IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CONSTITUTION PIPELINE COMPANY, LLC Plaintiff, v. NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; BASIL SEGGOS, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; JOHN FERGUSON, CHIEF PERMIT ADMINISTRATOR, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION Defendants.	)	CIVIL ACTION Case No. 1:16-CV-0568 (NAM/DJS) Electronically Filed

MEMORANDUM OF LAW IN SUPPORT OF THE DELAWARE RIVERKEEPER NETWORK, AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER'S MOTION TO INTERVENE AS DEFENDANT

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I. INTRODUCTION

Maya van Rossum, the Delaware Riverkeeper, and the Delaware Riverkeeper Network ("DRN" and collectively, "Movant-Intervenors"), respectfully submit this Memorandum of Law in support of their Motion to Intervene as a defendant in the above-captioned action. Movant-Intervenors seek to intervene in this case pursuant to Federal Rules of Civil Procedure 24(a) and 24(b). For the reasons set forth below, Movant-Intervenors satisfy the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)(2), and permissive intervention under Rule 24(b). Accordingly, we respectfully request that the Court grant this Motion to Intervene. In the event that this Court does not grant intervention, Movant-Intervenors respectfully request that this Court grant Movant-Intervenors amici curiae status.

Plaintiff Constitution Pipeline Company, LLC ("Constitution") seeks, *inter alia*: (1) a declaration that state water quality permits are preempted by federal law; (2) a declaration that Constitution is exempt from New York's State Pollutant Discharge Elimination System General Permit; (3) a declaration that Constitution is not required to obtain state permits; and (4) to enjoin New York from seeking to enforce compliance with state permit requirements. This relief would directly adversely affect DRN's interests and its members' interests and therefore Movant-Intervenors satisfy the standards for intervention as-of-right and permissive intervention.

Counsel for DRN has contacted counsel for Defendants and they do not oppose this Motion to Intervene. Counsel for DRN contacted counsel for Plaintiff, and counsel for Plaintiff stated their perceived concern regarding what interests DRN had in the matter because the project was "not located within the Delaware River Basin." When Movant-Intervenors made Plaintiff's counsel aware that the Project does in fact cross through a substantial portion of the watershed, Plaintiff's counsel stated that it still opposes this Motion to Intervene.

II. BACKGROUND

The Clean Water Act ("CWA") allows states to adopt water quality standards in order to maintain water quality within their borders. Section 401 (a)(1) of the CWA requires applicants for federal licenses to obtain a certification from the state when the applicant seeks to conduct an activity that might result in a discharge to a navigable water. 33 U.S.C. 1341(a)(1). The state certification must affirm that the proposed discharge complies with the state's water quality standards, and "any other appropriate requirement of state law". *Id.* at 1341(d). Section 402 of the CWA requires a permit for the discharge of any pollutant to a water body, and gives states the authority to administer their own permit programs. *Id.* at 1342 (a) and (b).

On June 13, 2013 Constitution filed an application with the Federal Energy Regulatory Commission ("FERC") under Section 7 of the Natural Gas Act, 15 U.S.C. 717*f*, seeking a Certificate of Public Convenience and Necessity ("certificate"). Constitution also requested authorization to construct and operate a 125-mile natural gas pipeline and associated facilities ("pipeline" or "project") from Susquehanna County, Pa. to Schoharie County, NY.

The pipeline project would cut through the Delaware River Watershed in New York and cross many pristine natural areas and waterbodies. On July 17, 2013, Movant-Intervenors submitted comments and a motion to intervene on the FERC docket, citing the project's significant adverse environmental impacts.

The application Constitution submitted included a list of required authorizations to start the project. Among the required authorizations Constitution listed were a Clean Water Act Section 401 water quality certification ("WQC" or "water quality certification"), associated state permits, and a Section 402 discharge permit issued by the New York State Department of Environmental Conservation ("NYSDEC"). This application also included the identification of

protected water bodies, wetlands, floodplains, flood hazard zones, endangered and threatened species, and ecologically sensitive areas that would be negatively affected by construction and/or operation of the pipeline. The application indicated that a NYSDEC water quality certification would be needed for all water and wetland crossings.

FERC issued a Final Environmental Impact Statement ("FEIS") on October 24, 2014. The FEIS detailed the pipeline's potential adverse impacts on water bodies, wetlands, and other environmental health, and listed NYSDEC's water quality certification as one of the "major permits, approvals and consultations" applicable to the project. FERC recommended various environmental conditions that would help minimize environmental impacts, one of which was a requirement that Constitution submits to FERC documentation demonstrating it has received all of the required federal authorizations prior to commencing construction activities. On December 2, 2014 FERC issued the Certificate of Public Convenience and Necessity. In its Order, FERC found that the impacts on water bodies and wetlands would be mitigated by Constitution's compliance with NYSDEC's water quality certification. *Constitution Pipeline Company*, 149 FERC ¶ 61,199 at ¶¶ 79, 106. The Order also contained an express requirement that Constitution obtain all authorizations required under federal law.

Movant-Intervenors subsequently filed motions for rehearing of the Order, and on January 27, 2015, FERC granted rehearing. On January 28, 2016, FERC upheld the original Order, and acknowledged that the Order lacked current force or effect as the environmental conditions, including NYSDEC's issuance of the CWA 401 water quality certification, were not yet satisfied. FERC explicitly recognized NYSDEC's ability to issue a WQC and the requirement that Constitution must comply therewith when stating "[i]f and when NYSDEC

issues a WQC…Constitution will be required to comply with the requirements of the WQC." FERC Rehearing Order: 20160128-3064 (Jan. 28, 2016).

FERC's FEIS states that the pipeline would cross 220 water bodies in New York, many of which are sensitive fisheries, and approximately eighty acres of protected wetlands. (FEIS, p. 4-93; Appendix G). The FEIS also states that the pipeline would cross over twenty three miles of terrain with slopes greater than fifteen percent grade and often greater than thirty percent. (FEIS, Appendix G).

Constitution made several incomplete submissions to NYSDEC for a WQC while its Certificate application was pending before FERC, and on or about April 29, 2015 NYSDEC issued a notice of complete application. On or before March 9, 2016, New York state employees became aware of alleged illegal tree felling being conducted in Constitution's right of way in New York. On April 22, 2016, NYSDEC denied Constitution's application for a 401 WQC, citing NYSDEC's finding that Constitution failed to meaningfully address the significant water impacts that would occur as a result of the project. NYSDEC also found that Constitution had failed to demonstrate sufficient compliance with New York's water quality standards and that Constitution failed to provide sufficient information related to stream crossings and wetlands crossings. Constitution's applications for the related applicable state permits remain pending.

On May 16, 2016, Constitution filed a complaint against NYSDEC, Basil Seggos, Acting Commissioner of NYSDEC, and John Ferguson, Chief Permit Administrator of NYSDEC. On May 20, 2016, Constitution filed an amended complaint.

Maya van Rossum and DRN submit this motion to intervene as they have substantial legal interests at risk, including their interest in the proper administration of water quality standards and states' authority to administer the Clean Water Act.

III. ARGUMENT

A. THE DELAWARE RIVERKEEPER AND DELAWARE RIVERKEEPER NETWORK ARE ENTITLED TO INTERVENE AS OF RIGHT

Delaware Riverkeeper Network and the Delaware Riverkeeper have a right to intervene because Plaintiff's suit seeks to undermine states' authority to enforce the federal Clean Water Act's water quality standards generally, and specifically to eliminate New York's authority to enforce water quality standards within the state, including parts of the Delaware River watershed, for natural gas pipeline projects subject to the Natural Gas Act. Federal Rule of Civil Procedure 24(a)(2) states that a court "must permit anyone to intervene who…claims an interest relating to the property or transaction that is the subject of the action, and…disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). As such, the test for intervention as-of-right is as follows: 1) submission of a timely motion; 2) assertion of an interest relating to the property or transaction that is the subject of the action; 3) without intervention, the disposition of the action may impair or impede movant's ability to protect its interest; and 4) demonstration of an interest not adequately represented by the other parties. *See United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994) *(citing United States v. State of New York*, 820 F.2d 554, 556 (2d Cir. 1987); *Restor-A-Dent Dental Lab., Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871, 874 (2d Cir. 1984)). This test, however, is "one of inclusion rather than exclusion." *XL Specialty Insurance Company v. Lakian et al.,* 632 F. App'x 667, 669 (2d Cir. 2015) (*citing* 7C Charles Alan Wright et al., *Federal Practice & Procedure* § 1908.1, at 309 (3d ed. 2007)).

DRN satisfies the requirements for mandatory intervention, as the organization and its members possess legally protected interests that would be affected by this action. New York's

ability to administer its water quality regulations and the ability of other states in the Delaware River watershed to administer their respective water quality regulations for FERC- jurisdiction pipelines would be drastically undermined if Constitution were to obtain the relief sought. Movant-Intervenors' interests would be negatively affected as a result. Additionally, these legally protected interests are not adequately represented by Defendants to this action, and the filing of this motion is timely. For these reasons, Movant-Intervenors have a right to intervene.

1. THIS MOTION IS TIMELY

Movant-Intervenors' application to intervene is timely. The determination of timeliness of a motion to intervene is within the discretion of the court, and is "evaluated against the totality of the circumstances before the court." *Farmland Dairies v. Comm'r of the N.Y. State Dep't of Agric. and Markets*, 847 F.2d 1038, 1044 (2d Cir. 1988) (*citing NAACP v. New York,* 413 U.S. 345, 366 (1973) and *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 594–95 (2d Cir. 1986)). The circumstances considered include: "(1) how long the applicant had notice of the interest before [making] the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *United States v. Pitney Bowes, Inc*., 25 F.3d at 70.

An analysis of these factors demonstrates the timely nature of this motion to intervene. Plaintiff's Complaint was filed on May 16, 2016. Upon receiving notice of the Complaint, Movant-Intervenors filed their motion at the earliest practicable date. This Court has consistently found motions to intervene to be timely when filed within three months of the commencement of the suit. *See, for example, Range v. National R.R. Passenger Corp.*, 176 F.R.D. 85, 88 (W.D.N.Y. 1997).

Further, intervention at this time would not prejudice existing parties resulting from any delay. At this point no dates have been set for discovery, a briefing schedule was approved only eight days ago, and Defendant's Motion to Dismiss was filed only five days ago. None of the parties have engaged in settlement discussions, and no settlement has been reached. Movant-Intervenors do not seek to disrupt any progress that could be made toward settlement, but rather to ensure that Movant-Intervenors' interests are appropriately represented in the litigation, which would not be protected absent intervention. Movant-Intervenors do not seek to add claims to the lawsuit, and do not intend to ask the Court to deviate from any deadlines set forth in any forthcoming scheduling orders. Accordingly, the Movant-Intervenors' presence in this litigation would not burden or prejudice the current parties in any legally cognizable manner.

Additionally, Movant-Intervenors will be prejudiced if the motion is denied, as Ms. van Rossum, DRN, and its members have legally protected rights that will be negatively affected by the litigation, as discussed in full detail below. Finally, there are no unusual circumstances militating against a finding of timeliness. In sum, Movant-Intervenors have worked diligently and expeditiously to prepare their Motion to Intervene and Motion to Dismiss in this matter and the circumstances support a finding that the application is timely.

2. MOVANT-INTERVENORS HAVE A SUBSTANTIAL LEGAL INTEREST IN THIS MATTER

Rule 24(a)(2) requires that a proposed intervenor "have a 'direct, substantial, and legally protectable' interest in the subject matter of the action." *United States v. City of N.Y.,* 198 F.3d 360, 365 (2d Cir.1999) (*quoting Washington Elec. Coop. Inc. v. Mass. Mun. Elec. Co.,* 922 F.2d 92, 96 (2d Cir.1990); *see also Restor–A–Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871, 874 ("[S]uch an interest must be direct, as opposed to remote or contingent."). Movant-Intervenor Maya van Rossum, the Delaware Riverkeeper, has a substantial legal interest

in this matter, as does DRN in its own right and by and through its members. These interests include environmental, recreational, aesthetic, and economic interests.

a. Environmental, Recreational, Aesthetic, and Economic Interests

Movant-Intervenors have recreational, aesthetic, and environmental interests at issue in this case. DRN members live, work, and recreate throughout the watershed, including the area in the Delaware River Basin that is potentially affected by the Constitution pipeline. Movant-Intervenors make frequent use of the potentially impacted areas for recreation, education, wildlife viewing, scenic enjoyment, and traditional cultural purposes, and have a demonstrated interest in and history of protecting the area's natural, recreational, and cultural values. *See* Declaration of Maya van Rossum ¶¶ 12-20, 4-11; Declaration of Gail Musante, ¶¶ 13-23; Craig Buckbee ¶¶ 9, 11, 24-25. These members' environmental, aesthetic, and recreational interests are legally protectable and will be affected by this legal action.

Movant-Intervenors have an interest in protecting water quality in the Delaware River watershed, an interest previously found to be sufficient to support intervention. In *United States v. Hooker Chemicals & Plastics Corp.*, the Western District of New York court recognized a legally protectable interest in Ontario's interest in protecting the water quality of a shared water body, Lake Ontario. *United States v. Hooker Chems. & Plastics Corp.*, 101 F.R.D. 444 (W.D.N.Y. 1984). Movant-Intervenors have a similar interest in protecting the water quality of the Delaware River Watershed. This is demonstrated by the fact that Movant-Intervenors have collected water quality samples throughout the watershed, including in the area that would be affected by the pipeline, to monitor water quality and understand and analyze the ways in which it is affected by pipelines. *See* Declaration of Gail Musante ¶¶ 8, 12 and Declaration of Maya van Rossum ¶¶ 4-6.

Environmental and aesthetic harms have consistently been found to be protectable legal interests. *See Sierra Club v. Morton,* 405 U.S. 727, 734 (1972); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000); *Herdman v. Town of Angelica*, 163 F.R.D. 180, 183, 185-188 (W.D.N.Y. 1995); *see also Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 105-06 (E.D.N.Y. 2001). DRN members enjoy the pristine areas and waterbodies that would be affected by Constitution Pipeline, and the wildlife that make use of the areas and waterbodies. *See* Declaration of Gail Musante ¶¶ 13-23 and Declaration of Maya van Rossum ¶¶ 12-19, 7-11. Members enjoy potentially affected areas for recreational purposes including but not limited to fishing, kayaking and other boating, hiking, and wildlife observation. *See id*. These protectable interests would be negatively affected by the relief sought by Plaintiff.

The Supreme Court has held that recreational, aesthetic, and environmental interests are "undeniable cognizable interest[s]" for the purpose of Article III standing, and the demonstration of an Article III interest satisfies the intervention requirement for demonstrating an interest in the Court of Appeals for the Second Circuit. *See, generally Ricci v. DeStefano*, No. 3:04cv1109, 2010 WL 9113871, n. 4 (D. Conn. May 12, 2010); *see also, Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 131 (2d Cir. 2001) (stating "where a proposed intervenor's interests are otherwise unrepresented…the standard for intervention is no more burdensome than the standing requirement" (citation omitted)), *and Diamond v. Charles,* 476 U.S. 54, 68-69 (1985) (finding that an interest sufficient for intervention is not necessarily sufficient for standing).

Additionally, Movant-Intervenors have economic interests that would be negatively affected by the relief Plaintiff proposes. Movant-Intervenors would suffer economically if states such as New York were to lose their ability to administer their own water quality standards for FERC-jurisdiction pipeline projects. In addition to decreased property values and diminished

local economies, those members whose businesses and livelihoods depend on high water quality would be negatively affected. *See* Declaration of Gail Musante ¶¶ 28, 32; Declaration of Maya van Rossum ¶¶ 8,11; Declaration of Craig Buckbee ¶¶ 4-26.

b. DRN's Interests in its Own Right

The Supreme Court has recognized that "certain public concerns constitute an adequate 'interest' within the meaning of [Rule 24(a)(2)]." *Diamond*, 476 U.S. at 68, (citing *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967)). DRN has an interest in its own right, as the organization represents the public interest and is actively involved in pipeline issues throughout the watershed. *See* Declaration of Maya van Rossum ¶¶ 4-11. Further, DRN has been actively involved on this particular pipeline project, has recently worked for the protection of the Oquaga Creek from other natural gas activity, and educates members on water quality issues in the watershed. *See* Declaration of Maya van Rossum ¶¶ 4-7, 9.

In *Herdman v. Town of Angelica*, a case very similar to the one at bar, a private party sued a New York town challenging the validity of a local ordinance and an environmental group sought intervention. *Herdman,* 163 F.R.D. at 180. There, the court considered "the public nature of the action…and the basis for, and strength of, [the organization's] particular interest in the outcome of the litigation. *Id.* at 187. An examination of these factors demonstrates that DRN has far more than a general, academic, or peripheral interest in the issues presented here. DRN has worked vigorously to protect water quality throughout the Delaware River basin, and to protect this area in particular. *See* Declaration of Maya van Rossum ¶¶ 3-11. DRN has also opposed the Constitution pipeline specifically by participating in the docket at FERC, has consistently opposed other pipelines in the watershed, and participated in a case where a pipeline company made nearly identical arguments in the Middle District of Pennsylvania – arguments which were

rejected by the court wholesale. *See* Declaration of Maya van Rossum ¶¶ 20, 10-11 *and Tennessee Gas Pipeline Co. LLC v. Delaware Riverkeeper Network, et al.*, 921 F.Supp.2d 381 (M.D. Pa. 2013).

DRN has intervened on the FERC docket for this particular pipeline and has advocated rigorously for NYSDEC to reject this pipeline project. *See* Declaration of Maya van Rossum ¶¶ 20, 10-11. In separate litigation, DRN has taken the position that some pipeline projects cannot demonstrate compliance with state water quality standards, and that some pipeline companies demonstrate a lack of willingness to comply with state WQS. *See Delaware Riverkeeper Network, et al v. Pa. Dept. of Envtl. Prot., et al.,* Docket No. 15-2122, (3d Cir.) (argued Oct. 29, 2015). Furthermore, DRN has recently worked to protect the Oquaga Creek, and the surrounding area from the harms associated with natural gas development, both of which stand to be impacted by the proposed project. For example, in 2011, DRN and the Delaware Riverkeeper submitted comments on XTO Energy's application before the Delaware River Basin Commission for a surface water withdrawal from the Creek. *See* Declaration of Maya van Rossum, ¶ 9. DRN was particularly concerned about non-point source pollution and the effects on stream ecology, and recognized the importance of this Creek as a productive trout stream and one of the last remaining large tributaries with independent flows not affected by the Cannonsville Dam, which blocks the passage for upstream spawning grounds for trout. Now, the Oquaga faces similar threats, also from natural gas development, but now from the proposed Project.

DRN has a demonstrated interest in educating its members regarding water quality and the effects of pipelines in addition to protecting the watershed. These interests would be affected if Constitution and other pipelines were no longer required to submit information necessary for 401 WQCs, such as the associated state permits, and Section 402 discharge permits, if such

projects were no longer required to comply with New York's water quality standards. Movant-Intervenors would be denied access to the information submitted for these permits, including information regarding stream and wetlands crossings, pipeline depth, blasting activity information, water turbidity, and thermal discharges. This loss of information would limit DRN's ability to protect the watershed, and to educate the public and its members.

Movant-Intervenors also have a unique interest in preserving states' rights to implement the 401 Water Quality Certification process, as Movant-Intervenors currently have a case pending before the Third Circuit Court of Appeals and another case before the D.C. Circuit Court of Appeals, both of which materially implicate this issue. *See Delaware Riverkeeper Network v. FERC*, Docket No. 16-1092, (D.C. Cir.) (filed March 8, 2016); *Delaware Riverkeeper Network, et al v. Pa. Dept. of Envtl. Prot., et al.,* Docket No. 15-2122, (3d Cir.) (argued Oct. 29, 2015).

For these reasons, DRN in its own right has interests at stake in this litigation, in addition to the interests of its members.

3. MOVANT-INTERVENORS' INTERESTS WOULD BE IMPARIED BY DISPOSITION OF THE ACTION WITHOUT INTERVENTION

Rule 24(a)(2) does not require that a court decision would completely eviscerate Movant-Intervenors' ability to protect their interest; instead, it merely requires that a decision would "impair or impede" it. Fed. R. Civ. P. 24(a)(2). It is plain that the disposition of this suit will impair or impede Movant-Intervenors' interests. A ruling that the State of New York lacks the authority to regulate water quality within its borders pursuant to the Clean Water Act would obviously impede Movant-Intervenors' interests in protecting and enjoying the entire Delaware River watershed, and not just those portions lying within New York. In fact, NYSDEC found that Constitution was not able to demonstrate that water quality would be maintained through

construction and operation of the pipeline. DRN has previously supported this position and continues to, as pipeline construction and maintenance creates water quality issues such as increased turbidity and surface water runoff. For these reasons, Movant-Intervenors' environmental, recreational, aesthetic, and economic interests would be directly impaired by disposition of this suit.

Additionally, the relief Plaintiff seeks would turn the natural gas pipeline permitting process on its head by providing the authority to strip each and every state, including the other states in the Delaware River Basin, of their ability to implement and enforce state water quality standards in the context of natural gas pipeline construction and operation. Movant-Intervenors and DRN's members have been and will be injured by such unregulated construction activities, which degrade habitat for wildlife, air quality, precious water sources, and the scenic and recreational enjoyment that they find in the natural areas of the Delaware River Basin. Courts have long permitted conservation groups to intervene where, as here, the litigation at issue may result in harm to natural and other resource values that are important to the groups' missions and where the groups have worked to protect those values. *See, e.g., Herdman*, 163 F.R.D. at 187 *and Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995) (concluding impairment prong of intervention test was satisfied when plaintiff's claim could impair conservation groups' ability to protect an interest in a threatened species for which they had advocated).

Additionally, Movant-Intervenors' interests would be impaired by the creation of negative authority. The Northern and Western District Courts of New York have previously found that the creation of adverse persuasive authority may impede an intervenor's interests as a practical matter. *See, for example, Herdman*, 163 F.R.D. at 188; (citing *United States v. Pitney*

Bowes, Inc., 25 F.3d at 70. As discussed above, Movant-Intervenors have two cases pending before the circuit courts of appeal that materially involve a state's application of 401 WQC to natural gas pipelines. Movant-Intervenors' current and future litigation would be adversely affected if Plaintiff prevails here.

4. CURRENT PARTIES DO NOT ADEQUATELY REPRESENT MOVANT-INTERVENORS' INTERESTS

Generally, the burden of demonstrating inadequate representation by an existing party should be "minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, n. 10 (1972). However, the *parens patriae* doctrine creates a stronger presumption that an intervenor's interests are represented when a state is a party to an action. *See, for example, Envtl. Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 739-40 (D.C. Cir. 1979). In instances where the state is not the party bringing suit, courts have looked to "(1) whether the government entity has demonstrated the motivation to litigate vigorously and to present all colorable contentions, and (2) the capacity of that entity to defend its own interests and those of the prospective intervenor". *Herdman*, 163 F.R.D. at 190; *see also Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (finding adequacy of representation depends on whether the party is capable and willing to make all of proposed intervenor's arguments, whether proposed intervenor offers a necessary element or different perspective to the proceedings that would otherwise be neglected, and proposed intervenor's expertise).

Here, NYSDEC will not adequately represent the Movant-Intervenors' focused interests on environmental and cultural resource protection, as Movant-Intervenors and NYSDEC do not share the same interests. In addition to not adequately representing Movant-Intervenors' specific environmental, economic, and cultural resource interests, NYSDEC's interests are confined to the State of New York. The Delaware River watershed includes Pennsylvania, New Jersey, and

Delaware in addition to New York, and as discussed above, the relief sought by Constitution would have devastating effects throughout the watershed, and affect the pipeline's permits in Pennsylvania. Further, NYSDEC's mission includes the pursuit of environmental quality with the simultaneous consideration of the State's overall economic prosperity, a balancing by which Movant-Intervenors are not confined. *See* NYSDEC's Mission, *available at http://www.dec.ny.gov/24.html.* Movant-Intervenors' concerns, and the proposed pipeline itself, extend beyond New York and as such, Movant-Intervenors' interests are both geographically broader and more nuanced than that of NYSDEC.

The contrast between New York's interests and Movant-Intervenors' are demonstrated by the abovementioned *Tennessee Gas Pipeline Company* case, in which co-defendants DRN and the Pennsylvania Department of Environmental Protection presented two different legal theories representing divergent interests on this very same issue. *See Tennessee Gas Pipeline Co. LLC v. Delaware Riverkeeper Network, et al.,* 921 F.Supp.2d 381. While Defendants may adequately represent some water quality-related interests, they do not have a duty to represent specific aesthetic, recreational, and private interests such as Movant-Intervenors' interests in recreational and aesthetic enjoyment, cultural resources, community character, and property value. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 (8th Cir. 1993) (finding inadequate representation by the state of a county's and landowners' narrower local and individual interests); *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 870 (8th Cir. 1977) (finding inadequate representation when proposed intervenors' and defendants' interests were disparate, though not adverse).

Furthermore, while Movant-Intervenors are not currently in litigation against NYSDEC, they do frequently litigate against state environmental agencies regarding this particular issue,

and against natural gas infrastructure and water quality issues generally. Court precedent recognizes a history of adversarial proceedings between a proposed intervenor and the party upon which the proposed intervenor must rely as a factor in finding inadequacy of representation. *See, for example Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 900 (9th Cir. 2011) (holding that where federal agency defendant issued challenged order "only reluctantly in response to successful litigation by Applicants[,] ... this fact alone demonstrates that" agency representation of applicants' interest may be inadequate); and *Cnty. Of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980) (finding "further reason to doubt that" DOI would protect intervenor's interest in a rulemaking because "the Department began its rulemaking only reluctantly after [the proposed intervenor] brought a law suit against it").

In addition to differing interests, Movant-Intervenors have a wealth of knowledge and experience litigating pipeline and water quality issues. *See, for example, Delaware Riverkeeper Network v. FERC*, Docket No. 16-1092, (D.C. Cir.) (filed March 8, 2016); *Delaware Riverkeeper Network, et al v. Pa. Dept. of Envtl. Prot., et al.,* Docket No. 15-2122, (3d Cir.) (argued Oct. 29, 2015). Further, Movant-Intervenors' longstanding interest and familiarity with pipeline issues generally and Constitution specifically will be helpful in clarifying the facts and issues in this case. Movant-Intervenors were a party to the only case that examined the exact same issues identified by Plaintiff, and therefore have an intimate knowledge of the issues currently before the Court. *See Tennessee Gas Pipeline Co. LLC v. Delaware Riverkeeper Network, et al.*, 921 F.Supp.2d 381. In *Tennessee Gas*, plaintiff Tennessee Gas Pipeline Company – represented by the same law firm now representing Constitution – sought nearly identical declaratory relief that the Natural Gas Act preempted the issuance of Pennsylvania Department of Environmental Protection's state-issued permits relating to Pennsylvania's water

quality standards. *Id*. Plaintiff here simply regurgitates the same failed legal arguments offered in that case, that the Natural Gas Act preempts state permits issued pursuant to the Clean Water Act. *Id*. at 385-386.

For these reasons, Movant-Intervenors' interests are currently not adequately represented by the current Defendants.

B. ALTERNATIVELY, THE DELAWARE RIVERKEEPER AND DELAWARE RIVERKEEPER NETWORK SHOULD BE GRANTED PERMISSIVE INTERVENTION

If the Court determines that one or both of the Movant-Intervenors has not satisfied all of the requirements for intervention as of right, the Court should grant permissive intervention under Rule 24(b). Rule 24(b) permits intervention where an applicant's claim or defense, in addition to being timely, possesses questions of law or fact in common with the existing action. Fed. R. Civ. P. 24(b)(1)(B). This is a substantially lower burden than the test for intervention as of right under Rule 24(a) since it entirely omits any requirement relating to interests or adequacy of representation and, like intervention of right, permissive intervention is to be granted liberally.

As shown above, this motion is timely and granting the motion will not prejudice the proceedings or the existing parties. Moreover, Movant-Intervenors intend to respond directly to the Plaintiff's challenges to the lawfulness of NYSDEC's actions. *See Nat. Res. Def. Council, Inc. v. Tenn. Valley Auth.*, 340 F. Supp. 400, 408-09 (S.D.N.Y. 1971), *rev'd on other grounds,* 459 F.2d 255 (2d Cir. 1972) (granting intervention when complaint presented common questions of law and fact with the main action). Accordingly, permissive intervention is also warranted.

C. ALTERNATIVELY, THE DELAWARE RIVERKEEPER AND DELAWARE RIVERKEEPER NETWORK SHOULD BE GRANTED AMICI CURIAE STATUS

While there is no governing standard for obtaining leave to submit an amicus brief in New York district court, the usual rational for such submissions is that they "are of aid to the

court and offer insights not available from the parties." *United States v. El–Gabrowny*, 844 F.Supp. 955, n. 1 (S.D.N.Y.1994) (*citing United States v. Gotti*, 755 F.Supp. 1157, 1158–59 (E.D.N.Y.1991)). Movant-Intervenors' unique interests and expertise in pipeline proceedings generally and Constitution's specifically, and expertise in water quality issues within the basin, discussed in detail above, demonstrate Movant-Intervenors' ability to provide insights beyond those provided by NYSDEC and which would aid the court in resolution of this matter.

IV. CONCLUSION

For the foregoing reasons, Maya van Rossum, the Delaware Riverkeeper, and the Delaware Riverkeeper Network respectfully request that the Court grant its Motion to Intervene. In the event that this Court does not grant intervention, Movant-Intervenors respectfully request that this Court grant Movant-Intervenors amici curiae status.

Respectfully submitted this 5th day of August,

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