UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Constitution Pipeline Company, LLC	)	Docket Nos. CP18-5-000
	)	CP18-5-001
	)	CP18-5-002

REQUEST FOR REHEARING
OF STOP THE PIPELINE

Pursuant to Section 717r(a) of the Natural Gas Act (NGA)[1] and Rule 713 of the Federal Energy Regulatory Commission ("FERC" or "Commission") Rules of Practice and Procedure,[2] Stop the Pipeline ("STP") hereby requests rehearing and recission of the Order on Voluntary Remand, which declared New York State Department of Environmental Conservation ("NYSDEC") waived its right to deny Constitution Pipeline Company, LLC's ("Company") application for a 401 water quality certification. *Constitution Pipeline Company, LLC*, 168 FERC ¶ 61,129 (August 28, 2019) ("Waiver Order II").

I. STATEMENT OF RELEVANT FACTS

The Company pre-filed in April 2012, and filed an application with FERC 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.[3] FERC assigned docket numbers PF12-9 and CP13-499, respectively. STP intervened[4] and submitted an analysis of the Company's lack of response to issues raised by

[1] 15 U.S.C. § 717r(a) (2018).

[2] 18 C.F.R. § 385.713 (2019).

[3] FERC, FEIS: CONSTITUTION PIPELINE AND WRIGHT INTERCONNECT PROJECTS (2014) at ES-1, 4-116 ("FEIS").

[4] STP, Motion to Intervene (July 13, 2013).

NYSDEC and the United States Army Corps of Engineers ("ACE").[5] FERC released its Draft Environmental Impact Statement ("DEIS") on February 21, 2014, noting that 24% of the properties had not been surveyed.[6] This was still true when the Final Environmental Impact Statement ("FEIS") was issued on October 24, 2014. On December 14, 2014, the Commission issued a certificate of public convenience and necessity ("Certificate Order") to the Company and Iroquois Gas Transmission System, L.P. ("Iroquois") to construct the Constitution Pipeline Project and Wright Interconnect Project ("Projects").[7] One of the conditions in the Certificate Order was the need to acquire all required federal licenses and permits, including the 401 water quality certification from NYSDEC.[8]

The problem that caused the multi-year delay for the 401 water quality certification – and the two withdrawals and resubmissions by the Company – was not a written agreement between Constitution and NYSDEC, but the Company's persistent refusal to provide the information that NYSDEC repeatedly said it needed.[9] For example, on July 17, 2013, NYSDEC asked the Company to evaluate Horizontal Directional Drilling (HDD) for every stream crossing, but the Company refused to do so, stating that FERC did not require it.[10] Over the following years, the Company continued to challenge NYSDEC's authority and refused to supply the information that was repeatedly requested. STP pointed out this history and documented the information that was still missing in its comments to NYSDEC on Constitution's application for a 401 water quality certification.[11] These comments, which included an expert report on issues such as cumulative water quality impacts to streams and aquatic species, went well beyond the scope of what FERC considers under NEPA.[12] On May 20, 2015, STP supplemented its comments by detailing the vast amount of specific information that was still missing from the Company's

[5] STP, Comment to FERC (Dec. 16, 2013), ("STP 12/16/13 FERC Comment").

[6] FERC, DEIS: CONSTITUTION PIPELINE AND WRIGHT INTERCONNECT PROJECTS (2014) at 1-3.

[7] *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (2014) ("Certificate Order").

[8] *Id*., Att. A.

[9] NYSDEC, Answer in Opposition to Petition for Declaratory Order, 5-6 (Nov. 9, 2017) ("NYSDEC Answer in Opposition").

[10] *Id*., Ex. 2 at 19-20.

[11] STP 2/27/15 NYSDEC Comment.

[12] *Constitution Pipeline*, 868 F.3d at 100-101 (discussing the distinctions between procedural and substantive laws).

application.[13] For example, when the Company withdrew and resubmitted its application for the second time on April 27, 2015, many parcels still had not been surveyed, and information about parcels that had been surveyed had not yet been provided to NYSDEC.

Ultimately, it was the Company's refusal to supply the required information that lead to NYSDEC's denial of the Company's application on April 22, 2016.[14] Even then, the Company maintained its position that NYSDEC lacked the authority to deny a 401 water quality certification for an interstate gas pipeline that FERC had already approved. After refusing to give NYSDEC the information it requested, the Company then brought multiple legal challenges against NYSDEC. It lost all of its cases, but refused to give up, even though the Second Circuit resolved the underlying conflict in 2017.

> Here, the record amply shows, *inter alia*, that Constitution persistently refused to provide information as to possible alternative routes for its proposed pipeline or site-by-site information as to the feasibility of trenchless crossing methods for streams less than 30 feet wide -- i.e., for the vast majority of the 251 New York waterbodies to be crossed by its pipeline -- and that it provided geotechnical data for only two of the waterbodies.[15]

In response to the Company's arguments that open cut trenching, not HDD, was the industry recognized standard for crossing streams less than thirty feet wide, the Second Circuit stated, "Industry preferences do not circumscribe environmental relevance."[16] Most relevant here, the Second Circuit held that the NYSDEC's actions were reasonable: "[w]e conclude that the denial of the 401 certification after Constitution refused to provide relevant information, despite repeated NYSDEC requests, was not arbitrary or capricious."[17] It also held that the District of Columbia Circuit had exclusive jurisdiction over the Company's claim that NYSDEC waived its right.[18]

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[13] Stop The Pipeline, Supplemental Comment Letter (May 20, 2015) ("STP 5/20/15 NYSDEC Comment").

[14] NYSDEC Answer in Opposition, Ex. A. April 22, 2016 Denial Letter.

[15] *Constitution*, 868 F.3d at 103.

[16] *Id.* 102-3.

[17] *Id.* 103.

[18] *Id.* 99-100.

In spite of this directive from a circuit court, the Company petitioned the Commission to declare that NYSDEC had waived its right to deny its application for a 401 water quality certification. The Commission twice denied the Company's petition, but reversed itself in Waiver Order II.

II. STATEMENT OF THE ISSUES

1. The Commission violated the Natural Gas Act ("NGA"), 15 U.S.C. § 717r(d)(2), by issuing Waiver Order II after the United States Court of Appeals for the Second Circuit held that the District of Columbia Circuit has exclusive jurisdiction for a failure-to-act claim.[19]

2. The Commission has an affirmative duty to lead an integrated environmental review and set a schedule that "compl[ies] with applicable schedules established by Federal law."[20] Since FERC failed to provide notice of the deadline for a decision under section 401 of the CWA, 33 U.S.C. § 1341(a), as required under 15 U.S.C. § 717n(c)(1)(B), Waiver Order II is arbitrary and capricious.[21] This is also a due process violation.

3. The Commission violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), by ignoring the Company's failure to challenge the NYSDEC's delay under 15 U.S.C. § 717r(d)(2).

4. The Commission's interpretation of *Hoopa Valley* is impermissibly broad.[22]

5. The Commission's retroactive application *Hoopa Valley* is inequitable.

III. ARGUMENT

1. The Commission violated the law of the case and 15 U.S.C. § 717r(d)(2).

"An agency is bound to follow the law of the Circuit."[23] Here, the United States Court of Appeals for the Second Circuit held that the District of Columbia Circuit has exclusive jurisdiction over a failure-to-act claim.[24] The Commission acknowledged this,[25] but then

[19] *Constitution*, 868 F.3d at 99-100.

[20] 15 U.S.C. § 717n(c)(1)(B).

[21] 5 U.S.C. §§ 706(2)(A), (D).

[22] *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019).

[23] *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980).

[24] *Constitution Pipeline*, 868 F.3d at 99-100.

proceeded to ignore it by issuing an order.[26] "[I]t is the courts that have the final word on matters of statutory interpretation."[27] "[T]he [Commission] cannot, as it did here, choose to ignore the [Second Circuit's] decision as if it had no force or effect. Absent reversal, that decision is the law which the [Commission] must follow."[28]

The Second Circuit's decision is the law of the case because a mandate was issued,[29] and because it has jurisdiction to review Waiver Order II. "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of 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. . ."[30] Here the natural-gas company is located in New York,[31] so the Second Circuit has jurisdiction over orders issued by the Commission. This is confirmed by two petitions currently in the Second Circuit that are challenging FERC's orders in regards to the Constitution Pipeline Project.[32]

However, FERC failed to follow the binding law of the circuit court.

> The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority. The latter "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of (the) court deciding the case," and the higher tribunal is amply armed to rectify any deviation through the process of mandamus.[33]

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[25] Waiver Order II, P.7, n.13.

[26] *Id.*, P.1.

[27] *Ithaca College*, 623 F.2d at 228.

[28] *Id.*

[29] *Constitution Pipeline* (Case No. 16-1568, ECF No. 258).

[30] 15 U.S.C. § 717r(b).

[31] *See*, Get the Facts: Constitution Pipeline, www.constitutionpipeline.com/get-the-facts-constitution-pipeline (last visited Sept. 14, 2019) (which lists two offices, both in New York State); Iroquois' headquarters are in Connecticut, www.iroquois.com/contact.asp (last visited Sept. 14, 2019).

[32] *See Catskill Mountainkeeper, et al. v. FERC*, Second Cir. Case No. 16-345 and *Stop the Pipeline v. FERC*, Second Cir. Case No. 16-361.

[33] *Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977). STP hereby puts the Commission on notice that it will likely file a petition for a writ of mandamus if a final order on rehearing is not issued in thirty days of the filing of this request for rehearing.

Instead of complying with this fundamental rule of law, FERC relied upon a decision by the District of Columbia Circuit.[34] It did so even though *Millennium* was filed with the Second Circuit by the NYSDEC almost two months prior to the decision in *Constitution Pipeline*.[35] In response, the Company admitted *Millennium* was denied for lack of standing, but argued that it could initiate parallel proceedings with the Commission on the issue of waiver.[36] The Second Circuit rejected that option.

> We regard subsection (2) [15 U.S.C. § 717r(d)(2)] – titled "Agency delay" – as encompassing not only "an alleged failure to act" but also an allegation that a failure to act within a mandated time period should be treated as a failure to act.[37]

It then held that the District of Columbia Circuit has exclusive jurisdiction over a waiver (failure-to-act) claim.

> Constitution's "waive[r]" argument is that the NYSDEC Decision must be treated as a nullity by reason of NYSDEC's "*failing to act* within the prescribed time period under the CWA" . . .. Such a failure-to-act claim is one over which the District of Columbia Circuit would have exclusive jurisdiction, 15 U.S.C. § 717r(d)(2).[38]

Since the Second Circuit has already considered the jurisdictional issues raised in *Millennium* and told Constitution to bring its waiver claim to the District of Columbia Circuit, it has already rejected the Commission's arguments,[39] and already determined the Commission lacks authority to issue Waiver Order II.

In spite of this, the Commission impermissibly expanded the holding in *Millennium* to include situations where the 401 water quality certification has been denied.[40] Contrary to the Commission's claim, *Millennium* was dismissed because it had not suffered an injury and therefore lacked standing.

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[34] Waiver Order II, P.15 (citing *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 700-701 (D.C. Cir. 2017)).

[35] *See* Resp't's FRAP 28(j) Letter, Case No. 16-1568, ECF No. 227.

[36] Company's FRAP 28(j) Letter, Case No. 16-1568, ECF No. 330 (Attachment 1).

[37] *Constitution Pipeline*, 868 F.3d at 99.

[38] *Constitution Pipeline*, 868 F.3d at 100.

[39] Waiver Order II, P.15.

[40] *Id.*

> Before reaching the merits of Millennium's claim, we first examine Millennium's standing to sue. . . . To satisfy the case-and-controversy requirement, a petitioner must allege (i) that it suffered an injury in fact. . . . Millennium fails at the first prong. It asks us to hold that the Department violated the Clean Water Act's statutory deadline. Even if that were so, Millennium would suffer no cognizable injury from the violation. We therefore dismiss Millennium's petition for want of standing.[41]

"So what can Millennium do in the face of the Department's *continued inaction*? Millennium can go directly to FERC and present evidence of the Department's waiver."[42] The Commission acknowledged that the sole reason the waiver issue was not decided by the District of Columbia Circuit was because Millennium had "no cognizable injury and therefore lacks standing."[43] The Second Circuit also noted that because Millennium lacked standing, its case was dismissed.[44] Under those circumstances, "Millennium could seek a remedy *for the delay* only from FERC."[45]

That, however, is not the situation here because NYSDEC denied the Company's application for a 401 water quality certification before Constitution sought judicial review.[46] Therefore, unlike Millennium, Constitution had suffered an injury and had standing to bring a petition to the District of Columbia Circuit, which could have provided a remedy for the injury by reversing or nullifying NYSDEC's denial. To avoid the logic of STP's position, the Commission misrepresents what STP wrote. "Stop the Pipeline attempts to limit *Millennium Pipeline's* discussion of standing to situations where the state has not yet rendered a final decision on the application. There is no support for this distinction, which illogically suggests that unlawful delay ending in denial cannot injure a project sponsor."[47] In fact, STP argued the opposite. "Here, NYSDEC denied Constitution's application for a section 401 water quality certification on April 22, 2015, so Constitution *has suffered an injury* that can be redressed by the D.C. Circuit. Therefore, the Company would have standing."[48] The Second Circuit

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[41] *Millennium*, 860 F.3d at 699-700.

[42] *Id*. 701 (emphasis added).

[43] *Millennium Pipeline Co., LLC,* 160 FERC ¶ 61,065, n.8 (2017).

[44] *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 454-55 (2d Cir. 2018).

[45] *Id*. 455 (emphasis added).

[46] Waiver Order II, PP.6-7.

[47] *Id.*, P.15.

[48] STP Supplemental Pleading at 20 (emphasis added).

understood this distinction, which is why it held the District of Columbia Circuit has exclusive jurisdiction over Constitution's failure-to-act claim.[49] Therefore, it is up to the courts, not the Commission, to determine if NYSDEC waived its authority in this situation. Last year, the Supreme Court underscored that an agency is not entitled to deference for its interpretation of a statute that it is not charged to administer.[50] Just as the NLRB was not entitled to deference in interpreting Federal Arbitration Act, the Commission will not be entitled to deference in interpreting the Clean Water Act, jurisdictional issues, or circuit court decisions.

Finally, STP's claim that the Commission lacks jurisdiction to issue Waiver Order II is not "an untimely collateral attack on the Declaratory Order," as FERC asserts.[51] *Tennessee* is inapplicable because it concerned the relationship between a certificate of public convenience and necessity and a notice to proceed with construction.[52] This situation is entirely different. Here, the Commission requested a voluntary remand after it issued Waiver Order I, thereby reopening the proceedings in Constitution's Petition for a Declaration of Waiver.[53] As a result, Waiver Order II is now the final agency action because it "mark[s] the 'consummation' of the agency's decisionmaking process [that determines] 'rights or obligations' or from which 'legal consequences will flow[.]'"[54] The Commission says STP is precluded from objecting because it did not file a request for rehearing on Waiver Order I. However, the sole reason to request rehearing is to seek judicial review,[55] which STP could not do after Waiver Order I because it had not suffered an injury and therefore would have lacked standing. As such, it was not "aggrieved by an order[,]" which is the basis for requesting rehearing.[56] The Company sought review of Waiver Order I and that case has now been terminated.[57] The District of Columbia

[49] *Constitution Pipeline*, 868 F.3d at 99-100.

[50] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629-30 (2018).

[51] Waiver Order II, P.15.

[52] *Tenn. Gas Pipeline Co., LLC*, 162 FERC ¶ 61,013, P 37 (2018).

[53] Waiver Order II, PP.8-13.

[54] *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal citations omitted).

[55] 15 U.S.C. §§ 717r(a), (b).

[56] *Id*. § 717r(a).

[57] *Constitution Pipeline Co., LLC v. FERC*, D.C. Cir. Case No. 18-1251, ECF Nos. 1775259, 1775261.

Circuit no longer has jurisdiction over this matter.[58] In any event, jurisdiction is required at all stages of a challenge, and the Commission lacked it when it issued Waiver Order II.[59]

2. The Commission has an affirmative duty to lead an integrated environmental review and set a schedule that "compl[ies] with applicable schedules established by Federal law."[60] Since FERC failed to provide notice of the deadline for a decision under section 401 of the CWA, as required under 15 U.S.C. § 717n(c)(1)(B), Waiver Order II is arbitrary and capricious. Reversing positions without notice is also a due process violation.

The Commission has affirmative duties under the NGA that do not exist under the Federal Power Act ("FPA"), which makes *Hoopa Valley* inapplicable here. In its 2005 amendments,[61] Congress instructed the Commission to set a schedule for federal authorizations that ensures compliance with the schedules established by other federal laws.[62] Congress also ordered the Commission to maintain an integrated record for judicial review, and gave the District of Columbia Circuit jurisdiction over agency delay.[63] The Commission controls due process because it is responsible for coordinating federal authorizations.[64] These mandates to integrate all federal authorizations in one process, with one record for judicial review, were not followed here. The Commission issued two 90-day schedules for federal authorizations (Attachments 2, 3) and both of them ignored the one-year timeframe Congress gave States to act by granting, conditioning, or denying water quality certifications.[65]

The Company filed its first application to NYSDEC on August 22, 2013 and then withdrew and resubmitted it on May 9, 2014.[66] In FERC's first 90-day schedule for federal authorizations, which was issued on December 13, 2013 (Attachment 2), FERC did not inform

[58] Circuit Rule 41(b).

[59] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998).

[60] 15 U.S.C. § 717n(c)(1)(B).

[61] Energy Policy Act of 2005, Pub.L. 109-58, Title III, §313(a), Aug. 8, 2005.

[62] 15 U.S.C. § 717n(c)(1)(B).

[63] 15 U.S.C. §§ 717n(d), 717r(d)(2).

[64] *Id.* §§ 717n(a)-(d).

[65] 33 U.S.C. § 1341(a)(1).

[66] Waiver Order II, P.4.

NYSDEC that it had to act on the application by August 21, 2014. Therefore the schedule either did not "ensure[] compliance with the schedules established by other federal laws[,]" or NYSDEC did not waive its rights.[67] In FERC's revised 90-day schedule for federal authorizations, which was issued on August 18, 2014 (Attachment 3), FERC did not inform NYSDEC that it had either failed to act on the Company's application by August 21, 2014, or that it had to act on the withdrawn and resubmitted application by May 8, 2015. On October 24, 2014, FERC issued the FEIS for the project. In its list of major permits, it stated that the water quality applications were submitted in August 2013 and consultations were ongoing.[68] It did not mention that the Company withdrew and resubmitted its application on May 9, 2014. Nor did it set a deadline for NYSDEC to act or state that NYSDEC had failed to act on time. On December 2, 2014, the Commission issued a certificate of public convenience and necessity to the Company. The Certificate Order did not state that NYSDEC had failed to act on the Company's application by August 21, 2014, or give a date by which it had to act. Thus, the Commission never provided notice of the date by which NYSDEC must act on the 401 water quality certification, as required under 15 U.S.C. § 717n(c)(1)(B).

> In Waiver Order II, the Commission capriciously reverses its position.
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> The Commission interprets *Hoopa Valley* to stand for the general principle that where an applicant withdraws and resubmits a request for water quality certification for the purpose of avoiding section 401's one-year time limit, and the state does not act within one year of the receipt of an application, the state has failed or refused to act under section 401 and, thus, has waived its section 401 authority.[69]

While that analysis may be true under the FPA, *Hoopa Valley* cannot be applied to this situation without consideration of the Commission's obligation to lead an integrated review and set schedules for agencies acting under federal law. In other words, the Commission cannot declare NYSDEC waived its right to deny the 401 water quality certification in 2015 because Congress instructed it to tell agencies the schedule for federal authorizations, and the Commission failed to inform NYSDEC that it had to act by any set date. The Commission also lacks authority to

[67] 15 U.S.C. § 717n(c)(1)(B).

[68] FEIS, 1-16.

[69] Waiver Order II, P.31. *See also* PP.33, 38.

extend the holding of *Hoopa Valley* to this Project given the distinct statutory requirements of the NGA.

If FERC is correct that there is a firm one-year time frame for a state to act, then the Commission caused NYSDEC's waiver by failing to provide notice of the deadline in its first 90-day schedule for federal authorizations (Attachment 2). It also neglected to inform NYSDEC that it had failed to act in a timely manner or that it had to act by May 8, 2015 in its revised 90-day schedule for federal authorizations (Attachment 3), the FEIS, and Certificate Order. Thus, considering the Commission's role in this matter, Waiver Order II is a capricious reversal of its own prior actions. In addition, since a 401 water quality certification is required for federal projects and eminent domain has been used to take property, the Commission's new interpretation is also a due process violation because it did not provide notice of a date by which NYSDEC had to act.[70]

The Commission mistakenly states that the Clean Water Act preempts "state law" regarding the need for public notice, hearings, and comments on the Company's application for the 401 water quality certification. "Stop the Pipeline notes that New York DEC was obligated by New York statute to provide notice of Constitution's application and to receive public comments, which consumed more than two months and generated more than 15,000 comments. Stop the Pipeline Supplemental Pleading at 8-13. We note that the Clean Water Act as a federal law takes precedence over state law. U.S. Const. amend. VI, § 2."[71] In fact, New York State law regarding public notice and comment fulfills the requirements of the Clean Water Act.[72] This need for public notice and comments is specified in sentence preceding the one on which the Commission relies to find waiver. "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."[73] Thus, contrary to the Commission's assertions, public notice and hearings were required to be held and public comments considered before NYSDEC could act on the Company's application.

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[70] *See Mullane v. Central Hanover Trust Co*., 339 U.S. 306 (1950).

[71] Waiver Order II, n.84.

[72] 33 U.S.C. § 1251(e).

[73] *Id*. § 1341(a).

In sum, the lack of opportunity to be heard by NYSDEC violates the NGA because the Commission failed to "establish a schedule for all Federal authorizations…[that] compl[ied] with applicable schedules established by Federal law."[74] In addition, under Waiver Order II, landowners were denied the process that is due to them before their land is entered, taken, or altered.

3. The Commission ignored the Company's failure to challenge NYSDEC's delay.

The Commission failed to consider the 2005 amendments to the Natural Gas Act, which specify the steps that should be taken by a pipeline company, such as Constitution, if an agency, other than FERC, is engaged in dilatory behavior.[75]

> (2) Agency delay
> The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).
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> (3) Court action
> If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.[76]

The Company did not bring any "failure to act" or "unreasonable delay" claims to the District of Columbia Circuit, and such claims are now moot given that DEC has acted.[77] Rather

[74] 15 U.S.C. § 717n(c)(1)(B).

[75] Energy Policy Act of 2005, Pub.L. 109-58, Title III, §313(a), Aug. 8, 2005.

[76] 15 U.S.C. §§ 717r(d)(2), (3) (2018).

[77] *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 67-68 (2004) (claims that agency failed to timely act were moot once agency took action).

than challenging NYSDEC's lack of action while its application was being reviewed, the Company gambled that it would receive its 401 water quality certification. Ever since that gamble failed to pay off, the Company has tried to go back in time and argue that DEC was required to act sooner. The Second Circuit held that the District of Columbia Circuit has exclusive jurisdiction to hear such claims.[78] Instead of following the Court's directive, the Company petitioned the Commission, which, as argued *supra*, Section III.1., does not have jurisdiction over this matter. In any event, under the NGA, its arguments are moot. *Hoopa Valley* is inapplicable because it was decided under the FPA, which does not include requirements that are comparable to § 717r(d)(2) for challenging agency delay in the District of Columbia Circuit while it is occurring.

4. The Commission's interpretation of *Hoopa Valley* is impermissibly broad.

In Waiver Order II, the Commission takes *Hoopa Valley* out of context and expands the holding beyond the issue raised. "Whereas statutory waiver is mandated after a request has been pending for more than one year, the issue in this case is *whether states waive Section 401 authority by deferring review and agreeing with a licensee to treat repeatedly withdrawn and resubmitted water quality certification requests as new requests*."[79] Here, NYSDEC did not defer review. Nor is the Company a licensee, profiting from an otherwise expired fifty-year old hydroelectric license.[80] Instead, it is an applicant that repeatedly refused to give NYSDEC the information it requested, hoping to build the pipeline in the cheapest and fastest manner possible.

In *Hoopa Valley*, the Court explicitly limited the holding to the withdrawal and resubmission of the same request.

> Implicit in the statute's reference "to act on *a request*" for certification, the provision applies to a specific request. *See* 33 U.S.C. § 1341(a)(1) (emphasis added). This text cannot be reasonably interpreted to mean that the period of review for one request affects that of any other request. . . . The record does not indicate that PacifiCorp withdrew its request and submitted a wholly new one in its place, and therefore, we decline to resolve the legitimacy of such an arrangement. We likewise need not determine how different a request must be to constitute a "new request" such that it restarts the one-year clock.[81]

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[78] *Constitution Pipeline*, 868 F.3d at 99-100.

[79] *Hoopa Valley*, 913 F.3d at 1101 (emphasis added).

[80] Waiver Order II, P.24.

[81] *Id*. 1104.

Ignoring the evidence presented during remand,[82] the Commission treated the two distinct cases as comparable and thereby concluded that the additional information and filings made by the Company after May 9, 2014 did not constitute a new request.[83] It did so by focusing on the technique used (a letter withdrawing and resubmitting the application),[84] rather than the substantive filings made between: (1) August 22, 2013 and May 8, 2014; (2) May 9, 2014 and April 26, 2015; and (3) April 27, 2015 and April 22, 2016. It also completely ignored the Company's obstructive behavior.

> Here, the record amply shows, *inter alia*, that Constitution persistently refused to provide information as to possible alternative routes for its proposed pipeline or site-by-site information as to the feasibility of trenchless crossing methods for streams less than 30 feet wide -- i.e., for the vast majority of the 251 New York waterbodies to be crossed by its pipeline -- and that it provided geotechnical data for only two of the waterbodies.[85]

Most relevant here, the Second Circuit held that the NYSDEC's actions were reasonable: "[w]e conclude that the denial of the 401 certification after Constitution refused to provide relevant information, despite repeated NYSDEC requests, was not arbitrary or capricious."[86] Thus, it has already been determined that the lengthy delays were caused by the Company's refusal to provide the information that NYSDEC legitimately requested.[87] These differences distinguish this case from *Hoopa Valley*, where there was a completely static application, with no new information being filed and no active review. [88] That is why the District of Columbia Circuit repeatedly referred to the agreement between the applicant and the states as a "withdrawal-and-resubmission scheme."[89] There was no such scheme here.

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[82] *See, e.g.*, STP's April 1, 2019 Supplemental Opposition to Petition for Declaratory Order at 8-13 (STP's Supplemental Pleading);

[83] Waiver Order II, P.40.

[84] *Id*. P.39.

[85] *Constitution Pipeline*, 868 F.3d at 103.

[86] *Id*.

[87] *Id*. 100-103.

[88] Waiver Order II, P.24.

[89] *Hoopa Valley*, 913 F.3d at 1103-5.

The Commission also misrepresents the judicial review of its waiver order regarding Millennium's Pipeline Project.[90] The Second Circuit's decision does not support the Commission's ruling here. "If a state deems an application incomplete, it can . . . request that the applicant withdraw and resubmit the application."[91] Since that is exactly what NYSDEC did here, it did not waive its authority.

5. The Commission's retroactive application *Hoopa Valley* is inequitable.

The Commission did not consider the legal and factual distinctions between *Hoopa Valley* and this case in its rejection of STP's equitable arguments.[92] Nor did the District of Columbia Circuit in its denial of rehearing.[93] For example, in Waiver Order II, the Commission ignored its affirmative duties under the NGA, as well as the failure of the Company to challenge NYSDEC's delay as it was occurring. *See* Sections III. 2., 3., *supra*. These statutory requirements and provisions are not in the FPA, making *Hoopa Valley* inapplicable here. In addition, the *Hoopa Valley* decision does not hinge on the form of the withdrawal and resubmission, as the Commission contends.[94] Instead, it was based on the context of the case, which involved a scheme to delay relicensing. *See* Section III. 4., *supra*. While the Commission wants to create a bright-line rule for all 401 water quality certifications, the statutes that require federal licenses and permits have their own procedural requirements that must be considered in the analysis. Here, the Commission is condoning the Company's bad behavior by allowing it to benefit from the delays it created by refusing to submit the information NYSDEC requested. That was not the situation in *Hoopa Valley*, where the Petitioner was not the applicant for the 401 water quality certification. Thus, the District of Columbia Circuit did not consider the inequity of the circumstances that exist in this case. As such, *Hoopa Valley* should not be applied retroactively to the Waiver Petition.

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[90] Waiver Order II, P.25. The Commission neglected to provide a citation to the case.

[91] *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018). *See also, id*., n.35 ("*Constitution Pipeline*, 868 F.3d at 94 (noting that an applicant for a Section 401 certification had withdrawn its application and resubmitted at the Department's request – thereby restarting the one-year review period).").

[92] Waiver Order II, PP.17-19.

[93] *Hoopa Valley Tribe v. FERC*, No. 14-1271 (Apr. 26, 2019) (orders denying petition for panel rehearing and rehearing en banc).

[94] Waiver Order II, P.39.

In addition, *Hoopa Valley* does not announce a new rule of federal law under the NGA, so there is nothing to apply retroactively.[95] In *Hyde*, the Supreme Court described four exceptions to the retroactive application of a new rule.[96]

> [A]s courts apply "retroactively" a new rule of law to pending cases, they will find instances where that new rule, for well-established legal reasons, does not determine the outcome of the case. Thus, a court may find (1) an alternative way of curing the constitutional violation, or (2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief, or (3) as in the law of qualified immunity, a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications, or (4) a principle of law, such as that of "finality" …that limits the principle of retroactivity itself.[97]

Here, there is "a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief."[98] Under the explicit terms of the NGA, which was applied and interpreted by the Second Circuit, the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction over agency delay and *waiver*.[99] Therefore, as discussed *supra* in Section III. 1., the Commission lacks jurisdiction to make this determination. Finally, there is also "a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications[.]"[100] This is the principle of equitable tolling.

In *Menominee*, the Supreme Court upheld the two-prong test for equitable tolling.[101] "[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'"[102] Equitable tolling applies to non-

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[95] *Harper v. Va. Dep't. of Taxation*, 509 U.S. 86, 97-8 (1993).

[96] *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758-9 (1995).

[97] *Hyde*, 514 U.S. at 758-9.

[98] *Id.* at 759.

[99] *See* 15 U.S.C. § 717r(d)(2) (2018); *Constitution*, 868 F.3d at 99-100.

[100] *Hyde*, 514 U.S. at 759.

[101] *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755-56 (2016).

[102] *Id.* quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010).

jurisdictional deadlines in federal statutes.[103] Under *Hyde*, a party must show that it relied on the agency's prior position and that public policy does not support retroactive application.[104]

Here, the record proves that NYSDEC was diligently pursuing its right to make a determination on the Company's application for a section 401 water quality certification, and that it was the Company's obstructive behavior that prevented it from making a decision earlier. The facts to support this were described in Section I of STP's Supplemental Pleading and upheld by the Second Circuit.[105] Thus, both prongs of the test have been satisfied. Next, the one-year time-frame in section 401 is a non-jurisdictional deadline.[106] Finally, the parties in the proceeding relied on FERC's long-standing regulatory position that the withdrawal and resubmission of an application for a water quality certification resets the one-year time-frame under section 401 the Clean Water Act, and FERC has stated that it is in the public interest to have certainty regarding that deadline.

> Since 1987 the Commission has consistently determined, both by regulation and in our orders on proposed projects, that the reasonable period of time for action under section 401 is one year after the date the certifying agency receives a request for certification. We see no reason to alter that determination. The substantial benefits from this interpretation, which we have primarily discussed in the hydroelectric context, apply equally to natural gas transportation projects. First, our interpretation avoids the difficulty of having to ascertain and construe the requirements of numerous divergent state statutes and regulations (i.e., regarding what is a triggering request for certification) and provides clarity and certainty to all parties. Second, the Commission's reading of section 401 does not infringe on states' authority to fashion procedural regulations they deem appropriate or, if necessary, to deny applications for failure to meet such regulations. Rather, it provides the maximum allowable time prescribed by the Clean Water Act. Finally, the Commission has concluded that the public interest is best served by avoiding uncertainty associated with open-ended certification deadlines.[107]

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[103] *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631 (2015). *See also, Bowden v. United States,* 106 F.3d 433, 437 (D.C. Cir. 1997); *Millennium Pipeline Co., L.P. v. Gutierrez*, 424 F. Supp. 2d 168, 177 (D.D.C. 2006).

[104] *Hyde*, 514 U.S. at 759.

[105] *Constitution*, 868 F.3d at 100-3.

[106] 33 U.S.C. § 3341(a)(1) (2018).

[107] *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014, P 16 (2018) (footnotes omitted).

In addition to granting states one year from the date of the receipt of the application, FERC has consistently ruled that the withdrawal and resubmission of an application resets the clock.

> We reiterate that once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under section 401(a)(1). We continue to be concerned, however, that states and project sponsors that engage in repeated withdrawal and refiling of applications for water quality certifications are acting, in many cases, contrary to the public interest and to the spirit of the Clean Water Act by failing to provide reasonably expeditious state decisions. Even so, we do not conclude that the practice violates the letter of the statute. Section 401 provides that a state waives certification when it does not act on an application within one year. The statute speaks solely to a state's action or inaction, not to the repeated withdrawal and resubmission of applications. By withdrawing its applications before a year had passed, and by presenting New York DEC with new applications, Constitution gave New York DEC new deadlines. The record does not show that New York DEC in any instance failed to act on an application that was before it for more than the outer time limit of one year.[108]

STP and others relied on the Commission's interpretation of section 401,[109] which has been consistently applied for decades.[110] Thus it is inequitable to alter its bright-line rule without prior notice. It is also against the public interest because Congress has stated that: (1) protection of our Nation's water is in the public interest; (2) states have a vital role to play in that protection; and (3) the Natural Gas Act does not preempt states acting under their federal Clean Water Act authority.[111] Under Waiver Order II, the pipeline would be built without any protections to maintain New York State's strict water quality standards. That result, as Congress has stated, is not in the public interest.

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[108] *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014, P 23 (2018) (footnotes omitted).

[109] *See, e.g.* STP 5/20/15 DEC Comment, 2 ("DEC has another year before it must make a decision on the WQC now that the Company has withdrawn and resubmitted its application.")

[110] *See, e.g., Barrish & Sorenson Hydroelectric Co., Inc*., 68 FERC ¶ 62,161 (1994); *Ridgewood Maine Hydro Partners, L.P*., 77 FERC ¶ 62,201, 64,408 (1996).

[111] 33 U.S.C. §§ 1251(a), (b), 1311(a), 1313, 1341(a) (2018); 15 U.S.C. § 717b(d)(3) (2018).

Finally, since a petition for a writ of certiorari has been filed, the Commission should reverse its order until the Supreme Court makes a decision. *California Trout & Trout Unlimited v. Hoopa Valley Tribe & FERC*, Supreme Court Case No. 19-257.

IV. CONCLUSION

For the foregoing reasons, STP respectfully requests that the Commission grant its request for rehearing.

Respectfully submitted on the 27th day of September, 2019,

/s/ Anne Marie Garti
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Attachment 1

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June 28, 2017

BY CM/ECF

Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: Constitution Pipeline Company, LLC v. Seggos, et al., No. 16-1568
Oral Argument Held November 16, 2016

Dear Ms. Wolfe:

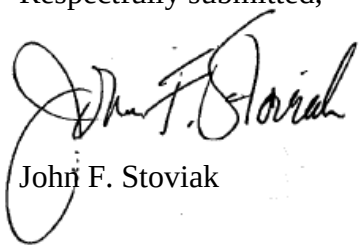
On behalf of Petitioner Constitution Pipeline Company, LLC ("Constitution"), we submit this letter in response to Respondents' June 23, 2017 Rule 28(j) letter regarding a decision issued by the United States Court of Appeals for the District of Columbia Circuit in *Millennium Pipeline Co., LLC v. Seggos*, No. 16-1415 (D.C. Cir. June 23, 2017) ("*Millennium*"), a case dismissed for lack of standing. Here, Constitution's standing is not at issue.

This case, brought pursuant to Section 717r(d)(1) of the Natural Gas Act, challenges the **action** taken by Respondents New York State Department of Environmental Conservation ("NYSDEC") denying Constitution's Section 401 Water Quality Certification application. Section 717r(d)(1) of the Natural Gas Act provides: "The United States Court of Appeals . . . **shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a** . . . **State administrative agency acting pursuant to Federal law to . . . deny any permit, license, concurrence, or approval . . . required under Federal Law**. . . ." 15 U.S.C. §717r(d)(1) (emphasis added) (see pages 31-37 of Final Brief of Petitioner). The petition in *Millennium* was brought pursuant to a different section of the Natural Gas Act – Section 717r(d)(2) – since that case challenged NYSDEC's **failure to act** on a Water Quality Certification application.

Therefore, this Court continues to have the full authority under Section 717r(d)(1) to decide whether the **action** taken by NYSDEC in denying Constitution's Water Quality Certification application was arbitrary and capricious and an abuse of discretion.

However, consistent with the Opinion in *Millennium* regarding the proper forum in which a 401 Clean Water Act waiver request should be made, Constitution now has an option to pursue a parallel proceeding before FERC to resolve the waiver issue and Constitution, therefore, respectfully requests that the Court limit any ruling on the waiver argument to procedural issues.

Respectfully submitted,



John F. Stoviak

cc: All Counsel (Via ECF)

Attachment 2

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Constitution Pipeline Company, LLC	Docket No. CP13-499-000
Iroquois Gas Transmission System, L.P.	Docket No. CP13-502-000

NOTICE OF SCHEDULE FOR ENVIRONMENTAL REVIEW OF THE CONSTITUTION PIPELINE AND WRIGHT INTERCONNECT PROJECTS

(December 13, 2013)

On June 13, 2013, Constitution Pipeline Company, LLC (Constitution) and Iroquois Gas Transmission System, L.P. (Iroquois) filed applications in Docket Nos. CP13-499-000 and CP13-502-000, respectively, requesting Certificates of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act to construct, operate, and maintain certain natural gas pipeline facilities. The proposed projects are known as the Constitution Pipeline and Wright Interconnect Projects and, together, would provide New England markets with an increased natural gas capacity of up to 650,000 dekatherms per day.

On June 26, 2013, the Federal Energy Regulatory Commission (FERC or Commission) issued Notices of Application for both of these projects. Among other things, these notices alerted other agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach final decisions on requests for all related federal authorizations within 90 days of the date of issuance of the Commission staff's final Environmental Impact Statement (EIS) for the Constitution Pipeline and Wright Interconnect Projects. This instant notice identifies the FERC staff's planned schedule for completion of the final EIS for these projects.

Schedule for Environmental Review

Issuance of Notice of Availability of the final EIS	June 13, 2014
90-day Federal Authorization Decision Deadline	September 11, 2014

If a schedule change becomes necessary, an additional notice will be provided so that the relevant agencies are kept informed of the progress of these projects.

Project Descriptions

Constitution would construct and operate 124 miles of 30-inch-diameter natural gas pipeline in Susquehanna County, Pennsylvania and Broome, Chenango, Delaware, Schoharie, and Otsego Counties, New York. In addition, it would construct appurtenant

aboveground facilities, including mainline valves, metering stations, tie-ins, and maintenance equipment. Iroquois would construct in tandem with Constitution's project and would add 22,000 horsepower of new compression at its existing Wright Compressor Station in Schoharie County, New York.

Background

On April 16, 2012, the Commission staff granted Constitution's request to use the FERC's Pre-filing environmental review process and assigned the Constitution Pipeline Project Docket No. PF12-9-000. On September 7, 2012, the Commission issued a *Notice of Intent to Prepare an Environmental Impact Statement for the Planned Constitution Pipeline Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings*.

On July 10, 2013, the Commission issued a *Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Wright Interconnect Project and Request for Comments on Environmental Issues* that discussed Iroquois' proposal to expand its Wright Compressor Station. The Notice announced the Commission's intent to analyze the impacts of both the Constitution and Iroquois projects in the same EIS.

Both of these Notices were sent to federal, state, and local government agencies; elected officials; affected landowners; environmental and public interest groups; Native American tribes and regional organizations; commentors and other interested parties; and local libraries and newspapers. In response to the Notices and at the scoping meetings we received comments from approximately 2,500 interested parties. Major environmental issues raised during scoping include:

- alternatives analysis and the use of existing pipeline systems;
- cumulative impacts;
- impacts on air quality and noise;
- impacts on groundwater and public water supplies;
- social and economic concerns;
- environmental justice;
- property values;
- public safety;
- homeowner's insurance;
- tax revenues;
- natural resource concerns;
- fish and wildlife and their habitat;
- vegetation;
- impacts on agriculture; and
- construction in karst terrain.

The U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, New York State Department of Agriculture and Markets, and Federal Highway Administration are cooperating agencies in the preparation of the EIS.

Additional information about the projects may be obtained by contacting the Environmental Project Manager, Kevin Bowman, by telephone at 202-502-6287 or by electronic mail at kevin.bowman@ferc.gov.

Lauren O'Donnell, Director
Division of Gas – Environment
and Engineering

Attachment 3

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Constitution Pipeline Company, LLC — Docket No. CP13-499-000
Iroquois Gas Transmission System, L.P. — Docket No. CP13-502-000

NOTICE OF REVISED SCHEDULE FOR ENVIRONMENTAL REVIEW OF THE **CONSTITUTION PIPELINE AND WRIGHT INTERCONNECT PROJECTS**

(August 18, 2014)

This notice identifies the Federal Energy Regulatory Commission staff's revised schedule for the completion of the environmental impact statement (EIS) for Constitution Pipeline Company, LLC and Iroquois Gas Transmission System, L.P.'s Constitution Pipeline and Wright Interconnect Projects. The first notice of schedule, issued on December 13, 2013, identified June 13, 2014 as the final EIS issuance date. Due to proposed changes in project facilities and routing, we were unable to meet this issuance date. However, staff has now received all the information necessary on the project facilities to complete our review. As a result, staff has revised the schedule for issuance of the final EIS.

Schedule for Environmental Review

Issuance of Notice of Availability of the final EIS	October 24, 2014
90-day Federal Authorization Decision Deadline	January 22, 2015

If a schedule change becomes necessary, an additional notice will be provided so that the relevant agencies are kept informed of the project's progress.

Additional Information

In order to receive notification of the issuance of the EIS and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription (http://www.ferc.gov/docs-filing/esubscription.asp). Additional information about the project may be obtained by contacting the Environmental Project Manager, Kevin Bowman, by telephone at 202-502-6287 or by electronic mail at kevin.bowman@ferc.gov.

Rich McGuire, Acting Director
Division of Gas – Environment
and Engineering

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

September 27, 2019

/s/ Anne Marie Garti
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