UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 16-1568

Caption [use short title]

Constitution Pipeline Company v. New York State Department of Environmental Conservation

Motion for: leave to file amicus curiae brief in support of petitioner

Set forth below precise, complete statement of relief sought:

Movants request leave to file an amicus curiae brief in support of Constitution Pipeline Company's petition for review of the New York State Department of Environmental Conservation's decision.

MOVING PARTY: Nat'l Assn' of Mfrs. et al.
☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: N.Y. State Dep't of Envtl. Conserv.

MOVING ATTORNEY: Ryan C. Morris

OPPOSING ATTORNEY: Frederick A. Brodie

[name of attorney, with firm, address, phone number and e-mail]

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The Capitol, Albany, NY 12224
(518) 776-2317, Frederick.Brodie@ag.ny.gov

Court-Judge/Agency appealed from: New York State Department of Environmental Conservation

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Ryan C. Morris **Date:** 07/19/2016

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

16-1568

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONSTITUTION PIPELINE COMPANY, LLC,

Petitioner,

v.

BASIL SEGGOS, Acting Commissioner; JOHN FERGUSON, Chief Permit Administrator; and NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents,

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

Intervenors.

On Petition for Review From The
New York State Department of Environmental Conservation

UNOPPOSED MOTION OF NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, AMERICAN GAS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN CHEMISTRY COUNCIL, NATURAL GAS SUPPLY ASSOCIATION, AMERICAN FOREST & PAPER ASSOCIATION, AND PROCESS GAS CONSUMERS GROUP FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF SUPPORTING PETITIONER

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Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

National Association of Manufacturers (NAM) is the largest manufacturing association in the United States. The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

Interstate Natural Gas Association of America (INGAA) is an incorporated, not-for-profit trade association representing virtually all of the interstate natural gas transmission pipeline companies operating in the United States. INGAA has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock. Most INGAA member companies are corporations with publicly traded stock.

American Gas Association (AGA) is a nonprofit, nonstock association. AGA does not have any parent companies, and no publicly-held company has a 10 percent or greater ownership interest in AGA. AGA does not issue stock.

American Petroleum Institute (API) is a nationwide, not-for-profit association representing companies engaged in all aspects of the oil and gas industry. API has no parent companies, and no publicly-held company has a 10% or greater ownership interest in API.

Natural Gas Supply Association (NGSA) represents integrated and independent companies that produce and market natural gas in the United States. NGSA has no corporate parents and no publicly held company owns a 10% or greater interest in NGSA.

American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC has no parent corporation, and no publicly held company has 10% or greater ownership in ACC.

American Forest & Paper Association (AF&PA) is the national trade association of the U.S. paper, packaging, tissue, and wood products industry. AF&PA has no parent corporation, and no publicly held company has 10% or greater ownership thereof.

Process Gas Consumers Group (PGC) is the national trade association of industrial consumers of natural gas. PGC has no parent corporation, and no publicly held company has 10% or greater ownership thereof.

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UNOPPOSED MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

The National Association of Manufacturers, Chamber of Commerce of the United States of America, Interstate Natural Gas Association of America, American Gas Association, American Petroleum Institute, American Chemistry Council, Natural Gas Supply Association, American Forest & Paper Association, and Process Gas Consumers Group (together, "Movants") respectfully request leave to file an *amicus curiae* brief in support of petitioner Constitution Pipeline Company. Counsel for respondents has indicated that they do not oppose this motion.

Together, Movants represent a wide range of companies and organizations in the manufacturing, commercial, energy, and oil and gas sectors. Movants have a vital interest in this case. As some of the largest producers, transporters, and users of natural gas in the country, many of Movants' members are directly affected by the decision under review, which denied a certification necessary for the construction of an important interstate pipeline. Further, Movants are concerned by the broader impacts of certification denials like this one on the development of much-needed natural gas infrastructure. Total natural gas demand,

driven in particular by manufacturing and power generation, is poised to increase by 40 percent over the next decade, and the U.S. supply is expected to increase by 48 percent over the same period. Further, explosive growth in shale gas requires the construction of new pipeline capacity. Movants thus have a strong interest in the effectuation of Congress's policy for the efficient, transparent, and predictable approval of natural gas pipelines.

Movants can contribute to the Court's disposition of this case by placing the decision under review in the proper regulatory context and by illuminating some of the broader economic and environmental impacts of such decisions. In particular, Movants can explain in detail FERC's key role in approving new pipeline projects, and the exhaustive environmental review FERC undertakes as part of that process pursuant to the National Environmental Policy Act. Movants can also explain the country's increasing need for natural gas infrastructure development, as well as the benefits that such growth will bring in many sectors of the economy and to the environment.

Accordingly, Movants respectfully request leave to file the attached *amicus* brief in support of petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2016, I caused the foregoing motion to be served on all registered counsel through the Court's CM/ECF system.

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BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, AMERICAN GAS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN CHEMISTRY COUNCIL, NATURAL GAS SUPPLY ASSOCIATION, AMERICAN FOREST & PAPER ASSOCIATION, AND PROCESS GAS CONSUMERS GROUP SUPPORTING PETITIONER

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GLOSSARY

CWA: Clean Water Act

DEC: New York State Department of Environmental Conservation

EA: Environmental Assessment

EIS: Environmental Impact Statement

FERC: Federal Energy Regulatory Commission

NEPA: National Environmental Policy Act

NGA: Natural Gas Act

INTEREST OF AMICI CURIAE[1]

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing large and small manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development. The NAM is a powerful voice for the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country.

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[1] No party's counsel authored any part of this brief, nor have any parties or their counsel contributed money that was intended to fund the preparation or submission of this brief. No person other than *amici*, their members, and their counsel contributed any money that was intended to fund the preparation or submission of this brief.

The Interstate Natural Gas Association of America represents the interstate natural gas pipeline industry in North America, including virtually all of the interstate pipelines operating in the United States. Its members transport over 95 percent of the nation's natural gas through a network of over 200,000 miles of pipelines.

The American Gas Association (AGA), founded in 1918, represents more than 200 state regulated or municipal natural gas distribution companies. AGA members serve 95 percent of the 72 million natural gas customers, representing more than 160 million people, in the United States. These customers daily rely on AGA members to provide safe, reliable, and affordable natural gas service as a basic life necessity or for business purposes. AGA and its members are committed to continuing to improve the high level of safety and reliability throughout the natural gas industry, including interstate transmission. Numerous AGA programs and activities focus on the safe and efficient delivery of natural gas to customers.

The American Petroleum Institute is the only national trade association that represents all aspects of America's oil and natural gas industry. Its 650 corporate members, from the largest major oil compa-

nies to the smallest of independents, come from all segments of the industry. They are producers, refiners, suppliers, marketers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry.

The American Chemistry Council represents the leading companies engaged in the business of chemistry, a $797 billion enterprise and a key element of the nation's economy. Its members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The business of chemistry is the nation's largest exporter, accounting for fourteen percent of all U.S. exports. The existence of abundant and affordable natural gas in the U.S. is encouraging member companies and the rest of the U.S. chemical industry to devote over $160 billion in new capital investments.

The Natural Gas Supply Association is a trade association that represents integrated and independent companies that produce and market natural gas. Established in 1965, it encourages the use of natural gas within a balanced national energy policy, and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural

gas to U.S. customers. Members account for approximately thirty percent of the domestic natural gas production and are shippers on interstate pipelines.

American Forest & Paper Association is the national trade association of the paper and wood products industry, which accounts for approximately 4 percent of the total U.S. manufacturing gross domestic product. The industry makes products essential for everyday life from renewable and recyclable resources, producing over $200 billion in products annually and employing approximately 900,000 men and women with an annual payroll of approximately $50 billion.

The Process Gas Consumers Group is a national trade association of industrial consumers who require natural gas in many of their key operations. It was organized to promote the development and adoption of coordinated, rational, and consistent federal and state policies governing interstate natural gas service to industrial gas users. Members own and operate hundreds of manufacturing plants and facilities in virtually every State and consume natural gas delivered through interstate natural gas pipelines systems throughout the Nation.

Amici have a vital interest in this case. As some of the largest producers, transporters, and users of natural gas in the country, many of *amici*'s members are affected by the decision under review, which denied a certification necessary for the construction of an important interstate pipeline. Further, *amici* are concerned by the broader impacts of certification denials like this one on the development of much-needed natural gas infrastructure. Total natural gas demand, driven in particular by manufacturing and power generation, is poised to increase by 40 percent over the next decade, and the U.S. supply is expected to increase by 48 percent over the same period. Further, explosive growth in shale gas requires the construction of new pipeline capacity. *Amici* thus have a strong interest in the effectuation of Congress's policy for the efficient, transparent, and predictable approval of natural gas pipelines.

INTRODUCTION

The New York Department of Environmental Conservation (DEC) decision under review implicates critical concerns related to the careful federal-State balance struck by Congress in the Natural Gas Act's (NGA's) process for approving natural gas pipeline projects. If not properly scrutinized, State water-quality-certification denials under

Section 401 of the Clean Water Act (CWA) could stymie much-needed natural gas infrastructure growth, potentially depriving consumers, States, and the country of significant economic and environmental benefits. To be sure, individual States play a limited role in the NGA's pipeline approval process by virtue of Section 401. Congress, however, gave the Federal Energy Regulatory Commission (FERC) the principal authority to determine—after fully accounting for potential environmental impacts—whether a proposed pipeline is consistent with the "public convenience and necessity." Allowing individual States to unilaterally veto FERC-approved projects for reasons that FERC has already considered and rejected, or for reasons unrelated to discharges regulated by the CWA, fundamentally undermines and upsets that balance. Such a veto also deprives other affected States and the nation of vitally important infrastructure projects, which provide abundant natural gas to businesses and consumers and benefit both the local and national economies and the environment. For these reasons, the Court should closely scrutinize State denials of Section 401 certifications for FERC-approved pipeline projects.

BACKGROUND

Natural gas infrastructure projects, like Constitution Pipeline's Interstate Project, offer significant economic and other benefits. FERC considers these benefits during the pipeline approval process. State vetoes of FERC-approved projects not only undermine FERC's authority; they also threaten to impose significant harm on the nation's energy infrastructure.

1. Natural gas infrastructure development offers important economic benefits. These benefits generally come in two forms: (1) economic activity related to the development, operation, and maintenance of infrastructure projects, and (2) the many benefits of lower natural gas prices.

To begin with, recent economic developments—including access to abundant supply, low commodities prices, and uncertainty in the global economy—have underscored the need for growth in natural gas infrastructure. One recent study estimates that capital expenditures on midstream oil and gas infrastructure—which includes natural gas gathering, transport, and storage—will range from $471 billion to $621 billion over the next 21 years, with roughly $267 billion to $352 billion

going to natural gas infrastructure. *See* INGAA Found., *North American Midstream Infrastructure Through 2035: Leaning into the Headwinds* 8–9 (Apr. 12, 2016), http://www.ingaa.org/File.aspx?id=27961&v=db4fb0ca (*Headwinds*). Moreover, between 167,400 to 208,600 miles of natural gas gathering and transmission pipeline will be built during the same period. Studies like this "clearly demonstrate that much new infrastructure is needed," with even less optimistic economic projections "requir[ing] significant infrastructure development." *Id.* at 11. Indeed, there are currently "bottlenecks in some parts of the U.S. where there is insufficient transmission pipeline capacity to move the [natural gas] to market." IHS Economics, *The Economic Benefits of Natural Gas Pipeline Development on the Manufacturing Sector* 4 (May 2016), http://www.nam.org/Data-and-Reports/Reports/Natural-Gas-Study/Energizing-Manufacturing-Full-Report/ (*Economic Benefits*). New York State itself has recognized the clear need for natural gas infrastructure development, including "the need to improve the capacity to transport [natural] gas into New York." 2015 N.Y. State Energy Plan, Vol. 2, Sources, at 87, http://energyplan.ny.gov/Plans/2015.

Such investments bring significant benefits: Projected infrastructure development over the next two decades could "add $655 billion to $861 billion of value to the U.S. and Canadian economies and result in employment of 323,000 and 425,000 people per year." *Headwinds*, *supra*, at 11. In fact, New York is among the top ten States in total employment from midstream investment. *Id.* at 12. But these benefits are not limited to companies and States directly involved in midstream operations; "there are many indirect and induced benefits that occur in many other industries, and a substantial number of service sector jobs are created as a result …." *Id.* Simply put, "[a]ll sectors and regions of North America benefit from infrastructure development." *Id.*; *see also Economic Benefits*, *supra*, at 4 ("[M]any firms across a diverse set of industry sectors are beneficiaries of tens of billions of dollars in capital expenditures and operating and maintenance … expenditures ….").

These benefits include the lower natural gas prices that can result from increased capacity. Natural gas has a variety of uses: electricity generation, residential, commercial (including as a vehicle fuel), and industrial. *Economic Benefits*, *supra*, 5–6; *see also Order Approving Electric And Gas Rate Plans*, No. 15-E-0283, 2016 WL 3386590, at *39 (N.Y.

Pub. Serv. Comm'n June 15, 2016) (*PSC Order*) ("[T]he expansion of natural gas service will bring more affordable heat to New York homes and businesses."). In all of these areas, "lower natural gas prices will result in benefits to consumer purchasing power and confidence, higher profits among businesses, and improvements in cost-competitiveness for domestic manufacturers relative to their international competitors." *Economic Benefits*, *supra*, at 4; *see PSC Order*, 2016 WL 3386590, at *39 (noting that low-cost gas can attract businesses).

Lower natural gas prices can also lead to lower electricity prices and reduce costs in "energy-intensive industries such as chemicals, metals, food, and refining." *Economic Benefits*, *supra*, at 4, 34–37. Likewise, "[m]any industries use [natural gas] as a fuel or a feedstock for production," *id.* at 5, and thus cheap and plentiful natural gas is a boon to the growth or resurgence of manufacturing across the country, *see id.* at 21. For example, the paper and wood products industry spent approximately $2.4 billion on natural gas in 2010. U.S. Energy Info. Admin., *Manufacturing Energy Consumption Survey* (2010). In 2015 alone, "economic benefits from increased domestic shale gas production and the accompanying lower NG prices include contributions of $190

billion to real gross domestic product (GDP), 1.4 million additional jobs, and $156 billion to real disposable income." *Economic Benefits*, *supra*, at 4.

2. Natural gas projects offer other significant benefits as well. Pipeline development enables and encourages access to and use of natural gas, which has broadly recognized environmental benefits. Conversely, obstructing natural gas infrastructure development frustrates efforts to transport abundant supplies of this clean-burning fuel to power and heat American homes and businesses. And studies anticipate that "[m]ost growth in electricity demand [will be] met by generation with natural gas and renewable capacity, which are more economic to build to meet new demand." *See* U.S. Energy Info. Admin., *Effects of the Clean Power Plan* (June 20, 2016), http://www.eia.gov/forecasts/aeo/section_issues.cfm#cpp.

All of this will be possible, however, only if natural gas infrastructure keeps pace with increased demand. "New pipeline and processing infrastructure expansion will be a key to connecting new supply sources with new and growing sources of demand." *Economic Benefits*, *supra*, at 20; *see also* N. Am. Elec. Reliability Corp., *Potential Reliability Impacts*

of EPA's Clean Power Plan viii (May 2016). And again, the State has recognized that new pipeline projects "will be critical to ensuring reliable, competitively priced supplies to New York in the future." 2015 New York State Energy Plan, *supra*, Vol. 2, at 101.

ARGUMENT

The Court should carefully scrutinize a State's denial of a water-quality certification under CWA Section 401 where FERC has already considered potential environmental impacts in approving the same project. This requirement flows from Congress's decision both to give FERC exclusive authority over the routing of interstate pipelines and to make FERC the lead agency in addressing environmental concerns raised by pipeline projects under the NGA and the National Environmental Policy Act (NEPA). It is also necessary to avoid the problems that would arise if individual States could veto pipeline projects that FERC has already found to be required by the public convenience and necessity. In those circumstances, a single State could deny the project's economic and other advantages not merely to its own citizens, but also to the citizens of all States that would be served by or benefit from the pipeline. These concerns are particularly acute where, as here, the

relevant State agency already participated in FERC's environmental review process and raised the same issues on which its later Section 401 denial was premised.

I. The National Environmental Policy Act and the Natural Gas Act Establish the Primary Scheme for Evaluating The Environmental Impacts of a Pipeline Project, Which FERC Faithfully Applied In This Case.

A. The National Environmental Policy Act Establishes a Thorough Review Process that Rigorously Assesses the Environmental Impact of Federal Agency Actions.

NEPA declares the federal government's policy "to use all practicable means and measures … to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a). NEPA was intended to "make the quality of the environment a concern of every federal agency." *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1088 (D.C. Cir. 1973); *see* 40 C.F.R. § 1501.4.

In service of this policy, NEPA requires federal agencies to prepare "a detailed statement" on "the environmental impact of" any "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)(i). Such statements are known as

Environmental Impact Statements, or EIS. Typically, agencies begin the NEPA process by preparing an Environmental Assessment, or EA, which must "provide sufficient evidence and analysis for determining whether" the project will have a "significant impact." 40 C.F.R. § 1508.9(a). If so, an EIS must be prepared. If not, the EA's thorough environmental assessment helps ensure the agency's compliance with NEPA. *See id.*

Although there is no "litmus test … to determine what constitutes 'major Federal action,'" *Save Barton Creek Ass'n v. Fed. Highway Admin.*, 950 F.2d 1129, 1134 (5th Cir. 1992), courts have held, consistent with NEPA's implementing regulations, that this language reaches private activities that must be "approved by federal agencies," 40 C.F.R. § 1508.18(a); *see, e.g., Scientists' Inst.*, 481 F.2d at 1088. Thus, with respect to "major Federal actions," a federal agency considering a private project that (a) may significantly affect the environment and (b) must be "approved by permit or other regulatory decision," 40 C.F.R. § 1508.18(b)(4), must prepare an EIS (although it may, and often will, prepare an EA first, *e.g.*, 18 C.F.R. § 380.5(a)).

An EIS must describe "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] (iii) alternatives to the proposed action." 42 U.S.C. § 4332(2)(C). In preparing an EIS, an agency must "involve environmental agencies, applicants, and the public." 40 C.F.R. § 1501.4(b). If multiple agencies have jurisdiction, a "lead agency" will be selected to prepare the EIS based on the agencies' relative expertise, involvement, and authority. *See* 40 C.F.R. § 1501.5; *NRDC v. Callaway*, 524 F.2d 79, 86–87 (2d Cir. 1975).

Before an agency prepares an EIS, it must "determin[e] the scope of issues to be addressed," with the input of "affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons." 40 C.F.R. § 1501.7(a)(1). After this "scoping" process is complete, the EIS is "prepared in two stages": First, the agency prepares a draft EIS, which must "disclose and discuss … all major points of view on the environmental impacts of the alternatives including the proposed action." 40 C.F.R. § 1502.9(a). The agency must then obtain comments from any other federal agency with relevant jurisdiction or expertise, "[a]ppropriate State and local agencies which are

authorized to develop and enforce environmental standards," and the public, including by "affirmatively soliciting comments from those persons or organizations who may be interested or affected." *Id.* § 1503.1(a). Second, the agency must prepare a final EIS that "respond[s] to comments," "discuss[es] … any responsible opposing view," and "indicate[s] the agency's response to the issues raised." *Id.* § 1502.9(b). If new developments arise, the EIS must be supplemented. *Id.* § 1502.9(c)(1).

NEPA's "'action-forcing' procedures," including the EIS requirement for certain projects, serve to ensure "that agencies take a 'hard look' at environmental consequences," and "provide for broad dissemination of relevant environmental information." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Affected parties can challenge the adequacy of an agency's NEPA review and its consideration of an EIS by seeking judicial review of the final agency determination. *E.g.*, *Robertson*, 490 U.S. at 345–46. A decision not to prepare an EIS is subject to judicial review as well. *E.g.*, *Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472, 474 (2d Cir. 2012).

The courts carefully review an agency's NEPA compliance to ensure that its "duty … to consider environmental factors not be shunted aside in the bureaucratic shuffle." *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 787 (1976); *see Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir. 2008) (courts apply "a strict reading of NEPA's procedural requirements"). "NEPA itself does not mandate particular results," however; "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson*, 490 U.S. at 350.

B. The Natural Gas Act's Pipeline Approval Process Establishes FERC as the Primary Evaluator of a Pipeline Project's Environmental Impacts.

1. Under the NGA, "a natural gas company must obtain from FERC a 'certificate of public convenience and necessity' before it constructs, extends, acquires, or operates any facility for the transportation or sale of natural gas in interstate commerce." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 302 (1988); *see* 15 U.S.C. § 717f(c). "FERC will grant the certificate only if it finds the company able and willing to

undertake the project in compliance with the rules and regulations of the federal regulatory scheme." *Schneidewind*, 485 U.S. at 302. In assessing the "public convenience and necessity," FERC considers "all factors bearing on the public interest," *see Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1146 (D.C. Cir. 1980), including any potential environmental impacts, *e.g.*, *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967–68 (D.C. Cir. 2000). FERC's consideration of these factors is guided by its Certificate Policy Statement, which states its goal of "appropriately consider[ing] the enhancement of competitive transportation alternatives, the possibility of overbuilding, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain." *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,737 (1999) (*Certificate Policy*), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

Under the NGA, FERC is "the lead agency … for the purposes of complying with [NEPA]." 15 U.S.C. § 717n(b)(1). Thus, FERC generally addresses the potential environmental impacts of a "major" pipeline by preparing an EIS. In particular, FERC's regulations require the

preparation of an EIS for "[m]ajor pipeline construction projects … using rights-of-way in which there is no existing natural gas pipeline." 18 C.F.R. § 380.6(a)(3). Where a FERC EIS is mandated, it must satisfy the requirements of the NEPA regulations, *see supra* pp. 15–16, and also summarize the project's "significant environmental impacts"; any "alternative … that would have a less severe environmental impact"; any potential "mitigation measures"; any impacts that cannot be mitigated; and studies "that might provide baseline data or additional data on the proposed action." 18 C.F.R. § 380.7.

FERC's "public convenience and necessity" analysis carefully accounts for the environmental impacts, alternatives, and potential mitigation measures described in an EIS. For example, FERC may consider a pipeline project's impact on wetlands and aquatic resources, wildlife, and air quality and noise. *E.g.*, *Corpus Christi Liquefaction, LLC Cheniere Corpus Christi Pipeline, L.P.*, 149 FERC ¶ 61,283, 62,907–08 (2014). FERC may also consider the safety and reliability of the project, its cumulative environmental effects, and whether it has a disproportionate impact on people of a certain race, ethnicity, income level, etc. *Id.* at 62,909. FERC's analysis of these and other factors is based on

the EIS, any public comments received, and input from stakeholders. *See id.* at 62,906–07. Based on this comprehensive process, FERC may deny approval, or it may require the adoption of alternatives or mitigation measures as a condition of approval. *E.g.*, *id.* at 62,912 (imposing 104 different environmental conditions of approval). A party who is dissatisfied with FERC's environmental analysis can seek rehearing. 15 U.S.C. § 717r(a); *e.g.*, *Corpus Christi Liquefaction, LLC Cheniere Corpus Christi Pipeline, L.P.*, 151 FERC ¶ 61,098, 61,651 (2015). If rehearing is unsuccessful, an affected party can seek judicial review. 15 U.S.C. § 717r(a); *e.g.*, *Midcoast Interstate*, 198 F.3d at 967–68.

2. FERC's approach in this case illustrates its thorough consideration of a pipeline project's environmental impacts, as well as the problems with allowing a State agency that participated fully in that process to second-guess the result. FERC's environmental review of the Interstate Project began in April 2012. *Constitution Pipeline Co., LLC Iroquois Gas Transmission Sys., L.P.*, 149 FERC ¶ 61,199, 62,212 (2014) (*Approval Order*). FERC staff issued a notice of intent to prepare an EIS, which was published in the Federal Register and "sent to more than 2,100 interested entities … including federal, state, and local

agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners … ; local libraries and newspapers; and other stakeholders who had indicated an interest in the project." *Id.* The notice described the project and announced three public scoping meetings. *See id.* 101 speakers provided comments at those meetings, and FERC received 750 written submissions from stakeholders. *Id.* FERC repeated this process in late 2012 after an additional alternative route for the pipeline was identified, receiving more input from interested parties, *see id.*, and did so again in 2013 when Constitution and Iroquois Gas Transmission System filed their formal applications, *see id.* at 62,212–13.

FERC staff issued a draft EIS in February 2014, addressing the issues raised during scoping. Notice was again published in the Federal Register, and the draft EIS was again mailed to interested entities. Four more public meetings were held in early 2014 to receive comments on the draft. "A total of 246 speakers provided comments at the meetings, and more than 600 stakeholders submitted a total of 884 letters in response to the draft EIS." *Id.* at 62,213. In response to these com-

ments, FERC opened two more limited comment periods for affected landowners. *See id.*

FERC issued the final, 450-page EIS in October 2014. The final EIS addressed comments on the draft, and discussed a wide range of issues: "geology; soils; water resources; wetlands; vegetation; wildlife and fisheries; special status species; land use, recreation, and visual resources; socioeconomics; cultural resources; air quality and noise; reliability and safety; cumulative impacts; and alternatives." *Id.* After considering all of these factors, the EIS concluded "that if the projects are constructed and operated in accordance with applicable laws and regulations, the projects will result in some adverse environmental impacts. However, these impacts … will be reduced to less-than-significant levels with the implementation of Constitution's and Iroquois' proposed mitigation and [FERC] staff's recommendations." *Id.* Following issuance of the EIS and after consulting with various stakeholders, Constitution adopted a number of route changes for the pipeline. *See id.* at 62,219.

FERC itself took all of these factors into account in its December 2014 decision to approve the Interstate Project, and devoted significant attention to the "[m]ajor issues of concern addressed in the final EIS":

"construction in areas of karst geology [*i.e.*, areas formed on soluble rock]; waterbodies and wetlands; interior forests and migratory birds; invasive plant species, compliance enforcement; rare bat species; homeowners' insurance and property values; safety; induced development of natural gas production; cumulative impacts; and alternatives." *Id.* FERC discussed each of these points in turn, *id.* at 62,213–19, as well as additional comments received too late to be addressed in the final EIS, *see id.* at 62,219–24.

After discussing all of these points and inputs in detail, FERC concluded "that the projects, if constructed and operated as described in the final EIS, are environmentally acceptable actions." FERC also "accept[ed] the environmental recommendations in the final EIS" and included those recommendations "as conditions … to" its approval. *Id.* at 62,223–24. In all, FERC imposed 43 separate conditions of approval, including construction procedures, route variations, and other mitigation measures. *See id.* at 62,225–30.

Based on this environmental review and its careful consideration of other relevant factors, FERC ultimately found that "the benefits that the Constitution Pipeline Project will provide to the market outweigh

any adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities," and that, with the appropriate environmental conditions imposed, "the public convenience and necessity requires approval of Constitution's proposal, as conditioned in this order." *Id.* at 62,206–07. FERC subsequently denied rehearing, again addressing in detail the EIS process, the environmental impacts, alternatives, and conditions. *Constitution Pipeline Co., LLC Iroquois Gas Transmission Sys., L.P.*, 154 FERC ¶ 61,046 (2016).

From the initial review, beginning in April 2012, through the December 2014 Approval Order, FERC's environmental review process lasted two years and seven months. FERC received hundreds of public comments from stakeholders of all kinds: federal, State, and local agencies; elected officials; environmental and public interest groups; and potentially affected landowners.

Importantly, DEC was an active participant throughout this process. As Constitution has explained, DEC submitted at least nine detailed written comments regarding the project's potential environmental effects. Pet'r Br. 11–12. DEC did not seek rehearing of FERC's ap-

proval or otherwise challenge FERC's environmental review (although other parties, including intervenors here, sought rehearing and then filed petitions for review in this Court, *see Catskill Mountainkeeper, Inc. v. FERC*, No. 16-345; *Stop the Pipeline v. FERC*, No. 16-361).

* * *

FERC's approval of the Interstate Project reflects scrupulous adherence to NEPA's procedural requirements; the correct allocation of responsibility among federal, State, and local agencies and interested parties; and the proper balancing of environmental concerns against the other relevant factors. In particular, FERC carefully accounted for the environmental concerns identified in the EIS and raised by stakeholders—including DEC—and mandated that Constitution and Iroquois abide by numerous conditions intended to address or mitigate those concerns. FERC thus did exactly what NEPA requires: it took "a 'hard look' at environmental consequences" and ensured "broad dissemination of relevant environmental information." *Robertson*, 490 U.S. at 350. FERC's ultimate approval of the Interstate Project, based on the conclusion that the project's "benefits … to the market outweigh any adverse effects," 149 FERC at 62,206–07, is likewise consistent with the

fact that NEPA permits an agency to "decid[e] that other values outweigh the environmental costs," *Robertson*, 490 U.S. at 350. And FERC properly applied the Commission's Certificate Policy Statement by "balancing the evidence of public benefits to be achieved against the residual adverse effects," with the overall goal of developing necessary infrastructure for the benefit of energy consumers. *See* 149 FERC at 62,206.

II. The Court Should Carefully Scrutinize Certification Denials under Clean Water Act Section 401 that Conflict with FERC's Approval of the Same Project.

As Constitution's brief explains, because Constitution was required to apply for a CWA Section 404 permit for the Interstate Project, it also had to apply to DEC for a "water quality certification" under Section 401. Pet'r Br. 22. This requirement reflects that individual States have a certain role to play in the pipeline approval process—but that role is a limited one, which should not be permitted to override FERC's assessment of a pipeline's benefits and environmental impacts.

A. The Clean Water Act's Water Quality Certification Procedure Gives States Limited Authority to Ensure Compliance with Water Quality Standards.

Section 401 of the CWA requires any applicant for a federal license or permit "to conduct any activity … which may result in any discharge into the navigable waters" to obtain a "water quality certifica-

tion" from the relevant State authorities, certifying that the discharge will comply with the relevant CWA provisions, 33 U.S.C. § 1341(a)(1), including federally approved water quality standards, *see Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 143–44 (2d Cir. 2008). State participation in the water quality certification process is optional, *see Green Island Power Auth. v. FERC*, 577 F.3d 148, 151 (2d Cir. 2009) (States may waive certification); as a result, State implementation of Section 401 has varied. Recently, some States have begun using Section 401 as a tool to advance their environmental policy interests. This more aggressive use of Section 401 has led to tensions between State and federal agencies (especially FERC) and regulated entities over the extent of the States' power under Section 401. *See* Claudia Copeland, Congr. Research Serv., *Clean Water Act Section 401: Background and Issues* 1 (July 2, 2015), *available at* https://www.fas.org/sgp/crs/misc/97-488.pdf.

B. State Agencies Should Not Be Allowed to Use the Section 401 Process to Second-Guess FERC's Judgment in Approving a Pipeline Project.

Once FERC has carefully considered the environmental impacts of a proposed pipeline and approved the project—as it did here, *see supra*

pp. 20–26—a State agency should not use Section 401 to relitigate the environmental issues raised before FERC, or to deny certification on grounds unrelated to the regulation of discharges that affect clean water. Section 401 gives the States a defined and limited role in the pipeline approval process, which is secondary to FERC's authority under the NGA to determine what the public convenience and necessity requires. Consequently, the Court should apply thorough and searching scrutiny to Section 401 denials where, as here, FERC has extensively analyzed a project's environmental impacts, imposed mitigation conditions, and approved it.

Congress has clearly set forth the federal policy for locating interstate natural gas transmission lines in the NGA and the Energy Policy Act of 2005. It designated FERC the key decisionmaker with respect to these projects, including as to environmental impacts. *See* 15 U.S.C. § 717n(b)(1) (FERC "shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and … complying with [NEPA]"). The CWA's separate Section 401 procedure, although applicable to pipeline projects by virtue of its broad language, was not intended to and should not displace FERC's judgment as to the public

convenience and necessity, which already includes consideration of environmental impacts. *See supra* pp. 20–26.

A State's exercise of Section 401 certification authority "is not a sovereign state right." *Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 93 (2d Cir. 2006). "Rather, Congress has the authority to regulate discharges into navigable waters under the Commerce Clause, and the State, in this case, exercises only such authority as has been delegated by Congress." *Id.* A State's use of its limited Section 401 authority to override FERC's judgment as to the environmental impacts or the public benefit of a proposed pipeline project would upset the balance Congress struck in the NGA and the CWA. Indeed, FERC has noted often—including in this case—that, while it "encourages cooperation between interstate pipelines and local authorities … this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by [FERC]." 149 FERC at 62,224.

The Supreme Court has similarly cautioned that giving States an unfettered "veto power" over projects subject to federal approval would "subordinate to the control of the State the 'comprehensive' planning

which [federal law] provides shall depend upon the judgment of [FERC]." *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152, 164 (1946); *see also California v. FERC*, 495 U.S. 490, 506 (1990) (State efforts to impose stricter environmental requirements "interfere with [FERC's] comprehensive planning authority"). The same reasoning applies here. Although the States properly play a role in the pipeline approval process under Section 401, they should not exercise their authority in a manner that disrupts FERC's "comprehensive planning authority" under the NGA.

Thus, where a State agency denies a Section 401 certification for a project that FERC has approved after considering the project's environmental impacts (and the agency's comments on those issues), the Court should carefully scrutinize that decision to ensure that the State's denial is based on proper, statutorily authorized grounds and does not interfere with the NGA's pipeline approval process. "More aggressive review under the arbitrary and capricious standard may be appropriate in any number of circumstances," including where the "the nature of problem under agency consideration" or problems in the agency process call for "heightened … scrutiny." *See Office of Commc'n of United*

Church of Christ v. FCC, 707 F.2d 1413, 1425 n.23 (D.C. Cir. 1983); *cf. Smathers v. Multi-Tool, Inc./Multi-Plastics, Inc. Emp. Health & Welfare Plan*, 298 F.3d 191, 199 (3d Cir. 2002) (applying "more penetrating review" to decisions potentially affected by conflict of interest). A more searching review in cases like this one is also consistent with the congressional intent expressed in the Energy Policy Act, which increased the courts of appeals' authority to police State "order[s] or actions" that "would prevent the construction" of a natural gas pipeline. 15 U.S.C. § 717r(d)(3); *see Islander E. Pipeline Co.*, 482 F.3d at 94. And it is especially important for the courts to ensure that States do not interfere with FERC's approval decisions because FERC itself has no authority to reject States' Section 401 decisions. *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 102 (2d Cir. 1997).

A higher degree of scrutiny is particularly appropriate where, as here, the State agency participated fully in FERC's environmental review process. DEC repeatedly raised before FERC, in detail, the very same concerns that it raised again with Constitution during the drawn-out Section 401 application process. Pet'r Br. 11–12. That includes its concerns about the routing of the Interstate Project, a matter as to

which States have no authority. *See id.* 44–47. As the New York Court of Appeals has explained, nothing in Section 401 or its legislative history "empower[s] DEC to deny certification on the basis of broader environmental provisions of New York law or regulation"; thus, "allow[ing] DEC … to usurp the authority that Congress reserved for FERC … , over issues beyond water quality standards … is not justified." *Niagara Mohawk Power Corp. v. State Dep't of Envtl. Conservation*, 624 N.E.2d 146, 150–51 (N.Y. 1993). At bottom, Congress "maintained essentially preemptive Federal control by restricting State certification" to the specific grounds enumerated in Section 401. *Id.* at 151.

Consequently, a State should not be permitted to use Section 401 to reconsider environmental issues that were already decided by FERC and are beyond the narrow purview of the State's authority under that provision, *i.e.*, ensuring compliance with water quality standards. When a State steps outside the narrow boundaries of Section 401 and considers issues like pipeline routing, it should no longer be viewed as exercising its federally delegated powers, but rather as engaging in the sort of "concurrent" environmental review this Court has condemned. *Nat'l Fuel Gas Supply Corp. v. Public Serv. Comm'n*, 894 F.2d 571, 579

(2d Cir. 1990) ("Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review.").

Where a State has participated in FERC's environmental review and repeatedly made detailed submissions to FERC on environmental issues, the Court can be confident that the State's environmental concerns have been heeded. And, of course, if the State is unsatisfied with FERC's resolution of these issues, it is free to seek rehearing and then judicial review. Section 401 should not be read to permit an end-run around that orderly process. Consequently, applying the usual, deferential arbitrary-and-capricious review in such cases would leave too much room for States to use the Section 401 process to get a second bite at the apple, which would in turn "disturb and conflict with the balance embodied in [FERC's] considered … determination." *California*, 495 U.S. at 506. The Court should therefore apply more searching scrutiny in cases like this one.[2]

[2] For all the reasons Constitution has explained, DEC's denial was arbitrary and capricious regardless of how closely the Court scrutinizes it. Nevertheless, *amici* believe such scrutiny is appropriate in this case and others like it because of the broader implications explained in this brief.

C. Allowing Individual States to Veto FERC-Approved Projects Under Section 401 Would Deprive Other States and the National Economy of the Economic and Environmental Benefits of Pipeline Projects.

Permitting States to unilaterally veto FERC-approved pipeline projects would deprive other States, consumers, and the national economy of the significant benefits offered by natural gas projects. As described above, natural gas infrastructure development—which is much needed, and will only become more so in future years—offers a wealth of economic and other benefits. These include the direct and indirect benefits of pipeline construction, operation, and maintenance (in particular, job creation in a variety of sectors) as well as the many upsides of lower natural gas prices, which are a boon to consumers and businesses alike. *Supra* pp. 7–12. And numerous federal and State policies rely on the growth of natural gas energy production to pursue climate change goals. *See, e.g.*, *PSC Order*, 2016 WL 3386590, at *39.

Permitting a State to block a particular natural gas project would, of course, prevent that project from contributing to these benefits, hampering job creation and competition in the immediate path of the pipeline. And these effects reverberate beyond the State that denies the certification. Because pipelines frequently cross multiple States (as the

Interstate Project does), one State's unilateral veto affects businesses and consumers in the upstream and downstream States as well. Thus, one State can effectively say "not in my backyard," thereby depriving *neighboring* States of jobs, infrastructure development, and lower natural gas prices. *See Nat'l Fuel Gas Supply Corp.*, 894 F.2d at 579 ("Allowing all the sites and all the specifics to be regulated by agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need, with the increased costs or lack of gas to be borne by utility consumers in other states."). Indeed, affirming the decision under review could provide other States with a roadmap to do precisely that. FERC's centralized review, on the other hand, prevents parochial concerns from dominating the pipeline approval process. *See id.*

Section 401 denials can also have effects beyond the specific project at hand by increasing the regulatory risk for pipeline investors, chilling new infrastructure development. Obtaining FERC approval for a proposed pipeline is a long, thorough, and costly process. Denials like the decision under review are likely to make investors wary of risking the substantial time and money necessary to undertake that process,

only to see a single State veto the project in the end—perhaps on the very grounds FERC already considered. The resulting whiplash is particularly jarring where, as here, the State agency actually participated fully in the FERC process. However, absent more searching judicial scrutiny, there is nothing stopping a State agency from sitting out that process entirely, only to step in and deny certification after it has been completed. The added uncertainty that will result if such denials are affirmed would surely deter much-needed infrastructure investment.

In short, the many benefits of natural gas projects, which span State borders and sectors of the economy, are precisely why Congress made FERC the key decisionmaker. FERC is ideally situated to take into account these broader benefits *and* the local impacts that may concern an individual State regulator. Indeed, as reflected in FERC's Certificate Policy Statement and its decisions in this case, FERC aims "to foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts while serving increasing demands for natural gas." *See Certificate Policy*, 88 FERC at 61,743; *Approval Order*, 149 FERC at 62,206–07. FERC carefully weighs *all* of these considerations and orders whatever mitigation conditions are

necessary to reduce environmental impacts. And the Courts ensure that FERC abides by NEPA's and the NGA's requirements in doing so. FERC's ultimate judgment based on this thorough analysis should be respected.

CONCLUSION

For the reasons above and in Constitution's briefs, the Court should grant Constitution's petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 29(d) AND 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,822 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionately spaced typeface using the 2007 version of Microsoft Word in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2016, I caused the foregoing brief to be served on all registered counsel through the Court's CM/ECF system.

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