UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Constitution Pipeline Company, LLC	)	Docket No. CP18-5-000

SUPPLEMENTAL ANSWER AND PROTEST OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION OPPOSING PETITION FOR DECLATORY ORDER

Pursuant to Rules 211 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC")[1] and the "Notice Affording the Parties an Opportunity to File Pleadings" issued by FERC on March 11, 2019,[2] the New York State Department of Environmental Conservation (the "Department") hereby files this supplemental answer and protest opposing the Petition for a Declaratory Order ("Petition") submitted by Constitution Pipeline Company, LLC ("Constitution").[3] In the Petition, Constitution seeks a declaratory order finding that the Department waived its authority to issue, condition, or deny Constitution's application for a water quality certification under Section 401 of the Clean Water Act[4] (the "Section 401 Application") for a natural gas pipeline that would cross more than 120 miles of undeveloped land in New York and Pennsylvania (the "Project"). FERC previously denied the Petition in a January

[1] 18 C.F.R. §§ 385.211, 385.213.

[2] Notice Affording the Parties an Opportunity to File Pleadings, *Constitution Pipeline Company, LLC*, Docket Nos. CP18-5-000, CP18-5-001 (March 11, 2019).

[3] In further support of this Supplemental Protest and Answer, the Department is submitting the Affirmation of Jonathan A. Binder ("Binder Aff."), the Affidavit of Christopher M. Hogan ("Hogan Aff."), and the Affidavit of Roy A. Jacobson, Jr. ("Jacobson Aff."), as well as supporting materials that were part of the record of the Department's review of Constitution's Section 401 Application. *See* Binder Aff., ¶8. The record materials are set forth in an Appendix filed herewith ("Appx.").

[4] 33 U.S.C. § 1341 ("Section 401").

11, 2018 Order (the "Waiver Denial").[5] FERC thereafter denied rehearing of the Waiver Denial (the "Rehearing Denial").[6] Constitution sought judicial review of the Waiver Denial and Rehearing Denial in the U.S. Court of Appeals for the District of Columbia Circuit, and the Department sought to intervene in support of FERC.[7] Before that case was briefed, however, the D.C. Circuit granted FERC's request to remand the matter for further consideration in light of the court's decision in *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099 (D.C. Cir. 2019) ("*Hoopa Valley*").

Hoopa Valley does not require a departure from FERC's conclusions, in both the Waiver Denial and the Rehearing Denial, that the Department did not waive its authority to deny the Section 401 Application. *Hoopa Valley* was a narrow decision which is properly limited to the unusual facts of that case, where two states entered into a written agreement with the operator of a hydroelectric dam to delay indefinitely the operator's application for a Section 401 certification. Indefinite delay was achieved by having the operator purport to withdraw and resubmit its application each year via a one-page form letter. *Id.* at 1101-02. The applicant had no intention of obtaining a Section 401 certification from the states, and the states had no intention of taking any action on the moribund application. *Id.* at 1104.

The D.C. Circuit's decision was addressed to the "specific factual scenario presented," in which "an applicant agree[d] with the reviewing states to exploit the withdrawal-and-resubmission of water quality certification requests over a lengthy period of time." *Id.* at 1105. The D.C. Circuit

[5] Order on Petition for Declaratory Order, *Constitution Pipeline Company, LLC*, Docket No. CP18-5-000, 162 FERC ¶ 61,014 (Jan. 11, 2018).

[6] Order Denying Rehearing, *Constitution Pipeline Company, LLC*, Docket No. CP18-5-000, 164 FERC ¶ 61,029 (July 19, 2018).

[7] *Constitution Pipeline Company, LLC v. FERC*, Docket No. 18-1251 (D.C. Cir.).

held that such a "coordinated withdrawal-and-resubmission scheme" did not "trigger new statutory periods of review." *Id.* at 1100-01, 1105.

Hoopa Valley does not apply to Constitution's petition. As an initial matter, Constitution never challenged the legal validity of the withdrawal and resubmission process it chose to uitilize, instead claiming only that the Department failed to act within a "reasonable" period of time. Petition, at 18-22. Constitution cannot now retroactively invoke *Hoopa Valley* to supplement its defective petition. Further, there was no agreement, written or otherwise, between Constitution and the Department to defer the Department's review perennially through a *pro forma* withdrawal-and-resubmission process, as was the case in *Hoopa Valley*. Rather, on only two occasions, Constitution voluntarily submitted new requests for a water quality certification

because the Department indicated that more time was necessary to obtain relevant materials and to review Constitution's lengthy submissions. Each time it withdrew its application, Constitution also made a new request for a Section 401 certification. The Department engaged in an active and vigorous review of these requests, which included differing iterations of Constitution's Section 401 Application received between August 2013 and September 2015 totaling tens of thousands of pages, voluminous supplemental submissions, and more than 15,000 public comments.

The Department's active review was stymied by Constitution's "persistent[] refus[al]" to submit requested information on issues affecting water quality.[8] Nonetheless, the Department denied Constitution's Section 401 Application within one year of Constitution's April 2015 request. Accordingly, FERC should adhere to its prior conclusions, in both the Waiver Denial and

[8] *Constitution Pipeline Co., LLC v. New York State Dep't of Envt'l Conservation*, 868 F.3d 87, 103 (2d Cir. 2017), *cert. denied* 138 S. Ct. 1697 (2018) ("*Constitution Pipeline*").

the Rehearing Denial, that the Department did not waive its authority to deny Constitution's Section 401 Application.

In the event FERC declares the Department waived its authority to issue, condition or deny a Section 401 certification, it should nonetheless decline to authorize construction of the Project in the circumstances of this particular case. Although an untimely denial of the Section 401 Application would not prevent FERC from authorizing construction under 33 U.S.C. § 1341(a)(1), FERC could still consider the Department's decision in determining whether to authorize construction.[9] Here, in asking Constitution on two occasions to make a new request for a water quality certification, Constitution and the Department were acting based on the law then applicable to Section 401 applications. The U.S. Court of Appeals for the Second Circuit has approved of that approach both expressly[10] and implicitly,[11] and FERC has recognized its legal validity, *see* Waiver Denial at ¶23 (and decisions cited). Only because of the D.C. Circuit's decision in *Hoopa Valley* – a case to which neither the Department nor the certifying states were parties – is FERC even once again considering the legitimacy of the approach undertaken by Constitution and the Department. Meanwhile, the Second Circuit upheld the substance of the Department's decision to deny Constitution's Section 401 Application (the "Denial") (Appx.1358) based on Constitution's failure to provide relevant information repeatedly requested by the Department.[12] At any point over the last three years, Constitution could have re-applied for a Section 401 certification,

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[9] *See, e.g., Weaver's Cove Energy, LLC v. Rhode Island Dep't of Envt'l Management*, 524 F.3d 1330, 1334 (D.C. Cir. 2008); *Puerto Rico Sun Oil Co. v. U.S. Envt'l Protection Agency*, 8 F.3d 73, 79-80 (1st Cir. 1993).

[10] *See N.Y. State Dep't of Envt'l Conservation v. Federal Energy Regulatory Comm'n*, 884 F.3d 450, 456 (2d Cir. 2018) (*NYSDEC v. FERC*).

[11] *See Constitution Pipeline*, 868 F.3d at 94; *Islander E. Pipeline Co., LLC v. Conn. Dep't of Envt'l Protection*, 482 F.3d 79, 87 (2d Cir. 2006) (*Islander East I*).

[12] *Constitution Pipeline*, 868 F.3d at 100-103.

supplied the information that the Department had consistently requested, and started a new one-year window for the Department to act. It did not do so. Allowing Constitution to nonetheless construct the Project would reward its intransigence.

Whatever FERC does, it should not authorize construction of the Project to begin until judicial review of the new waiver decision has concluded. Construction of the Project without the mitigation conditions of a Section 401 certification from the Department will cause immediate and irreparable harm to the environment of the State of New York. This harm will include adverse impacts to stream and wetland water quality and associated wildlife habitats caused by Constitution's construction of the pipeline through 251 state waterbodies. FERC has recognized that the environmental impacts of the Project will not be mitigated in the absence of a Section 401 certification from the State. Moreover, a finding of waiver would be subject to serious challenge on appeal, considering the Second Circuit's explicit recognition of the validity of the process[13] and the limiting language included in *Hoopa Valley*.[14] In light of the irreparable environmental harm that would be caused by construction of the Project and the likelihood that a court would reverse a finding of waiver, any FERC order finding waiver should be stayed until judicial review is complete. Alternatively, any FERC order finding waiver should be stayed until FERC makes a final and reviewable determination on any motions for rehearing, so that judicial review is available under the Natural Gas Act § 717r(a), (b).

APPLICABLE LAWS

Under Clean Water Act § 401, an applicant for a federal "license or permit" to authorize "any activity . . . which may result in any discharge" into state waters must obtain "a certification

[13] *NYSDEC v. FERC*, 884 F.3d at 456.

[14] *Hoopa Valley*, 913 F.3d at 1100-01, 1105.

from the State in which the discharge originates or will originate . . . that any such discharge will comply" with certain water quality standards and requirements.[15] A water quality certification under Section 401 must "set forth any effluent limitation and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under" various Clean Water Act provisions "and with any other appropriate requirement of State law."[16] "No license or permit shall be granted if certification has been denied by the State[.]"[17] If the state "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 . . . shall be waived."[18]

One of the federal licenses that requires a water quality certification under Section 401 is a certificate of public convenience and necessity authorizing the interstate transportation or sale of natural gas issued by FERC pursuant to Natural Gas Act § 7.[19] FERC may issue such a certificate only where the proposed project "is or will be required by the present or future public convenience and necessity."[20] FERC is responsible for ensuring that an applicant obtains all "permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal

[15] 33 U.S.C. § 1341(a)(1).

[16] *Id.* § 1341(d).

[17] *Id.* § 1341(a)(1).

[18] *Id.*

[19] 15 U.S.C. § 717f.

[20] *Id.* § 717f(e).

law," including a Section 401 certification.[21] The Natural Gas Act expressly provides that "nothing in this Act affects the rights of States" under the Clean Water Act.[22]

FACTUAL BACKGROUND

A. Constitution Obtains a Conditional Certificate of Public Convenience and Necessity from FERC

In 2013, Constitution applied to FERC for a certificate of public convenience and necessity authorizing construction and operation of the Project: 124 miles of 30-inch-diameter natural gas pipeline, temporary and permanent access roads, and various associated facilities, stretching from Susquehanna County, Pennsylvania to Schoharie County, New York. Second Supplemental Resource Report No. 1: General Project Description at 1-1, FERC Docket No. CP13-499, Accession No. 20131112-5073 (November 2013).[23] The Project would traverse almost 100 miles across four counties in New York State. *Id.* at 1-3. From the beginning, FERC recognized that the Project would have a significant environmental impact, such that an environmental impact statement (EIS) was required. *See* Notice of Intent to Prepare E.I.S. at 1, FERC Docket No. PF12-9, Accession No. 20120907-3012 (Sept. 7, 2012).

In October 2014, FERC released the Final EIS for the Project, which detailed the "numerous impacts on the environment" the Project would cause. Final EIS at ES-3, FERC Docket No. CP13-499-000, Accession No. 20141024-4001 (October 2014). FERC noted that 91% of the Project's right-of-way would be "greenfield" or "lands and vegetation, including adjacent areas, that are undisturbed or undeveloped." *Id.* at 2-1, 2-8. According to FERC's evaluation, the Project

[21] *Id.* § 717n(a), (b); *see, e.g., Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 142 (2d Cir. 2008) ("*Islander East II*").

[22] 15 U.S.C. § 717b(d)(3).

[23] In general, documents developed by or submitted to FERC, and thus already part of the administrative record, are not included in the Appendix.

would disrupt more than 1,400 acres of land, including 80 acres of wetlands, and cross 250 waterbodies. *Id.* at 2-8, 4-45, 4-62. FERC described various techniques that could be used to cross the waterbodies, noting that "trenchless" crossing methods would involve "minimal" potential impacts when compared to other crossing methods. *Id.* at 4-56.[24] FERC required Constitution to obtain and comply with all applicable state "permits and approvals," including a Section 401 certification from the Department. *Id.* at ES-13, 1-13 to 1-16.

FERC issued a conditional certificate of public convenience and necessity to Constitution in December 2014. Order Issuing Certificates and Approving Abandonment, *Constitution Pipeline Company, LLC*, Docket No. CP13-499-000, 149 FERC ¶ 61,199 (Dec. 2, 2014). The certificate was conditioned on Constitution complying with various environmental conditions, including a requirement that Constitution "file documentation that they have received all applicable authorizations required under federal law." *Id.* at 46, 51. FERC reiterated the conclusion of the Final EIS that "impacts on waterbodies and wetlands" from the project would be mitigated by "Constitution's compliance with conditions" of a Section 401 certification issued by the Department. *Id.* ¶ 79. FERC thereafter denied rehearing requests on the conditional certificate from several parties, although not Constitution. Order Denying Rehearing and Approving Variance, *Constitution Pipeline Company, LLC*, Docket No. CP13-499-001, 154 FERC ¶ 61,046 (Jan. 28, 2016).

[24] "Trenchless" crossing methods include several different techniques that all involve drilling a tunnel under a waterbody and then installing the pipeline without disturbing the waterbody. Final EIS at 2-22 to 2-25. Accordingly, "[t]he waterbody and its banks, and typically the entire immediate riparian zone, would not be disturbed by clearing or trenching[.]" *Id.* at 4-56. The alternative to trenchless methods most relevant here is the "dry open cut" method, which involves damming and redirecting the waterbody, then digging a trench through the dry stream bed. *Id.* at 2-21 to 2-22. The dry crossing method adversely affects water quality by increasing turbidity, reducing light penetration and photosynthetic oxygen production, introducing chemical and nutrient pollutants, and decreasing dissolved oxygen levels. *Id.* at 4-54 to 4-55.

B. Constitution Applies for a Section 401 Certification and the Department Commences an Active and Comprehensive Administrative Review

Unlike the states in *Hoopa Valley*, the Department engaged in an active administrative review of Constitution's Section 401 Application from the date Constitution submitted its first application in August 2013 to the date of the Department's decision to deny the application in April 2016. On only two occasions, Constitution voluntarily withdrew its pending application and made a new request for a Section 401 certification so the Department could continue its active review of the Project. Indeed, the Department's review was prolonged because Constitution supplied additional information to the Department on a periodic basis over a prolonged period and failed to supply other information necessary to the Department's review of the application.

In August 2013, while Constitution's application for a certificate of public convenience and necessity was pending before FERC, Constitution submitted its first Joint Application seeking a Section 401 certification and several related state permits from the Department, as well as a Clean Water Act Section 404[25] Permit from the United States Army Corps of Engineers. Joint Application Forms (Aug. 22, 2013) (Appx.150). The Joint Application was supported by 16 attachments totaling more than 6,000 pages, but was organized in a confusing manner that made crossing-specific information difficult to locate. Hogan Aff., ¶8.[26] Following an initial, partial review of the 6,000-page application, the Department notified Constitution that the application was incomplete, and listed additional information that had to be provided. Notice of Incomplete Application (Sept. 12, 2013) (Appx.170). The Department noted that the sheer volume of the Joint Application prevented the Department from being able to "perform an exhaustive review" at that point. NOIA Companion Letter at 1 (Sept. 12, 2013) (Appx.171).

[25] 33 U.S.C. § 1344.

[26] Only the Joint Application forms and relevant excerpts are included in the Appendix.

In particular, the Department expressed concern that details regarding stream crossings were inadequate. *Id.* at 2 (Appx.172). The Department had repeatedly made clear, in writing and verbally, that trenchless crossing methods, such as horizontal directional drilling ("HDD"), were preferred for all stream crossings. Hogan Aff., ¶18; Letter from Tomasik to Silliman at 3 (June 21, 2012); Letter from Desnoyers to Bose at 3 (Nov. 7, 2012); Letter from Desnoyers to Bose at 1 (May 28, 2013); Department Comments to Bose at 3 (July 17, 2013) (Appx.52,57,61,104). Accordingly, if Constitution did not intend to use trenchless crossing methods at a specific crossing, the Department asked Constitution to "explain why HDD will not work or is not practical for that specific crossing." Letter from Desnoyers to Bose at 3 (Nov. 7, 2012) (Appx.104). Because the Joint Application did not clearly set forth the crossing methods that would be used or the reason for their selection, the Department requested "all details for proposed stream crossings" in accordance with a sample matrix that the Department had provided earlier that year. Sample Matrix, attached to May 30, 2013 e-mail; NOIA Companion Letter at 2; (Appx.101,172).

In November 2013, Constitution submitted supplemental permit application materials, including thousands of pages of new or updated materials. Hogan Aff., ¶9; Joint Application Forms (Nov. 27, 2013) (Appx.246). It still refused to "provide[] scale drawings in the format provided by [the Department]." Joint Application Supplemental Information Cover Letter, at 3 (Nov. 27, 2013) (Appx.244). Constitution also conducted a generic Trenchless Feasibility Study, in which it unilaterally eliminated all streams less than 30-feet wide – amounting to 75% of all crossings – from consideration for trenchless methods because trenchless methods would, according to Constitution, "have the potential" to require greater workspace needs. Trenchless Feasibility Study at 1-1, 2-3 (Nov. 2013) (Appx.186,190).

In January 2014, the Department notified Constitution that "a complete application requires field delineation and verification of all crossings." Minutes of NYSDEC/Constitution Status Call (Jan. 29, 2014) (Appx.271). The Department also reiterated that it wanted a "'Rosetta Stone' plan set/binder" that would organize stream crossings along a coherent "milepost by milepost" basis. *Id.* at 2 (Appx.272). In February 2014, the Department again asked Constitution to provide stream-crossing information in an organized and coherent manner to facilitate the Department's review, and provided more examples of what it expected. Tomasik E-mail and Attachments (Feb. 12, 2014) (Appx.273).

On May 9, 2014, Constitution submitted a new "request for a [water quality certification]" to the Department. *See* Request Letter (May 9, 2014) (Appx.378). The parties understood that this action would extend the one-year period "by which requests for certifications are to be approved or denied as set forth in Section 401(a)(1)" of the Clean Water Act. *Id.* At this point in time, Constitution's application was still considered administratively incomplete and FERC had not completed its Final EIS. Binder Aff., ¶¶12,15; *see* 6 N.Y.C.R.R. § 621.3(a). In these circumstances, if Constitution had declined to withdraw its request for a water quality certification, the Department almost certainly would have denied Constitution's Section 401 Application as incomplete. Binder Aff., ¶16; *see, e.g., id.* ¶ 17 & Exhibit A.

In July 2014, the Department sent Constitution a list of "revised materials" it wanted Constitution to provide in support of its Joint Application. Memorandum (July 3, 2014) (Appx.380). The Department again referenced the need for "a master table" to use "as a key to reference all documents related to each specific crossing." *Id.* The Department also asked Constitution to submit a third-party environmental monitoring plan for construction, details relating to the Project's permanent and temporary impacts to streams and wetlands, "details for

each crossing," including the "[l]ocation and type of pipeline crossing method," and "[p]ipeline installation crossing method and details," including "[b]lasting plan (if required)." *Id.* at 2-3 (Appx.381-82).

In August 2014, Constitution submitted another revised Joint Application totaling thousands of pages, that included a "portion" of the items requested in the Department July 2014 memorandum. Cover Letter at 3 (Aug. 12, 2014); Application Forms (Aug. 12, 2014) (Appx.386,391). The Department's staff continued to have difficulty parsing the information that had accompanied the massive Joint Application. Schubring E-mail (Sept. 1, 2014) (Appx.397). Constitution finally submitted a new version of the Joint Application organized by crossing in September 2014. Joint Application by Crossing (Sept. 2014) (Appx.398).[27] Constitution submitted several hundred pages of additional supplemental information in November 2014. Cover Letter to Additional Information Submittal (Nov. 17, 2014) (Appx.428).

The Department published a Notice of Complete Application for the Joint Application in December 2014 and opened a public comment period that included three legislative public hearings. Notice of Complete Application (Dec. 24, 2014) (Appx.430). It quickly became clear that there was tremendous public interest in the Project and, consistent with the Department's practice when there is significant public interest in a permit request, the Department extended the comment period until the end of February 2015. Hogan Aff. ¶14. The Department received more than 15,000 written public comments on the Joint Application, in addition to various statements made at the public hearings. *Id.*; *see* Draft Responsiveness Summary at 3 (June 2, 2015)

[27] One example of the milepost-specific version of the Joint Application is included in the Appendix. (Appx.400) Constitution submitted several hundred similar reports.

(Appx.681). Many of the comments raised various issues that the Department considered as part of its ongoing review. Hogan Aff., ¶14.

The Department's decision to treat the application as complete for purposes of inviting public comment did not foreclose the Department from requesting additional information needed for its review. *See* Binder Aff., ¶¶ 13, 14, and 18; Hogan Aff., ¶13; 6 N.Y.C.R.R. §§ 621.6(d), 621.14(b). In particular, the Department and Constitution were engaged in active discussions regarding waterbody-crossing techniques before, during, and after the public comment period. Hogan Aff., ¶¶10, 12, 13, 16. For example, the Department set up a meeting with Constitution for a "presentation on trenchless technology," Tomasik E-mail (Jan 14, 2015), and requested geotechnical evaluations for two trenchless stream crossings, Tomasik E-mail (Jan. 27, 2015) (Appx.438,457). In February 2015, Constitution – in responding to one of the Department's requests for information on crossing methods – prepared a draft revision to its Trenchless Feasibility Plan, but still refused to consider trenchless methods for streams less than 30 feet wide because of a supposed "industry recognized standard." Draft Trenchless Feasibility Study Edits at 1 (February 2015) (Appx.458). Rather than comply with the Department's request to conduct crossing-specific feasibility analyses, Constitution generically excluded the vast majority of streams from consideration, arguing that the Department could not point to a "regulation, formally adopted policy or guidance document that would warrant deviating" from Constitution's supposed standard. *Id.*

Constitution submitted a revised, 4,000-page version of the Joint Application on March 27, 2015. *See* Revised Joint Application (March 27, 2015) (Appx.472); Hogan Aff. ¶15. Although the new version included substantial revisions, Constitution still provided only a "portion" of items requested by the Department back in July 2014. Revised Joint Application Cover Letter at 4

(March 27, 2015) (Appx.470). In April 2015, Constitution submitted a 110-page draft document attempting to respond to the 15,000 public comments received by the Department. Draft Responsiveness Summary (April 3, 2015) (Appx.494).

Faced with the prospect of reviewing the most recent (March 2015) version of the Joint Application, tens of thousands of pages of prior submissions from Constitution, and the 15,000 written public comments, all while trying to obtain complete responses from Constitution on important water-quality-related issues such as waterbody-crossing methods and third-party monitoring protocols, the Department realized that it needed more time to make an informed determination. Hogan Aff., ¶16. On April 27, 2015, Constitution submitted another new request for a Section 401 Certification, in response to the Department's representation that the Section 401 Application would most likely be denied otherwise. Request Letter (April 27, 2015) (Appx.621). Constitution specifically noted that it was making a new "request for certification under Section 401" of the Clean Water Act, and made no attempt to reserve its right to challenge the timeliness of the Department's review or the legal validity of the process of making new requests by letter to extend the time period of the Department's review. *Id.* Like Constitution, the Department treated the letter as a new request, issuing a new Notice of Complete Application and thereby initiating a new public comment period pursuant to 6 N.Y.C.R.R. § 621.7(a). Notice of Complete Application (April 27, 2015) (Appx.623). The Department noted that it would consider all public comments submitted during the earlier public comment period, such that interested parties did not have to re-submit their comments. *Id.* In a separate press release, the Department noted that the new request included "no changes or modifications" from earlier requests, but made clear that the Department's "review of the application [was] ongoing[.]" Press Release (April 29, 2015) (Appx.625). Constitution never availed itself of the federal statutory provisions designed to curtail improper

agency inaction. *See, e.g.*, *Millennium Pipeline Company, LLC v. Seggos*, 860 F.3d 696, 701-702 (D.C. Cir. 2017) (describing avenues for review of alleged agency inaction available to applicant under Natural Gas Act).

During the period immediately preceding and following Constitution's April 27, 2015 request for a Section 401 Certification, the Department engaged in ongoing efforts to obtain more information from Constitution regarding the feasibility of trenchless crossing techniques at the handful of streams that Constitution had not artificially eliminated based on its unilaterally-imposed "industry standard." Hogan Aff. ¶18. The Department sent Constitution a list of streams that "must be crossed" by HDD in March 2015, and noted that the Department expected a "Phase 3 analysis" for those crossings, unless Constitution could explain why a Phase 3 analysis was "not available." E-mail from Chris Hogan to Keith Silliman (March 17, 2015) (Appx.464). A Phase 3 analysis would entail a full geotechnical feasibility analysis. *See* Trenchless Feasibility Study at 1-1, 4-1 to 4-6 (Appx.180,221-26). In response, Constitution expanded its evaluation of trenchless feasibility to 25 stream crossings—fewer than 10% of the total crossings. Out of that small number of crossings, Constitution eliminated many from further consideration for trenchless crossing based on generic concerns such as cost or scheduling issues. *See* Summary of Current and Previously Proposed Trenchless Cross Locations (May 2015); NY Stream Crossing Feasibility Analysis Table (May 20, 2015) (Appx.628,651). In response, the Department asked Constitution to complete "[a] feasibility analysis" for trenchless crossing techniques "at each of the identified stream crossings" and to make that feasibility determination "based solely upon technical characteristics, not cost/safety/schedule concerns." NY Stream Crossing Feasibility Analysis, with Department Comments (May 27, 2015) (Appx.655). Constitution re-submitted a revised analysis in June 2015, but still had not completed full geotechnical evaluations and did not provide the

Department with the evaluations it had completed. Revised NY Stream Crossing Feasibility Analysis (June 30, 2015) (Appx.818).

In July 2015, the Department circulated a draft Section 401 permit to the Army Corps for review and comment, with the proviso that the draft permit was "VERY PRELIMINARY," subject to significant changes, and had not been fully reviewed within the Department. Tomasik E-mail (July 20, 2015) (Appx.822). The draft permit reflected ongoing frustration among the Department's staff that details regarding trenchless crossing plans had been requested "several times, but they have not been provided." Draft Permit at 19 (Appx.842). Although the existence of this draft permit confirms the Department's good faith in considering the possibility of issuing a heavily conditioned 401 certificate to Constitution, as well as its ongoing review of Constitution's request, the draft permit had no legal effect and did not bind the Department to issue a permit. Binder Aff., ¶23; Hogan Aff. ¶19. The Department never promised to issue a Section 401 certification to Constitution by a date certain. Hogan Aff., ¶23. Circulating draft permits to involved federal agencies for review and comment is standard Department practice. Binder Aff., ¶22; Hogan Aff., ¶19.

In September 2015, Constitution submitted yet another version of the Joint Application, totaling more than 9,000 pages, with additional information requiring the Department's review. Supplemental Joint Application (Sept. 15, 2015) (Appx.943); Hogan Aff. ¶20. Constitution purported to include, for the first time, "complete wetland and waterbody field survey data for lands affected by the Project." Cover Letter to Supplemental Joint Application at 1 (Appx.969). Particularly in light of that addition, the Department could not simply accept Constitution's assurance that the edits to the Section 401 Application were "minor" without reviewing it. *Id.* at 4 (Appx.972); *see* Hogan Aff., ¶20.

In late 2015 and early 2016, the Department and Constitution exchanged a series of e-mails regarding the development of a third-party environmental monitoring plan, a primary purpose of which was to ensure compliance with the Department's Section 401 Certification and other state permits. Draft Third-Party Monitoring Plan (October 2015); Comments on Revised Monitoring Plan (Nov. 18, 2015); Draft Third-Party Monitoring Plan (November 2015); Response to Department Comments (Nov. 23, 2015); Further Department Comments (Feb. 23, 2016) (Appx.1049,1206,1216,1218,1279). Ultimately, Constitution accepted the Department's edits. Response to Further Department Comments (March 28, 2016) (Appx.1288). The negotiations over the third-party monitoring plan reflect that an active administrative review process was ongoing in the months leading to the Denial.

Additionally, throughout late 2015, Constitution applied for permits from the Department to conduct geotechnical (or "Phase III") investigations that were "necessary to evaluate the feasibility of trenchless installation method" at various waterbody crossings. Cover Letters Regarding Geotechnical Borings (Sept. 14, 2015, Oct. 15, 2015, Nov. 9, 2015) (Appx.845,976,1133). The Department issued all the requested permits in a timely manner. Geotechnical Access Permits (Nov. 5, 2015, Nov. 18, 2015) (Appx.1109,1117,1125,1209). Although the Department had specifically asked to be provided with these geotechnical studies, *see* Chris Hogan Email (March 17, 2015) (Appx.464), Constitution ultimately submitted full geotechnical evaluations for only two stream crossings. Geotechnical Report Excerpts (Appx.439,632).

C. The Department Denies Constitution's Section 401 Application without Prejudice

On April 22, 2016, within one year of Constitution's April 27, 2015 request for a Section 401 certification (and well within one year of Constitution's submission of the most recent,

September 2015, version of the application), the Department denied the application without prejudice. Denial (Appx.1358). The Department concluded that Constitution had "fail[ed] in a meaningful way to address the significant water resource impacts that could occur from this Project" and "failed to provide sufficient information to demonstrate compliance with New York State water quality standards." Denial at 1 (Appx.1358). The Department invited Constitution to address these deficiencies through a new Section 401 application. *Id.* at 14 (Appx.1371). The Department noted that the other permits sought in the Joint Application "remain[ed] pending." *Id.* at 1 n.3 (Appx.1358).

The Department determined that Constitution failed to adequately evaluate the feasibility of trenchless crossing methods at all steam crossings. *Id.* at 8-9 (Appx.1365-66). Despite requests from the Department dating back to June 2012 for Constitution to evaluate the feasibility of trenchless crossing techniques at all waterbody crossings, Constitution repeatedly and categorically refused to evaluate the feasibility of using trenchless crossing techniques at streams less than 30 feet wide, and failed to provide site-specific analyses, including geotechnical evaluations, for the stream crossings it did evaluate. *Id.* at 11-12 (Appx.1368-69). The Department listed several additional bases for the Denial, citing inadequate information regarding pipe-burial depth, plans for blasting, and wetland crossings. *Id.* at 12-14 (Appx.1369-71).

D. The Second Circuit Upholds the Department's Denial

Rather than attempting to rectify the information gaps in its Section 401 Application, Constitution sought review of the Denial in the Second Circuit.[28] *See Constitution Pipeline*

[28] Constitution also sought a declaratory judgment from the United States District Court for the Northern District of New York that the various state permits it had applied for were preempted by the Natural Gas Act, but the Northern District dismissed this case for lack of standing. Memorandum-Decision and Order, *Constitution Pipeline Company, LLC v. New York State Dep't of Envt'l Conservation*, No. 16-cv-568 (N.D.N.Y. Mar. 16, 2017) (Appx.1594).

Company, LLC v. New York State Dep't of Envt'l Conservation, Docket No. 16-1568 (2d Cir.). For the first time, Constitution argued that the Department's review of its Section 401 Application had been too slow. *See* Final Br. for Pet., at 28-37 (Oct. 17, 2016) (Appx.1409-18). Although Constitution asserted that the Department had missed three different deadlines measured from five different starting points, Constitution nowhere suggested that its use of letter requests in May 2014 and April 2015 to extend the timeframe of the Department's review was invalid under the terms of Section 401. *Id.* Constitution also argued that the Denial was arbitrary and capricious and in excess of the Department's jurisdiction. *Id.* at 37-67 (Appx.1418-1448).

The Second Circuit denied Constitution's petition for review. *Constitution Pipeline*, 868 F.3d at 91. The Second Circuit upheld the substance of DEC's Denial, concluding that "the denial of the § 401 certification after Constitution refused to provide relevant information, despite repeated [Department] requests, was not arbitrary and capricious." *Id.* at 103. The Court observed that "the record amply shows . . . that Constitution persistently refused to provide . . . site-by-site information as to the feasibility of trenchless crossing methods for streams less than 30 feet wide—*i.e.*, for the vast majority of the 251 New York waterbodies to be crossed by its pipeline—and that it provided geotechnical data for only two of the waterbodies." *Id.* at 103. Rejecting Constitution's categorical exclusion of streams under 30-feet-wide based on an alleged "industry recognized standard," the Second Circuit observed that "industry preferences do not circumscribe environmental relevance." *Id.* at 102-03.

With respect to the timeliness of the Department's review, the Court found "nothing in the administrative record to show that [the Department] received the information it had consistently and explicitly requested over the course of several years—much less anything to support Constitution's claim that [the Department] said 'it had' all of the information it required 'to issue'

the requested certification." *Id.* at 99-100 (quoting Final Br. for Pet., at 29 [Appx.1420]). Nonetheless, the Court declined to resolve the "waiver" argument, because "[s]uch a failure-to-act claim is one over which the District of Columbia Circuit would have 'exclusive' jurisdiction." *Constitution Pipeline Company, LLC*, 868 F.3d at 100 (quoting 15 U.S.C. § 717r(d)(2)).

The Second Circuit denied Constitution's motion for rehearing or rehearing *en banc*, Order Denying Rehearing or Rehearing En Banc (Oct. 19, 2017) (Appx.1609), and the U.S. Supreme Court denied Constitution's Petition for a Writ of Certiorari, 138 S. Ct. 1697 (2018).

E. FERC Concludes that the Department Did Not Waive Its Section 401 Authority

Following the Second Circuit's decision, Constitution again declined to re-apply to the Department for a Section 401 certification and instead sought to attack the Denial collaterally by commencing this proceeding. *See* Petition for a Declaratory Order, *Constitution Pipeline Company, LLC*, Docket No. CP18-5-000 (Oct. 11, 2017). Notably, Constitution still did not argue that its use of letter requests to extend the Department's review time in May 2014 or April 2015 was a legal nullity. *Id.* at 18-22. Instead, Constitution's petition argued only that the Department had failed to act within a reasonable period time under Section 401(a)(1), which Constitution claimed should be tied to four different deadlines. *Id.* Constitution's Waiver Petition also sought to attack collaterally the Second Circuit's conclusion that Constitution had repeatedly failed to provide relevant information to the Department, especially on topics related to stream crossing techniques. *Compare* Petition at 23 (claiming that "there can be no doubt that Constitution provided [the Department] with the information it needed to issue the water quality certification"), *with Constitution Pipeline Company, LLC*, 868 at 103 (concluding that "Constitution refused to provide relevant information, despite repeated [Department] requests"). The Department filed a notice of intent to intervene and opposition to the Petition. *See* Notice of Intervention, Protest, and

Answer in Opposition to Petition for Declaratory Order, *Constitution Pipeline Company, LLC*, Docket No. CP18-5-000 (Nov. 9, 2017).

FERC denied the Petition. Order on Petition for Declaratory Order, *Constitution Pipeline Company, LLC*, Docket No. CP18-5-000, 162 FERC ¶ 61,014 (Jan. 11, 2018) ("Waiver Denial"). FERC rejected Constitution's argument that the waiver period should be less than one year. *Id.* ¶16. FERC then rejected Constitution's suggestion that its voluntary withdrawal of the application and submittal of a new application in April 2015 rendered the Department's review time "unreasonable." *Id.* ¶22-23. FERC noted that "Constitution's argument implies that [the Department] reviewed a static collection of information from the time Constitution" withdrew its Joint Application on April 27, 2015, but "[t]hat is not accurate." *Id.* ¶23.

Constitution moved for rehearing, which FERC denied. Order Denying Rehearing, *Constitution Pipeline Company, LLC*, Docket No. CP18-5-001, 164 FERC ¶ 61,029 (July 19, 2018) ("Rehearing Denial"). FERC rejected Constitution's contention that Section 401 established a "jurisdiction-stripping deadline" that parties could not alter, and adhered to its prior determination that the Department had not waived its authority to issue, condition, or deny the Section 401 Application. *Id.* ¶¶13-19.

Constitution petitioned for review of the Waiver Denial and Rehearing Denial in the D.C. Circuit. Petition for Review, *Constitution Pipeline Company, LLC v. Federal Energy Regulatory Comm'n*, Docket No. 18-1251 (D.C. Cir.). The Department sought to intervene on behalf of FERC, but before that case could be briefed, the D.C. Circuit granted FERC unopposed motion to hold the case in abeyance pending the outcome of *Hoopa Valley Tribe v. Federal Energy Regulatory Comm'n*, Docket No. 14-1271 (D.C. Cir.). *See Constitution Pipeline Company, LLC v. FERC*, No. 18-1251, Doc. #1758585 (D.C. Cir. Nov. 5, 2018).

F. The D.C. Circuit Issues a Narrow Decision in *Hoopa Valley* Limited to the Unusual Facts of That Case

In *Hoopa Valley*, the D.C. Circuit issued a narrow decision tied to the unusual facts of that case. There, the applicant for a Section 401 certification for a series of aging hydroelectric dams in Oregon and California entered into a *written agreement* "to defer the one-year statutory limit for Section 401 approval by annually withdrawing-and-resubmitting the water quality certification requests." *Hoopa Valley Tribe*, 913 F.3d at 1101. Accordingly, for more than a decade, the applicant submitted the same one-page letter purporting to withdraw and resubmit its application just before the one-year deadline expired. *Id.* at 1104. Based on this arrangement, the "single issue" necessary for the D.C. Circuit to resolve was "whether a state waives its Section 401 authority when, pursuant to *an agreement* between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year." *Id.* at 1109 (emphasis added); *accord id.* at 1100-01.

The D.C. Circuit held that, under the circumstances presented by that case, the states had waived their authority. *Id.* at 1105. The decision turned on the existence of a written contract that "explicitly required abeyance of all state permitting reviews." *Id.* at 1101. The Court noted that the States' "deliberate and contractual idleness defie[d]" the timing requirements of Section 401. *Id.* at 1104. The Court rejected the effectiveness of a "coordinated withdrawal-and-submission scheme" between the states and the applicant to extend the Section 401 deadline, noting that "if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings." *Id.* at 1103-05. Notably, the Court's decision indicates that the states had not requested, and the applicant had not provided, *any* relevant materials in support of the Section 401 application for more than a decade. *Id.*

The Court expressly declined to determine whether, in different circumstances, the withdrawal and resubmittal of a Section 401 application would "restart[] the one-year clock," making clear that it was resolving only the case before it, "in which the licensee entered a written agreement with the reviewing states to delay water quality certification." *Id.* at 1104. The Court observed that the applicant's "withdrawals-and-resubmittals were not just similar requests, they were not new requests at all." *Id*. Pursuant to the written agreement, the applicant "never intended to submit a 'new request.'" *Id.*

In surveying applicable caselaw, the Court again made clear its decision addressed "the specific factual scenario presented in this case, *i.e.*, an applicant *agreeing with* the reviewing states to exploit the withdrawal-and-resubmission of water quality certification requests over a lengthy period of time." *Id.* at 1105 (emphasis added). The court distinguished prior Second Circuit decisions – including *Constitution Pipeline* – approving of the withdrawal and resubmittal of an application to avoid "incomplete applications and premature decisions," by noting that "[t]he record indicates that [the applicant's] water quality certification request had been complete and ready for review for more than a decade." *Id.*

Subsequently, the D.C. Circuit remanded this proceeding back to FERC for further briefing. *See* Order, *Constitution Pipeline Company, LLC v. Federal Energy Regulatory Comm'n*, Docket No. 18-1251 (D.C. Cir. Feb. 28, 2019). After remand of this proceeding, several parties petitioned the D.C. Circuit for panel or *en banc* rehearing of the *Hoopa Valley* decision. *See* Petition for Rehearing or Rehearing En Banc (Appx.1610). That petition remains pending.

ARGUMENT

POINT I

CONSTITUTION'S PETITION IS NOT GOVERNED BY THE NARROW HOLDING OF *HOOPA VALLEY*

Unlike the coordinated, decade-long "scheme" – memorialized in a written agreement – between states and an applicant to extend indefinitely the review period for a Section 401 application rejected in *Hoopa Valley*, Constitution made new requests for a Section 401 certification only twice, and did so in the context of an active and ongoing administrative review by the Department. In neither case did Constitution and the Department enter into any agreement, written or otherwise, to delay indefinitely the Section 401 process. Accordingly, each new "request" restarted the one-year limit for the Department's review.

As an initial matter, Constitution never argued in its Petition that the use of letter requests to extend the Department's time to review the Section 401 Application was invalid as a matter of law. Instead, Constitution claimed only that the Department's period of review was "unreasonable" based on various possible deadlines of less than one year. *See* Petition, 18-20. Although the D.C. Circuit stated in *Hoopa Valley* that a year was the "maximum" time a state could take for its review, it also recognized that the determination of what was reasonable is left to individual federal agencies. *See Hoopa Valley*, 913 F.3d at 1103-04. Accordingly, *Hoopa Valley* does not resurrect Constitution's arguments related to any alleged "unreasonable" delay of less than one year. *See* Waiver Denial, ¶¶13-21.

Moreover, in contrast to *Hoopa Valley*, in this case there was no agreement between Constitution and the Department to circumvent the Section 401 deadline. *See Hoopa Valley*, 913 F.3d at 1103. The existence of a written agreement or "scheme" to forego active review was cited throughout *Hoopa Valley* as the critical factor to the Court's determination that waiver had

occurred. *See id.* at 1101, 1103-05. Here, each of the two withdrawals was part of an active administrative process, allowing more time for Constitution to provide information requested by the Department, and for the Department to review that information. Constitution's Petition makes clear that there was no "agreement" between Constitution and the Department to circumvent section 401. *See* Petition, at 12-15, 21. Rather, Constitution chose to withdraw its application and make a new request because the Department indicated that it would likely deny the Section 401 Application if Constitution did not do so. Hogan Aff., ¶11; *see* Binder Aff. ¶ 24; *see also Constitution Pipeline*, 868 F.3d at 94 (noting that Constitution withdrew and resubmitted its Section 401 application "at [the Department's] request"). *Hoopa Valley* does not apply to these circumstances, where the state agency asks the applicant to make a new request in order to ensure a full and fair review of the voluminous materials submitted by the applicant, and the applicant voluntarily makes a new request based on an apparent business decision that doing so will improve its chances of obtaining a Section 401 certification.

Likewise, the record here makes clear that, unlike the states in *Hoopa Valley*, the Department was not using Constitution's new requests to "defer[] review" of Constitution's Section 401 application. 913 F.3d at 1100. Rather, the Department's review was active and ongoing. *See e.g.,* Hogan Aff. ¶¶10-18; Binder Aff., ¶¶19-21; pp. 9-17, *supra*. As FERC observed in the Waiver Denial, Constitution's Petition "implies that [the Department] reviewed a static collection of information" from April 27, 2015, which is "not accurate." Waiver Denial, ¶23. Before and after each withdrawal and resubmission, Constitution provided various materials relevant to the Department's review, including revised Joint Applications and attachments, supplemental studies and materials, details regarding stream crossing techniques and third-party

monitoring plans, and proposed responses to the 15,000 public comments received by the Department. Binder Aff., ¶¶ 19-21; Hogan Aff. ¶¶10-18; *see* pp. 11-17, *supra*.

Also unlike *Hoopa Valley*, Constitution intended its May 2014 and April 2015 letters to be new requests for a a Section 401 certification. *Cf. Hoopa Valley*, 913 F.3d at 1100 (noting that applicant "never intended to submit a 'new request.'"). On each occasion, Constitution could have asked the Department to decide the Section 401 application as it then stood, which likely would have resulted in a denial. *See* Hogan Aff. ¶11; Binder Aff., ¶24. Rather than risk allowing that to happen, Constitution withdrew its application and then asked again (i.e., requested) via letter that the Department issue a Section 401 Certificate. *See* Request Letter (May 9, 2014); Request Letter (April 27, 2015) (Appx.378,621). Administratively, the Department also treated the April 2015 letter as a new request, issuing a new Notice of Complete Application and opening a new public comment period. Notice of Complete Application (April 27, 2015) (Appx.623); Hogan Aff., ¶17; Binder Aff., ¶20. This arrangement is a far cry from the situation in *Hoopa Valley*, where the applicant had no intention of actually obtaining a Section 401 certificate and the states had no intention of actively reviewing the application. *See* 913 F.3d at 1104-05.

Finally, to the extent that *Hoopa Valley* could be construed as rejecting the withdrawal and resubmittal process more broadly, it conflicts with other applicable judicial precedent. In *NYSDEC v. FERC*, the Second Circuit assured the Department that, if it needed more time to review a request for a Section 401 certification, it could "request that the applicant withdraw and resubmit the application." 884 F.3d at 456.[29] The decisions of a federal circuit court are "binding on all inferior courts and litigants in the [judicial circuit,] and also on administrative agencies when they deal

[29] The Second Circuit has also referenced the parties' use of the withdrawal-and-resubmittal process in *Constitution Pipeline* (868 F.3d at 94) and *Islander East I* (482 F.3d at 87).

with matters pertaining thereto." *Alleghany General Hosp. v. N.L.R.B.*, 608 F.2d 965, 970 (3d Cir. 1979). Constitution maintains offices in the State of New York and is a joint venture organized for the purpose of constructing and operating the Project, which would mostly be built in New York, and which is intended to supply natural gas to New York markets. *See*, *e.g.*, Get the Facts: Constitution Pipeline, constitutionpipeline.com/get-the-facts-constitution-pipeline (last visited April 1, 2019) (describing alleged benefits of project to New York State and listing two offices, both in New York). Accordingly, FERC should follow the law applicable in the Second Circuit. *See* 15 U.S.C. § 717r(b) (noting that judicial review of a FERC order is available in the Circuit where the project applicant has its principal place of business). The fact that judicial review of a FERC order would also be available in the D.C. Circuit does not justify ignoring the precedent of the Second Circuit. *See Ithaca College v. N.L.R.B.*, 623 F.3d 224, 227-29 (2d Cir. 1980) (federal agency cannot ignore unfavorable precedent of circuit court where judicial review of its order is likely to end up, even if more favorable precedent is available in another circuit where judicial review is available).

Although the court in *Hoopa Valley* characterized the Second Circuit's language regarding withdrawal-and-resubmittal as dicta, *Hoopa Valley*, 913 F.3d at 1105, it was in fact essential to the court's conclusion that FERC had reasonably interpreted the statutory phrase "receipt of [a] request." *See NYSDEC v. FERC*, 884 F.3d at 456. *Hoopa Valley* suggests that the Second Circuit's reference to the availability of "denial without prejudice" rendered its statement regarding withdrawal and resubmittal dicta. *Hoopa Valley*, 913 F.3d at 1105. However, "where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

In short, *Hoopa Valley* does not require FERC to depart from the conclusion it reached in the Waiver Denial and Rehearing Denial. Holding otherwise would ignore the explicit limitations placed by the D.C. Circuit on the import of the *Hoopa Valley* decision, as well as binding precedent from the Second Circuit.

POINT II

THE DEPARTMENT COMPLIED WITH SECTION 401'S TIMEFRAME FOR REVIEW

In light of the ongoing and active administrative review underway on May 9, 2014 and April 27, 2015, each of Constitution's new requests restarted the one-year time period for the Department's review. The Department acted within a year of the April 27, 2015 request, issuing the Denial on April 22, 2016. (Appx.621,1358).[30] Even if FERC is not convinced that Constitution's April 2015 request was sufficient to restart the waiver period, Constitution submitted a revised version of the entire Joint Application in September 2015, totaling more than 9,000 pages, which also could properly be considered a new "request." (Appx.943); Hogan Aff., ¶20. Measured from the date of that most recent Joint Application, the Department acted well within its one-year deadline.

Nor did the Department delay unreasonably. As described above, the Department's review was active and ongoing from the submission of Constitution's first Joint Application in August 2013 to the date of the Denial in April 2016. *See* pp.9-17, *supra*. The eight months leading up to

[30] To the extent not otherwise addressed here, the Department renews the arguments set forth in its "Notice of Intervention, Protest, and Answer in Opposition to Petition for Declaratory Order," dated November 9, 2017. In particular, the Department continues to object to Constitution's attempts to re-litigate the sufficiency of its Section 401 Application, an issue which was resolved by the Second Circuit in a decision that has collateral estoppel effect on this administrative proceeding. *See* Notice of Intervention, Protest, and Answer in Opposition to Petition for Declaratory Order, at 14-15.

the Denial, in which Constitution claims the Department was inactive, Petition at 2, were in fact filled with discussions regarding the details of third-party-monitoring plans, permitting of geotechnical evaluations, and internal review of Constitution's voluminous submissions (including a new Joint Application submitted in September 2015) and more than 15,000 public comments. *See* pp.15-17, *supra*; Hogan Aff., ¶¶18, 20, 21, 22; Binder Aff., ¶21. In these circumstances, there was no unreasonable agency delay.

The Department's review also comported with the purposes of Section 401. The Clean Water Act reflects Congress's intent to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" of waters within their borders. 33 U.S.C. § 1251(b); *see also id.* § 1370 (preserving states' right to adopt or enforce more stringent water quality protections than federal standards). "State certifications under § 401 are essential to the scheme to preserve state authority to address the broad range of pollution" under the Clean Water Act. *S.D. Warren Co. v. Maine Bd. of Envt'l Protection*, 547 U.S. 370, 386 (2006). Thus, Section 401 is "[o]ne of the primary mechanisms through which the states may assert the broad authority reserved to them" under the Clean Water Act. *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991). The one-year time limit for agency action "was meant to ensure that 'sheer inactivity by the State . . . will not frustrate the Federal application.'" *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (quoting Conf. Rep. 91-940 at 56 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2691, 2741).

Here, the Department fulfilled Section 401's dual purposes by conducting a thorough and timely administrative review of Constitution's Section 401 Application, in order to preserve and protect the quality of New York's waterways, without delaying the federal proceedings before FERC. There was no "sheer inactivity" by the State with the intent of delaying federal licensing

proceedings before FERC. Hogan Aff., ¶¶8-22; Binder Aff. ¶25. In fact, Constitution was still submitting information in support of its application for a Clean Water Act Section 404 Permit to the Army Corps during the month before the Denial, demonstrating that it was not just the Department's review that prevented Constitution from moving forward with the Project. *See* Army Corps Deficiency Letter (March 21, 2016); Table of Waterbody Crossings (March 29, 2016) (Appx.1281,1352); Binder Aff., ¶25; *see also* Conditional Certificate, at 51 (requiring Constitution to obtain all "applicable authorizations required under federal law").

Finally, the Department's review was impeded by Constitution's "persistent[] refus[al]" to provide requested information in a timely manner. *Constitution Pipeline*, 368 F.3d at 103. To find that the Department waived its authority in this case would sacrifice the Clean Water Act's goal of preserving state authority over state water quality while rewarding an applicant's delay and intransigence.

POINT III

IF FERC FINDS THE DEPARTMENT WAIVED ITS AUTHORITY UNDER SECTION 401, IT SHOULD NEVERTHELESS DECLINE TO AUTHORIZE CONSTRUCTION AND INSTRUCT CONSTITUTION TO RE-APPLY FOR A SECTION 401 CERTIFICATION

In the unusual circumstances of this case, even if FERC concludes the Department waived its authority (which it should not), FERC should decline to authorize construction of the Project until Constitution obtains a Section 401 certification from the Department. Although a federal agency is not bound by a state agency's late decision on a Section 401 application, the federal agency has discretion to consider the late-issued decision in its federal permitting process. *See Weaver's Cove Energy, LLC v. Rhode Island Dep't of Envt'l Management*, 524 F.3d 1330, 1334 (D.C. Cir. 2008); *Puerto Rico Sun Oil Co. v. U.S. Envt'l Protection Agency*, 8 F.3d 73, 79-80 (1st Cir. 1993); *Ackels v. U.S. Envt'l Protection Agency*, 7 F.3d 862, 867 (9th Cir. 1993). Indeed, in

the context of hydropower licenses, FERC has considered conditions imposed by late-issued Section 401 certifications as "recommendations." *See, e.g.*, Order Denying Rehearing, *FFP Missouri 15, LLC*, 162 FERC ¶ 61,237, at ¶15 (March 15, 2018). Here, FERC should decline to authorize construction of the Project and require Constitution to re-apply for a Section 401 certification for three reasons.

First, the Department acted in reliance on a long-accepted interpretation of Section 401. Until *Hoopa Valley*, state agencies had every reason to believe the withdrawal-and-resubmission process was a legally valid way to restart the one-year time-limit for agency review imposed by Section 401. The Second Circuit expressly approved of the process as one way to avoid being forced to act prematurely on Section 401 applications. *See NYSDEC v. FERC*, 884 F.3d at 456. Other state agencies have used the withdrawal-and-resubmittal process without objection. *See Islander East I*, 482 F.3d at 87. FERC had accepted the legality of the withdrawal-and-resubmittal process. Waiver Denial, ¶23 (and decisions cited). Even the Environmental Protection Agency ("EPA"), the agency tasked with interpreting the Clean Water Act, had noted that the withdrawal-and-resubmittal process could be used to "restart[] the certification clock." EPA, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*, at 13 (2010) (Appx.17), *also available at* https://www.epa.gov/sites/production/files/2016-11/documents/cwa_401_handbook_2010.pdf. The Department should not be penalized for acting pursuant to the prevailing understanding of Section 401.

Second, the substance of the Department's Denial has already been upheld by the Second Circuit, in a decision that observed how "the record amply shows, *inter alia*, that Constitution persistently refused to provide . . . site-by-site information as to the feasibility of trenchless crossing methods for streams less than 30 feet wide—*i.e.*, for the vast majority of the 251 New

York waterbodies to be crossed by its pipeline—and that it provided geotechnical data for only two of the waterbodies." *Constitution Pipeline*, 868 F.3d at 103. To authorize construction of the Project notwithstanding the Second Circuit's conclusion would reward Constitution's refusal to cooperate with the Department.

Third, the Department's Denial was made without prejudice: Constitution could have provided the information requested by the Department and re-applied for a Section 401 certification at any point over the last three years. Rather than avail itself of that option, Constitution instead sought to make an end-run around the Department through litigation and administrative proceedings. Constitution should not be permitted to construct the Project when it has made no attempt to fill the information gaps outlined in the Denial.

Taken together, these circumstances militate in favor of FERC exercising its discretion to deny Constitution permission to proceed with construction until it obtains a Section 401 certification. This would allow Constitution to reapply for a Section 401 certification from the Department, provide the necessary information on stream crossings and other details of the Project, and return to FERC when it has a Section 401 certification.

POINT IV

IF FERC FINDS WAIVER, IT SHOULD STAY THE EFFECT OF ITS ORDER UNTIL JUDICIAL REVIEW IS COMPLETE

Even if FERC were to find the Department waived its Section 401 authority over the Project (and it should not), FERC should stay the effect of any such order until judicial review of the order is complete. While the Natural Gas Act and FERC's regulations state that any request for rehearing of a FERC order does not automatically operate as a stay of such order, both provisions contemplate that FERC may order a stay. *See* 15 U.S.C. § 717r(c); 18 C.F.R. § 385.713(e). FERC has said that it will issue a stay when "justice so requires," and has listed three

factors relevant to a stay request: "(1) whether the moving party will suffer irreparable injury without the stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest." Order Denying Motion for Stay, *Columbia Gas Transmission LLC*, 129 FERC ¶ 61,021, at ¶6 (Oct. 9, 2009).[31]

"Justice requires" a stay in this case. 5 U.S.C. § 705. FERC should stay the effect of any order finding that the Department waived its Section 401 authority over the Project until judicial review is complete. *See* Order Granting Stay Pending Judicial Review, *Pacific Power & Light Co.*, 31 FERC ¶ 61,077 (April 17, 1985) ("[t]he interests of justice are best served by preservation of the *status quo* pending judicial review"). At a minimum, FERC should not issue any notice to proceed with construction of the Project in New York State until judicial review of a final FERC order on any rehearing motion is available. *See* 15 U.S.C. § 717r(a),(b) (judicial review of FERC orders not available until a party seeks rehearing and FERC acts on the rehearing request).

[31] Notably, FERC has not always strictly applied the stay factors described above, especially when applicants or industry parties have sought stays to avoid competitive disadvantage or economic expenditure. *See, e.g.*, Order Granting Stay, *Wisconsin Power and Light Co.*, 104 FERC ¶ 61,157, at ¶¶6-7 (July 29, 2003) (granting request of hydroelectric licensee to stay fishway prescription that "but for a stay, would to a substantial extent have been completed" before judicial review was complete); Order Granting Stay, *Eugene Water and Electric Board*, 83 FERC ¶ 61,165 (May 15, 1998) (staying applicant license requirements for hydroelectric project licensee because "[w]e will not require [licensee] to expend money and other resources to develop detailed final plans for construction of facilities that it may ultimately decide not to construct"); Order Granting Stay, *KansOk Partnership, et al.*, 73 FERC ¶ 61,293 (Dec. 8, 1995) (granting stay of jurisdictional determination to natural gas pipeline operators because APA test required FERC to "balance the interests of [the pipeline operator] and its customers with the overall public interest" to determine whether irreparable harm would occur); Order Granting Stay Pending Judicial Review, *Pacific Power & Light Co.*, 31 FERC ¶ 61,077 (April 17, 1985) (granting stay to potential hydroelectric developers who were passed over for license exemption because "[t]he interests of justice are best served by preservation of the *status quo* pending judicial review").

A. Irreparable Injury

If FERC allows construction of the Project to proceed without Constitution first obtaining a Section 401 certification from the Department, there will be severe and irreparable harms to the State's environment and water quality resources. The Project will cross 251 waterbodies in New York State, 87 of which support trout or trout-spawning. Jacobson Aff., ¶10. The Project will adversely impact some 85 acres of wetlands, along with additional wetland-adjacent areas and more than 500 acres of interior forest adjacent to wetlands or streams. *Id.* Construction of the Project without a Section 401 Certification will result in immediate and irreparable harm to these resources. Jacobson Aff. ¶¶ 8, 21.

In particular, the construction and operation of the Project would cause significant negative impacts to both small and large streams. *Id.* ¶ 11. Such impacts would include loss of available aquatic habitat, changes in thermal conditions, increased erosion, and stream instability and turbidity. *Id.* These and other impacts to the State's water quality resources would occur immediately upon commencement of construction of the Project, and would be difficult or impossible to repair after construction occurs. *Id.*; *see* Order Granting Stay Pending Judicial Review, *Pacific Power & Light Co.*, 31 FERC ¶ 61,077, at 61,144 (April 17, 1985) (noting that stay is appropriate because "[w]here construction has been authorized . . . return to the status quo ante may not be possible following commencement of construction").

Of particular concern is the likelihood that, should FERC allow construction of the Project to proceed without Constitution first obtaining a Section 401 certification from the Department, most streams will likely be crossed using an open-dry trench crossing method. Jacobson Aff. ¶15. If construction does not utilize trenchless crossing methods, negative impacts would be particularly profound at many of the 87 streams that support trout and trout spawning that would be crossed

by the Project. *Id.* ¶12-14. Such impacts would include a permanent loss of important habitat for trout species, in part because changes in the riparian zone at each stream crossing would not be allowed to recover fully to natural conditions. *Id.* ¶14. The loss of important wildlife habitat will continue beyond the period of active construction, and will abate only gradually over time, a process that is likely to take many years. *Id.* ¶15. In addition, crossing streams using trenched methods would cause exceedances of certain water quality standards related to turbidity, resulting in adverse impacts to downstream habitat that are not quickly or easily reversible. *Id.* ¶16.

Finally, in addition to impacts to streams, construction of the Project without a Section 401 certification from the Department would also adversely impact wetlands, including through changes in the type and species of vegetation and the wetland's soil profile. *Id.* ¶¶18, 19. These impacts would permanently alter the ecological functions and benefits of such wetlands, and would persist for a significant time after construction. *Id.*

FERC has recognized that, without a Section 401 certification and related state permits, environmental impacts from the Project will not be mitigated. In the Final EIS, FERC noted that a "principal reason[]" for its conclusion that environmental impacts from the Project would be acceptable was that "Constitution would be required to obtain applicable permits and provide mitigation for unavoidable impacts on waterbodies and wetlands through coordination with [the Department]." Final EIS at ES-13. FERC specifically recognized that a Section 401 certification from the Department was required to mitigate environmental impacts. *Id.* at 1-13 to 1-16, 5-20. Throughout its analysis, FERC staff relied on the NYSDEC's Section 401 certification review process to minimize environmental impacts:

- "Construction and operation-related impacts on wetlands would be further minimized or mitigated by Constitution's compliance with the conditions imposed by" NYSDEC. FEIS at ES-5;

- If "in-water blasting is required, Constitution would develop a detailed in-water blasting plan that complies with state-specific regulations and permit conditions." *Id.* at ES-6;

- "Waterbody crossings would be constructed in accordance with federal, state, and local permits . . . ." *Id.* at 2-20;

- Constitution "would incorporate the mitigation measures identified in [its] permit application[] as well as additional requirements of federal, state, and local agencies into their construction drawings and specifications." *Id.* at 2-29;

- Constitution "would mitigate for unavoidable wetland impacts by . . . complying with the conditions of its pending Section 404 and 401 permits." *Id.* at 4-63;

- "With adherence to . . . NYSDEC . . . permit requirements . . . impacts on wetlands would be minor." *Id.* at 4-68;

- Constitution would minimize adverse impacts from construction and trenching by "complying with applicable federal and state permits requirements." *Id.* at 4-245.

FERC's Conditional Certificate also relied on the Department's issuance of a Section 401 certification to mitigate environmental harm, noting that "[c]onstruction and operation-related impacts on waterbodies and wetlands will be further mitigations by Constitution's compliance with conditions of . . . the [Department's] Section 401 permit[] required under the Clean Water Act." Conditional Certificate, at ¶79. FERC also noted that, for the impacts of the Project to be considered "environmentally acceptable," it would need to be "constructed and operated as described in the final EIS," including the various conditions relying on the Department's Section 401 certification. *Id.* ¶ 146. FERC's decision denying rehearing on the Conditional Certificate further emphasized that environmental impacts would be minimized because "until [the Department] issues the [Section 401 certification], Constitution may not begin an activity, i.e., pipeline construction, which may result in a discharge into jurisdictional waterbodies." Rehearing Order, ¶¶ 62-63.

In short, FERC's Conditional Certificate and Rehearing Order depended on the Department's issuance of a Section 401 certification to mitigate environmental impacts. Without a Section 401 certification, these adverse environmental impacts will not be mitigated. FERC cannot both rely on the Department's issuance of a Section 401 certification to mitigate environmental harm and reject the Department's argument that constructing the Project without a Section 401 certification will cause irreparable harm. Constitution should not be allowed to begin constructing the Project in New York without a Section 401 certification until FERC's waiver determination has been upheld by a Court or, at a minimum, until the Department can apply to a Court for judicial review and a stay.

B. Harm to Other Parties

A stay pending judicial review would not harm the other parties. Constitution will likely object to the delay in construction that will result from a stay. However, Constitution could have avoided delay by re-applying for a Section 401 certification, with the information the Department requested, at any point in the past three years. If Constitution had re-applied promptly after the Denial, the Department's one-year window to act still would have expired two years ago. Indeed, Constitution could have expedited the Department's original review by submitting requested materials in a timely manner, instead of "persistently refus[ing]" to furnish requested information on issues affecting water quality.[32] Constitution cannot not now claim to be harmed by delay occasioned by its own conduct.

C. Public Interest

A stay of any waiver order would further the public interest. Given the limiting language included in *Hoopa Valley* and the explicit authorization offered by the Second Circuit in *NYSDEC*

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

v. FERC, any FERC order finding waiver faces would be subject to a serious challenge on judicial review. Without a stay, Constitution could seek permission to begin constructing the Project before judicial review is even available. *See* 15 U.S.C. § 717r(a),(b) (describing rehearing process that is predicate for judicial review of FERC orders under Natural Gas Act). Although Congress imposed a 30-day limit on FERC's consideration of rehearing requests, *id.* § 717r(a), FERC has in the past granted itself extensions of time to grant or deny rehearing requests, which has delayed the availability of judicial review under the Natural Gas Act. This process has resulted in cases where construction of a natural gas project has commenced – or even been substantially completed – before judicial review of predicate FERC orders is available. *See, e.g.*, *Sierra Club v. FERC*, 867 F.3d 1357, 1364-65 (D.C. Cir. 2017) (project construction had started by the time FERC denied petitioner's request for rehearing); *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1312 (D.C. Cir. 2014) (FERC took six months to deny rehearing request).

A stay of any waiver order while judicial review is pending would ensure that the environmental harm described above is not inflicted unless and until the order is upheld by a federal court. *See, e.g.*, Order Granting Stay, *Wisconsin Power and Light Co.*, 104 FERC ¶ 61,157, at ¶¶6-7 (July 29, 2003) (granting request of hydroelectric licensee to stay fishway prescription that "but for a stay, would to a substantial extent have been completed" before judicial review was complete). At the very least, construction should not be permitted to begin until FERC issues a final and reviewable order, such that the Department can seek judicial review and a stay from a court under the Natural Gas Act.

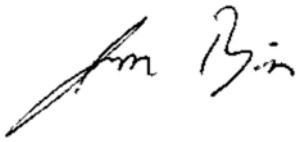
CONCLUSION

For the reasons described above, FERC should adhere to the conclusion reached in the Waiver Denial and the Rehearing Denial that the Department did not waive its authority to issue,

condition, or deny a Section 401 certification. If FERC finds that a waiver occurred, it should nonetheless decline to authorize construction until Constitution obtains a Section 401 certification or new evidence of waiver. If FERC finds that waiver occurred and declines to require Constitution to re-apply for a Section 401 certification, it should stay the effect of its decision until judicial review is complete or, at a minimum, available.

Dated: April 1, 2019
Albany, NY

Respectfully submitted,



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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

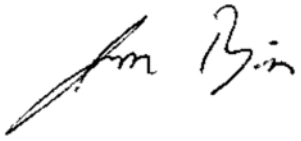
Constitution Pipeline Company, LLC	)	Docket No. CP18-5-000

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2019, I filed the foregoing document along with the following documents with the Secretary of the Federal Energy Regulatory Commission ("FERC") via FERC's online E-Filing system, which in turn effected service upon each person designated on the official service list compiled by the Secretary in this proceeding:

- Affirmation of Jonathan A. Binder in Support of Supplemental Answer and Protest;
- Affidavit of Christopher M. Hogan in Support of Supplemental Answer and Protest;
- Affidavit of Roy A. Jacobson, Jr. in Support of Supplemental Answer and Protest; and
- Volumes 1 to 7 of Appendix Containing Supplemental Materials in Support of Supplemental Answer and Protest.

Dated at Albany, NY this 1st day of April, 2019



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