas Corporation. R.1-002 at PP2-3, 1-003, Ex.A, JA____, JA____. Cabot would ship up to 500,000 Dth/d of its gas, which would flow into either the Iroquois or Tennessee pipelines. R.1-002 at P5, 1-004, Ex.G, GII, I, JA____, SA1, SA2, SA3. As a shipper, Cabot would pay these two pipeline companies fees based upon the amount of gas they transport. Thus, there are financial connections between the Company and Iroquois, both directly and through Cabot.

E. FERC Violated NEPA.

Reasonably foreseeable and connected actions should be studied in one EIS. 40 C.F.R. §§ 1508.7, 1508.25(a). FERC will claim that SoNo is neither reasonably foreseeable nor connected because it is not yet proposed. R.2298 at ¶96, JA____. However, this Court has held that perspective to be “too constricted.” *Callaway*, 524 F.2d at 88, 94. As discussed above, SoNo is a connected action because it

would allow gas owned by Cabot, which is currently stranded in Pennsylvania, to reach higher priced markets in Canada, or overseas. It is reasonably foreseeable because Iroquois has stated that it is simply waiting for this project to proceed before it files an application for SoNo. While the extent of the potential impacts are unknown, it is clear that taking property for gas that might be exported triggers serious constitutional questions that were never considered. R.2096 at PP31-32, JA____. Thus, FERC's failure to study this connected project is a violation of NEPA. *Town of Huntington v. Marsh*, 859 F.2d 1134, 1142 (2d Cir. 1988).

CONCLUSION AND PRAYER FOR RELIEF

Fifty-one years ago, this Court found that “the Commission... failed to compile a record which is sufficient to support its decision.” *Scenic Hudson*, 354 F.2d at 612, 620. A careful review of the record in this case will uncover a similar failure. Therefore, for all of the reasons stated above, STP respectfully asks this Court to: (1) vacate FERC's Certificate Order and order that all easement agreements acquired as a result of that order be rescinded and all court ordered easements nullified; (2) declare that the Commission's failure to issue a final order within thirty days of STP's request for rehearing was contrary to law and a violation of STP members' due process rights; and, (3) remand this matter for evidentiary hearings on the need for the project under the NGA and for a

supplemental EIS under NEPA, one that includes SoNo, a reasonably foreseeable connected project.

Respectfully submitted,

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Dated: July 12, 2016
White Plains, New York

CERTIFICATE OF COMPLIANCE

I, Karl S. Coplan, the Attorney of Record for the Petitioners herein, hereby certify that this Petition complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B), as it contains 13,918 words, excluding the portions of the Petition exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s / KARL S. COPLAN