UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Constitution Pipeline Company, LLC	)	Docket Nos. CP18-5-000
	)	18-5-001
	)	18-5-002

REQUEST FOR REHEARING AND STAY OF ORDER ON VOLUNTARY REMAND

Pursuant to Section 19 of the Natural Gas Act[1] and Rules 203 and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or the "Commission"),[2] the New York State Department of Environmental Conservation ("NYSDEC" or the "Department") hereby files this request for rehearing and stay of FERC's "Order on Voluntary Remand" issued on August 28, 2019 (the "Waiver Order").[3] In the Waiver Order, FERC improperly concluded that NYSDEC waived its authority under Clean Water Act Section 401[4] to issue, condition, or deny a water quality certification to Constitution Pipeline Company, LLC ("Constitution") for its proposed natural gas pipeline project (the "Project"). In particular, the Commission incorrectly concluded that the actions of Constitution – in twice voluntarily withdrawing and submitting a new application for a water quality certification authorizing Constitution to construct and operate the Project across 100 miles of undeveloped land in New York State – had caused the Department to waive its authority to deny that application. The Waiver Order came more than three years after the Department timely denied certification for the Project,

[1] 15 U.S.C. § 717r.
[2] 18 C.F.R. §§ 385.203 and 385.713.
[3] 168 FERC ¶ 61,129.
[4] 33 U.S.C § 1341.

subsequent to the Second Circuit's decision upholding the Department's denial on the merits,[5] and despite the fact that the Commission properly held on two prior occasions that the Department had *not* waived such authority.[6]

The Waiver Order departs from FERC's "longstanding interpretation" of section 401, Waiver Order ¶7, as applied in two earlier decisions concluding that the Department – which engaged in an active review of the voluminous materials submitted by Constitution (notwithstanding Constitution's ongoing failure to respond to the Department's requests for relevant information) – had not waived its section 401 authority. FERC reversed course based entirely on the intervening decision of the United States Court of Appeals for the District of Columbia Circuit in *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099 (D.C. Cir. 2019) ("*Hoopa Valley*"), a decision that has limited scope and effect in an entirely different circumstance, and that the parties have now petitioned the United States Supreme Court to review.[7] The Waiver Order also ignored contrary and binding legal precedent, other arguments made by the Department, and essential facts about the administrative record before the Department. FERC also denied the Department's request for a stay of its decision pending judicial review of the Waiver Order, notwithstanding the unique circumstances of this proceeding and the irreparable harm that will result from the construction of the Project without the required water quality certification. While a stay of the Wavier Order is necessary to prevent extensive and irreversible environmental damage to State waters, the Commission instead decided that a stay would "substantially harm" Constitution by "delaying a revenue stream" to the company, despite

[5] *Constitution Pipeline Co., LLC v. New York State Dep't of Envt'l Conservation,* 868 F.3d 87 (2d Cir. 2017), *cert. denied* 138 S. Ct. 1697 (2018) (*Constitution Pipeline*)
[6] *Constitution Pipeline Co., LLC,* 162 FERC ¶ 61,014 (Waiver Denial), *reh'g denied,* 164 FERC ¶ 61,029 (2018) (Rehearing Denial).
[7] *See* Petition for Certiorari, U.S. Supreme Court Docket No. 19-257 (Aug. 26, 2019).

Constitution's intransigence in supplying required information to the Department and failure to make any attempt to remedy the deficiencies identified in the Department's section 401 denial,[8] which were recognized and upheld by the Second Circuit Court of Appeals.[9] The Commission must vacate the Waiver Order and revert back to the correct legal and factual conclusions it made in both the initial Waiver Denial and the Rehearing Denial.

STATEMENT OF ISSUES

1. The Commission erred because the Waiver Order is legally wrong. First, the Waiver Order fails to follow the plain language and legislative intent of section 401. Second, FERC ignored the express limitations placed by the D.C. Circuit on its holding in *Hoopa Valley*. Third, FERC ignored binding contrary precedent from the Second Circuit.[10] Fourth, FERC erred in retroactively applying the *Hoopa Valley* holding to Constitution's section 401 application. Fifth, FERC simply ignored NYSDEC's argument that, in the specific circumstances of this case, FERC should decline to authorize construction. Sixth, FERC's significant expansion of the limited holding in *Hoopa Valley* would have far-reaching, unintended consequences for all states and other certifying authorities, including in circumstances outside the scope of FERC's jurisdiction.
2. The Commission erred because the Waiver Order misconstrues the administrative record in this proceeding. Unlike the applicant in *Hoopa Valley*, Constitution made a new request for a water quality certification after each time it chose to withdraw its application. Moreover, contrary to FERC's misleading statements in the Waiver Order, such requests were not limited to mere two-page letters. By focusing exclusively on the two-page letters

[8] Waiver Order at ¶¶43-53.
[9] *Constitution Pipeline,* 868 F.3d 87.
[10] *See NYSDEC v. FERC,* 884 F.3d 450 (2d Cir. 2018).

Constitution used to officially notify the Department that it was withdrawing its application, FERC ignored the thousands of pages of supporting documents and numerous changes made by Constitution to the Project, all which required the Department's review before it could determine whether the Project would comply with State water quality standards and requirements. FERC overlooked the new application for a section 401 certification, including thousands of pages of supporting materials, that Constitution submitted to the Department in September 2015, which on its own should have been considered a new "request" for certification.

3. The Commission erred in denying the Department's request to stay the effect of the Commission's legally and factually erroneous holding. Pursuant to Section 19(b) of the Natural Gas Act,[11] the Commission's action in this proceeding will be subject to judicial review in the Court of Appeals once FERC acts on this Request. FERC should stay the Waiver Order, as well as refrain from issuing any Notices to Proceed with respect to the Project, during the pendency of review of this Request, including any appeal thereof. A stay will preserve the jurisdiction of the Court of Appeals over a petition challenging the Waiver Order, should this Request be denied by the Commission. Furthermore, in denying a stay, FERC violated the Natural Gas Act, the Clean Water Act, and its own regulations by elevating Constitution's "revenue stream" over the irreversible environmental damage that the Project would cause to New York State's actual streams if the Project is built without a section 401 certification. Construction of the Project without the required certification would also harm the sovereign interests of the State under the Clean Water Act to protect its own water quality. Given both the unusual procedural history of this case,

[11] 15 U.S.C. § 717r(b).

as well as the irreparable environmental harm that would result, a stay is in the public interest. Instead, the Commission places the financial interests of an individual company over water quality, the sovereign rights of the State, and the public interest.

FACTUAL BACKGROUND

The Department's Supplemental Answer and Protest, filed on April 1, 2019 ("Supplemental Pleading"), recites the factual background associated with this Project.[12] This includes the administrative process before the Department associated with Constitution's three requests for a section 401 certification from the Department, and the Department's timely denial of the third request on April 22, 2016.[13] The Supplemental Pleading also sets forth how the Second Circuit upheld the Department's denial,[14] and how FERC previously found that the Department did not waive its authority in both the Waiver Denial and the Rehearing Denial.[15] Finally, the Supplemental Pleading explains the D.C. Circuit's narrow decision in *Hoopa Valley*, which is limited to the unusual facts of that case.[16]

ARGUMENT

Particularly in light of the fact that the Commission altogether ignored or overlooked many of the Department's arguments and factual statements in the Waiver Order, all of the arguments made in the Supplemental Pleading are hereby incorporated by reference into this Request. Furthermore, as set forth above in the Statement of Issues, the Commission erred in the Waiver Order because it is legally wrong, it misconstrued the administrative record before NYSDEC, and

[12] Supplemental Pleading at 7-23.
[13] *Id.* at 9-18.
[14] *Constitution Pipeline*, 868 F.3d 87; Supplemental Pleading at 18-20.
[15] *Id.* at 20-21.
[16] *Id.* at 22-23.

because it improperly denied NYSDEC's request for a stay. NYSDEC also renews its request for a stay.

I. THE WAIVER ORDER IS LEGALLY WRONG

a. FERC's Waiver Order Violates the Plain Language and Legislative Intent of Section 401

In concluding that the Department waived its authority to deny Constitution's section 401 application, FERC failed to comply with the plain language and legislative intent of section 401. Under section 401, a state agency waives its authority only if it "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."[17] The purpose of this provision was Congress' straightforward desire "to insure that sheer inactivity by the State . . . will not frustrate the Federal application."[18] Out of this modest restriction of the timing of state action, FERC has created a trap designed to undermine the very purpose of section 401 by preventing states from exercising their authority thereunder to block projects that will impact state water quality, even if they have won federal approval.[19]

There is no question that each time Constitution withdrew its section 401 application, it also asked the Department for (i.e., requested) a section 401 certification authorizing it to build the Project. Nor is there any question that the Department acted within one year of Constitution's April 2015 request by denying the application. Constitution voluntarily withdrew its earlier requests, meaning there was nothing pending for the Department to act upon. In theses circumstances, the Department did not "fail" or "refuse" to act upon *any* "request" for section 401 certification within

[17] 33 U.S.C. § 1341(a)(1).
[18] H.R. 92-911, *reproduced in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 809 (1973).
[19] *See* S.D. Warren, 547 U.S. 370, 380 (2006) (quoting S. Rep. No. 92-414, p. 69 [1971]).

one year, because the requests were nullified or no longer valid by operation of Constitution's application withdrawals.

Nor was the administrative process in this proceeding marked by the "sheer inactivity" Congress sought to prevent in enacting the waiver provision. To the contrary, as documented in the Department's Supplemental Pleading – and apparently unchallenged by Constitution or FERC,[20]– the Department engaged in an active and ongoing review of the tens-of-thousands of pages of materials submitted by Constitution in support of its application.[21] The Department's review was hampered by Constitution's "persistent[] refus[al]" to provide relevant materials on stream-crossing techniques.[22]

Although the Department's actions here comported with the plain language and legislative intent of section 401, FERC has latched onto the narrow holding of *Hoopa Valley* to allow Constitution to avoid the consequences of its business decision to twice withdraw its requests for a section 401 certification *and* its failure to provide relevant information despite repeated requests from the Department. Nothing in the text or legislative history of section 401 suggests it was intended to have such harsh results on state agencies diligently reviewing section 401 applications pursuant to then-applicable legal standards, and *Hoopa Valley* does not require a contrary result.[23]

FERC's concluding statement that "[a]rguments that the waiver conclusion is inconsistent with Congressional intent must be addressed to Congress,"[24] puts the cart before the horse. FERC, like every other federal agency and court, "must give effect to the unambiguously expressed intent

[20] Waiver Order at ¶37.
[21] *See* Supplemental Pleading, at 9-17.
[22] Constitution Pipeline, 868 F.3d at 103.
[23] *See* Point I.b, *infra*.
[24] Waiver Order at ¶42.

of Congress."[25] FERC assumes that the Department waived its authority, regardless of what Congress intended. But if Congress did not intend the waiver provision to apply to the circumstances of this case, then FERC's "waiver conclusion" is wrong and it is not the Department's burden to seek further Congressional clarification that the plain language and legislative history of section 401 mean what they say.[26]

b. FERC Ignored the Express Limitations Placed on *Hoopa Valley* by the D.C. Circuit

The sole acknowledged basis for FERC's decision to depart from its "longstanding interpretation" of section 401 and its two prior orders concluding that the Department did not waive its authority was the D.C. Circuit's 2019 decision in *Hoopa Valley*.[27] As an initial matter, the continued validity of *Hoopa Valley* is uncertain, as several of the parties to that case have petitioned the Supreme Court for review.[28] Moreover, FERC utterly ignored the express limitations placed on *Hoopa Valley* by the court, concluding instead that the Court had established a "general principle" prohibiting use of the withdrawal and resubmittal process.[29] To the contrary, *Hoopa Valley* was a narrow decision limited to the specific facts of that case.

In *Hoopa Valley*, 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."[30] Accordingly, for more than a decade, the applicant submitted the

[25] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).
[26] These issues are also addressed by the U.S. Environmental Protection Agency ("EPA") in its regulatory proposal seeking to "clarify" water quality certification, see n. 56 *infra*, which is currently open for public comment.
[27] Waiver Order at ¶1.
[28] *See* Petition for Certiorari, U.S. Supreme Court Docket No. 19-257 (Aug. 26, 2019).
[29] Waiver Order at ¶31.
[30] *Hoopa Valley*, 913 F.3d at 1101.

same one-page letter purporting to withdraw and resubmit its application just before the one-year deadline expired.[31] The D.C. Circuit held that, under the circumstances presented by that case, the states had waived their section 401 authority.[32] The decision turned on the existence of a written contract that "explicitly required abeyance of all state permitting reviews."[33] The Court noted that the States' "deliberate and *contractual* idleness defie[d]" the timing requirements of Section 401.[34]

But far from laying out a "general principle" prohibiting the withdrawal-and-resubmission process, the *Hoopa Valley* court expressly "decline[d] to resolve the legitimacy" of a case where an applicant "withdrew its request and submitted a wholly new one in its place."[35] Nor did the Court "determine how different a request must be to constitute a 'new request' such that it restarts the one-year case."[36] The Court noted that "[t]his case presents the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification."[37] Pursuant to the written agreement, the applicant "never intended to submit a 'new request.'"[38] The Court therefore concluded that the applicant's "withdrawals-and-resubmittals were not just similar requests, they were not new requests at all."[39] 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*."[40]

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[31] *Id.* at 1104.
[32] *Id.* at 1105.
[33] *Id.* at 1101.
[34] *Id.* at 1104 (emphasis added).
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 1105 (emphasis added).

Notwithstanding this express limiting language of the *Hoopa Valley* decision, FERC expressed its belief that the Court "did not in any way indicate that its ruling was limited solely to the case before it."[41] Accordingly, FERC interpreted *Hoopa Valley* "to stand for the general principle that where an applicant withdraws and resubmits a request for water quality certification *for the purpose of* avoiding section 401's one-year time limit, and the state does not act within one year of the receipt of any application, the state has failed or refused to act under section 401 and, thus, has waived its section 401 authority."[42] But such a "general principle" is precisely what the D.C. Circuit expressly said it was *not* establishing.[43]

As the Department described in detail in its Supplemental Pleading on the waiver issue, unlike the state agencies in *Hoopa Valley*, the Department was engaged in an ongoing and active review of Constitution's application for a section 401 certification throughout the review period.[44] There was no "deliberate" or "contractual" idleness on the part of the State.[45] The applicant in *Hoopa Valley* was not making a new "request" when it withdrew and resubmitted its application, because a written contract provided the pro forma requests were simply intended to indefinitely extend the applicant's ability to operate under its existing license.[46] Here, by contrast, both times Constitution withdrew its request, it was also making a new "request" for a section 401 certification. The Department treated each new submittal as a new request, and denied the third request (following the second withdrawal) within the one-year deadline. Nothing in *Hoopa Valley*

[41] Waiver Order at ¶19.
[42] Waiver Order at ¶31 (emphasis added).
[43] *See Hoopa Valley*, 913 F.3d at 1104.
[44] *See* Supplemental Pleading at 9-17.
[45] *Hoopa Valley,* 913 F.3d at 1104.
[46] *Id.*

required FERC to reverse course and conclude that the Department waived its authority under section 401.

c. FERC Ignored Binding Contrary Precedent from the Second Circuit

FERC compounded its erroneous interpretation of *Hoopa Valley* – which, after all, represents the decision of just one Court of Appeals – by declining to consider binding precedent from the Second Circuit that approved of the withdrawal and resubmittal process. In *NYSDEC v. FERC*, the Second Circuit, while agreeing with FERC that a complete application was not required to trigger section 401's waiver period, assured the Department and other state agencies 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."[47] Although FERC cited *NYSDEC v. FERC* to support its interpretation of when the time period for a state's review of a section 401 application *begins*,[48] FERC utterly failed to acknowledge that part of the basis for the Second Circuit's conclusion with respect to the reasonableness of FERC's interpretation in that case was the availability of the withdrawal-and-resubmittal process to extend the timeframe for state review.[49]

As the Department previously argued,[50] 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 with matters pertaining thereto."[51] Constitution maintains offices in the State of New York and is a joint venture organized for the purpose of constructing and operating the Project,

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[47] 884 F.3d at 456. 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 E. Pipeline Co. v. Conn. Dep't of Envt'l Conservation* (482 F.3d 79, 87 (2d Cir. 2006)).
[48] Waiver Order at ¶25.
[49] *NYSDEC v. FERC*, 884 F.3d at 456.
[50] Supplemental Pleading at 26-27.
[51] *Alleghany General Hosp. v. N.L.R.B.*, 608 F.2d 965, 970 (3d Cir. 1979).

which would mostly be built in New York.[52] Accordingly, FERC should follow the law applicable in the Second Circuit.[53] 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.[54] By failing to even consider – let alone follow – binding contrary precedent, FERC's Waiver Order is arbitrary and capricious, an abuse of discretion, and not in accordance with the law.

d. FERC Erred in Applying *Hoopa Valley* Retroactively to Constitution's 401 Application

i. The Waiver Order Announces a Change in Administrative Procedures which Cannot Be Applied Retroactively

Although the Waiver Order purports to apply the holding of *Hoopa Valley* to the Department's conduct, as discussed above, nothing in *Hoopa Valley* required FERC to find waiver in this case. Rather, the Waiver Order goes well beyond *Hoopa Valley*, as it sets forth FERC's new interpretation of section 401 as a categorical rule that applies to certain actions on the part of both applicants and the certifying authorities. For example, applicants may not be able to withdraw requests and submit new requests, states may not be able to act on section 401 requests submitted after an applicant has withdrawn a prior application, and at the same time states would be required to act upon a non-existent application that was withdrawn from the state's jurisdiction.[55] FERC's new interpretation of section 401 is consistent with the current Administration's efforts generally

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[52] *See, e.g.,* Get the Facts: Constitution Pipeline, constitutionpipeline.com/get-the-facts-constitution-pipeline (last visited September 20, 2019) (describing alleged benefits of the Project to New York State and listing two offices, both in New York).
[53] *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).
[54] *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).
[55] *See* Point I.f, *infra*.

to curtail state authority under section 401, and specifically to undermine New York's alleged attempts to "blockade" natural gas infrastructure projects, further suggesting that FERC's invocation of *Hoopa Valley* is a mere pretense for policy-making.[56] Regardless of whether FERC's new interpretation of section 401 is the product of administrative deliberation or policy-making, FERC is not authorized to retroactively apply a new interpretation of section 401 to the Department's historical actions on Constitution's application.

Absent express statutory authority, an administrative agency is generally not authorized to apply newly formulated administrative policies retroactively. *See Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208-209 (1988). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). An administrative rule has retroactive effect if it "attaches new legal consequences to events completed before its enactment." *Id.* at 269.

[56] Andrew Wheeler, *Here's how Team Trump will bust Cuomo's gas blockade*, N.Y. Post, Aug. 15, 2019. *See also* EPA, *Updating Regulations on Water Quality Certification*, 84 Fed. Reg. 44,080 (Aug. 22, 2019) (proposing to significantly narrow scope of state review under section 401, and impose federal oversight over every aspect of state permitting process); U.S. Army Corps, *Timeframe for Clean Water Act Section 401 Water Quality Certifications*, Regulatory Guidance Letter No. 19-02 (Aug. 7, 2019) (limiting states to 60 days to act on section 401 requests, with limited exceptions); *Executive Order on Energy Infrastructure and Economic Growth*, 84 Fed. Reg. 15,495 (Apr. 15, 2019) (ordering review of section 401 policies in order to promote energy infrastructure). The Administration has explicitly stated that its efforts to "clarify" the section 401 certification process are largely in direct response to recent actions taken by certain states with regard to energy infrastructure projects, most notably including the Department's action to deny certification for the Project. *See, e.g.*, Andrew Wheeler, *Here's how Team Trump will bust Cuomo's gas blockade*, N.Y. Post, Aug. 15, 2019; EPA, *Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking*, at 11-12 (Aug. 2019); 84 Fed. Reg. at 44,110. The Waiver Order's holding is consistent with key provisions of EPA's regulatory proposal, which is currently open for public comment. Regardless of whether the Commission's Waiver Order is part of the Administration's politically-motivated attack against the rights of New York and other states, it is legally wrong.

Here, the Department acted pursuant to FERC's "longstanding interpretation" of section 401 as allowing states to act on new requests submitted after an applicant has withdrawn a prior request. In the Waiver Denial and Rehearing Denial, FERC expressly recognized that the Department's conduct comported with FERC's current interpretation of the law. In the Waiver Order, however, FERC has suddenly reversed course, concluding that the same conduct FERC already said did not violate section 401 had, in fact, resulted in the Department's waiver of its section 401 authority. Nothing in section 401 suggests that Congress intended to allow federal agencies to apply new interpretations of its waiver provision retroactively. To the contrary, the Clean Water Act evinces a congressional intent to preserve state administrative authority.[57] And "nothing" in the Natural Gas Act "affects the rights of States" under the Clean Water Act.[58] Accordingly, FERC exceeded its authority by attempting to apply a new administrative policy retroactively to the Department's prior conduct.

ii. Constitution Never Argued that the Withdrawal-and-Submittal Process Was Ineffective

FERC also erred in retroactively applying *Hoopa Valley* to Constitution's application, because Constitution never argued that the withdrawal and resubmission process was invalid as a "general principle." Rather, Constitution sought a finding of waiver based *solely* on the Department's alleged failure to act within "a reasonable period of time," which Constitution claimed could be measured from at least four possible dates, one of which happened to be the date Constitution withdrew and resubmitted its requests for a second time.[59]

[57] *See* 33 U.S.C. § 1251(b).
[58] 15 U.S.C. § 717b(d)(3).
[59] Pet. for Declaratory Order, at 18-20.

The fact that Constitution did challenge "the second purported withdrawal-and-resubmission,"[60] on different grounds, does not entitle Constitution to raise any other additional argument that might later come up to support that date as a waiver deadline. FERC's contrary conclusion based on an after-the-fact rationale would allow applicants to broadly claim that a state agency waived its section 401 authority at some point in their review, and fill in the specific arguments at a later date based on intervening administrative or judicial decisions. FERC historically has not tolerated this sort of serial litigation of issues as they occur to the parties.[61] Here, Constitution waited until long *after* its request for rehearing of the Waiver Denial to challenge the legitimacy of the withdrawal and resubmittal process, even though the *Hoopa Valley* case had been pending in the D.C. Circuit since 2014.

Nothing in the D.C. Circuit's remand order, which was in response to FERC's own request for a voluntary remand, "obligated" FERC to give Constitution the benefits of arguments the company did not make in its petition for a Declaratory Order.[62] Rather, FERC should have concluded that because Constitution never availed itself of the argument that its own actions in voluntarily withdrawing its requests and submitting a new request for a section 401 certification had caused the Department to waive its authority.

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[60] Waiver Order at ¶17.

[61] *See, e.g.*, *Niagara Mohawk Power Corp.*, 96 FERC ¶ 61,011, at ¶61,044 (July 2, 2001) (FERC "look[s] with disfavor on parties raising on rehearing issues that should have been raised earlier"); *Baltimore Gas & Electric Co.*, 91 FERC ¶ 61,270, 61,922 (June 15, 2000) (FERC "look[s] with disfavor on parties raising on rehearing issues that should have been raised earlier. Such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision."); *Ocean State Power II*, 69 FERC ¶61,146, at ¶61,548 (Nov. 2, 1994) (rejecting "new evidence" and "new objections" raised on rehearing because FERC "cannot resolve issues finally and with any efficiency if parties attempt to have us chase a moving target").

[62] Waiver Order at ¶17.

iii. FERC's Approach Means Every Section 401 Certification Issued With Conditions or Denied Could Be Subject to Waiver Review and Deprives States of Certainty in the Outcome of Their Administrative Processes

FERC's willingness to use a 2019 decision to conclude that the Department's actions in 2015 resulted in waiver in order to void the Department's 2016 denial – even after intervening decisions from both the Second Circuit and FERC upholding the Department's actions – calls into question the validity of every section 401 certification that has ever been denied or issued with conditions. Under FERC's approach, any time an application was withdrawn and resubmitted, the state arguably unwittingly waived its Clean Water Act authority to be waived, despite the fact that *Hoopa Valley* was only decided in 2019. Ironically, the Commission claims that ensuring definiteness and finality in its proceedings is important,[63] yet its conclusions in the Waiver Order would have exactly the opposite effect. FERC's misplaced interpretation of *Hoopa Valley* could be used to circumvent section 401 denials issued a decade or more ago, and resurrect projects long assumed to be dead.[64] Similarly, an applicant operating pursuant to a section 401 certificate with state-imposed conditions could attempt to avoid those conditions by arguing that the applicant's own conduct in withdrawing and resubmitting its applications caused the state to waive its authority. Nothing in the text or legislative history of section 401's waiver provision, or in the *Hoopa Valley* decision itself, suggests that the waiver provision was intended to allow for perennial re-opening of section 401 decisions that were timely-issued under the then-prevailing interpretation of the law.

[63] Waiver Order at ¶44, n. 103.

[64] *See, e.g.*, *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 728 (4th Cir. 2009) (state agency acted within one year of receipt of *complete* application, not initial application); *Islander E. Pipeline Co., LLC*, 482 F.3d at 87 (applicant withdrew and resubmitted section 401 application, which state agency then denied).

The Waiver Order places states in the untenable position of not knowing what laws will apply to the permissible timeframe for their review of section 401 applications. A state agency – like the Department – can act pursuant to the prevalent interpretation of section 401 currently being followed by all federal agencies and courts, but nonetheless be held to have waived its authority based on some subsequent change in administrative position or new judicial interpretation by a single court. The Department and the citizens of New York State are entitled to finality in administrative decisions no less than Constitution and its constituent natural gas companies.[65] FERC has denied the Department – and all states decisionmakers – that finality by allowing applicants to raise new waiver arguments at any time and in serial manner as circumstances develop.[66] For these reasons alone, FERC erred in finding waiver based on the *Hoopa Valley* decision.

e. FERC Ignored the Department's Argument That, In the Specific Circumstances of This Case, FERC Should Decline to Authorize Construction

In the Waiver Order, FERC simply ignored the Department's alternative argument that, in the specific circumstances of this case, even if FERC found that waiver had occurred, it should exercise its discretion to decline to authorize construction and instruct Constitution to re-apply for a section 401 certification.[67] FERC's failure to even consider the Department's argument renders the Waiver Order arbitrary and capricious.

[65] *See, e.g.*, 91 FERC at ¶ 61,922.
[66] *See also National Fuel Gas Supply Corp.*, 164 FERC ¶61,084, at ¶6 (Aug. 6, 2018), *rehearing denied* 167 FERC ¶ 61,007, at ¶¶25-27 (April 2, 2019) (treating untimely motion for rehearing raising new waiver arguments that could have been presented in initial request for rehearing as a new motion and concluding that the Department waived its authority).
[67] Supplemental Pleading at 30-32.

Federal courts and FERC have recognized that the fact that a section 401 decision may be technically late does not mean the federal agency must ignore it entirely.[68] Indeed, in the context of hydropower licenses, FERC has considered conditions imposed by late-issued Section 401 certifications as "recommendations."[69]

As argued more fully in the Department's supplemental filing,[70] 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 the "longstanding interpretation" of section 401 that had been recognized by FERC, EPA, and federal Courts.[71] 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."[72] 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-plus years. Rather than avail itself of that option, Constitution instead sought to make an end-run around the Department through litigation and

[68] *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).
[69] *See, e.g.*, Order Denying Rehearing, *FFP Missouri 15, LLC*, 162 FERC ¶ 61,237, at ¶15 (March 15, 2018).
[70] Supplemental Pleading at 30-32.
[71] Waiver Order at ¶7; EPA, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*, at 13 (2010) (Appx.17); *See NYSDEC v. FERC*, 884 F.3d at 456.
[72] *Constitution Pipeline*, 868 F.3d at 103.

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.

f. FERC's Significant Expansion of the Limited Holding in *Hoopa Valley* Will Have a Host of Unintended Consequences

FERC's improper Waiver Order will have far-reaching consequences in a variety of fields, many of which will be entirely outside of FERC's jurisdiction. It may be that these consequences are unintended as the Commission has not fully considered the implications of its decision in this case. On the other hand, the Waiver Order is consistent with the federal government's comprehensive and well-coordinated effort to dismantle states' rights under the Clean Water Act.[73] Regardless of the intent, the impacts on all certifying agencies are the same and will be significant.

For example, as noted above and as stated in the Waiver Order, "[t]he Commission interprets *Hoopa Valley* to stand for the *general principle* that where an applicant withdraws and resubmits a request for water quality certification *for the purpose of* avoiding section 401's one-year time limit," a state can waive its section 401 authority.[74] Therefore, under the Commission's interpretation, whether or not waiver occurred will depend in part on the applicant's purpose in withdrawing a section 401 request. This interpretation would leave the Department and other state certifying authorities in the impossible position of having to determine an applicant's intent in deciding to withdraw a request. The Department and other certifying agencies are generally not well-suited to making such determinations.

[73] *See* n. 56, *supra*.
[74] Waiver Order at ¶31 (emphasis added).

There are numerous reasons, beyond merely extending the review period for the certifying authority, that an applicant might voluntarily and unilaterally choose to withdraw its section 401 request. Such a withdrawal could be due to the applicant's own business or other considerations. And a withdrawal could occur even absent any discussion or interaction – formal or otherwise – with the certifying agency. In other words, a withdrawal and resubmittal may occur without any foreknowledge on the part of the Department or other certifying authority. Under the Commission's interpretation, the Department would have to attempt to ascertain an applicant's mindset; if the agency guesses wrong, the consequences might be a finding of waiver by the Commission or other relevant federal agency. The Commission's newfound general principle regarding withdrawal and resubmittal, as espoused in the Waiver Order, would create numerous potential opportunities for uncooperative applicants to game the system in an attempt to elicit a finding of waiver. Because the general principle is entirely based on the *applicant's* actions and the *applicant's* purpose for such actions, certifying authorities would be left on the sidelines hoping that all applicants act in good faith.

In addition, because FERC's interpretation effectively forecloses the only other viable procedural option in cases where more time is necessary for a certifying agency to make a decision on a certification request, it will lead to an onslaught of denials. This will only serve to further decrease the definiteness and certainty the Commission claims it prefers – at least when such definiteness and certainty inures to the benefit of industry parties – including by increasing the frequency of litigation. Furthermore, many of these denials will be premature, to the extent they are likely to be based on insufficient information or the status of the federal agency's administrative or environmental review. Depending on when in the federal agency review process an applicant chooses to make its section 401 request to the state, environmental review may be

ongoing, which could in turn lead to changes in the project. Such project changes could cause resulting changes in the nature and extent of the project's water quality and other environmental impacts. Thus, the Commission's interpretation in the Waiver Order is likely to create additional and premature denials, as well as the potential need for subsequent section 401 requests to address project changes that result in altered water quality impacts.

Furthermore, in many cases, a certifying authority will have no choice but to deny a certification request even when a request is not actually pending before it. An applicant may decide to withdraw a request with no intention of ever submitting another application for the project, such as when it decides to abandon the project entirely. Or an applicant may plan to submit a subsequent application related to the project several months or years hence, as it makes changes to the project, acquires additional financing, or awaits appropriate market conditions. Just as the Court did in *Hoopa Valley*, in the Waiver Order FERC expressly declined to answer the question of "how different a subsequent request must be to constitute a 'new request' such that it restarts the one-year clock."[75] Neither *Hoopa Valley* nor the Waiver Order set forth any limitation on the intervening amount of time between a withdrawal and subsequent submittal of a 'new request.' Thus, to avoid inadvertently waiving its authority over a project that may be resurrected at some point in the future, an agency would have no choice but to deny even withdrawn applications. This absurd result, which defies both common sense and standard administrative agency practice and jurisdictional reach, further demonstrates the wide-ranging implications of the Commission's expansive interpretation of *Hoopa Valley*.

Finally, these and other consequences of FERC's incorrect and expansive interpretation of *Hoopa Valley* are not limited to projects subject to review under the Natural Gas Act, or even to

[75] Waiver Order at ¶¶25 and 39.

projects subject to FERC's jurisdiction pursuant to the Federal Power Act. According to the Commission, section 401's applicability has "no distinction between the many covered federal regimes."[76] Thus, especially because the Commission casts its decision in the Waiver Order in terms of a general principle rather than based on the specific facts of this case, its expansive interpretation is likely to be used in other contexts in an attempt to find waiver and undermine individual states' rights. Meanwhile, a narrower version of the Commission's general principle is subject to review by the Supreme Court, is contrary to the Second Circuit's binding precedent, and is currently part of an EPA regulatory proposal that is open for public comment. In this way, the Commission effectively usurps the authority of the federal courts and other federal agencies. These entities are perhaps more likely than FERC to consider and address the wide range of consequences from such an expansive interpretation of *Hoopa Valley*.

II. FERC MISCONSTRUED THE ADMINISTRATIVE RECORD

Aside from the Commission's legal errors in the Waiver Order as discussed above, the Commission also misconstrued the administrative record before NYSDEC that led to its timely denial of a water quality certification for the Project. Each time Constitution withdrew its then-pending request, Constitution made a new request for a certification, both in May 2014 and in April 2015, respectively. On both of these occasions, both NYSDEC and Constitution considered the submittals to be new requests that commenced a new one-year review timeframe under the section 401 (as, until the Waiver Order, did FERC). Moreover, even apart from these two new requests, Constitution submitted tens of thousands of pages of additional materials, the impacts of many being so great, it could have constituted a new request in and of itself sufficient to restart the one-year review timeframe.

[76] Waiver Order at ¶41.

Throughout the Waiver Order, the Commission repeatedly references the two-page letters sent by Constitution to the Department along with its second (2014) and third (2015) requests for certification.[77] The Commission misleadingly states that the Department contends such two-page letters constitute new requests "because (A) Constitution voluntarily sought to effect a withdrawal and a new request to avoid the communicated likely denial and (B) because [the Department] 'undertook to review that request actively.'"[78] While this is partially true, it is an incomplete characterization of the Department's position. In particular, it ignores the fact that, as FERC itself noted in the Waiver Denial, the Department did not review "a static collection of information."[79]

That is, the Waiver Order does not meaningfully address the tens of thousands of pages of additional materials submitted by Constitution to the Department. FERC's conclusion that the situation here is analogous or equivalent to the repeated one-page form letters, accompanied by no other administrative activity, in *Hoopa Valley* is therefore flawed. This conclusion necessarily relies on the Commission's seemingly willful ignorance to the remainder of the administrative record before NYSDEC.

In fact, far from just simple and identical two-page letters and in sharp contrast with the arrangement in *Hoopa Valley*, during the period starting with Constitution's second request in May 2014 and ending with its third request in April 2015, Constitution submitted thousands of pages of additional materials to the Department.[80] This additional material included, for example, a revised Joint Application submitted by Constitution to NYSDEC in August 2014.[81] In September 2014, Constitution submitted yet another new version of the Joint Application, followed by several

[77] Waiver Order at ¶¶4, 6, 34, 35, 38.
[78] Waiver Order at ¶35.
[79] Waiver Denial at ¶23
[80] Supplemental Pleading at 11-14 and accompanying affirmation, affidavits, and appendix.
[81] Supplemental Pleading at 12 and accompanying appendix materials.

hundred pages of additional material in November 2014.[82] In February 2015, Constitution prepared a draft revision to its Trenchless Feasibility Plan.[83] Finally, in March 2015, Constitution submitted a 4,000-page revised version of the Joint Application.[84]

Given the Commission's unwillingness to define how different a submittal must be to constitute a new "request" that might restart the waiver period, any or all of these submittals may have been sufficient to do so. At a minimum, this part of the administrative record before NYSDEC was certainly relevant to the Commission's analysis. It provides further support for the fact that the Department's handling of Constitution's requests for certification was far different than the arrangement in *Hoopa Valley*. Nevertheless, FERC apparently limited its review to the two-page letters in determining that Constitution's April 2015 request did not restart the review period.

The Commission, while blatantly ignoring these voluminous submissions, makes multiple other inaccurate statements regarding the record before the Department. For example, the Commission incorrectly claims that NYSDEC points to no record evidence to support the claim that if Constitution did not withdraw, the Department would most likely have denied the then-pending request.[85] Aside from the fact that the Department pointed to an accompanying affirmation and affidavit in its Supplemental Pleading,[86] the Department denied Constitution's request for a water quality certification. The denial was based on insufficient information and the Department's inability to determine the Project's compliance with applicable water quality standards.

[82] *Id.* and n. 27; accompanying appendix materials.
[83] Supplemental Pleading at 13 and accompanying appendix materials.
[84] *Id.* and accompanying affidavit and appendix.
[85] Waiver Order at ¶33.
[86] Supplemental Pleading at 11, 26.

Constitution's third request contained more information – albeit still severely insufficient – than the prior two requests, further demonstrating the validity of the Department's claims.[87]

The Waiver Order also places undue emphasis on a press release issued by the Department in April 2015.[88] The Commission's reliance on a Departmental press release further demonstrates its flawed review. A press release is a statement for the purpose of informing the public; it does not represent a formal decision, finding, or action by the Department. Regardless, the fact that the Department noted that the third request included "no changes or modifications" from earlier requests is irrelevant given (1) the fact that both Constitution and NYSDEC considered the April 2015 submission as a new request, and (2) NYSDEC opened a new public comment period on the April 2015 request.[89] The Commission also improperly speculates that "no changes or modification" applied to the entirety of the application rather than the specific submittal made by Constitution at that point in time. As described above, Constitution submitted a 4,000-page revised version of the Joint Application in March 2015 that was different in form from its previous application, along with thousands of pages of additional materials before and after April 2015. Moreover, that the Department considered public comments received on the earlier application as well as additional comments received on the new request was largely for the benefit of the public, given the extent of public interest in the Project, and to ensure the Department's compliance with

[87] Notably, in the same breath that the Commission chastises the Department for the supposed lack of record evidence to support its claims, the Commission itself speculates by attempting to read between the lines of an accompanying affidavit by NYSDEC staff. Waiver Order at ¶33 n. 74. This attempt to rewrite a sworn affidavit of NYSDEC staff is wholly inappropriate and, in any case, factually wrong.
[88] Waiver Order at ¶¶6, 34, and 38.
[89] Supplemental Pleading at 14-15 and accompanying affirmation, affidavits and appendix.

its own procedural regulations.[90] This does not have any bearing on whether a new waiver period begins pursuant to the Clean Water Act.

Finally, FERC erred in essentially ignoring the new request for certification submitted in September 2015. In particular, in September 2015, Constitution submitted yet another version of the Joint Application, totaling more than 9,000 pages – far more voluminous than the two-page letters relied upon by the Commission in the Waiver Order.[91] This September 2015 request included additional information that required the Department's review.[92] For example, Constitution purported to include certain information regarding wetlands and waterbodies for the first time.[93] While the Waiver Order offers lip service to the fact that the Department offers an "alternative theory" about the September 2015 submittal, it does not meaningfully address this argument.[94] The Department's denial in April 2016 was only eight months beyond this submission, well within the required one-year.

III. FERC ERRED IN DENYING THE DEPARTMENT'S MOTION FOR A STAY

The Waiver Order also erred in denying the Department's request for a stay of the Commission's ruling to allow the Department an opportunity to seek judicial review. As set forth in the Department's Denial Letter, which was upheld by the Second Circuit, the Project would result in severe and irreparable harms to the State's environment and water quality resources. These irreparable harms were summarized in NYSDEC's Supplemental Pleading, as well as in the

[90] In dicta, the Commission cites to the Supremacy Clause of the federal Constitution in claiming that the Clean Water Act, as a federal law, takes precedence over State law. Waiver Order at ¶36 n. 84. This is an extreme oversimplification of the Supremacy Clause and ignores that the State laws at issue address procedural requirements and the Department's critical obligation to provide public notice and an opportunity for comment.
[91] Supplemental Pleading at 16 and accompanying affidavit.
[92] *Id.*
[93] *Id.*
[94] Waiver Order at ¶38.

accompanying Jacobson Affidavit.[95] The Department expressly renews its request for a stay based on its prior submissions.

The irreparable harm that would result if construction of the Project is allowed to proceed without a water quality certification from the Department would include significant impacts to both large and small streams.[96] Furthermore, these impacts would occur immediately upon commencement of construction of the Project and would be difficult or impossible to repair after construction occurs.[97] Without the required section 401 certification from the Department, some streams would likely be crossed using an open-dry trench crossing method, rather than the trenchless crossing methods that would avoid or minimize impacts to such streams, including related to the permanent loss of trout, trout spawning, and other critical wildlife habitat.[98] In the Waiver Order, FERC simply dismisses – without any meaningful analysis – these and other record-supported irreparable harms that would result from construction and operation of the Project without a certification.

Moreover, FERC now incorrectly claims that it did not rely on the Department's ultimate issuance of a water quality certification as part of its environmental review.[99] The Commission therefore concludes that, because its staff found in the Environmental Impact Statement (EIS) that water quality impacts from the Project would be appropriately minimized, there are no irreparable water quality impacts.[100] But even if FERC's claims about its previous reliance on a NYSDEC-issued certification and its EIS were accurate – and they are not – FERC's assessment of

[95] Supplemental Pleading at 32-38.
[96] Supplemental Pleading at 34 and accompanying affidavit.
[97] *Id.*
[98] *Id.* at 34-35 and accompanying affidavit.
[99] Waiver Order ¶¶48 and 49.
[100] *Id.* at ¶ 49.

environmental impacts pursuant to the National Environmental Policy Act does not take the place of the Department's assessment of water quality impacts pursuant to section 401.[101] The entire legislative purpose of section 401 of the Clean Water Act was to preserve the existing authority of the states to protect their own water quality resources. It is the state certifying authorities, and not FERC or any other federal agency, that have the most knowledge and expertise regarding their own water quality resources and applicable water quality standards. Likewise, the Commission's assessment of water quality impacts in the EIS has no bearing on the determination of whether there would be irreparable harm from the construction of the Project without a certification. Even if it is true that impacts have been appropriately minimized, not even the Commission claims that there will be no impacts whatsoever. In fact, there will be impacts, as outlined in the Denial Letter, upheld by the Second Circuit, and summarized in the Department's Supplemental Pleading and accompanying affidavit.

While the Commission summarily dismisses the well-documented irreparable harms to water quality, the environment, and to the State that would result from the construction of the Project without the required certification from the Department, the Commission just as quickly and without any record evidence summarily concludes that a stay would substantially harm Constitution. By placing greater emphasis on Constitution's bottom line than on New York's environmental assets, FERC has continued its long and troubling tradition of applying a double-standard to stay requests, granting stays routinely to help applicants or industry parties avoid competitive disadvantage or economic expenditure, while declining to grant them in any other cases.[102]

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[101] *See Constitution Pipeline Co.*, 863 F.3d at 101.

[102] *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

Finally, the unique circumstances of this case further militate in favor of granting a stay to the Department and provide further support the fact that a stay is in the public interest. While the Commission stresses that ensuring finality and definiteness is important for industry actors, as noted above it appears that the Commission considers it to be irrelevant for certifying authorities and the general public. The Department denied Constitution a certification for the Project more than three years ago. Following the denial, there was extensive judicial and administrative review, including before the Second Circuit Court of Appeals and FERC itself. Constitution was without viable legal options until *Hoopa Valley* created a small opening that the Commission has now significantly expanded in the Waiver Order. The Department, as well as members of the general public, rightly considered its decision to be final and definite, especially in light of the lengthy judicial and administrative review. Yet now, solely because of the misinterpretation of one case from one circuit that remains subject to potential review by the Supreme Court and is inconsistent with binding precedent from the Second Circuit, Constitution may be allowed to proceed with construction of the Project. Furthermore, in the Waiver Order, the Commission itself reversed its own longstanding general interpretation, as well as its own prior conclusions for this Project on two separate occasions in the Waiver Denial and Rehearing Denial. Moreover, the Commission's finding of waiver in light of *Hoopa Valley* requires it to conclude that there was a "coordinated

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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 Rehearing Solely for the Purpose of Further Consideration and Granting Stay, *Northern Natural Gas Co.*, Docket No. RP88-106-002, 46 FERC ¶61,001 (Jan 3, 1989) (granting natural gas company's motion for stay without analyzing any stay factors); 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").

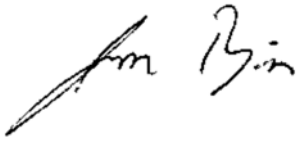
scheme" between the Department and Constitution. Yet now, through the Waiver Order, it is Constitution that obtains the benefits of this alleged coordination. Meanwhile, the Department, the environment, and the citizens of the State suffer the irreparable harms. Therefore, at a minimum, given the unusual legal and procedural circumstances of this case, the Department should have the opportunity to seek judicial review before construction of the Project is allowed to proceed.

CONCLUSION

For the reasons described above, FERC should vacate the Waiver Order, revert back to the conclusions it properly reached in the Waiver Denial and Rehearing Denial, and conclude that the Department did not waive its authority to deny Constitution's application for a Section 401 certification for the Project. If FERC nevertheless finds on rehearing 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. Whatever it does, FERC should stay the effect of the Waiver Order while it reviews this Rehearing Request.

Dated: September 27, 2019
Albany, NY

Respectfully submitted,



JONATHAN A. BINDER
Chief, Bureau of Energy and Climate Change
Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-1500

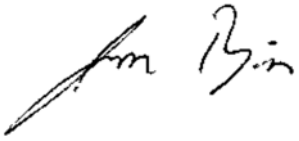
UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Constitution Pipeline Company, LLC	)	Docket Nos. CP18-5-000
	)	18-5-001
	)	18-5-002

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2019, I filed the foregoing document 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.

Dated at Albany, NY this 27th day of September, 2019



Jonathan A. Binder, Esq.
Chief, Bureau of Energy and Climate Change
Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, NY 12233-1500
Phone: (518) 402-9188
Email: Jonathan.Binder@dec.ny.gov