UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

IN THE MATTER OF	**)**	
	)	
Constitution Pipeline Company, LLC	**)**	**Docket No. CP13-499-000**

STATEMENT IN OPPOSITION TO CONSTITUTION PIPELINE COMPANY'S REQUEST FOR A PARTIAL NOTICE TO PROCEED AND MOTION FOR A STAY PENDING REHEARING BY STOP THE PIPELINE

Pursuant to Rules 101 and 212 of the Federal Energy Regulatory Commission ("FERC" or "Commission") Rules of Practice and Procedure, 18 C.F.R. §§ 385.101(a)(1), 385.212, the Pace Environmental Litigation Clinic, Inc. hereby files this statement on behalf of Stop the Pipeline ("STP") to object to the January 8, 2016 request for a partial notice to proceed ("NTP") made by the Constitution Pipeline Company, LLC ("Company"). STP further hereby requests a stay of the Commission's December 2, 2014 Order ("Order") granting a Certificate of Public Convenience and Necessity ("Certificate") to the Company as well as a stay of all construction activities, including the felling of trees, conducted under such Certificate or under any "partial" NTP, should the Commission grant the Company's request, pending review of the Order on rehearing and review of any order granting the partial NTP. FERC staff cannot approve the request for a partial NTP as it alters the terms of the Order.

I. BACKGROUND

On April 5, 2012 the Company requested pre-filing review of a proposed 30-inch diameter, 121-mile long natural gas transmission line that would run from Susquehanna County, Pennsylvania, through Broome, Chenango, Delaware and Schoharie Counties, New York. FERC

approved the request on April 16, 2012, and assigned docket number PF12-9 to the pre-filing. On September 14, 2012, FERC published a Notice of Intent to prepare an Environmental Impact Statement in the Federal Register and supplemented that notice on October 9, 2012. During the comment period on the scope of work, STP and its members submitted hundreds of comments requesting studies and analyses on many topics, including cumulative impacts and the need for the project. *See* STP's comments (submittals 20121010-5028 and 20121109-5196).

The Company submitted a 7(c) application for a certificate of public convenience and necessity for a 124-mile long pipeline on June 13, 2013, under docket number CP13-499. *See* Company's application (submittal 20130613-5078). STP filed a timely motion to intervene and analyzed the Company's lack of response to issues raised by the New York State Department of Environmental Conservation ("DEC") and United States Army Corps of Engineers ("ACE"). *See* STP's Motion to Intervene and Analysis (submittals 20130717-5045 and 20131217-5017). FERC released its Draft Environmental Impact Statement ("DEIS") on February 21, 2014. *See* FERC's DEIS (submittal 20140212-4002). Six federal and state agencies characterized the DEIS as insufficient, and requested a revised or supplemental DEIS on which to comment. *See* United States Environmental Protection Agency ("EPA") comment (submittal 20140409-5120); the United States Department of Interior/ Fish and Wildlife Services ("FWS") comment (submittal 20140408-5035); ACE comment (submittal 20140408-5149); DEC comment (submittal 20140407-5409); New York State Office of Attorney General (OAG) comment (submittal 20140416-5100); and New York State Public Service Commission (PSC) comment (submittal 20140407-5001). STP, along with its individual members, again requested a thorough environmental analysis of all issues, including cumulative impacts and the need for the project, and pointed out countless legal requirements under a variety of laws, including the Clean Water Act ("CWA") and National Environmental Policy Act ("NEPA"). *See* STP's comments on DEIS (submittal 20140408-5088); Anne Marie Garti's Report on Need for Project (submittals 20140407-5237, 20140407-5252). The Final Environmental Impact Statement ("FEIS"), issued on October 24, 2014, did not include documentation on a variety of issues raised by STP, including cumulative impacts and the need for the project. Over the past year and a half, STP has persistently called for a Supplemental Draft Environmental Impact Statement ("SDEIS") to cure the lack of required documentation and analyses. *See* STP's comments (submittals 20140707-

5086, 20140923-5016, 20141017-5152, 20150529-5195, 20150921-5040, 20151109-5091, 20151203-5030). All of these requests were ignored by FERC.

The Commission issued an Order granting the Company a Certificate on December 2, 2014. *See* FERC's Order (submittal 20141202-4011). STP filed a timely request for rehearing on January 2, 2015, making a variety of claims, including the Commission's violation of the CWA and Citizens' Due Process rights by failing to wait for DEC's determination of whether the project would violate New York State's water quality standards. *See* STP's request for rehearing (submittals 20150102-5158, 20150102-5014). The Commission granted STP's request for rehearing on January 27, 2015 for the sole purpose of granting itself more time to issue a final order ("Tolling Order"). *See* FERC's Tolling Order (submittal 20150127-3038). On March 10, 2015, STP demanded a final order from FERC, and notified the Commission it would be petitioning the Second Circuit Court of Appeals for a Writ of Mandamus, in an attempt to resolve the underlying legal issues prior to the commencement of project construction. *See* STP's notice to FERC (submittal 20150310-5125). The petition was denied.

In December 2014, the Company filed 125 complaints in condemnation in the Northern District of New York ("NDNY"). *See* Ex. 1. The NDNY granted the Company a partial motion for summary judgment and a motion for an injunction for immediate access. The latter included Court ordered easements across each of these parcels of land according to the terms of the December 2, 2014 Order. *See* Ex. 2, at 1. ("A permanent right of way and easement . . . as approved by the Federal Energy Regulatory Commission pursuant to the Natural Gas Act and the Order of the Federal Energy Regulatory Commission dated December 2, 2014"). FERC's Order states, "**Prior to receiving written authorization from the Director of OEP to commence construction of their respective project facilities**, the Applicants shall file documentation that they have received all applicable authorizations required under federal law (or evidence of waiver thereof)." *See* Order at 51. The Company has not received two federal authorizations: (1) a 401 water quality certificate from DEC and (2) a 404 permit from the ACE, both of which are required under the Clean Water Act. *See* Company's January 5, 2016 status report, Att. A at 4, 6 (submittal 20160105-5343). However, in direct contradiction to FERC's Order, the Company has now filed a request for a partial notice to proceed to cut almost all of the trees along the pipeline route, claiming that felling trees is "not construction." *See* Company's request for NTP at 1–2 (submittal 20160108-5125).

II. ARGUMENT

A. The Company's Request for a Partial Notice to Proceed Must Be Denied

1. Introduction

On January 8, 2016, in spite of not having obtained two required federal authorizations, Lynda Schubring, Environmental Project Manager for the Company, submitted a four-page letter, with six attachments, requesting a partial notice to proceed from FERC. *See* Company's request for NTP (submittal 20160108-5125). One federal authorization that the Company has not obtained is a 401 water quality certificate that can be granted, conditioned, denied, or waived by DEC. The other missing authorization is a 404 permit that can be granted, conditioned, or denied by ACE. Both are required under the Clean Water Act, and both are mandatory conditions in the Commission's Order. 33 U.S.C. §§ 1341, 1344 (2012); Order at 45, 51. The Company has admitted in the thirty-two weekly status reports it has filed with FERC that it has not obtained these two federal authorizations, and that they are both required to obtain a NTP. *See, e.g.*, Company's January 5, 2016 status report at 1, Att. A at 4, 6 (submittal 20160105-5343) ("A FERC Notice to Proceed (NTP) is required prior to the commencement of any other Project construction activities and is currently pending necessary federal authorizations."). In spite of these acknowledgments, the Company is now claiming that felling approximately 700,000 trees on 1000 acres of land is not part of the construction of this project.[1] NTP at 1–2. The notion that site preparation is not an integral part of construction would be laughable for its absurdity if the consequences here were not so dire.[2]

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[1] FERC, FEIS 4-118 (2014) (submittal 20141024-4001). (The table states that 1,034 acres of upland forest would be affected by construction and operation of the pipeline). EPA, Comment on Marc 1, at 7 (July 11, 2011), FERC Docket No. CP10-480-000, submittal 20110711-5181. (EPA states "one acre of land sustains approximately 700 mature hardwood trees, according to Guidelines issued by the U.S. Department of Energy (DOE) pursuant to Section 1605(b) of the Energy Policy Act of 1992. . . .")

[2] *See, e.g.*, *Construction*, BUSINESS DICTIONARY, http://www.businessdictionary.com/definition/construction.html ("1. General: *Clearing*, dredging, excavating, and grading of land and other activity associated with buildings, structures, or other types of real property such as bridges, dams, roads." (emphasis added)); *Glossary of Statistical Terms: New Construction*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), https://stats.oecd.org/glossary/detail.asp?ID=1774 ("New construction refers to *site preparation* for, and construction of, entirely new structures and/or significant extensions to existing structures whether or not the site was previously occupied." (emphasis added)). "Clearing" or "site preparation" are typically the first phase of construction and cannot be separated from the activities that follow.

In typical fashion, the Company is claiming one thing in this docket, while stating something entirely different, under oath, in another. In December 2014, the Company filed 125 complaints in condemnation in the NDNY. Ex. 1. It also filed an injunction for immediate access to the land, to which it attached an affidavit by Matthew Swift, dated January 9, 2015. *See* Ex. 3, Swift Aff. The affidavit begins by referencing another. *Id.* ¶ 2. In his December 11, 2014 affidavit attached to the motion for partial summary judgment, Mr. Swift states his title as "Project Manager for Williams Gas Pipeline Company, LLC, the operator of Constitution, and [] Project Manager for the Project." Ex. 4, Swift Aff. ¶ 4. In his affidavit for an injunction, Mr. Swift swears, under penalty of perjury, that construction begins with tree clearing. Ex. 3, Swift Aff. ¶ 8 ("Pipeline construction begins with tree and vegetation clearing, and installation of environmental controls, followed by grading and trenching."). Now, in a desperate attempt to move the project forward, the Company is directly contradicting its own Project Manager by trying to claim that cutting 700,000 trees is not part of construction. In other words, the Company is attempting to defraud the public, irreparably destroy private property, and subvert State and National laws.

The Company implicates other agencies in this ploy. Ms. Schubring frames the request for a NTP as a requirement of the FWS, which issued a Biological Opinion ("BO") for the Northern long-eared bat on December 31, 2015. NTP at 1; FWS, BO (submittal 20160105-4002). However, nowhere in the BO does FWS say that trees must be cut *this* winter. In fact, consistent with every other document on file other than the request for a NTP, the BO states that all federal authorizations must be obtained before construction is commenced. BO at 2 ("Construction of the project cannot commence until the FERC issues a notice to proceed. This is anticipated in late 2015 or early 2016 upon completion of ESA consultation and *issuance of pending state and federal permits*." (emphasis added)). Thus, according to the FWS, the cutting of trees is contingent upon DEC granting a 401 water quality certificate and the ACE granting a 404 permit.

There is no evidence in the documents submitted by the Company that DEC, ACE, or any other agency has formally agreed to or approved proceeding in the fashion proposed by the Company. The Company has not included any letters, notarized transcripts, or affidavits that are specific to this pipeline. Instead it included two old letters from the ACE in reference to two completely different projects in Pennsylvania where a 401 water quality certificate may already

have been granted. *See* NTP, Att. A. However, even if the Company had submitted credible evidence of agency complicity in this outrageous proposal, federal laws still must be followed. Neither lower level staff in state and federal agencies, nor the Commission itself, can override the requirements of federal law. *City of Tacoma v. FERC*, 460 F.3d 53, 65 (D.C. Cir. 2006) ("Though FERC makes the final decision as to *whether* to issue a license, FERC *shares* its authority to impose license conditions with other federal agencies."). Accordingly, the Commission must deny this request for a "partial" NTP.

2. The Commission would be exceeding its authority if it grants the request

The Commission has two main roles as it considers an application for an interstate gas pipeline. The first is to determine whether the project qualifies for a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c) (2012).[3] The application for a certificate of public convenience and necessity also triggers an environmental review under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), with FERC designated as lead agency, 15 U.S.C. § 717n(b)(1). In these roles, the Commission must ensure compliance with all federal laws, including the partnership between the state and federal government under the Clean Water Act. *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 143 (2d Cir. 2008). As such, *the 401 water quality certificate "is a prerequisite to the FERC granting final approval to commence construction of the proposed pipeline*." *Id.* at 144 (emphasis added). Since the clearing of almost 700,000 trees in preparation for laying pipeline in the ground is the first phase of construction, the Commission must deny the Company's request to cut trees until DEC grants a 401 water quality certificate. This also ensures that there will be no irreparable injury if DEC denies the water quality certificate, or conditions it in a way that affects the current proposal. *Pub. Util. Dist. No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 711 (1994) [hereinafter *PUD 1*] ("Section 401(d) thus allows the State to impose 'other limitations' on the project in general to assure compliance with various provisions of the Clean Water Act and with 'any other appropriate requirement of State law.'"). Thus DEC has the right to deny a 401 water quality certificate under subsection (a), and the right

[3] *License*, BLACKS LAW DICTIONARY (9th ed. 2009) ("1. A permission, usu. revocable, to commit some act that would otherwise be unlawful; 2. The certificate or document evidencing such permission.").

to condition it in accordance with "any other appropriate requirement of State law" under subsection (d). 33 U.S.C. § 1341(a), (d). In either event, the result could be that the pipeline project is never commenced, and, if the NTP is granted, the irreparable injury to the environment, STP and its members would be for naught.

While the Commission has the authority to impose conditions in its certificates, that power does not extend to overriding the explicit Congressional mandates in the Clean Water Act. The Natural Gas Act grants the Commission a much more modest right, an ability to attach "reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e). The words "reasonable terms and conditions" are not a carte blanche, and certainly do not empower the Commission to interpret or rewrite federal law to preempt the express rights of states under the Clean Water Act. *City of Tacoma*, 460 F.3d at 65. Upon judicial review, no deference will be given to FERC on water quality issues as it is DEC, not FERC, that is authorized to decide whether New York State water quality standards might be violated. *Ala. Rivers All. v. FERC*, 325 F.3d 290, 396–97 (D.C. Cir. 2003). For this reason, the Company's unsworn and unspecific claims of "approval" from unknown employees of various state and federal agencies, or the Commission's "interpretation" of those "approvals," are meaningless. No determination has been made by DEC that the tree and vegetation clearing does not implicate section 401, nor has the project been approved.

a. DEC has the power to deny the 401 Water Quality Certificate

In 1972 Congress passed the Clean Water Act so "that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1). To achieve this lofty goal, it was mandated that "the discharge of any pollutant by any person shall be unlawful." *Id.* § 1311(a). Congress integrated an existing state role into the federal regime, granting states the right to develop and enforce water quality standards. *Id.* § 1313. State water quality standards were considered so critical to the success of cleaning up our nation's waters that Congress provided states with the authority to stop federal projects that might violate water quality.

> Any applicant for a Federal license or permit to conduct any activity . . . 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. . .that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. § 1341(a)(1). The Clean Water Act specifies that a 401 Certificate must be issued *before* a federal license or permit is issued. "No 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). This statement is explicit and unambiguous, and gives states the right to block federal projects that the State determines will violate state water quality standards. *Islander E.*, 525 F.3d at 164. That right becomes meaningless if hundreds of thousands of trees along a 124-mile corridor can be cut prior to DEC's decision.

b. DEC has broad authority to condition the 401 WQC

In its request for a NTP prior to the issuance of 401 water quality certificate, the Company says it will "avoid watercourses and waterbodies." NTP at 2. It also claims that "because this activity does not involve a discharge of dredged and/or filled material, no state certification is required for this activity, in that Section 401 of the CWA only applies to activities 'which may result in any discharge into the navigable waters.'" *Id.* This is either a complete misunderstanding of DEC's authority under the Clean Water Act, or a blatant attempt to diminish it.

Once a 401 water quality certificate is required, DEC assumes great power over the project. In *PUD 1,* the Supreme Court held that a State's authority under the Clean Water Act is extremely broad and includes the right to impose conditions far from the actual disturbance. *PUD 1*, 511 U.S. at 708–09, 723. To reach this decision, the Court reviewed all of section 401.

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

Id. at 711. The Supreme Court thus upheld State-imposed conditions in a 401 certification that required minimum stream flows in an undisturbed part of the water body, even though minimum stream flows did not implicate the "discharge" that triggered the 401 certification requirement. DEC apparently shares the view of the Supreme Court, and recently used this argument in its denial of a 401 water quality certificate for a nuclear power plant.[4] New York State's position is

[4] In denying Entergy's application for a section 401 water quality certificate, DEC stated that applicants are required to demonstrate compliance with all "[s]tate statutes, regulations and criteria otherwise

that "the applicant *must* demonstrate compliance with sections 301-303, 306 and 307 of the [CWA], as implemented by state WQS, effluent limitations, discharge prohibitions, new source performance standards, and state statutes, regulations and criteria otherwise applicable to [the project] activities." N.Y. COMP. CODES R. & REGS. tit. 6, § 608.9 (2016). In this instance, the appropriate state statutes include, but are not limited to, fish and wildlife laws, and protections of endangered or threatened species, and species of concern. N.Y. ENVTL. CONSERV. LAW §§ 11-0105, 11-0535 (McKinney 2016). These species, and their habitats, may include the very trees and undergrowth the Company is asking permission to destroy. In addition, under the Company's proposal, trees, limbs, and other undergrowth would be left lying on the ground for many months, if not years. If another extreme storm event were to happen this winter or spring, this debris could be carried by the torrents that suddenly appear, scour the banks and beds of streams, dam existing streams, and cause even more catastrophic flooding in the valleys that lie downhill from the still proposed route.[5] Such an occurrence would cause substantial turbidity and other problems, and thus violate New York State water quality standards. N.Y. COMP. CODES R. & REGS. tit. 6, § 703.2.

Throughout this entire process, DEC has been critical of the Company's application and the adequacy of the environmental review performed by FERC. For example, DEC has specifically stated that the alternative and cumulative impact analyses in the DEIS are deficient. *See* DEC's comments on DEIS (submittal 20140407-5409). Instead of endorsing FERC's decision to approve the Company's preferred route, it requested an analysis of another route that it characterizes as having less of an impact on water quality. *See* DEC's comments on its hybrid alternative (submittal 20150529-5195). In other words, it is possible DEC will condition the 401 water quality certificate in a way the Company is not considering. *See PUD 1*, 511 U.S. at 713. ("[L]imitations to assure compliance with state water quality standards are also permitted by 401(d)'s reference to 'any other appropriate requirement of State law.'"). It is also possible that this maneuver by the Company is meant to foreclose such a possibility.

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applicable to such activities." This language expresses DECs own position that relevant state statutes and regulations must be complied with by applicants before DEC will grant a section 401 certificate. *See* DEC, NOTICE OF DENIAL FOR JOINT APPLICATION FOR CWA 401 WATER QUALITY CERTIFICATION NRC LICENSE RENEWAL - ENTERGY NUCLEAR INDIAN POINT UNITS 2 AND 3, at 21–23 (2010), http://www.dec.ny.gov/docs/permits_ej_operations_pdf/ipdenial4210.pdf.

[5] In the past decade, there have been three extreme storm events in the vary region where this pipeline is proposed. They devastated towns and caused billions of dollars in damages.

The point is that FERC must wait for the DEC's decision. The Commission simply does not have the authority to decide whether the felling of 700,000 trees might violate New York State water quality standards. DEC has the right to impose any number of conditions on this project, and those conditions could include the protection of the very trees and undergrowth that would be prematurely cut. The unsworn and unspecific claim that the Company spoke to someone at DEC and that unnamed person did not object to the request—even if true—does not somehow grant the Company or the Commission the right to conclude that DEC has formally taken such a position or consented to the Company's request. Since the Supreme Court has sanctioned the appropriate use of State law in these situations, FERC cannot grant the Company's request to cut trees prior to the issuance, or denial, of a 401 water quality certificate.

3. A partial notice to proceed is contrary to FERC's December 2, 2014 Order

The Commission's December 2, 2014 Order forbids granting this request for a partial NTP. FERC's Certificate is conditioned on "compliance with the environmental conditions listed in the appendix to this order." *See* Order at 45. Condition 7 says that the Company shall file weekly status reports that shall include "an update on the Applicants efforts to obtain the necessary federal authorizations[.]" Condition 8 states, "**Prior to receiving written authorization from the Director of OEP to commence construction of their respective project facilities**, the Applicants shall file documentation that they have received all applicable authorizations required under federal law (or evidence of waiver thereof)." *See* Order at 51. Here the Company admitted in its January 5, 2016 status report that it has not obtained two required federal authorizations: (1) a 401 water quality certificate from DEC, and (2) a 404 permit from the ACE. *See* Company's status report at 6 (submittal 20160105-5343). The Company's Project Manager has stated under oath that tree cutting is part of construction. Ex. 3, Swift Aff. ¶ 8. Thus FERC cannot issue a partial notice to proceed for the felling of trees as that would be the start of construction, which must await the decisions by DEC and the ACE.

This past fall, the Company requested permission to coat pipes at construction yard 5b. In a September 18, 2015 letter granting permission for this limited activity at a confined site, FERC stated that construction of the rest of the project must await all federal authorizations. *See* FERC, letter approving pipe-coating activity (submittal 20150918-3046) ***("This letter does not***

authorize commencement of construction of Constitution's project. I remind you that Constitution must comply with all remaining terms and conditions of the Commission's Order."). Since the Company's request is outside of the Commission's Order, FERC staff cannot approve it. If the request is to be granted, the Commission must issue a new order. In turn, the Company must obtain new orders from the NDNY for easements on land acquired through eminent domain because the current easements require strict compliance with FERC's December 2, 2014 Order.

4. The Company has not submitted sufficient evidence to support their request

As discussed in the introduction, the Company's entire request for a NTP is based on the erroneous premise that cutting hundreds of thousands of trees is somehow separate from the construction process. This absurd fallacy has been contradicted, under oath, by the Company's own project manager. Ex. 3, Swift Aff. ¶ 8 ("Pipeline construction begins with tree and vegetation clearing, and installation of environmental controls, followed by grading and trenching."). That admission, when combined with FERC's Order, which requires all federal authorizations prior to the start of construction, mandates a denial of this request. *See* Order, Condition 8, at 51.

The request for the NTP also includes hearsay that unspecified agency employees have agreed that it's okay with them if 700,000 trees are cut now. As discussed above, even if these unnamed employees did say this, neither lower level staff in state and federal agencies, nor the Commission itself, can override the requirements of federal law. *City of Tacoma v. FERC*, 460 F.3d 53, 65 (D.C. Cir. 2006) ("Though FERC makes the final decision as to *whether* to issue a license, FERC *shares* its authority to impose license conditions with other federal agencies."). Only the DEC Commissioner can decide whether or not to grant a 401 water quality certificate, and on what terms, so the opinions of these unnamed employees are irrelevant. *See* N.Y. ENVTL. CONSERV. LAW § 17-0303(4)(d) (2016).

The Company includes two letters from the ACE that authorized the cutting of trees in wetlands in other projects in Pennsylvania. The first letter, dated January 28, 2011, does not include a docket number, but it appears to be for the Tennessee Gas Pipeline's Northeast Upgrade Project, docket number CP11-161. This project was for an upgrade of the 300 line, not a 124-mile long greenfield pipeline. It is worth noting that the D.C. Circuit held that this pipeline

project was illegally segmented from three others to which it was connected. *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014). The second letter, dated February 25, 2015, also does not include a docket number, but also appears to be for an upgrade, the Leidy Southeast Expansion Project, docket number CP13-551. It is currently in litigation.

The distinctions between the Constitution pipeline and these other projects make these two letters from the ACE inapplicable to the current situation. Both of the projects associated with these letters were much smaller upgrades, rather than greenfield projects, and only had environmental assessments, rather than full environmental impact statements. Significantly, at the time these letters were written, it is likely that both projects had already acquired their 401 water quality certificates. Finally, it cannot be ignored that, unlike in those cases, the Company here has *no such written* "approval" or opinion from *any* agency. If anything, the unrelated letters highlight the lack of support for the Company's request.

5. Easements granted under eminent domain by the Northern District of New York require strict compliance with the December 2, 2014 Order

In Attachment F, the Company erroneously states that it has all the required easement agreements to perform this work. *See* NTP, Att. F ("Constitution has possession of all of the right of way areas where tree felling will occur, and the affected landowners have either received agreed compensation for the rights of way, or payment of compensation has been secured by bonds filed with and approved by the United States District Court for the Northern District of New York."). It is true that the NDNY granted the Company easements across each of the condemned parcels of land. However, the Court Order for each parcel states that the easement is conditioned upon, and must abide by, the terms of the December 2, 2014 Order of the Commission. *See* Ex. 2, at 1. ("A permanent right of way and easement . . . as approved by the Federal Energy Regulatory Commission pursuant to the Natural Gas Act and the Order of the Federal Energy Regulatory Commission dated December 2, 2014"). As discussed above, FERC's Order is further conditioned upon the need for "compliance with the environmental conditions listed in the appendix to this order." *See* Order at 45. Condition 7 says that the Company shall file weekly status reports that shall include "an update on the Applicants efforts to obtain the necessary federal authorizations[.]" Condition 8 states, "**Prior to receiving written**

authorization from the Director of OEP to commence construction of their respective project facilities, the Applicants shall file documentation that they have received all applicable authorizations required under federal law (or evidence of waiver thereof)." *See* Order at 51. Here the Company admitted in its January 5, 2016 status report that it has not obtained two required federal authorizations: (1) a 401 water quality certificate from DEC, and (2) a 404 permit from the ACE. *See* Company's status report at 6 (submittal 20160105-5343). The Company's Project Manager has stated under oath that tree cutting is part of construction. Ex. 3, Swift Aff. ¶ 8. Since the conditions specified in the NDNY's Order have not been met, then trees cannot be cut on properties obtained through eminent domain proceedings in New York State. If the Company moves forward under these circumstances, trespassing charges may be filed seeking compensatory and punitive damages.

6. The Company can request an extension from FERC if needed.

The Company undertook this endeavor at its own risk, and was never assured that the money that it was expending would result in the required authorizations within the timeframes it specified. Since DEC has the power to deny the 401 water quality certificate, then 700,000 trees should be left standing now. It is true that FERC's Certificate states the pipeline should be operational by the end of December 2016. However, it is likely that FERC would extend the time frame for construction if DEC grants a 401 water quality certificate at a date later than expected. That should be the request now, rather than the unnecessary destruction of 700,000 trees. Allowing the Company to start construction prior to DEC's issuance of a 401 water quality certificate would be a gross violation of law.

B. FERC Must Stay All Activities Until It Issues a Final Order

In the event that the Commission elects to grant the Company's request for a NTP, STP hereby moves, pursuant to Rule 212 of the Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2015), for a stay of the NTP Order and for a stay of any removal of trees or other plant life pursuant to the NTP Order pending the later of (1) resolution of the pending petition for

rehearing regarding the December 2, 2014 Certificate and (2) resolution of any subsequently filed petition for rehearing of the NTP Order itself, when and if filed by STP.

Pursuant to the Administrative Procedure Act, the Commission has the authority to stay its actions when "justice so requires." 5 U.S.C. § 705 (2012). In assessing a request for a stay, the Commission will consider: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether the stay is in the public interest. *See Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,020, at 15 (Jan. 12, 2011). Absent a stay, construction of the project will go forward causing irreparable harm to STP and its members through the removal of thousands of plants, including trees that are decades old and could never be replaced. The irreparable environmental harm facing STP and its members will be permanent and will not be remediable by any amount of monetary compensation. In sharp contrast, any injury to the Company is purely speculative. The pipeline project has yet to gain formal approval, and in the event that the Company fails to obtain the necessary certifications and approval from DEC, ACE or FERC (upon rehearing), the stay will have caused no injury to the Company at all. Thus, the balance of the harms weighs in favor of granting the stay pending rehearing. The public interest also weighs in favor of granting a stay given the permanent and irreparable damage to the environment caused by allowing the Company to proceed on a project of uncertain future.

1. A Stay is Necessary to Avoid Irreparable Injury

The purpose of a stay is to preserve the *status quo* pending the Commission's review of its decisions. *See, e.g.*, *Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1978) ("By maintaining the *Status quo* [sic], while additional environmental studies are performed, or additional alternatives are considered, an injunction ensures that there will be at least a possibility that the agency will change its plans in ways of benefit to the environment. It is this possibility that courts should seek to preserve." (internal quotations omitted)). Under the standard for injunctive relief—which the Commission has applied to its assessment of requests for administrative stays—the harms alleged "must not be remote nor speculative, but actual and imminent and can not be remedied by an award of monetary damages." *Shapiro v. Cadman Towers*, 51 F.3d 328, 332 (2d Cir. 1995); *see also Wis. Gas Co. v. Fed. Regulatory Comm'n*, 758 F.2d 669, 674 (D.C.

Cir. 1985). The petitioner has met its burden if it can show the irreparable harm is likely to occur. *See Winter v. Nat. Res. Def. Counsel*, 555 U.S. 7, 22 (2008).

Should the Commission refuse to grant a stay, there is little dispute that STP and its members will suffer irreparable injury. The Supreme Court has stated that environmental harm "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration i.e., irreparable." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). The Company is proposing to cut down trees and plant life for a 124-mile pipeline that would cause approximately 700,000 trees in 1034 acres of forested land to be clear-cut. FERC, FEIS 4-118 (2014) (submittal 20141024-4001). Approximately 36 miles of this path would affect interior forests, which are particularly important because they serve as quality habitat for different species of wildlife and migratory birds, and if destroyed or fragmented would subject these animals to loss of feeding and nesting habitat. *Id.* at 4-71.

The Project would also cross 298 surface water bodies, most of which are cold-water streams that are home to trout and serve as a breeding ground for their spawn. *Id.* at ES-6. Impacts to these trout and their breeding grounds directly affect STP and its members' enjoyment of their properties. *See* Ex. 5, Declaration of Robert Lidsky, ¶ 9 [hereinafter Lidsky Decl.], submitted herewith. The project route, where the Company seeks to begin felling trees, would impact 95.3 acres of wetlands, including 33.8 acres of forested wetlands, 35.4 acres of herbaceous wetlands, and 26.1 acres of shrub-scrub wetlands. FEIS at 4-62. Additionally, 35.1 miles of the proposed route (28 percent of the entire route) are sited on steep slopes, which are prone to flash floods. *Id.* at 4-18, App. G. Removing vegetation from the area will increase the severity and frequency of these flashfloods, which has caused major destruction right where the pipeline is proposed to be built. *See* Ex. 5, Declaration of Daniel J. and Laura Jean Brignoli, ¶ 13 [hereinafter Brignoli Decl.], submitted herewith; Lidsky Decl., ¶ 8; Declaration of Glenn and Laura Bertrand, ¶ 8 [hereinafter Bertrand Decl.], submitted herewith.

Property owners along the pipeline, including members of STP, will suffer irreparable injury if the Company is allowed to start construction of the project, as it would affect 1,871.5 acres of land. FEIS at 4–118. Members of STP, like many members of the local communities threatened by the pipeline's route, purchased their land specifically for the land's pristine forested environment. *See* Ex. 5, Brignoli Decl. ¶¶ 4–5; Lidsky Decl. ¶¶ 4–7; Declaration of Robert and Anne Stack, ¶ 5 [hereinafter Stack Decl.], submitted herewith. Indeed, some of the

trees and shrubs that the company seeks to cut down were planted decades ago by members of STP themselves. *See* Ex. 5, Bertrand Decl., ¶¶ 4–6. Many members purchased this land as an investment and hope to pass down the property to their children. Bertrand Decl., ¶ 4; Stack Decl., ¶ 5. The destruction and deforestation of the virgin land will permanently alter the scenic views, marring the aesthetics of STP's members' properties forever. Stack Decl., ¶¶ 4–5; Brignoli Decl., ¶¶ 4–5; Lidsky Decl., ¶¶ 4–7; Bertrand Decl., ¶¶ 4–5. Instead of beautiful views of lush forest, the land will be marked with stumps to where these trees once stood. The pipeline will irrevocability fragment members' property and habitats, and will cause valuable land to become practically worthless.

None of these facts are truly in dispute. Real property, like the property threatened here by the requested NTP, is, by its very nature unique, and accordingly, injunctive relief is often appropriate to protect interests in real property. "[T]he threat of the destruction of the plaintiff's property constitutes irreparable harm." *Randisi v. Mira Gardens, Inc.*, 707 N.Y.S.2d 204, 205 (App. Div. 2d Dep't 2000); *see also Destiny USA Holdings, LLC v. Citigroup Glob. Mkts. Realty Corp.*, 897 N.Y.S.2d 669 (Sup. Ct. 2009), *aff'd as modified*, 889 N.Y.S.2d 793 (App. Div. 4th Dep't 2009). There can be little doubt that the removal of hundreds of thousands of decades-old trees and countless other plants over thousands of acres is an "irreparable injury," and there can be no doubt that this will be the result should a stay be denied here.

2. The Balance of the Equities Favors the Granting of a Stay, Especially Given that Any Injury Alleged By the Company Is Purely Speculative.

The issuance of a stay will not cause substantial injury to the Company, and, indeed, whatever potential injury there may be is speculative given that the pipeline project does not have the permits and certifications necessary to proceed and may never receive them. For example, the Commission's Certificate requires that the Company obtain a Clean Water Act Section 401 Water Quality Certification ("WQC") from the New York State Department of Environmental Conservation ("DEC"). DEC has expressed significant concerns about the pipeline project's impacts to water quality, and the DEC has yet to issue the necessary 401 WQC. Moreover, STP raised significant issues in its petition for rehearing involving the Clean Water Act, NEPA and due process, any one of which could put an end to the project when FERC

completes the rehearing. As such, the Company cannot rely on the speculative assumption that a project delay will cause *any* injury, given the uncertainty surrounding whether the pipeline will ever be built.

Even if the Commission were to consider the speculative potential injury and assume that the Company will eventually be granted permission to proceed, the economic losses that the Company may suffer are insignificant given that the Company "[was] on notice that the project might be enjoined, and any economic investments were made at the companies' own peril." *Conservation Cong. v. U.S. Forest Serv.*, 803 F. Supp. 2d 1126 (E.D. Cal. 2011). Whatever relevance such an injury may have, it cannot outweigh the irreparable environmental injuries detailed above. *See Citizen's Alert Regarding the Env't v. U.S. Dep't. of Justice*, No. 95-1702 (GK), 1995 WL 748246, at *11 (D.D.C. Apr. 15, 1995) (holding loss of money and jobs due to project delay did not outweigh "permanent destruction of environmental values that, once lost, may never again be replicated"). Accordingly, the equities strongly favor granting a stay.

3. A Stay Is in the Public Interest

In cases involving public convenience, each decision on whether a stay should be granted should be evaluated based on its own particular facts and circumstances. *Minto v. Salem Water, Light & Power Co.*, 250 P. 722 (Or. 1926) ("There is no hard or fixed rule whether an injunction should be granted or refused."). The public interest sways towards protecting the rights of the property owners who are already being affected by the eminent domain proceedings and who suffer continuous environmental harm with out a grant of stay. *See Weinberger v. Romeo-Barcelo*, 456 U.S. 305, 312 (1932) (citing *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)). Moreover, the public interest in keeping ancient forests pristine and undisturbed is self-evident. In contrast, there can be no public interest in permitting the destruction of a thousand acres of trees to benefit a project that has not been approved and may never even be completed. Whatever minimal public interest there may be in a completed pipeline, that is not what is proposed in the NTP Order. Rather, the NTP Order is for destruction of plant life alone and serves no public interest. Accordingly, staying this Order will be in the public interest.

Each of the factors relevant to determining if a stay should be granted weighs heavily in STP's favor. Consequently, the Commission should stay its NTP Order and any actions authorized thereunder pending resolution of the currently pending Petition for Rehearing, and any subsequently filed petitions related to the NTP Order itself.

Respectfully submitted,

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