Oral Argument Not Yet Scheduled

IN THE
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA

DELAWARE RIVERKEEPER NETWORK; MAYA VAN ROSSUM, the Delaware Riverkeeper,	)	Docket No. 16-1092
Petitioners,	)	**BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR REVIEW**
v.	)	
FEDERAL ENERGY REGULATORY COMMISSION,	)	
Respondent,	)	
and,	)	
TRANSCONTINENTAL GAS PIPE LINE COMPANY LLC,	)	
Intervenor.	)	

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RULE 26.1 DISCLOSURE STATEMENT

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

Respectfully submitted this 9th day of September 2016,

By: /*s/ Aaron Stemplewicz*

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GLOSSARY

CWA	Clean Water Act
Commission	Federal Energy Regulatory Commission
Intervenor	Transcontinental Pipe Line Company, LLC
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
Petitioners	Delaware Riverkeeper Network, and the Delaware Riverkeeper
Project	Leidy Southeast Expansion Project
R.	Administrative Record as per Amended Certified Index
P[P]	Paragraph[s]

JURISDICTIONAL STATEMENT

The Natural Gas Act ("NGA") requires a Certificate of Public Necessity and Convenience ("certificate") from the Federal Energy Regulatory Commission ("Commission") for constructing facilities for the transportation of gas. *See* 15 U.S.C. § 717f(c)(1)(A). Any person aggrieved by a Commission order granting a certificate may seek rehearing within thirty days of the order's issuance. *See* 15 U.S.C. § 717r(a). The NGA gives this Court jurisdiction to review Commission orders approving certificates, but limits review to objections "urged before [the Commission] in [an] application for rehearing," and denied in an order on the rehearing request. 15 U.S.C. § 717r(b). Review must be sought within sixty days of denial. *Id*.

Delaware Riverkeeper Network, and the Delaware Riverkeeper, (collectively "Petitioners") urged the issues raised here in a January 16, 2015 rehearing request, R. 411, JA000544-599, submitted within thirty days of the December 18, 2014 Order granting a certificate of public convenience and necessity ("Order") for Transcontinental Gas Pipe Line Company's ("Intervenor") Leidy Southeast Expansion Project ("Project"). R. 406, JA000487-543. The Commission issued an order denying Petitioners' rehearing request ("Order Denying Rehearing") on

March 3, 2016.[1] R. 569, JA000701-30. Petitioners filed a petition for review on March 8, 2016, five days after the Commission's final decision. Because Petitioners timely submitted the issues raised here to the Commission, were denied rehearing, and timely petitioned for review, this Court has jurisdiction.

STATEMENT OF THE ISSUES

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

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

[1] The Commission's Order Denying Rehearing was issued exactly one day after the Petitioners filed a complaint in the United States District Court of the District of Columbia, Docket No. 16-416, alleging, among other things, that the Commission's failure to take final agency action on Petitioners' rehearing request unlawfully prevents timely judicial review of natural gas pipeline projects. The Complaint specifically identified the docket for this project, CP13-551, as an example of the Commission's bias and failure to act.

(Raised at R. 381 at 1-11, R. 411 at 34-46; JA000334-44, JA000577-89; ruled on at R. 569 at PP36-38, JA000716)

3) Did the Commission violate the NEPA by failing to disclose or verify flow velocity and other technical data necessary to determine the full extent of the Project's inter-relatedness to previous, pending, and future projects, and also to determine the operational safety of the Project? (Raised at R. 381 at 26-29, R. 411 at 46-48, JA000359-362, JA000589-91; ruled on at R. 569 at PP28-35, JA000714-15)

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

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

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

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

Respondent: Federal Energy Regulatory Commission.

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

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

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

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

Intervenors: Agharkar, Shreeram N; Aghevli, Karleen; Altmann, Jeanne; Anadarko Energy Services Company; Atmos Energy Marketing, LLC; Barr, Christopher and Patricia Shanley Beardsley-Humphreys, Jennifer M.; Beatty, Richard; W. Blumenthal, Barbara; Cabot Oil & Gas Corporation; Calpine Energy Services, LP; Cherry, Kathleen P.; Chevron Natural Gas; Chow, Paula K.; Consolidated Edison Company of New York and Philadelphia Gas Works (jointly); Delaware Riverkeeper Network; Duke Energy Carolinas, LLC; Duke Energy Florida, Inc.; and Duke Energy Progress, Inc.; Exelon Corporation; ExxonMobil Gas & Power Marketing Company; Florida Power & Light Company; Fridman, Symon and Helen; Goldfarb, Sidney J.; Goldston, Robert J.; Grossman, Gene and Jean B.; Hoppenot, Anne and Herve; Josephson, Paul; Joshi, Rakesh; Law, Jr., Stuart A., and Karen S.; Madden, Jeanne-Anne; Municipal Gas Authority of Georgia and Transco Municipal Group; Municipality of Princeton; National Fuel Gas Distribution Corporation; National Grid Gas Delivery Companies; Neufeld, Leah; New Jersey Department of Environmental Protection; New Jersey

Natural Gas Company; NJR Energy Services Company; Noble Energy Inc.; North Carolina Utilities Commission; Pang, Myungyun; Peifer, Cynthia H.; Piedmont Natural Gas Company, Inc.; Pollard, Carol S.; Preston, Marvin IV and Candace L.; Princeton Ridge Coalition; Public Service Company of North Carolina and South Carolina Electric & Gas Company; Sierra Club, New Jersey Chapter, Environment New Jersey, and Food & Water Watch; Shapiro, Paul and Helene; Shell Offshore, Inc.; Sourland Conservancy; Stonybrook-Millstone Watershed Association; Southern Company Services, Inc.; Township of Montgomery; Township of Readington; UGI Distribution Companies; Vilko, Naomi; Waldorf School of Princeton; Washington Gas Light Company; Winant, John and Kathy; Yuan, Kaixu; Zhang, Tianyi.

Rulings Under Review

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

Related Cases

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

Delaware Riverkeeper Network, et al. v. Pennsylvania Department of Environmental Protection, et al., Third Circuit Court of Appeals, Docket No. 15-2122

Delaware Riverkeeper Network, et al. v. Federal Energy Regulatory Commission, D.C. Circuit Court of Appeals, Docket No. 15-1052

New Jersey Conservation Foundation, et al v. New Jersey Department of Environmental Protection, et al., Third Circuit Court of Appeals, Docket No. 15-2158

Delaware Riverkeeper Network, et al. v. Commonwealth of Pennsylvania, et al., Pennsylvania Environmental Hearing Board, Docket No. 2015-060-M

Delaware Riverkeeper Network, et al. v. Federal Energy Regulatory Commission et al., United States District Court for the District of Columbia, Docket No. 16-416.

STATUTES AND REGULATIONS

The Addendum presents pertinent statutory and regulatory provisions.

STATEMENT OF THE CASE

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

Monroe Counties, Pennsylvania (the "Franklin Loop").[2] *See* R. 183 at 5, JA000128.

The Commission issued an Environmental Assessment for the Project on August 11, 2014, recommending a Finding of No Significant Impact. R. 359 at 13, JA000170. Petitioners submitted comments on the Environmental Assessment on September 10, 2014, asserting that the Commission failed to properly analyze and consider a host of issues. R. 381, JA000334-486.

In the Environmental Assessment the Commission identified the need for Intervenor to obtain a water quality certification from the Pennsylvania Department of Environmental Protection, as required by Section 401 of the Clean Water Act. R. 359 at 28, JA000171. Section 1341(a)(1) of the Clean Water Act states, in part, "[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence." *See* 33 U.S.C. § 1341(a)(1). On June 10, 2014 Intervenor submitted its application to the Pennsylvania Department of Environmental Protection ("Department") for the issuance of the Section 401 water quality certification. R. 484 at 1, JA000677.

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

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

JA000503. On January 16, 2015, Petitioners timely submitted a rehearing request. R. 411, JA000544-99.

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

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

Prior to the Commission taking final action on Petitioners' rehearing request and Petitioners' Motion for Stay, and while the Section 401 water quality certification was still under review by the Department, the Commission began providing authorizations for various forms of construction activity to proceed on the Project. For example, on January 30, 2015, the Commission issued a letter

order granting Intervenor's first request to begin construction activity, stating that it:

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

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

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

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

R. 445, JA000640-643. Petitioners' February 26, 2015 comment letter was ignored by the Commission, and tree felling construction activity was allowed to proceed

as authorized in a Commission letter order dated March 9, 2015. This letter order granted Intervenor the right to:

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

R. 466, JA000644-46.

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

On March 25, 2015 the Commission granted Intervenor an additional request to:

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

R. 474, JA000659-661.

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

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

judicial review as provided in the Natural Gas Act of the proposed Project – the Commission finally denied Petitioners' rehearing request on March 3, 2016. R. 569, JA000701-30.

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

STANDING

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

Petitioners have standing as a not-for-profit environmental protection organization whose executive director, who is also a member, uses and enjoys the specific geographic areas affected by construction and operation of the Project, and whose recreational and aesthetic interests will be harmed by the faulty and unlawful issuance of a Certificate by the Commission for the Proposed Project. *See* AD017-26 (Maya van Rossum Declaration at ¶¶ 8-15); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977). The Commission's violation of the

Clean Water Act and the National Environmental Policy Act make it substantially more likely that Petitioners will suffer the harms described in the supporting affidavit now and in the future, thus demonstrating causation. *See Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 669 (D.C. Cir. 1996). The Delaware Riverkeeper Network's stated purpose is to preserve and protect the Delaware River Basin Watershed; this purpose is directly germane to the appeal of the unlawful certification of the pipeline project by the Commission. AD017-26 (Maya van Rossum Declaration at ¶¶ 3-5). Construction and operation of the Project has harmed and will continue to harm Petitioners' protected recreational and aesthetic interests in the environment, in particular the degradation and loss of valuable wetlands and habitat, thus constituting injury in fact within the zone of interests of the Clean Water Act, Natural Gas Act, and National Environmental Policy Act. *See* AD017-26 (Maya van Rossum Declaration at ¶¶ 7-15); *Laidlaw*, 528 U.S. at 180-81; *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1236 (D.C. Cir. 1996); *Bentsen*, 94 F.3d at 667.

Additionally, because Petitioners' appeal concerns only the question of whether the Commission's orders are lawful, it is not necessary for any individual member of the Delaware Riverkeeper Network to participate in this proceeding in order to secure effective relief for all its injured members. *See Warth v. Seldin*, 422 U.S. 490, 515 (1975) ("If . . . the association seeks a declaration, injunction, or

some other form of prospective relief, it can be reasonably supposed that the remedy, if granted, will inure to the benefit of those members . . . actually injured").

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

STANDARD OF REVIEW

Review of the merits of Respondent's approval of Intervenor's application for the Project is governed by the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 701 to 706; *see also Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556

F.3d 177, 192 (4th Cir. 2009) (claims challenging federal agency action under the Clean Water Act are subject to judicial review under the APA). Under the APA, "a reviewing court shall 'hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376 (1989); *see also Specter v. Garrett*, 971 F.2d 936, 944 (3rd Cir. 1992). While this standard is deferential, "[d]eference . . . does not mean blind obedience." *Garvey v. Nat'l Transp. Safety Bd.*, 190 F.3d 571, 580 (D.C. Cir. 1999). Where an agency "entirely failed to consider an important aspect of the problem," or failed to consider factors required by law, the action must be set aside. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

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

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

Airport Impact Relief, Inc. v. Wykle, 192 F.3d 197, 202 (1st Cir. 1999) (quoting *Penobscot Air Servs., Ltd. v. Federal Aviation Admin.*, 164 F.3d 713, 719 (1st Cir. 1999) (internal quotations omitted). "The reviewing court must determine whether

the decision was based on a consideration of the relevant factors and whether the agency made a clear error of judgment." *Airport Impact Relief*, 192 F.3d at 202 (citing *Oregon Nat. Resources Council, supra*, 490 U.S. at 378).

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

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

The failure of an agency to obtain accurate baseline condition information for a proposed project prior to its approval prevents the decision-maker from determining the environmental impact of the project, such action is evidence of an arbitrary and capricious decision. *See N. Plains Research Council, Inc. v. Surface Transp. Bd*., 668 F.3d 1067 (9th Cir. 2011) (finding that a government agency who failed to provide adequate baseline data to assess project impacts to aquatic resources failed to consider an "important aspect of the problem," resulting in an arbitrary and capricious decision) (internal quotations omitted); *see also Half Moon Bay Fisherman's Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988)

("Without establishing the baseline conditions . . . there is simply no way to determine what effect the [action] will have on the environment. . .").

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

SUMMARY OF THE ARGUMENT

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

Additionally, the Commission violated NEPA by failing to establish an accurate baseline from which to conduct its environmental review of the Project. Specifically, the Commission grossly misidentified numerous specially protected wetlands, and miscalculated both the cover type categorization of those wetlands and the total acreage of those wetlands. The Commission's failure to begin its environmental review process with accurate environmental resource information renders its Environmental Assessment, and the Orders that rely upon it, arbitrary, capricious, or otherwise not in accordance with the law.

The Commission also violated NEPA by failing to disclose critical information related to gas flow velocity for the proposed Project, and by failing to respond to comments and an expert report identifying significant safety and operational problems with the Project. Additionally, the Commission violated NEPA by approving the proposed Project despite the admitted existence of gas flow velocities that far exceed gas flow velocities that the Commission specifically cited as a reason for denying a project alternative for a similar pipeline project.

ARGUMENT

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

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

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if

> appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title . . . **No license or permit shall be granted until the certification required by this section has been granted or waived** . . .

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

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

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

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

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

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

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

H.R. Conf. Rep. No. 940, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 2712, 2741 (emphasis added).

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

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

Indeed, the Natural Gas Act does not make any exceptions for licenses or permits that are conditioned on the subsequent grant of the 401 water quality

certification. Congress could have created an exception in the Natural Gas Act of 1938, which was amended as recently as 2005, but did not do so. In the decades since the Clean Water Act was passed, Congress has repeatedly chosen not to reduce or modify the power of states under Section 401 of the Clean Water Act.

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

While the Commission has authority to impose conditions in its certificates, that power does not extend to overriding an explicit Congressional mandate. When Congress speaks directly to the issue at hand, "[t]he court…must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. 837, 842-43. In the case of whether a federal agency like the Commission can issue a federal license or permit before a state has issued its Section 401 water quality certification, Congress' intent was clear: "[n]o license or permit shall be granted **until** the certification required by this section **has been obtained or has been waived**." 33 U.S.C. § 1341(a)(1) (emphasis added). The plain language of the statute speaks for itself.

The Natural Gas Act grants the Commission an ability to attach "reasonable terms and conditions as the public convenience and necessity may require." *See* 15 U.S.C. § 717f(e). While we do not dispute the fact that the Commission may have the ability to issue certificates with some conditions, it cannot do so until **after** the state has issued or waived the Section 401 water quality certification. Otherwise the Commission consistently risks approving or restricting certain alternatives and other activities that violate a state's water quality standards.

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

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

Specifically, the Commission authorized Intervenor to begin the following activities: "construction at the Mt. Effort pipe yard," "tree felling activities . . . . in the Dorrance and Franklin Loops in Monroe and Luzerne Counties," "tree felling

activities" for "Compressor Stations 515 and 520 in Luzerne and Lycoming Counties," "tree felling activities" for "certain upland segments of the Skillman and Pleasant Run Loops in Mercer, Somerset, and Hunterdon Counties," "construction at Compressor Station 205 in New Jersey and Compressor Stations 515 and 520 in Pennsylvania," and "tree felling of 7.63 acres of extra workspace along the Franklin Loop in Luzerne County." *See* R. 420, 422, 466, 474, JA000600-01, JA000602-03, JA000644-46, JA000659-61.

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

The case law is clear, the felling of trees and other vegetation in wetlands for the Project constituted a "discharge" triggering the requirement of a Section 401 water quality certification. In *Avoyelles Sportsmen's League, Inc. v. Marsh*, the Fifth Circuit Court of Appeals found that the clearing of vegetation in wetlands would "significantly alter the character of the wetlands and limit the vital

ecological functions served by the tract," and therefore, when vegetation or other materials are "redeposited" in the wetland, the discharge language of Section 401 is triggered. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923-24 (5th Cir. 1983); *see also United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000) (holding that returning "seemingly benign substances like rock, sand, cellar dirt, and biological materials" to a wetland constituted a "discharge" pursuant to the Clean Water Act.); *Borden Ranch P'ship v. U.S. Army Corps of Engineers*, 261 F.3d 810, 814-15 (9th Cir. 2001) (holding that the removal of a "protective layer of soil" in a wetland triggered the "discharge" language of the Clean Water Act). Here, the record evidence clearly shows that **all** tree felling activities – including tree felling in and around wetlands – were finished in Pennsylvania before the Department issued the Section 401 water quality certification. R. 485, JA000677-84. As such, the Commission violated the Clean Water Act by authorizing activities that constitute a discharge requiring a Section 401 water quality certification.

Importantly, tree felling activities are **precisely** the type of activities that Pennsylvania's Section 401 water quality certification is designed to govern. Indeed, Petitioners repeatedly warned the Commission that tree felling activities should not proceed absent a Section 401 water quality certification from Pennsylvania because it is a violation of Pennsylvania's water quality standards to

fell trees in certain types of specially protected wetlands. However, these comments were summarily ignored by the Commission. R. 445, JA000640-43.

In Pennsylvania, the water quality standards that must be observed in order for the state to issue a Section 401 water quality certification are defined and described in the Pennsylvania Code. *See* 25 Pa. Code §§ 93.4a-93.4d; 25 Pa. Code § 105.1; 25 Pa. Code § 105.15; 25 Pa. Code § 105.17; 25 Pa. Code § 105.18a; 25 Pa. Code § 105.20a; 25 Pa. Code § 105.451. These standards expressly apply to wetlands, and dictate that the Pennsylvania Department of Environmental Protection is prohibited from issuing Section 401 water quality certifications for proposed projects that will have an "adverse impact" on the wetlands classified as "exceptional" pursuant to the Pennsylvania Code. *See* 25 Pa. Code § 105.18a(a)(1). Tree felling activities in wetlands resulting in the permanent conversion of forested wetlands to non-forested emergent wetlands therefore strikes at the core of Pennsylvania's water quality standards, as it adversely affects both the functions and values of those wetlands. R. 445, JA000640-43.

Petitioners submitted expert reports to the Commission putting the Commission on notice that the conversion of forested wetlands to non-forested emergent wetlands results in significant decreases to "above ground biomass," "structural diversity of the wetland," "local climate amelioration," "forest interior habitat," "visual and aural screening from human activity," "suitability of shade-

loving plant species," and the "production of mast for wildlife." R. 411 at Ex. G, JA000464-67. Tree felling in wetlands also results in losses related to structural diversity, species diversity, and the loss of rare/ancient trees. *Id*. The wetland functions of "pollution prevention" and "sediment control" can also be expected to decrease. *Id*. Furthermore, wetland functions relating to drainage patterns, water quantity, and water quality are also adversely impacted by tree felling in wetlands. *Id*. The wetlands will also provide decreased "soil stabilization," "streambank anchoring against erosion," "nutrient storage," "temperature maintenance," and storm damage shielding. *Id*.

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

The plain language of the Clean Water Act clearly contemplated the potential sequencing of events whereby a federal agency authorizes a project and thereby obstructs state's ability to modify or alter project plans pursuant to its rights under the Clean Water Act, which is exactly why the Clean Water Act requires the Section 401 water quality certification to be issued **prior** to any other

federal licenses or permits. Here, by allowing tree felling activities to be conducted prior to the issuance of the Section 401 water quality certification materially restricted and inhibited Pennsylvania's ability to require alternative project design and resource mitigation or avoidance. In other words, by authorizing tree felling activities to begin prior to the issuance of the Section 401 water quality certification, the Commission infringed upon the right of Pennsylvania to review and place conditions on the Section 401 water quality certification that could require the project applicant to significantly change scope and design of the Project. It is impossible to know what additional conditions Pennsylvania would have conferred upon the Section 401 water quality certification had the Commission not already committed to moving the Project forward absent the review and consent of the state.

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

> We respectfully request that FERC not issue a "Notice to Proceed" for any tree felling activities . . . until Transco has obtained all required approvals from NJDEP for the Leidy Southeast Expansion Project . . . We believe our request is extremely urgent since any tree felling activity prior to permit issuance may impact available alternatives for project design and mitigation.

R. 471, JA000656-658. A state's interest in protecting water quality through its Section 401 water quality certification process is well established, and has been explicitly enshrined by the Supreme Court:

> State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained on the floor when what is now § 401 was first proposed:
>
> > No [person] will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No [person] will be able to make major investments in facilities under a federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements.

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

Additionally, by allowing tree felling and other activities to begin in a situation where a state later denies the water quality certificate, the Commission runs the risk of authorizing construction activity to begin for a project that the state later stops by denying the Section 401 water quality certificate. This results in irreparable harm to the environment that would have been avoided if the

Commission had simply complied with the Clean Water Act and waited to issue the approval, and/or any letter orders authorizing construction activity, until all the necessary federal approvals were acquired.

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

On April 20, 2016, the New York Department of Environmental Conservation denied the Section 401 water quality certification for the project pursuant to its powers to "block" the project. *See* AD033-46 (Joint Application: DEC Permit# 0-9999-00181/00024 Water Quality Certification/Notice of Denial, New York Department of Environmental Conservation, April 20, 2016). Therefore,

as a result of the Commission's premature and unlawful authorization of tree felling in violation of the Clean Water Act, the family now had their entire business unnecessarily cut to pieces. Additional examples of needless tree felling litter the right of way for the Constitution pipeline in Pennsylvania, leaving a permanent scar across the northern tier of the state.

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

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

AD027-30 ("Request for Additional Information in Response to the Request for Limited Notice to Proceed with Tree Felling," FERC Docket No. CP14-529, Accession 20160325-3003). In other words, before the Commission allowed any tree felling for the Connecticut Expansion project, the Commission required that the project applicant provide proof that both Connecticut and Massachusetts agree

that tree felling will not violate either of their state specific water quality standards. The Commission therefore admitted that it simply does not have the expertise, or authority, to determine whether tree felling in wetlands is prohibited by, or materially impacts, a state's water quality certification process.

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

The Commission's sole duty with regard to the Section 401 water quality certification was to respect the rights of the states and their mandate to carry out the goals of the Clean Water Act. Ultimately, the Commission must follow the law, but failed to do so in issuing the December 18, 2014 Order before Pennsylvania issued its Section 401 water quality certification for the Project. The Commission's failure to comply with Section 401 of the Clean Water Act means that the December 18, 2014 Order was issued in a manner contrary to the Clean Water Act. As such, that Order should be vacated or otherwise remanded for further review.

II. The Commission's Mischaracterization Of Project Impacts Fails To Provide An Adequate Baseline From Which A NEPA Review Can Proceed

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

NEPA requires that the agency "adequately considered and disclosed the environmental impact of its actions. . ." *Baltimore Gas & Electric Co. v. Natural Res. Defense Council, Inc.,* 462 U.S. 87, 97-98 (1983); *see also Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1998) (finding that the "goal of [NEPA] is to ensure that federal agencies infuse in project planning a thorough consideration of environmental values").

A baseline is a practical requirement in a NEPA environmental analysis employed to identify the environmental consequences of a proposed agency action. *See American Rivers, Inc. v. FERC*, 201 F.3d 1186, n. 15 (9th Cir. 1999). It has been recognized that "[w]ithout establishing . . . baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA." *Half Moon Bay*, 857 F.2d at 510; *see also N. Plains Res.* Council, 668 F.3d at 1085 ("without [baseline] data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency fails to consider an important aspect of the problem, resulting in an arbitrary and capricious decision.") (internal quotation marks and brackets omitted); Council on Environmental Quality, Considering Cumulative Effects under the National Environmental Policy Act, at 41 (January 1997) ("The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process"); *see also* 40 C.F.R. § 1508.27(b)(3).

NEPA requires that the lead agency provide the data on which it bases its environmental analysis. *See Lands Council v. Mcnair*, 537 F.3d 981, 994 (9th Cir. 2008) (holding that an agency must support its conclusions with studies that the agency deems reliable) (overturned on other grounds). Such analyses must occur **before** the proposed action is approved, not afterward. *See LaFlamme v. FERC*,

852 F.2d 389, 400 (9th Cir. 1988) ("[T]he very purpose of NEPA's requirement that an [environmental review] be prepared for all actions that may significantly affect the environment is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action") (internal citation and quotation marks omitted). This is consistent with NEPA's twin aims of (1) ensuring that agencies carefully consider information about significant environmental impacts; and, (2) guaranteeing relevant information is available to the public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1998).

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

The Commission's Environmental Assessment includes a section dedicated to the analysis of wetlands harms and mitigation. *See* R. 406 at 61-68, JA000202-09. This section provides an evaluation of the various types of wetlands in the Project area, and the expected impacts of construction and operational activity on those wetlands. *Id*. The data collected and analyzed by the Commission must be accurate to provide a useful baseline from which the Commission can generate its NEPA environmental review. However, the Commission verifiably misclassified numerous specially protected wetland resources that were to be impacted by the proposed Project.

The Commission admits that the methodology and information collected for its NEPA review regarding wetlands "enabled staff to disclose and evaluate potential impacts on wetlands and to serve as a starting point for the development of protective mitigation," which included a "consideration of the water resource classifications for the potentially affected surface and groundwater resources." R. 569 at P37, JA000716. Therefore, it is clear that the Commission relied on the classification information and other data it collected with regard to evaluating impacts to wetlands. However, overwhelming evidence exists on the record – including two expert reports and numerous comment letters – that the Commission improperly categorized a significant number of wetlands, which therefore prevented the Commission from making an informed decision regarding whether the Project would have a significant impact on wetlands necessitating further environmental review.

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

Importantly, Appendix I also includes a column titled, "State Wetland Classification," which provides the state classification for each wetland impacted

by the Project. *Id*. This is **crucial information** in the context of the Commission's NEPA review because States such as Pennsylvania classify their wetlands in a hierarchy based on the differing functions and values that each of the wetlands provide. Some wetlands are simply more functionally valuable than others, and therefore harms to those wetlands must necessarily be given greater weight or consideration in a NEPA review. *See, e.g.,* 40 C.F.R. § 1508.27(b)(3).

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

Accurate information regarding the classification of the wetlands is therefore critical to the Commission's understanding of the potential harms caused by the construction and operation of the Project, and ultimately whether they result in a significant impact necessitating further environmental review. *See* 40 C.F.R. § 1508.27(b)(3) ("Unique characteristics of the geographic area such as proximity to

historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.") For example, if a pipeline project in Pennsylvania proposed to impact forty wetlands that were non-forested "other" wetlands as categorized pursuant the Pennsylvania Code, the environmental impact would be significantly less in the context of a NEPA review than if those same forty wetlands were categorized as high-value forested "exceptional" wetlands that are habitat for endangered species. This is exactly why the Commission makes a point of analyzing this data in its NEPA reviews.

Here, the Commission identified that there were a total of seven "exceptional" wetlands in Pennsylvania that would be impacted by the Project. R. 406 at I-1-3 JA000328-31. DRN notified the Commission in its comments that this determination was a significant undercounting of the number of "exceptional" value wetlands in the Project area, and that the Commission was therefore grossly underestimating the potential impact of the Project on wetlands. R. 381 at 2-11, R. 411 at 34-46, JA000335-44, JA000577-89. Indeed, the only record evidence that provides a site-specific review of the criteria for proper wetland classification was provided by Petitioners to the Commission in an expert report by a wetlands specialist. R. 381 at Ex. G, JA000464-67.This site-specific review based on Intervenor's application materials determined that there were at least **nine additional** wetlands that qualified as "exceptional" that were misidentified by the

Commission as "other," and therefore not accounted for in the Environmental Assessment. *Id*. There is no evidence in the record that any certified wetlands specialist employed by the Commission performed a similar analysis.

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

Importantly, Petitioners' expert evaluation was later **expressly verified by Intervenor**. Indeed, Petitioners' analysis actually proved to be a very conservative estimate of the total number of "exceptional" wetlands in the project area. After the Commission issued its Certificate, Intervenor admitted to the Pennsylvania Department of Environmental Protection that the wetlands categorizations they initially provided to the Commission were largely inaccurate. Intervenor conceded

that all nine of the wetlands Petitioners identified were indeed "exceptional" wetlands, and added that an additional fifteen wetlands should also be evaluated as meeting the strict criteria for being "exceptional" wetlands. *See* AD031-32 (Wetlands Table, Chapter 105 Application). Instead of **seven** "exceptional" value wetlands existing in the project area – as accounted for in the Environmental Assessment generated by the Commission – there were actually **thirty-one**. *Id*.

The Commission's miscalculation therefore represents an undercounting of roughly 340 percent. Such a drastic and widespread failure to account for the impacts to critical and specially protected wetlands is likely due to the fact that the Commission never field-verified any of the wetlands data that it relied upon in the Environmental Assessment, **despite being presented uncontroverted evidence by a qualified wetlands specialist that the analysis the Commission was relying on was fatally flawed**. R. 381 at 2-11, JA000335-44. Furthermore, the Commission never collected, analyzed, or reviewed any evidence relating to the criteria by which Pennsylvania determines the quality and therefore classification of its wetlands. R. 381 at 3-6, JA000336-39. Indeed, nothing of the sort appears in the record. By arbitrarily ignoring the condition and ecological importance of the impacted wetlands, the Commission failed to account for the significance of their loss in the Environmental Assessment and Finding of No Significant Impact.

This is also an excellent example of why it is so important for the Commission to follow letter of the law of the Clean Water Act, and wait to issue its Certificate of Public Convenience and Necessity until after the State has issued its Section 401 water quality certification. Otherwise the Commission risks issuing NEPA documents and other orders based on incomplete or verifiably inaccurate information, which is exactly what happened in the instant matter. This is precisely the type of flawed and incomplete analysis that NEPA and the Clean Water Act is designed to prevent, yet the Commission repeatedly allows this flawed type of analysis and improper sequencing of review to occur.

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

Commission's Orders are arbitrary, capricious, or otherwise not in accordance with law.

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

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

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

A description of each of the different types of wetlands in the project area, their associated cover types, and some of the functions they provide appeared in

the body of the Environmental Assessment section on wetlands. R. 406 at 62, JA000203. Appendix I specifically included a column for categorizing "Wetland Type," which is designed to identify the National Wetlands Inventory designation for each wetland, which included: "PEM" = Palustrine Emergent Wetland; "PSS" = Palustrine Scrub-Shrub Wetland; and "PFO" = Palustrine Forested Wetland. R. 406 at Exhibit I-1-3, JA000328-31.

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

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

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

Of the forty-nine wetlands in Pennsylvania identified by the Commission in Appendix I of its wetlands analysis, the cover type of at least **fourteen wetlands**

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

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

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

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

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

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

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

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

Petitioners specifically identified each one of these wetlands in their comments, and had a certified wetlands specialist field verify the cover types identified above. R. 381 at 8-11, JA000341-44. Inexplicably, the Commission failed to respond to this analysis in both the Environmental Assessment and the Order Denying Rehearing, as such, there is no evidence refuting any of these cover type classifications anywhere in the administrative record. The only glimmer of

reasoning provided by the Commission justifying their improper categorizations is a brief statement that the "wetland delineations were conducted using the Corps' Wetlands Delineation Manual," and that this "methodology is sufficient." R. 406 at P77, JA000514. However, this singular answer is utterly non-responsive to the conclusions in Petitioners' expert report. The Commission failed to properly identify numerous wetlands impacts, and as a result, the Commission also failed to account for these impacts in its flawed NEPA analysis. As such, the Commission's Order and Finding of No Significant Impact is arbitrary, capricious, or otherwise not in accordance with law.

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

III. The Commission Violated NEPA by Failing to Disclose or Verify Flow Velocity and Other Technical Data Necessary to Determine the Full Extent of the Project's Inter-relatedness to Previous, Pending, and Future Projects, and also to Determine the Operational Safety of the Project

A pipeline engineering expert reviewed the gas flow velocity information in the Project application and determined that the safety and interconnectedness of the proposed Project with other Transco pipelines necessitated the disclosure of additional information that did not appear in the administrative record. R. 305, JA JA000138-42. This information is necessary to determine whether the Commission improperly segmented its review of multiple pipeline projects similar to the way in which they unlawfully reviewed the projects in *Delaware Riverkeeper Network et al. v. Federal Energy Regulatory Commission*. *Delaware Riverkeeper Network*, 753 F.3d at 1313-16.

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

full disclosure of relevant information, and renders the Order and the Order Denying Rehearing arbitrary, capricious, or otherwise not in accordance with law.

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

Accordingly, agencies violate NEPA when they fail to disclose that their analysis or the record contains incomplete information. *See N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708 (10th Cir. 2009); *see also Motor Vehicles Mfrs.*, 463 U.S. at 43 (holding that an agency acts arbitrarily and capriciously when it fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found

and the choice made") (internal quotation marks omitted). Such required "up-front disclosures [include] relevant shortcomings in the data or models." *Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir. 2005); *see also* 40 C.F.R. § 1502.22 (An agency "shall make clear" if there is "incomplete or unavailable information" in an NEPA environmental review document).

The very purpose of public issuance of an Environmental Assessment pursuant to NEPA is to "provid[e] a springboard for public comment." *Public Citizen*, 541 U.S. at 768. It is well established that "where comments from responsible experts [provide] **conflicting data** or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response." *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) (emphasis added); *see also Friends of the Earth, Inc. v. Hall*, 693 F. Supp. 904, 934 (W.D. Wash. 1988) (A NEPA review that fails to disclose and respond to "the opinions held by well respected scientists concerning the hazards of the proposed action is fatally deficient"); *Pacific Coast Federation of Fisherman's Ass'ns v. U.S. Dept. of the Interior*, 929 F.Supp.2d 1039, 1056 (E.D. Ca. 2013) ("The underlying environmental data relied upon to support the expert conclusions must be made available to the public").

For natural gas transmission pipelines, such as the Project, actual gas velocities are a "critical variable" that drive pipeline design decisions. R. 381 at Exhibit D at 2, JA000425. For example gas velocities that exceed the design specifications of a given pipeline can result in internal particulate erosion that threatens the integrity of the pipeline. *Id*. at Exhibit D at 4, JA000427. The Commission is well aware of the issue of gas velocity erosional limit ranges, because the Commission recently rejected a possible pipeline alternative in an application where the Commission found that "transporting the current and proposed gas volumes through only the existing pipeline would result in gas velocity significantly above TGP's recommended maximum design velocity of approximately 40 feet per second. This increased velocity could compromise the pipeline's integrity and safety." R. 381 at 20, JA000353. Indeed, gas flow velocity was recently questioned as a possible culprit for the explosion of a Texas Eastern natural gas transmission line in May of 2016. *See* http://powersource.post-gazette.com/powersource/companies/2016/05/11/Could-faster-gas-flow-have-contributed-to-Texas-Eastern-pipeline-erosion/stories/201605110092.

Additionally, accurate gas velocity measurements are necessary to determine the functional independence or dependence of a proposed pipeline project in relation to other pipeline projects. If a pipeline project functionally relies on past or

future pipeline projects to operate, those projects must be accounted for in a NEPA review document. *See Delaware Riverkeeper Network*, 753 F.3d at 1304.

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

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

> 9. At each compressor station, include the compressor HP, fuel usage, compressor suction pressure, compressor discharge pressure, the compression ratio, gas volume compressed in MMSCF/D.

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

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

On July 25, 2014 Petitioners submitted a comment letter replying to the July 2014 Intervenor letter. R. 349, JA000161-63. Petitioners' July letter made it clear that Petitioners already had access to, and indeed based its initial comments from the March 2014 letter on, the flow diagrams contained in Exhibits G and G-II, and that Intervenor's limited additional submission of data was non-responsive to any of the nine questions. *Id*. Transco never provided the requested for information,

and therefore the information does not appear anywhere in the administrative record.

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

This analysis, based on the flow velocity diagrams in the record, is the **only evaluation in the record of the gas flow velocity implications of the Project**. *See* R. 385, JA000424-33. Therefore, this expert report, the accompanying flow velocity analysis, and the questions and concerns it raised are wholly unanswered and unrebutted by both the Commission and Intervenor.

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

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

As noted above, the Commission is well aware of gas velocity erosional safety issues, and also the resulting design and engineering limitations caused by those gas velocity issues. However, the Commission failed to provide an explanation as to why it treated two different pipeline project proposals differently

despite the existence of identical factual circumstances. The Commission's differing treatment, without reason or explanation, renders the Commission's decision arbitrary, capricious, or otherwise not in accordance with law.

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

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

The Commission requested Intervenor to "[f]ile the maximum gas velocity that would occur at the proposed facilities." R. 195 at 157, JA000137. Intervenor responded that the pipeline would have "a flow velocity ranging from 30 to 50 fps." *Id*. After Petitioners raised concerns about flow velocity, Intervenor walked back their statement, admitting that one segment would exceed sixty feet per second. R. 406 at 174, JA000315.

Despite the fact that critical information was missing from the administrative record with regard to flow velocity data, Petitioners' expert report was able to make a preliminary determination that "velocities are most likely exceeding 60 fps in the system[] . . . based on the limited information in Exhibit G and associated documents supplied to me under CEII for the Project." R. 381 Exhibit D at 3, JA000426. Petitioners' report found that this problem is likely widespread, stating that the Commission's "conclusions that their velocities for the Northern market only exceed 60 fps in one line, [are] not credible." R. 381 Exhibit D at 3, JA000426. The Commission can point to no hydraulic modeling or analysis in the administrative record showing that flow velocities are consistent with Intervenor's bare and unsupported statement. Indeed, the only analysis on the record is Petitioners expert report calling into serious question the long-term safety and operational viability of the Project.

The Commission has failed to explain why it has chosen to allow Intervenor to operate at velocities higher than its stated design threshold, while it denied Tennessee Gas and Pipeline Company for exceeding its design threshold. Despite devoting eight paragraphs to the issue of gas velocities in the Order, R. 406 at PP25-31, JA000496 -99, the Commission simply did not address the fact that for a previous pipeline project involving substantially similar facilities the Commission came to the conclusion that exceeding velocity limits was not safe; yet here, came

to the opposite conclusion that exceeding velocity thresholds was safe. This irreconcilable position provides yet another example of a dispositive deficiency with regard to the Commission's decision to issue the Certificate of Public Convenience and Necessity for the Project.

CONCLUSION

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

Respectfully submitted this 9th day of September, 2016,

/s/ Aaron Stemplewicz

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 13,537 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

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

Dated: September 9th, 2016

s/ Aaron Stemplewicz

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CERTIFICATE OF SERVICE

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

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Oral Argument Not Yet Scheduled

IN THE
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA

DELAWARE RIVERKEEPER NETWORK; MAYA VAN ROSSUM, the Delaware Riverkeeper,	)	Docket No. 16-1092
	)	**ADDENDUM**
Petitioners,	)	
v.	)	
FEDERAL ENERGY REGULATORY COMMISSION,	)	
Respondent,	)	
and,	)	
TRANSCONTINENTAL GAS PIPE LINE COMPANY LLC,	)	
Intervenor.	)	

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5 U.S.C. § 706. Scope of review

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

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordancewith law;
> > (B) contrary to constitutional right, power, privilege, or immunity;
> > (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> > (D) without observance of procedure required by law;
> > (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or
> > (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

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

Natural Gas Act

15 U.S.C. § 717f. Construction, extension, or abandonment of facilities

. . .

(c) Certificate of public convenience and necessity.

(1)

(A) No natural-gas company or person which will be a naturalgas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful. (B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a

certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(B)

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

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

(B) natural gas produced by such person.

. . .

15 U.S.C. § 717r. Rehearing and review

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

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

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

National Environmental Policy Act

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

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

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

> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

33 U.S.C. § 1341(a)(1)

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

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

33 U.S.C. § 1251(d)

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

40 C.F.R. § 1502.22 Incomplete or unavailable information.

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

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.
(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

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

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

40 C.F.R. § 1508.27 Significantly.

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

. . .

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

Pennsylvania Code

25 Pa. Code § 93.4a

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

25 Pa. Code § 96.3(b)

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

25 Pa. Code § 105.1

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

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

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

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

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

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

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

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

(viii) Preventing pollution.

(ix) Providing recreation.

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

25 Pa. Code § 105.15(a)

§ 105.15. Environmental assessment.

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

25 Pa. Code § 105.15(b)

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

25 Pa. Code §§ 105.17(1)-(2)

§ 105.17. Wetlands.

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

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

(i) Wetlands which serve as habitat for fauna or flora listed as ‘‘threatened’’ or ‘‘endangered’’ under the Endangered Species Act of 1973 (7 U.S.C.A. § 136; 16 U.S.C.A. § § 4601-9, 460k-1, 668dd, 715i, 715a, 1362, 1371, 1372, 1402 and 1531—1543), the Wild Resource Conservation Act (32 P. S. § § 5301—5314), 30 Pa.C.S. (relating to the Fish and Boat Code) or 34 Pa.C.S. (relating to the Game and Wildlife Code).

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

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

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

(v) Wetlands located in areas designated by the Department as ‘‘natural’’ or ‘‘wild’’ areas within State forest or park lands, wetlands located in areas designated as Federal wilderness areas under the Wilderness Act (16 U.S.C.A. § § 1131—1136) or the Federal Eastern Wilderness Act of 1975 (16 U.S.C.A. § 1132) or wetlands located in areas designated as National natural landmarks by the Secretary of the Interior under the Historic Sites Act of 1935 (16 U.S.C.A. § § 461—467).

(2) *Other wetlands.* This category includes wetlands not categorized as exceptional value wetlands.

25 Pa. Code §§ 105.18a(a)-(1)

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

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

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

Declaration of Maya K. van Rossum
in support of
Petitioners Brief

Delaware Riverkeeper Network, et al v. Federal Energy Regulatory Commission

Docket Number: 16-1092

DECLARATION OF MAYA K. VAN ROSSUM

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

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

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

3. DRN was established in 1988. It is a nonprofit 501(c)(3) membership organization. DRN advocates for the protection of the Delaware River, its tributary streams, and the habitats and communities of the Delaware River watershed.

4. The DRN office is located at 925 Canal Street, Suite 3701, Bristol, PA 19007. Currently there are 20 staff members and numerous volunteers. The volunteer network is fluid, constantly changing, and project-specific. The exact number changes on a year-to-year basis. Thousands of individuals have done work for us in the past, undertaking water quality monitoring, stream clean ups, habitat restoration projects, or speaking out on issues of concern for waterway and habitat health.

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

6. Our membership provides irreplaceable participation in, and support for DRN, including engaging in our work in a variety of ways from action on issues to providing the financial support necessary for our river protection work. Basic membership is free. Membership is demonstrated in a number of different ways, including but not limited to: making donations, participating in events, signing

letters targeted to decision-makers, participating in DRN public information sessions, helping distribute DRN information including alerts and fact sheets, responding to DRN calls for action on projects and issues, volunteering as a water quality monitor, assisting with DRN restoration projects or actively communicating with DRN about our work and issues of concern in the Watershed, signing up and/or donating financial support.

7. DRN has more than 16,000 members, the vast majority of whom live, work and/or recreate within the Delaware River Basin and/or the four watershed states. We represent the recreational, educational, and aesthetic interests of our members who enjoy many outdoor activities in the Delaware River Basin, including camping, boating, swimming, fishing, birdwatching, hunting and hiking, and who are impacted by or benefit from the policies, programs, legal decisions and/or precedents implemented in the four watershed states. Additionally, we represent the economic interests of many of our members who own businesses that rely on a clean river ecosystem, such as ecotourism activities, fishing, boating, art, and high property values. Furthermore, DRN also represents the health interests of those who use the Delaware River's resources for drinking, cooking, farming, swimming, or gardening and are impacted by the policies, programs, legal decisions and/or precedents we help to create and advance in the four watershed states. And we support the protection and restoration of the Delaware River, its

tributaries and watershed, and the creation and honoring of constitutional environmental rights throughout our watershed states and the nation for the benefit of present and future generations.

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

9. Many DRN members are concerned with the proliferating number of pipelines that have crossed, or are planned to cross, portions of the Delaware River Watershed and the resulting impact those construction activities have on the remaining exceptional value wetlands in the state. The permanent conversion of these wetlands results in impacts to these members' recreational, aesthetic, educational, property, health, safety and commercial interests. More specifically, individual DRN members have communicated their concerns to me and my staff

regarding the harms to their aesthetic, recreational, property and quality of life interests that they have suffered from the construction impacts they have seen from the completed Transcontinental Pipe Line Company's Northeast Supply Link project as well as the same types of harms they will suffer from construction impacts from the proposed Project. DRN represents our members' interests that will be negatively affected by the Project in bringing this action.

10. As the Delaware Riverkeeper and as a member of DRN, I personally have enjoyed areas that will be crossed by the Project. I have personally visited the streams, wetlands, and adjacent forested areas in the watershed, by myself, with colleagues, and have plans to return to the area with my family and friends for recreational purposes, including among other things, hiking, nature walks, wildlife observation and enjoyment as well as for professional purposes. I enjoy my visits to these areas whether in my professional or personal capacity. I often include my family in my enjoyment of the areas of the watershed, some of which we have visited during time spent at my family's cabin owned up until July 24, 2015, and find them beautiful and unique natural areas important to share with my children for their personal and educational growth. I have a great appreciation for the public lands and scenery contained within the watershed to be affected by the Project, including but not limited to the Fern Ridge Bog Preserve.

11. In my capacity as the Delaware Riverkeeper, a mother, and a person who enjoys the out of doors, I will be personally and professionally harmed by the damage that will be inflicted by the construction activities of the Project, and will be adversely affected by the future operational impacts of the Project, including the permanent conversion of exceptional value wetlands from forested wetlands to emergent wetlands. For example, I enjoyed the trail in the area of the Fern Ridge Bog Preserve about a year ago exploring the natural systems of the region and Tunkhannock Creek. Hickory Run State Park camping visits are part of the curriculum of the summer camp my children have, and continue to enjoy, with my son visiting Hickory Run State Park for a 2 day, overnight camping trip as recently as July 23-24, 2015. My son will continue to participate in this camp for years to come. In addition, we pass by Fern Ridge Bog Preserve and Hickory Run State Park en route to our new cabin located in Sullivan County, NY and so while our annual family outings have not yet brought us to the Fern Ridge Bog Preserve specifically we do anticipate visitation in this area in the near future, as the result of the beauty that I experienced during my previous hike and this new proximity to what will become a regular travel route several times a year.

12. I fully expect my personal, professional, recreational, and family trips to the Project area will continue in the near and far future. My personal, recreational, family and professional activities in the past and future have, and will continue, to

be composed of hiking, camping, boating, and otherwise enjoying the River waters and natural scenic beauty of the region.

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

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

is associated with construction, including pipeline construction activities, and expect to be harmed by those same activities for the proposed Project.

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

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

17. The Delaware Riverkeeper Network is registered as a 501(c)(3) nonprofit organization. DRN is funded by individual charitable donations and grants from grant-making organizations and state or federal agencies that are earmarked for

specific charitable purposes. DRN's annual budget is approximately $2 million. This annual budget is entirely committed to DRN's ongoing programs, including payment of salaries and benefits of existing staff members, maintenance of our office, engaging legal representation for legal actions and costs of commissioning expert reports and conducting water quality testing via our volunteer watershed monitoring network.

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

I declare under penalty of perjury that the foregoing is true and correct. Executed this 28 day of April, 2016.

Maya K. van Rossum

Maya K. van Rossum,
the Delaware Riverkeeper

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

OFFICE OF ENERGY PROJECTS

In Reply Refer To:
OEP/DG2E/Gas Branch 1
Tennessee Gas Pipeline
Company, L.L.C
Docket No. CP14-529-000
§ 375.308(x)

March 25, 2016

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

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

Dear Mr. Perrow:

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

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

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, DC 20426

If certain information cannot be provided within this time frame, indicate which items will be delayed and provide a projected filing date.

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

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

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

Sincerely,

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

Enclosure

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

ENCLOSURE

Tennessee Gas Pipeline L.L.C. (Tennessee)
Docket No. CP14-529-000

General

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

2. Identify any proposed private access roads Tennessee is requesting to use and confirm that it has obtained authorization from the landowner(s) or land managing agency. If modifications or improvements for the proposed access roads are required for tree felling activities, provide the status of the applicable permits or authorizations required.

Implementation Plan for Environmental Condition 6

3. Clarify or provide a revised Project schedule (Attachment A of the Implementation Plan) reflecting tree felling activities on or before the March 31 deadline for applicable species regulated by the U.S. Fish and Wildlife Service (USFWS).

4. Clarify or provide specific information in a revised Project schedule (Attachment A of the Implementation Plan) regarding an Environmental Inspector (EI) and other crew mobilizations and the sequence of activities that will be conducted to mark the extent of **approved** areas of the rights-of-way, additional temporary workspaces, sensitive resources (e.g. wetlands and waterbodies), and approved access roads prior to tree felling.

    a. Clarify that environmental training will take place for all on-site Project personnel (e.g., EIs, survey, tree felling contractors) prior to tree-felling activities.

    b. Confirm that EIs will receive the appropriate training to implement the measures outlined in the construction monitoring plan. Furthermore, provide specific details assuring that the proposed number of EIs is sufficient for the Connecticut Loop to maintain compliance with this and other monitoring activities.

Implementation Plan for Environmental Condition 9

5. Provide evidence that the U.S. Army Corps of Engineers (USACE) New York and New England field offices concur that a permit under Section 404 of the Clean Water Act is not required for non-mechanized tree felling for the proposed Project.

6. Provide evidence that the Massachusetts Department of Environmental Protection and the Connecticut Department of Energy and Environmental Protection concur that Water Quality Certificates under Section 401 of the Clean Water Act are not required for non-mechanized tree felling for the proposed Project. Identify any wetland setback requirements for tree felling outside of wetlands.

Implementation Plan for Environmental Condition 21

7. Provide evidence that Tennessee received clearance for bald and golden eagles from the Connecticut Natural Diversity Database and the Massachusetts Department of Fisheries and Wildlife Natural Heritage and Endangered Species Program per the USFWS New England Field Office's request (phone call noted on February 16, 2016 as indicated in the Implementation Plan).

Implementation Plan for Environmental Condition 23

8. Provide correspondence showing that the construction monitoring plan for the 23 Connecticut state-listed species was developed in coordination with, or been approved by, the Connecticut Department of Energy and Environmental Protection.

Implementation Plan for Environmental Condition 26

9. Provide a plan for ensuring that no ceremonial stone landscapes, including features, landscapes, and their alignments would be affected by tree felling activities in Massachusetts.

ɜble 2B-1

Wetlands Impacted by the Leidy Southeast Expansion Project in Pennsylvania

Wetland ID	Approximate MP	Crossing Length (feet)[b]	Construction Method / Disturbance Type	NWI Classification[c]	State Wetland Classification	Total Wetland Disturbance (Acre)[d]	Emergent Wetland Disturbance (Acre)[e]	Permanent Forested Wetland Disturbance (Acre)[f]	Temporary Forested Wetland Disturbance (Acre)[g]	Scrub-Shrub Wetland Disturbance (Acre)
Franklin Loop – Monroe County										
WW-007-007	57.48	NA	Workspace	PEM	Exceptional	0.01	0.01			
WW-001-012	58.41	42	Open Cut	PEM	Exceptional	0.01	0.01			
WW-001-013	58.54	63	Open Cut	PFO	Exceptional	0.06		0.02	0.04	
WW-001-014	58.86	274	Open Cut	PSS	Exceptional	0.30				0.30
				PFO	Exceptional	0.48		0.27	0.21	
WW-001-016	58.99	98	Open Cut	PEM	Exceptional	0.14	0.14			
				PFO	Exceptional	0.22		0.12	0.10	
WW-001-019	59.18	9	Open Cut	PEM	Exceptional	0.13	0.13			
WW-001-020	59.29	410	Open Cut	PSS	Exceptional	0.38				0.38
				PFO	Exceptional	0.78		0.43	0.35	
WW-001-021	59.63	33	Open Cut	PEM	Exceptional	0.18	0.18			
WW-18-001	59.70	NA	Workspace	PEM	Exceptional	0.03	0.03			
WW-001-028	59.76	2031	Push/Pull	PSS	Exceptional	1.02				1.02
				PFO	Exceptional	3.31		1.85	1.46	
WW-001-030	60.54	123	Open Cut	PEM	Exceptional	0.02	0.02			
				PFO	Exceptional	0.15		0.04	0.11	
WW-001-022	61.07	222	Open Cut	PEM	Exceptional	0.22	0.22			
WW-001-024	61.25	105	Open Cut	PEM	Exceptional	0.28	0.28			
WW-001-025	61.64	243	Open Cut	PEM	Exceptional	0.49	0.49			
WW-001-026	62.11	226	Open Cut	PEM	Exceptional	0.17	0.17			
WW-001-027	62.32	105	Open Cut	PEM	Exceptional	0.36	0.36			
				PFO	Exceptional	0.03			0.03	
WW-001-031[h]	62.83	440	Open Cut	PEM	Exceptional	1.11	1.11			
WW-001-032	63.43	39	Open Cut	PEM	Exceptional	0.18	0.18			
				PFO	Exceptional	0.02			0.02	
WW-001-035	63.74	205	Open Cut	PEM	Exceptional	0.08	0.08			
WW-001-036	64.14	1996	Push/Pull	PSS	Exceptional	1.12				1.12
				PFO	Exceptional	2.12		1.14	0.98	
WW-007-002	64.93	175	Open Cut	PEM	Exceptional	0.17	0.17			
WW-006-003	65.26	37	Open Cut	PEM	Exceptional	0.01	0.01			
WW-001-038	65.43	64	Open Cut	PEM	Exceptional	0.11	0.11			
Total Impacts Franklin Loop - Monroe County						13.69	3.7	3.87	3.3	2.82
Total Number of Wetlands Impacted by Franklin Loop – Monroe County = 23										

AD031

Notes:

[a] MP = milepost

[b] Crossing Length in feet is based upon distance of wetland crossed by the proposed centerline. This reflects the mileposts between which the wetland would be impacted by Project workspaces. The wetland may not be continuously impacted because the wetland boundary may vary in relation to the workspace limit.

[c] NWI Classification

PEM = Palustrine Emergent Wetland

PSS = Palustrine Scrub-Shrub Wetland

PFO = Palustrine Forested Wetland

[d] Total Wetland Disturbance = combined impacts of all cover types in full workspace footprint

[e] Emergent Wetland Disturbance = total impacts to emergent wetlands in full workspace footprint (no differentiation between existing and new permanently maintained ROW)

[f] Permanent Forested Wetland Disturbance = forested wetlands within new permanently maintained ROW

[g] Temporary Forested Wetland Disturbance = forested wetlands within workspace footprint OUTSIDE of new permanently maintained ROW (allowed to revert back to forested wetland after construction)

[h] WW-001-031 is an expansive wetland complex that is contiguous outside of the survey corridor. Thus, the appearance of individual wetlands on Mapping Supplements although one wetland.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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April 22, 2016

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

Re: Joint Application: DEC Permit # 0-9999-00181/00024 Water Quality Certification/Notice of Denial

Dear Ms. Schubring,

On April 27, 2015, Constitution Pipeline Company, LLC (Constitution) submitted to the New York State Department of Environmental Conservation (NYSDEC or Department) a Joint Application (Application)[1] to obtain a Clean Water Act[2] Section 401 Water Quality Certification (WQC) for the proposed Project and New York State Environmental Conservation Law (ECL) Article 15, Title 5 (Protection of Waters) and Article 24, Title 23 Freshwater Wetlands permits. Based on a thorough evaluation of the Application as well as supplemental submissions, the Department hereby provides notice to Constitution that in accordance with Title 6 New York Codes Rules and Regulation (NYCRR) Part 621, the Application fails in a meaningful way to address the significant water resource impacts that could occur from this Project and has failed to provide sufficient information to demonstrate compliance with New York State water quality standards. Constitution's failure to adequately address these concerns limited the Department's ability to assess the impacts and conclude that the Project will comply water quality standards. Accordingly, Constitution's request for a WQC is denied.[3] As required by 6 NYCRR §621.10, a statement of the NYSDEC's rationale for denial is provided below.

BACKGROUND

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

[1] New York State and U.S. Army Corps of Engineers Joint Application, Constitution Pipeline, August, 2013. Constitution initially submitted its WQC application on August 28, 2013. With the Department's concurrence Constitution subsequently withdrew and re-submitted the WQC application on May 9, 2014 and April 27, 2015, each time extending the period for the Department to review the application by up to one year.

[2] *See* 33 U.S.C.A. Section 1341.

[3] The other permits sought by Constitution in the Joint Application remain pending before the Department and are not the subject of this letter.

its approval on Constitution first obtaining all other necessary approvals. Accordingly, Constitution's Application for a WQC pending with the Department must be approved before construction may commence. Constitution's Application was reviewed by NYSDEC in accordance with ECL Article 70 (Uniform Procedures Act or UPA) and its implementing regulations at 6 NYCRR Part 621, which provide a review process for applications received by NYSDEC.

Despite FERC conditioning its approval on Constitution's need to obtain a WQC, the Department has received reports that tree felling has already occurred in New York on the Project's right of way. This tree cutting, both clear cutting and selective cutting, has occurred notwithstanding the fact that Constitution has right-of-way agreements with the property owners where this cutting has occurred. The tree felling was conducted near streams and directly on the banks of some streams, and in one instance has resulted in trees and brush being deposited directly in a stream, partially damming it. As described below, this type of activity, if not properly controlled, can severely impact the best usages of the water resource.

Concurrent with its review, the Department received a Clean Air Act Title V application[4] for the Wright Compressor Station (Wright Compressor Station) from Iroquois Gas Transmission System, Inc. Additionally, Constitution is obligated to obtain coverage from NYSDEC under the SPDES Stormwater General Permit for Construction Activities (GP-0-15-002) and prepare a Stormwater Pollution Prevention Plan (SWPPP) prior to Project construction.

Proposed Project Description and Environmental Impacts

Constitution proposes construction of approximately 124.14 miles of new interstate natural gas transmission originating in northeastern Pennsylvania, proceeding into New York State through Broome, Chenango, Delaware, and Schoharie Counties, terminating at the existing Wright Compressor Station in Schoharie County. In New York State, the Project, rather than co-locating a significant portion of the pipeline on an existing New York State Department of Transportation (NYSDOT) Interstate I-88 access area[5], proposes to include new right-of-way (ROW) construction of approximately 99

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[4] Minor Source Air Permit Modification, Wright Compressor Station, Town of Wright, Schoharie County, NY, Iroquois Gas Transmission System, July 26, 2013.

[5] On September 25, 2013, NYSDEC provided FERC with comments on Constitution's Environmental Report dated June 13, 2013, supplemented in July, 2013 that concurred with the United States Army Corps of Engineers' (ACOE) comments and supported ACOE's request to FERC for additional details and documentation to support the reasons why all or some of the Project route could not be routed with the New York State Department of Transportation (NYSDOT) Interstate I-88 control of access area. On April 7, 2014, the Department provided FERC with preliminary comments on the DEIS which extensively analyzed the environmental benefits of utilizing Interstate I-88 (also referred to as Alternative "M") regarding stream, wetland, and interior forest habitats.

In June 2014, Constitution provided information about Alternative M which Department Staff found did not contain sufficient analysis to determine whether Alternative M would generate fewer impacts than Constitution's preferred route. However, using Constitution's information, as well as publicly available information, Department Staff

miles of new 30-inch diameter pipeline, temporary and permanent access roads and additional ancillary facilities.

Although the Department repeatedly asked Constitution to analyze alternative routes that could have avoided or minimized impacts to an extensive group of water resources, as well as to address other potential impacts to these resources, Constitution failed to substantively address these concerns. Constitution's failure to adequately address these concerns limited the Department's ability to assess the impacts and conclude that the Project will comply with water quality standards. Project construction would impact a total of 251 streams, 87 of which support trout or trout spawning. Cumulatively, construction would include disturbance to 3,161 linear feet of streams resulting in a total of 5.09 acres of stream disturbance impacts. Furthermore, proposed Project construction would cumulatively impact 85.5 acres of freshwater wetlands and result in impacts to regulated wetland adjacent areas totaling 4,768 feet for crossings, 9.70 acres for construction and 4.08 for acres for Project operation. Due to the large amount of new ROW construction, the Project would also directly impact almost 500 acres of valuable interior forest. Cumulatively, within such areas, as well as the ROW generally, impacts to both small and large streams from the construction and operation of the Project can be profound and could include loss of available water body habitat, changes in thermal conditions, increased erosion, and creation of stream instability and turbidity.

The individual quality and integrity of streams form the primary trophic levels that support many aquatic organisms and enable the provision of stream ecosystems at large. Under the Project's proposal, many of the streams to be crossed present unique and sensitive ecological conditions that may be significantly impacted by construction and jeopardize best usages. For a number of reasons, streams that support trout and other cold water aquatic species are typically the most sensitive. The physical features of these streams include dense riparian vegetation often composed of old-growth trees which are free of invasive species and that shade and cool streams while also maintaining the integrity of adjacent banks or hillslopes. Undisturbed spring seeps provide clean, cold water and stable yet sensitive channel forms maintain the integrity of the stream itself and further preserve water quality. Biologically, these streams are vital in providing complex habitat for foraging, spawning and nursery protection by wild reproducing trout.

Impacts to these streams are exacerbated as the cumulative negative effects of multiple crossings are added. Demonstrating this, the trout stream Clapper Hollow Creek and its tributaries would be crossed 11 times by the project. Likewise, Ouleout Creek and its tributaries will be crossed 28 times. Many of these streams are part of tributary networks that are dependent upon the contributing quality of connected streams to supply and support the physical and biological needs of a system. This is especially true in supporting the viability of wild trout populations.

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conducted a review that found that Alternative M could reduce overall impacts to water bodies and wetlands when compared to Constitution's preferred route.

Initially, 100 per cent loss of stream and riparian habitat will occur within the ROW as it is cleared and the pipeline trenched across streams. The trenching of streams will destroy all in-stream habitat in the shorter term and in some cases could destroy and degrade specific habitat areas for years following active construction. For example, highly sensitive groundwater discharge areas within streams could be disturbed, resulting in loss or degradation to critical spawning and nursery habitat. In addition, physical barriers will temporarily prevent the movement of aquatic species during active construction and changes to the stream channel will persist beyond the active construction period, creating physical and behavioral barriers to aquatic organism passage.

Changes to thermal conditions will also likely occur due to clearing of riparian vegetation. Because of the need to maintain an accessible ROW, subsequent revegetation will take considerable time to replace what was lost, notably long-lived, slow growing forest trees. Loss of riparian vegetation that shades streams from the warming effects of the sun will likely increase water temperatures, further limiting habitat suitability for cold-water aquatic species such as brook trout. The loss of shade provided by mature riparian vegetation may be exacerbated in the long term by climate change and thus be more significant since small changes in the thermal loading of cold water trout streams could result in the long term loss of trout populations.

NYSDEC Staff's extensive experience and technical reviews have shown that destabilization of steep hillslopes and stream banks will likely occur and may result in erosion and failure of banks, causing turbid inputs to waterbodies. Specifically, Project construction would include approximately 24 miles of steep slope or side slope construction. Cumulatively, this would amount to roughly 24 per cent of the new cleared right-of-way. Exposed hillslopes can become less stable and, when appropriate stormwater controls are not properly implemented, erosion can result in increased sediment inputs to streams and wetlands. If these events occur they can affect the water quality and habitat quality of these streams.

Trenching of streams can also destabilize the stream bed and such conditions can temporarily cause an exceedance of water quality standards, notably turbidity. Turbidity and sediment transport caused as a result of construction can negatively impact immediate and downstream habitat, can smother or kill sensitive aquatic life stages and reduce feeding potential of all aquatic organisms. More specifically, visual predators such as brook trout find food using visual cues. Thus, reductions in clear water conditions may reduce feeding success that can ultimately result in impacts on aquatic species' propagation and survival and corresponding reductions in the attainment of the waters' best usages.

As a result of chronic erosion from disturbed stream banks and hill slopes, consistent degradation of water quality may occur. Changes in rain runoff along ROW may change flooding intensity and alter stream channel morphology. Disturbed stream channels are at much greater risk of future instability, even if the actual work is conducted under dry conditions; long ranging stream erosion may occur up and

downstream of disturbed stream crossings well beyond the time of active construction. This longer term instability and erosion can result in the degradation of spawning beds and a decrease in egg development. The loss of spawning potential in some cold headwater streams may significantly reduce the long-term viability of these streams to support trout. Constitution proposes to cross 50 known trout spawning streams which will likely result in cumulative impacts on the trout populations in these streams. More specifically, and by way of an example of cumulative impacts to a water body, Constitution proposes to cross Ouleout Creek and its tributaries a total of 28 times with 15 of these crossings occurring in trout spawning areas.

Finally, at the landscape level, impacts to streams from the ROW construction are analogous to the cumulative impacts from roads. There is an established negative correlation between road miles per watershed area and stream quality. Thus, increases in the crossings of streams by linear features such as roads and the pipeline ROW can have cumulative impacts beyond the individual crossings. In the case of the 1 mile corridor surrounding the proposed Constitution pipeline, the pre-construction crossing/area ratio for the New York section is 2.28 crossings/square mile. However, the post-construction ratio will increase 44 per cent to 3.29 crossings/square mile. In specific basins this ratio will be higher and may cause a permanent degradation in stream habitat quality and likewise affect associated natural resources, including aquatic species' propagation and survival.

NYSDEC Application Reviews

On August 21, 2013, Constitution submitted the Application to obtain a CWA §401 WQC and NYSECL Article 15 and Article 24 permits to the Department. Due to insufficient information, NYSDEC issued a Notice of Incomplete Application on September 12, 2013, indicating that the Application was not complete for commencing review. On May 9, 2014, Constitution simultaneously withdrew and resubmitted its WQC request to the NYSDEC. Constitution supplemented the Application a number of times in 2014. A Notice of Complete Application for public review was published by NYSDEC in the Environmental Notice Bulletin (ENB) and local newspapers on December 24, 2014.

This notice commenced a public comment period ending on January 30, 2015 which was subsequently extended to February 27, 2015. To afford the Applicant time to respond to NYSDEC's requests for information based on thousands of public comments, and to extend the time period by which NYSDEC was required to issue the WQC and associated permits, Constitution submitted its second request to withdraw and resubmit the WQC on April 27, 2015. This resubmission initiated an additional UPA comment period until May 21, 2015. A total of 15,035 individual comments were received during the two comment periods. Most of these comments related to issues surrounding the Project applications; a relative handful were related to issues specific to the Compressor Station application.

Since August 21, 2013, Constitution supplemented its Application numerous times in response to additional information requests by the Department; Table 1 below provides an easy reference of the requests and submittals associated with the Application over the past several years.

Table 1		
Prepared by	Date	Summary
DEC	June 21, 2012	Summary of Pre-Application Meeting
DEC	May 30, 2013	Sample Matrix for Linear Projects
Constitution	August 28, 2013	401 WQC and related NYS Joint Permit application/documentation received by DEC
DEC	September 12, 2013	Notice of Incomplete Application
Constitution	November 27, 2013	Joint Permit Application - Supplemental Information
Constitution	May 9, 2014	401 WQC Application Withdrawal and Re-submittal
DEC	July 3, 2014	DEC Recommendations for Revised Joint Application
Constitution	August 13, 2014	Joint Permit Application - Supplemental Information # 2
Constitution	November 17, 2014	Additional Information Submittal
Constitution	November 17, 2014	Responses to Wetland Mitigation Plan Deficiencies
Constitution	November 24, 2014	Updated and Revised Information
Constitution	December 1, 2014	Response to Request for Additional Clarification of Wetland Impacts
DEC	December 24, 2014	Notice of Complete Application
DEC	December 31, 2014	NY Stream Crossing Feasibility Analysis Information Request
Constitution	January 22, 2015	Summary of Changes Trenchless Locations
Constitution	February 2, 2015	Revised Wetland Mitigation Plan
Constitution	February 6, 2015	Phase I Stream Analysis/Open Cut
DEC	February 19, 2015	DEC Proposed Wetland Re-route
Constitution	March 27, 2015	Joint Permit Application - Supplemental Information
Constitution	April 24, 2015	Response to DEC Preferred List of Trenchless Stream Crossings
Constitution	April 27, 2015	401 WQC Application Withdrawal and Re-submittal
DEC	April 27, 2015	Notice of Complete Application - WQC Withdrawal and Re-submittal

Constitution	May 13, 2015	Wetland Mitigation Area - Application for Pesticide Permit
Constitution	May 20, 2015	Supplemental Information - Trenchless Crossings
DEC	June 1, 2015	Notice of Incomplete Application - Pesticide Permit
Constitution	June 19, 2015	Canadarago Lake Mitigation Area Update
Constitution	June 30, 2015	Updated Trenchless Crossing Matrix
Constitution	July 8, 2015	Joint Permit Application - Supplemental Information - Wetland Re-route
Constitution	July 14, 2015	Additional Information Submittal - Wetland Impacts and Mitigation
Constitution	August 5, 2015	Response to Notice of Incomplete Application - Pesticide Permit
Constitution	September 15, 2015	Joint Permit Application - Supplemental Information
DEC	October 2, 2015	Acknowledgement of NOI - SPDES MS GP - Contractor Yard 5B
Constitution	January 6, 2016	Wetland Mitigation Area - Application for Pesticide Permit - Betty Brook
DEC	February 26, 2016	Acknowledgement of NOT - SPDES MS GP - Contractor Yard 5B

STATEMENT OF REASONS FOR DENIAL

The Department, in accordance with CWA §401, is required to certify that a facility meets State water quality standards prior to a federal agency issuing a federal license or permit in conjunction with its proposed operation. An applicant for a water quality certification must provide the Department sufficient information to demonstrate compliance with the water quality regulations found at 6 *NYCRR Section 608.9 (Water* Quality Certifications). Pursuant to this regulation, the Applicant must demonstrate compliance with §§301, 302, 303, 306 and 307 of the Federal Water Pollution Control Act, as implemented, by applicable water quality standards and thermal discharge criteria set forth in 6 NYCRR Parts 701,702,703, 704 and 750, and State statutes, regulations and criteria otherwise applicable to such activities.[6] Denial of a WQC may occur when an application fails to contain sufficient information to determine whether the application demonstrates compliance with the above stated State water quality standards and other applicable State statutes and regulations due to insufficient information. The Department is guided by statute to take into account the cumulative impact upon all resources in making a determination in connection with any license, order, permit or certification, which in this case includes being able to evaluate the cumulative water quality impacts of ROW construction and operation on the numerous water bodies mentioned in this letter.[7]

[6] 6 NYCRR §608.9 (2) and (6).

[7] ECL 3-0301(1)(b).

As noted above, Constitution supplemented its Application in response to information requests issued to it by the Department but has not supplied sufficient information for the Department to be reasonably assured that the State's water quality standards would be met during construction and operation of the proposed pipeline. As a result the Department cannot be assured that the aforementioned adverse impacts to water quality and associated resources will be avoided or adequately minimized and mitigated so as not to materially interfere with or jeopardize the best usages of affected water bodies. The following are the Department's reasons for denial of Constitution's Application based on applicable sections of the New York State environmental laws, regulations or standards related to water quality.

Stream Crossings

Project construction would disturb a total of 251 streams under New York State's jurisdiction, 87 of which support trout or trout spawning. Cumulatively, construction would disturb a total of 3,161 linear feet of streams and result in a combined total of 5.09 acres of temporary stream disturbance impacts. From inception of its review of the Application, NYSDEC directed Constitution to demonstrate compliance with State water quality standards and required site-specific information for each of the 251 streams impacted by the Project. NYSDEC informed Constitution that *all 251* stream crossings must be evaluated for environmental impacts and that trenchless technology was the preferred method for stream crossing. This information was conveyed to Constitution and FERC on numerous occasions since November 2012; however, Constitution has not supplied the Department with the necessary information for decision making.

Deficient Trenchless Stream Crossings Information and Lack of Specific Stream Crossings Details

Staff's review of the Application includes an analysis of adverse stream crossing impacts, specifically the suitability of open trenching versus trenchless techniques or subsurface boring methods. Open trenching is a highly impactful construction technique involving significant disturbance of the existing stream bed and potential long-term stream flow disruption, destruction of riparian vegetation and establishment of a permanently cleared corridor. Comparatively, trenchless methods present significantly fewer environmental impacts to the regulated resource. Because alternative trenchless techniques exist for this Project, the Department requested additional information from Constitution to evaluate their feasibility and to determine if the Application provides enough information to demonstrate compliance with water quality standards.

Since NYSDEC's most protective method for stream crossings is some form of a trenchless technology, NYSDEC directed Constitution to determine whether a trenchless technology was constructible for each stream crossing.[8] On a number of occasions NYSDEC identified the need to provide information so that it could evaluate trenchless stream installation methods (see Table 2, below); however, Constitution has not provided sufficient information to enable the Department to determine if the

[8] NYSDEC Comments to FERC, November 7, 2012.

Application demonstrates compliance with 6 NYCRR Part 703, including, but not limited to, standards for turbidity and thermal impacts (6 NYCRR §703.2), and 6 NYCRR Part 701 (best usages).

	Table 2	
Prepared by	Date	Summary
NYSDEC	June 21, 2012	In a summary of the initial pre-application meeting with Constitution, which took place on June 7, 2012, NYSDEC stated in a letter to Constitution that for protected streams and wetlands, trenchless technology is the preferred method for crossing and should be considered for *all* such crossings (emphasis added).
NYSDEC	November 7, 2012	In comments to FERC, NYSDEC stated that for streams and wetlands the preferred method for crossing is trenchless technology. The draft EIS should evaluate cases where other methods are proposed and Constitution should explain why trenchless crossing technology will not work or is not practical for that specific crossing.
FERC	April 9, 2013	FERC's Environmental Information Request (EIR) directed Constitution to address all of the comments filed in the public record by other agencies regarding the draft Resource Reports including all comments from the NYSDEC.
NYSDEC	May 28, 2013	Meeting with Constitution and NYSDEC staff at the DEC Region 4 office to review stream crossings. NYSDEC reiterates that acceptable trenchless technology was the preferred installation method and that stream crossings should be reviewed for feasibility of using those technologies.
NYSDEC	July 17, 2013	NYSDEC comments to FERC reiterates that trenchless technology is preferred method for stream crossings. The DEIS should evaluate cases where other methods are proposed and the Project Sponsor should explain why trenchless technology will not work or is not practical for that specific crossing.
NYSDEC and Constitution staff	July - August 2013	Field visits of proposed stream crossings prior to permit applications to the Department. At each crossing, NYSDEC emphasized to

		Constitution staff that trenchless technology is preferred/most protective.
Constitution	November 2013	Trenchless Feasibility Study provided by Constitution that described its choices of stream crossing techniques. Upon review, document and justifications found insufficient and all streams less than 30' wide were arbitrarily eliminated from any consideration for trenchless crossing methods.
NYSDEC and Constitution staff	December 31, 2014	Meeting conducted with Constitution staff in which NYSDEC indicated that the Trenchless Feasibility Study was inadequate, *e.g.* provided insufficient justification and removed all streams less than 30 feet in width from analysis.
NYSDEC	December 31, 2014	To aid in an appropriate review of stream crossing techniques and compliance with water quality standards, an informational request table including required technical information was developed by NYSDEC and provided to Constitution.
US Army Corps of Engineers	January 13, 2015	U.S. Army Corps of Engineers letter reiterates a request for a feasibility analysis of trenchless crossings.
Constitution and NYSDEC	January 23, 2015	Meeting between Constitution and NYSDEC staff wherein Constitution stated it was unable to complete the table (described above on December 31, 2014). NYSDEC staff indicated that the justification for stream crossing methods was insufficient and that appropriate site specific information must be provided.
Constitution and NYSDEC	January 28, 2015	Conference call: NYSDEC reiterated its request for a site specific analysis of trenchless stream crossings for all streams including those under 30 feet wide.
Constitution	February 5, 2015	Constitution provided an updated example of a trenchless feasibility study but that example continued to exclude streams up to 30 feet wide from analysis and did not provide detailed information of the majority of streams.

Constitution submitted a Trenchless Feasibility Study (Study) to FERC in November of 2013 which the Department has analyzed for the purpose of reviewing Constitution's WQC application. This Study did not include the information that FERC directed Constitution to supply to NYSDEC (and others) in its April 9, 2013 EIR, which incorporated NYSDEC's information requests, including NYSDEC's request to

Constitution dated November 7, 2012. Moreover, the Study did not include information that NYSDEC specifically requested in meetings and site visits with Constitution throughout 2013 and did not provide a reasoned analysis to enable the Department to determine if the Project demonstrates compliance with water quality standards.

Of the 251 streams to be impacted by the Project, Constitution's Study evaluated only 87 streams, in addition to the Schoharie Creek, as part of the Phase I desktop analysis[9] which Constitution used to determine if surface installation methods warranted consideration for a trenchless design. Of the 87 streams reviewed, Constitution automatically eliminated 41 streams from consideration for trenchless crossing because those streams were 30 feet wide or less. Constitution further eliminated 10 more streams from the Study because although they were in the proposed ROW, they would not be crossed by the Project. Accordingly, a total of 24 streams were subsequently analyzed in the Study's Phase II analysis which evaluated construction limiting factors including available workspace, construction schedules and finances. Using its review criteria, Constitution's Study finally concluded that only 11 stream crossings of the 251 displayed preliminary evidence in support of a potentially successful trenchless design and were chosen for the Phase III geotechnical field analysis. Department staff consistently told Constitution that its November 2013 Trenchless Feasibility Study was incomplete and inadequate (See Table 2).

Constitution's continued unwillingness to provide a complete and thorough, Trenchless Feasibility Study required Department staff to engage in a dialogue with Constitution on potential trenchless crossings for a limited number of streams. On April 24, 2015, Constitution's consultant produced a revised draft list of 29 trenchless stream crossings and an example of plans that would be provided for each crossing on the proposed list. Subsequently, in May 2015, Constitution provided detailed project plans for 25 potential trenchless crossings, but only two of those plans were based on full geotechnical borings that are necessary to evaluate the potential success of a trenchless design. Detailed project plans including full geotechnical borings for the remaining stream crossings have not been provided to the Department. From May through August 2015, NYSDEC engaged in a dialogue with Constitution on potential trenchless methods for 19 streams, although NYSDEC did not form a conclusion on a crossing method for the remaining streams, including the vast majority of trout and trout spawning streams. Furthermore, as noted above, Constitution's unwillingness to adequately explore the Alternative M route alternative, with the prospect of potentially fewer overall impacts to water bodies and wetlands when compared to Constitution's preferred route, means that the Department is unable to determine whether an alternative route is actually more protective of water quality standards. The Department therefore does not have adequate information to assure that sufficient impact avoidance, minimization or mitigation measures were considered as to each of the more than 200 streams proposed for trenched crossings.

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

Due to the lack of detailed project plans, including geotechnical borings, the Department has determined to deny Constitution's WQC Application because the supporting materials supplied by Constitution do not provide sufficient information for each stream crossing to demonstrate compliance with applicable narrative water quality standards for turbidity and preservation of best usages of affected water bodies. Specifically, the Application lacks sufficient information to demonstrate that the Project will result in no increase that will cause a substantial visible contrast to natural conditions.[10]

Furthermore, the Application remains deficient in that it does not contain sufficient information to demonstrate compliance with 6 NYCRR Part 701 setting forth conditions applying to best usages of all water classifications. Specifically, "the discharge of sewage, industrial waste or other wastes shall not cause impairment of the best usages of the receiving water as specified by the water classifications at the location of the discharge and at other locations that may be affected by such discharge."[11]

Cumulatively, impacts to both small and large streams from the construction and operation of the Project can be profound and include loss of available habitat, changes in thermal conditions, increased erosion, creation of stream instability and turbidity, impairment of best usages, as well as watershed-wide impacts resulting from placement of the pipeline across water bodies in remote and rural areas (See Project Description and Environmental Impacts Section, above). Because the Department's review concludes that Constitution did not provide sufficient detailed information including site specific project plans regarding stream crossings (*e.g.* geotechnical borings) the Department has determined to deny Constitution's WQC Application for failure to provide reasonable assurance that each stream crossing will be conducted in compliance with 6 NYCRR §608.9.

In addition, the Application lacks required site-specific information for each of the 251 stream crossings including, but not limited to the specific location of access roads, definite location of temporary stream crossing bridges, details of temporary bridges including depth of abutments in stream banks, details of proposed blasting and the location of temporary coffer dams for stream crossings. Absent this information and the information described above, the Department cannot determine whether additional water quality impact avoidance, minimization or mitigation measures must be taken to ensure compliance with water quality standards in water bodies associated with this infrastructure.

Insufficient Site-Specific Information on Depth of Pipe

NYSDEC received numerous public comments regarding the necessary depth for pipeline burial in stream beds that would prevent inadvertent exposure of the pipe. Historically, Department staff has observed numerous and extensive vertical

[10] 6 NYCRR §703.2.
[11] 6 NYCRR §701.1.

movements of streams in New York State that have led to pipe exposure and subsequent remedial projects to rebury the pipe and armor the stream channel. These subsequent corrective actions caused severe negative impacts on water quality and seriously impacted the stability and ecology of the stream that could have been avoided with a deeper pipe. Department staff requested that Constitution provide a comprehensive and site-specific analysis of depth for pipeline burial, but Constitution provided only a limited analysis of burial depth for 21 of the 251 New York streams.[12] Without a site-specific analysis of the potential for vertical movement of each steam crossing to justify a burial depth, NYSDEC is unable to determine whether the depth of pipe is protective of State water quality standards and applicable State statutes and standards.

In addition to impacts to water quality described above and without proper site-specific evaluations, future high flow events could expose the pipeline, resulting in risks to the health, safety, and welfare of the people of New York State. Pipe exposure would require more extensive stabilization measures and in stream disturbances resulting in addition degradation to environmental quality. We note that flooding conditions from extreme precipitation events are projected to increase on the operational span of the pipeline due to climate change.

Deficient Blasting Information

Constitution's Blasting Plan, dated August, 2014, outlines the procedures and safety measures to which Constitution would adhere in the event that blasting is required for Project installation. The Blasting Plan does not provide site-specific information where blasting will occur but instead provides a list of potential blasting locations based on the presence of shallow bedrock. In New York alone, Constitution identifies 42.77 total miles where shallow bedrock occurs, or approximately 44 per cent of the route, involving 84 wetlands crossings and 27 waterbody crossings. Constitution indicates that a final determination on the need for blasting will be made at the time of construction in waterbodies and wetlands. Due to the lack of specific blasting information needed for review with respect to associated water bodies, NYSDEC is unable to determine whether this Plan is protective of State water quality standards and in compliance with applicable State statutes and standards.

Wetlands Crossings

Wetlands provide valuable water quality protection by retaining and cleansing surface runoff to water bodies. Constitution's Application does not demonstrate that wetland crossings will be performed in a manner that will avoid or minimize discharges to navigable waters that would violate water quality standards, including turbidity. Absent detailed information for each wetland crossing that demonstrates Constitution properly avoided, minimized and mitigated impacts to wetland and adjacent areas, the Application does not supply the Department with adequate information to assure that

[12] See, Trout Stream Restoration Report, dated August 2014.

streams and water bodies will not be subject to discharges that do not comply with applicable water quality standards.

NYSDEC Denial

Constitution was required to submit an Application providing sufficient information to demonstrate compliance with the regulations found at 6 NYCRR §608.9, Water Quality Certifications. Pursuant to this regulation, an Applicant must demonstrate compliance with §§301, 302, 303, 306 and 307 of the Federal Water Pollution Control Act, as implemented, by applicable water quality standards and thermal discharge criteria set forth in 6 NYCRR Parts 701,702,703, 704 and 750, and State statutes, regulations and criteria otherwise applicable to such activities.[13] The Department must also take into account the cumulative impact to water quality of the full complement of affected water resources in making any determination in connection with any license, order, permit or certification.[14] For the reasons articulated above, the Department hereby denies Constitution's WQC Application because it does not supply adequate information to determine whether the Application demonstrates compliance with the above stated State water quality standards and other applicable State statutes and regulations.

This notice of denial serves as the Department's final determination. Should Constitution wish to address the above deficiencies, a new WQC application must be submitted pursuant to 6 NYCRR §608.9 and 6 NYCRR Part 621. Uniform Procedures Regulations, 6 NYCRR §621.10 provide that that an applicant has a right to a public hearing on the denial of a permit, including a §401 WQC. A request for hearing must be made in writing to me within 30 days of the date of this letter.

Sincerely,

John Ferguson
Chief Permit Administrator

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

[13] 6 NYCRR §608.9 (2) and (6).
[14] ECL 3-0301 (1)(b).