

16-1568

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONSTITUTION PIPELINE COMPANY, LLC,

Petitioner,

v.

BASIL SEGGOS, Acting Commissioner; JOHN FERGUSON, Chief Permit
Administrator; and NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Respondents,

STOP THE PIPELINE, CATSKILL MOUNTAINKEEPER, INC., SIERRA
CLUB, and RIVERKEEPER, INC.,

Intervenors.

On Petition for Review From The
New York State Department of Environmental Conservation

**PROOF BRIEF OF AMICI CURIAE NATURAL RESOURCES
DEFENSE COUNCIL, WATER DEFENSE, WATERKEEPER
ALLIANCE, EARTHWORKS, PENNENVIRONMENT, PECONIC
BAYKEEPER, AND CHESAPEAKE BAY FOUNDATION
SUPPORTING RESPONDENTS**

Kimberly Ong
NATURAL RESOURCES DEFENSE
COUNCIL
40 West 20th Street
New York, NY 10011
(212) 727-4443
Counsel for Amici Curiae

Albert K. Butzel
ALBERT K. BUTZEL LAW OFFICES
1125 Park Ave, 9E
New York, NY 10128
(212) 831-9146
Of Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae Natural Resources Defense Council, Water Defense, Earthworks, PennEnvironment, Peconic Baykeeper, Waterkeeper Alliance, and the Chesapeake Bay Foundation submit that they have no parent corporations and no publicly issued stock shares or securities. No publicly held corporation holds stock in any of the amici curiae.

/s/ Kimberly Ong

Kimberly Ong

NATURAL RESOURCES DEFENSE COUNCIL

40 West 20th Street

New York, NY 10011

Telephone: (212) 727-4443

Facsimile: (212) 727-1773

kong@nrdc.org

Counsel for Amici Curiae

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT..... i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE1

PRELIMINARY STATEMENT5

BACKGROUND8

I.IMPACTS OF PIPELINES ON WATER QUALITY9

 A. Impacts of Pipeline Construction Activity on Water Quality.....11

 B. Impacts of Pipeline Watercourse and Wetlands Crossings on Water
 Quality.....14

II.IMPACTS OF PIPELINES ON AQUATIC SPECIES16

ARGUMENT.....17

 POINT ONE
 **INDUSTRY AMICI EMPLOY THE INCORRECT STANDARD OF
 REVIEW17**

 POINT TWO
 **SECTION 401 OF THE CLEAN WATER ACT RESERVES TO THE
 STATE THE RIGHT TO SAFEGUARD ITS WATER QUALITY, WHICH
 IS SUPERIOR TO FERC’S RIGHT TO LICENSE INTERSTATE
 NATURAL GAS PIPELINES.....19**

 A. Section 401 in Context.....19

 B. Legislative Background of Section 40121

 C. The 2005 Reservation of States’ Rights24

D. FERC’s Own Review of the Pipeline’s Impacts on Water Resources In No Way Precludes, Preempts, or Supersedes the Role of the State in Water Quality Certification	25
E. DEC’s Participation (or Lack Thereof) in the FERC Certification Process Has No Relevance to Its Review of the Pipeline Under Section 401	26
 POINT THREE	
DEC RELIED ON FACTORS THAT FALL WELL WITHIN THE AMBIT OF “WATER QUALITY STANDARDS” UNDER SECTION 401 OF THE CLEAN WATER ACT	27
 CONCLUSION.....	30
 CERTIFICATE OF COMPLIANCE WITH RULES 29(d) AND 32(a)	31
 CERTIFICATE OF SERVICE	33

TABLE OF AUTHORITIES

CASES

<i>City of Tacoma, Wash. v. FERC</i> , 460 F.3d 53 (D.C. Cir. 2006)	25
<i>Constitution Pipeline v. Basil Seggos</i> , No. 16-cv-005680NAM-DJS (N.D.N.Y., filed July 12, 2016)	7
<i>Islander E. Pipeline Co. v. McCarthy</i> , 482 F. 3d 79 (2d Cir. 2006)	18
<i>Islander E. Pipeline Co. v. McCarthy</i> , 525 F.3d 141 (2d Cir. 2008)	9, 18
<i>Schneidewind v. ANR Pipeline Co.</i> , 485 U.S. 293 (1988)	19

STATUTES

33 U.S.C § 1313	27
33 U.S.C. § 1341	passim
33 U.S.C. § 1344	6
33 U.S.C. § 1371	21, 25
42 U.S.C. § 4321 <i>et seq.</i>	19, 21, 25, 26
5 U.S.C. § 706	18
Energy Policy Act of 2005, Pub. L. No. 109-58 (2005)	24
Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948)	21
Federal Water Pollution Control Amendments of 1956, 70 Stat. 498 (1956)	22
Water Quality Improvement Act of 1970, Pub. L. No. 91-224 (1970)	22

OTHER AUTHORITIES

116 Cong. Rec. S4401 (daily ed. Mar. 24, 1970)	23
151 Cong. Rec. S6982 (daily ed. June 22, 2005)	25
DEC, Final Supplemental Generic Environmental Impact Statement of Regulatory Program for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs (2015), <i>available at</i> http://www.dec.ny.gov/energy/75370.html (last visited Sept. 13, 2016)	11, 12, 14

H.R. Rep. No. 91-940 (1970).....	23
Letter from Bridget M. Lee, Earthjustice, to Kimberly D. Bose, Secretary, FERC (Apr. 7, 2014).....	12, 13, 16
Letter from John Ferguson, Chief Permit Administrator, DEC, to Lynda Schubring, Environmental Project Manager, Constitution Pipeline Company (Apr. 22, 2016)	passim
Letter from Stephan A. Ryba, U.S. Army Corps of Engineers, to Lynda Schubring, Constitution Pipeline (May 11, 2016).....	6
Lucie Levesque & Monique Dube, <i>Review of the Effects of In-Stream Pipeline Crossing Construction on Aquatic Ecosystems</i> , 132 <i>Envtl. Monitoring & Assessment</i> 395 (2007).....	passim
S. Rep. No. 92-414 (1971).....	24
Scott Reid & Paul Anderson, <i>Effects of Sediment Released During Open-Cut Pipeline Water Crossing</i> , 24 <i>Can. Water Resources J.</i> 235, 243 (1999), <i>available at</i> http://dx.doi.org/10.4296/cwrj2403235 (last visited Sept. 13, 2016)..	9, 14, 15, 17
U.S. Geological Survey, Groundwater Depletion, http://water.usgs.gov/edu/gwdepletion.html (last visited Sept. 12, 2016).	16

REGULATIONS

6 NYCRR § 700.....	28
6 NYCRR § 701.....	28
6 NYCRR § 703.....	28
6 NYCRR § 704.....	28

INTEREST OF AMICI CURIAE¹

Natural Resources Defense Council, Inc. (“NRDC”) is a national, nonprofit, nonpartisan environmental advocacy organization with a principal office located in New York City, and with over one half million members. NRDC has had a long history of litigating and advocating for clean water at both the federal level and in New York State—In 1972, for example, it helped pass the Clean Water Act, America’s bedrock water-protection law, and most recently, in 2015, NRDC was a principal advocate for the issuance of the Clean Water Rule, which returned guaranteed protections under the Clean Water Act to hundreds of thousands of miles of streams and tens of millions of acres of wetlands across the country. That same year, NRDC successfully advocated for the prohibition of high-volume hydraulic fracturing (“fracking”) activities in New York State, activities that the State found significantly threatened New York’s water resources.

Water Defense is a nonprofit organization in New York State dedicated to protecting clean water. It has two offices—one in New York City, and one in the Catskill region. Water Defense was founded in response to the water contamination caused by fracking in Dimock, Pennsylvania. Over the last several

¹ No party’s counsel authored any part of this brief, nor have any parties or their counsel contributed money that was intended to fund the preparation or submission of this brief. No person other than amici, their members, and their counsel contributed any money that was intended to fund the preparation or submission of this brief.

years, it has worked on various water-related issues in Pennsylvania, New York, and throughout the United States.

Earthworks is a nonprofit organization dedicated to protecting communities and the environment from the adverse impacts of mineral and energy development while promoting sustainable solutions. Founded in 1998, Earthworks now supports 65,000 nationwide members and works to protect water, air, land, and health. Earthworks advocates for state and federal policies governing pipelines and related fossil fuel infrastructure throughout New York. It also works to ensure that regulators and communities hold companies accountable to stringent operational standards.

PennEnvironment, Inc. (“PennEnvironment”) is a non-profit Pennsylvania-based organization with over 15,000 dues-paying members, and nearly 150,000 online activists and volunteers. PennEnvironment advocates for clean air, clean water, and the preservation of Pennsylvania’s natural resources. Among other activities in pursuit of these goals, PennEnvironment researches and distributes analytical reports on environmental issues including the effects of pollution and infrastructure on our water resources, advocates before legislative and administrative bodies on clean water and energy issues, engages in environmental litigation when necessary, and conducts public education programs on clean water issues and other environmental priorities.

Peconic Baykeeper is an independent, not-for-profit advocate dedicated to the protection and improvement of the aquatic ecosystems of the Peconic and South Shore Estuaries of Long Island. Based in Quogue, New York, Peconic Baykeeper fights for sensible land and water use policies to ensure the environmental, character, economic and recreational needs of our communities are met through the pursuit of swimmable, drinkable and fishable waters for all.

Waterkeeper Alliance (“Waterkeeper”) is a not-for-profit, member supported, international environmental organization based in New York City. Comprised of approximately 300 Waterkeeper organizations around the world, Waterkeeper’s goal is swimmable, drinkable and fishable water everywhere. Natural gas pipelines, such as the project at issue in this case, are one of the foci of Waterkeeper’s advocacy efforts, as pipeline construction through wetlands, streams and forests often results in significant and long-lasting adverse impacts to water quality in contravention of state standards.

The Chesapeake Bay Foundation, Inc. (“CBF”) is the largest independent 501(c)(3) organization dedicated solely to restoring and protecting the Chesapeake Bay and its tributaries, with offices located in Annapolis, Maryland; Harrisburg, Pennsylvania; Richmond, Virginia; Norfolk, Virginia; and the District of Columbia. CBF undertakes advocacy, education programs, and restoration projects throughout the Chesapeake Bay watershed, which include portions of New York

and Pennsylvania. CBF has over 232,000 members and e-subscribers, including 17,000 members in New York and over 30,000 members in Pennsylvania. Constitution Pipeline and related infrastructure would cross Susquehanna River, a tributary of the Chesapeake Bay, and more than 85 miles of the pipeline would lie entirely within the Susquehanna River basin. As a consequence, any negative impacts to those streams, brooks, and tributaries could also harm the Chesapeake Bay Watershed and critical natural resources such as water quality, wetlands, agricultural lands, aquifer recharge zones, and fish and wildlife habitats.

The abovementioned organizations (collectively “Environmental Amici”) all have a significant interest in protecting clean water and water resources in New York State and across the United States from activities that are likely to result in its degradation. Section 401 of the Clean Water Act is one of the country’s strongest protections, and it is central to Environmental Amici’s programs and interests to maintain that safeguard as Congress intended. The issue presented in this case—whether New York State has the authority to enforce water quality standards within its borders—directly implicates Environmental Amici’s interests.

PRELIMINARY STATEMENT

This case is about protecting water quality and ensuring that states can continue to enforce their own water quality standards.

On April 22, 2016, the New York State Department of Environmental Conservation (“DEC” or “State”), after a careful and exhaustive study, exercised its right under Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341 (“Section 401”), to deny certification to a proposed 30-inch diameter, 124-mile natural gas pipeline (the “Pipeline”) that would directly harm 251 streams, nearly 500 acres of forests, and over 85 acres of wetlands in New York State. *See* Letter from John Ferguson, Chief Permit Administrator, DEC, to Lynda Schubring, Environmental Project Manager, Constitution Pipeline Company 3 (Apr. 22, 2016) [hereinafter “DEC Letter”] [JA ___]. The Pipeline is proposed by the Constitution Pipeline Company, LLC (“Constitution” or “the company”), Petitioner in this proceeding.

Under Section 401, states are authorized to issue or deny certification (“401 certification”) to any activity subject to a federal permit that may result in a discharge of waste into that state’s waters. 33 U.S.C. § 1341. States are empowered to certify the activity if it complies with all applicable water quality standards, limitations, and restrictions. Should a state deny 401 certification, no federal license or permit can be granted for the activity. While the federal Natural

Gas Act generally empowers the Federal Energy Regulation Commission (“FERC”) to regulate interstate natural gas pipelines, 15 U.S.C. § 717f(c), the act explicitly preserves the states’ right to block a pipeline if the pipeline fails to show that it will comply with a state’s water quality standards, *id.* § 717b(d).

Here, DEC rightly denied Constitution’s 401 certification because the company failed to provide sufficient information to demonstrate that the Pipeline would comply with New York State water quality standards. Constitution did not, for example, provide DEC proof that the Pipeline construction—which would involve dredging and filling in streams, creeks and other watercourses—would not impair the propagation and fishing of trout, or that the Pipeline would not contribute to loss of habitat, changes in temperature, increased erosion, or increased turbidity (the suspension of solids in water). DEC Letter 12.

As a result of DEC’s decision, license for the Pipeline granted by FERC has been effectively rendered void, and a second permit application to the Army Corps of Engineers for a Section 404 permit, also under the federal Clean Water Act, 33 U.S.C. § 1344, was denied, Letter from Stephan A. Ryba, U.S. Army Corps of Engineers, to Lynda Schubring, Constitution Pipeline (May 11, 2016), Pet. Addendum, ADD 15–16. Both of these federal permits were conditioned on New York State’s 401 certification, and as such, Constitution cannot currently build the Pipeline in New York State.

Following DEC's denial, on July 12, 2016, Constitution initiated two lawsuits: this case, challenging DEC's denial of 401 certification, and another currently pending in the Northern District of New York.² Environmental Amici submit this Brief as amici curiae in support of DEC. Environmental Amici urge the Court to find that DEC acted in full conformance with its authority under Section 401 and correctly determined that Constitution failed to provide sufficient information for DEC to conclude that the Pipeline would comply with New York State's water quality standards.

Of equal importance, the Environmental Amici urge the Court to ensure that states remain arbiters of their own water quality, as Congress declared in the Clean Water Act and the Natural Gas Act. *Id.*; 33 U.S.C. § 1341. Constitution seeks to alter the longstanding right of states to enforce their own water quality standards by positing an interpretation of the Clean Water Act and the Natural Gas Act that, if accepted, would undermine this historical federal-state balance.

² See *Constitution Pipeline v. Basil Seggos*, No. 16-cv-005680NAM-DJS, Docket No. 12 (N.D.N.Y., filed July 12, 2016).

BACKGROUND

The Constitution Pipeline would run for nearly 100 miles in New York, and in its course, it would disturb 250 streams, creeks, and other watercourses, including 85 capable of supporting trout.³ DEC Letter 3. The impacts on water quality would not be limited to the 250 water crossings. Additional impacts would follow from the incursion of the Pipeline into 85 acres of wetlands and nearly 500 acres of forest would be cleared for construction of the Pipeline. FEIS at 4-59; DEC Letter 3. An additional eighty acres would be leveled for construction staging and resource crossings, and fifteen miles of new private access roads would be built, disturbing 40 more acres of land. FEIS at 2-15–16, apps. D, E, M.

³ When it first enters the State in Broome County, the Pipeline would make nine crossings at tributaries of Cascade Creek, eleven crossings at Fly Creek and its tributaries, three crossings at Marsh Creek and its tributaries, thirteen crossings at Oquaga Creek and its tributaries, and eight crossings at Dry Brook and its tributaries. In Chenango County, it would make twelve crossings of tributaries to Cornell Creek, two crossings at Landers Creek and its tributary, seven crossings of Susquehanna River tributaries, and thirteen crossings at Bennettsville Creek and its tributaries. Moving into Delaware County, the Pipeline would make four crossings at Masonville Creek tributaries, six crossings at Carrs Creek and its tributaries, fifteen crossings at Susquehanna River tributaries, two crossings at pond tributaries, twenty-five crossings at Ouleout Creek and its tributaries, fourteen crossings at Charlotte Creek tributaries, a crossing at Prosser Hollow Brook, and four crossings at Pumpkin Hollow Brook. The Pipeline would then make fifteen crossings at Kortright Creek, Middle Brook, and also tributaries feeding into those two streams. Finally, making six additional crossings of Charlotte Creek's tributaries into Schoharie County, the Pipeline would make nine crossings at Clapper Hollow Creek and its tributaries, three crossings at West Kill and its tributaries, five crossings at Beards Hollow Brook and its tributaries, seventeen crossings at feeder streams into Cobleskill Creek, eight crossings at House Creek and its tributaries, three crossings at Limekiln Creek tributaries, and a nearly 250-foot crossing of Schoharie Creek, four crossings of its tributaries, and a crossing at Louse Kill. FERC, Final Environmental Impact Statement for the Constitution Pipeline and Wright Interconnect Projects (2014) [hereinafter "FEIS"] apps. K-2, N [JA ___].

All of these invasions of waters, wetlands, and forests would impair water quality. Construction of a natural gas pipeline would, among other things, increase erosion, stormwater runoff, sedimentation, water temperatures, and turbidity. These are the very impacts that DEC was required to evaluate under state law and the authority granted to it under Section 401.

Constitution had the burden to prove to DEC that the Pipeline would not violate the State's water quality standards. *See Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 152 (2d Cir. 2008) (finding that it was the petitioner pipeline company's burden to demonstrate that its application should have been approved). Given DEC's findings of the broad scope and potentially destructive impact of the activities required to build the Pipeline, this Court should not second-guess DEC's conclusion that the company failed to show that the Pipeline complied with State water quality standards.

I. IMPACTS OF PIPELINES ON WATER QUALITY

Every step required in pipeline construction has the potential to impair water quality. And while the environmental impacts of pipelines begin at construction, they can persist for years after construction is complete. *See, e.g., Scott Reid & Paul Anderson, Effects of Sediment Released During Open-Cut Pipeline Water Crossing*, 24 *Can. Water Resources J.* 235, 243 (1999), available at <http://dx.doi.org/10.4296/cwrj2403235> (last visited Sept. 13, 2016) [hereinafter

“Reid”] (citing studies that document changes to nearby stream morphology as many as four years after construction had been completed); Lucie Levesque & Monique Dube, *Review of the Effects of In-Stream Pipeline Crossing Construction on Aquatic Ecosystems*, 132 *Envtl. Monitoring & Assessment* 395, 399 (2007) [hereinafter “Levesque”] [JA ___] (citing studies that document changes to aquatic organisms as many as four years after construction was completed).

Moreover, the many individual effects of pipeline construction can have a cumulative effect that is greater than the sum of its parts. While a pipeline crossing through a stream or river, or within a watershed, may not have significant effects on fish and fish habitat in that system, construction of multiple crossings on a stream or river, or within a watershed, has the potential for cumulative effects such that “the capacity of the system to recover from impact may be exceeded, and the detrimental effects of crossing construction permanent.” Levesque 407; *see also* DEC Letter 5. Here, in a number of instances, the Pipeline would make multiple crossings through tributaries that flow into a single larger stream or river, carrying their sediment into the larger water body. FEIS app. K-2.

In 2015, DEC conducted a supplemental environmental review of the fracking method of natural gas extraction, including a review of the environmental impacts of natural gas pipelines, and found that fracking had sufficient potential to have significant adverse environmental impacts to justify a prohibition of it within

New York. DEC, Final Supplemental Generic Environmental Impact Statement of Regulatory Program for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs, Findings Statement 5 (2015), *available at* <http://www.dec.ny.gov/energy/75370.html> (last visited Sept. 13, 2016) [hereinafter “SGEIS”]. Relevant here, DEC found that natural gas pipelines that carry the “fracked” gas have the potential to impair water quality.⁴ *Id.* at 6-51. Thus, DEC’s decision to deny 401 certification for the Pipeline is not the first time the State has determined that proposed natural gas pipelines could adversely impact water quality.

A. Impacts of Pipeline Construction Activity on Water Quality

The construction of any pipeline requires that the entire right-of-way be cleared of trees and other significant vegetation. The land within the right-of way, including stream banks, must be excavated to lay the pipe, then backfilled. Work staging areas must also be constructed, often along the banks of the stream crossings, and access roads must be built, requiring further clearing, grading, and compacting of soil. FEIS at 2-15–16, 2-20–25.

These construction activities significantly degrade water quality. To begin with, when vegetation, which ordinarily holds soil in place and absorbs

⁴ While Constitution cites several instances where DEC approved 401 certification for other natural gas pipelines, Pet. Br. 64, none of those cited certifications were issued after June 2015, when DEC issued its latest supplemental environmental review on fracking activities.

precipitation, is removed, the volume and intensity of stormwater runoff increases. SGEIS 6-14–15. This, in turn, exacerbates erosion, increases turbidity in nearby streams and brooks, and may lead to increased flooding and habitat loss. *Id.* 6-14–15, 51.

Heavy equipment used in the construction of a pipeline may also compact soil, which damages soil porosity and soil structure, exacerbating and accelerating stormwater runoff and erosion. Letter from Bridget M. Lee, Earthjustice, to Kimberly D. Bose, Secretary, FERC (Apr. 7, 2014), exhibit A (Meliora Environmental Design, Professional Review & Comment on DEIS (2014)) [hereinafter, “Meliora”], 9–11 [JA__–__]; DEC Letter 4. The effects of soil compaction are not short-term. Once soil is compacted, it is very difficult to restore so that infiltration of surface water or the regrowth of healthy vegetation matches rates that existed prior to construction. Meliora 9–10.

In addition, wetlands and streams depend on surrounding forested landscape “for their long-term persistence and health.” SGEIS 6-82–83. As emphasized by Meliora Environmental Design, a civil engineering firm that assessed the potential impacts of the Constitution Pipeline:

Forests filter contaminants, moderate stream temperatures and buffer flow volumes associated with precipitation events. They are the structural foundation upon which the ecological integrity and health of this region’s biological resources are built. The link between percent forest cover and water quality is clearly

established in the scientific literature. As an example, reductions in forest cover are directly correlated with negative changes in water chemistry, such as increases in nitrogen, phosphorus, sodium, chlorides, and sulfates, and with reductions in stream macroinvertebrate diversity.

Meliora 4 (citations omitted).

Forests and wetlands are critical elements in protecting water quality. *Id.* 10. The disturbance of these areas, even on a temporary basis, inevitably impedes their ability to serve this function. The disturbance and filling of wetlands would decrease the capacity of these important resources to capture and store water and to reduce erosion and the flow of silt into adjacent waterbodies. *Id.* 14. The clearing of forestland increases stormwater runoff, sedimentation, turbidity, and water temperatures of nearby streams and brooks. *Id.* 10–11. Increased turbidity and sediment deposition degrades water quality, harming native fish, shellfish, and other aquatic wildlife. Levesque 399.

Similarly, the construction of supporting infrastructure for the Pipeline, like construction of the Pipeline itself, would require tree cutting, grading, filling, and soil compaction. FEIS 4-43. More than 40 acres of construction staging areas and more than 15 miles of new access roads would be built, increasing stormwater runoff and other injuries to water quality of nearby watercourses, including in-stream erosion, turbidity, and sediment transport, which in turn degrade water

quality and cause habitat loss and flooding. FEIS apps. E, M; SGEIS 6-14, 6-41, 6-51.

B. Impacts of Pipeline Watercourse and Wetlands Crossings on Water Quality

When the Pipeline intersects a waterbody, the crossing would be constructed either by cutting a 5.5 to 7.7-foot trench along the bottom of the watercourse, FEIS 2-20, or by tunneling the Pipeline under the riverbed. In the former case, which would be used by Constitution for nearly all of its 250 crossings, the watercourse would be diverted while the trench would be dug and the pipe laid in a manner similar to that on dry land. DEC Letter 11. In the latter case, a tunnel would be drilled under the streambed and the pipe then routed through it. While the methods are very different, each has the potential to degrade water quality.

Trenching results in 100 percent loss of stream and riparian habitat within the right-of-way for the duration of construction. *Id.* 4. Trenching also disturbs the downstream channel bed and channel banks, increasing erosion, and sedimentation downstream. Levesque 396. Trenching also generates a plume of turbid water downstream from the construction site. Reid 240; Levesque 398. And while downstream turbidity plumes are usually limited to the duration of in-stream construction, Reid 242, turbidity can generate longer-lasting effects. Sediment erosion and deposition in the stream can deepen the stream and change the shape of the channel across its floodplain. J. M. Castro et al., *Risk-Based*

Approach to Designing and Reviewing Pipeline Stream Crossings to Minimize Impacts to Aquatic Habitats and Species, 31 River. Res. & Application 767, 767 (2015), available at <http://acwi.gov/sos/pubs/3rdJFIC/Contents/8F-Castro.pdf> (last visited Sept. 13, 2016) [hereinafter “Castro”] [JA ___]; Reid 243. These longer-term changes can compromise water quality and destroy crucial habitat for aquatic species.

Trenchless construction methods have their own negative effects, including increased turbidity and sedimentation due to excavation and the removal of vegetation. Castro 767. Still, these harmful impacts are significantly less than the risks to the environment associated with open-trench construction, Meliora 17, which explains in part why DEC sought additional trenchless crossings and why, when rebuffed, it concluded that Constitution had not shown that water quality standards would be met.

In certain areas where the pipeline passes through shallow bedrock, blasting may be used to dig the trench. FEIS 2-14–21. The use of blasting to excavate the Pipeline trench would also degrade water quality. Blasting directly damages aquatic species (if blasting takes place in the water), introduces contaminants from

the blasting process into groundwater and water resources, depletes groundwater,⁵ and increases groundwater turbidity near the blasting site. FEIS 4-42, 4-55, 4-63.

II. IMPACTS OF PIPELINES ON AQUATIC SPECIES

As water quality deteriorates, aquatic species, such as plants, fish, mollusks, crustaceans, and insects, may suffer significant harm—both in the short and long-term. Castro 767. For example, healthy streams typically have gravel bottoms and cobble bars free of mud and sediment. These provide aquatic animals with spawning areas. Meliora 13. They also provide benthic invertebrates, such as mussels and crustaceans, space for attachment, protection, feeding, and oxygen consumption. Levesque 400. When sediment settles, it smothers fish eggs, destroys the primary habitat for many benthic invertebrates, and deprives fish of a key food source (i.e., invertebrates). *Id.* at 400–02.

Increased sedimentation and turbidity also lead to increased water temperatures. Meliora at 13. Similarly, loss of vegetation near streams can remove shade cover and increase water temperatures. DEC Letter 4. Warmer waters can damage habitat for aquatic animals, rendering the habitat unlivable, especially for those, like trout, that dwell in cold-water streams. *Id.*

⁵ Which, among other things, could reduce the amount of water in streams and lakes. U.S. Geological Survey, Groundwater Depletion, <http://water.usgs.gov/edu/gwdepletion.html> (last visited Sept. 12, 2016).

The destructive impacts of in-stream pipeline construction on fish and other aquatic species have been well documented. In a study of impacts of a natural gas pipeline crossing on the Little Miami River in Ohio, downstream catches of the dominant fish species, the silver shiner, dropped by 95 percent immediately after construction. Reid 245. Shortly after the installation of a natural gas pipeline across a creek in British Columbia, turbidity levels increased dramatically, and benthic invertebrate abundance decreased by 74 percent. Reid 244. These effects have been observed to last up to four years after construction. Levesque 399.

ARGUMENT

POINT ONE

INDUSTRY AMICI EMPLOY THE INCORRECT STANDARD OF REVIEW

“Industry Amici”⁶ urge the Court to apply a novel, and incorrect, standard of review to 401 certification decisions. They propose that the Court abandon the long-established “arbitrary and capricious” standard and subject such decisions to what they call “heightened” or “more searching scrutiny.” Industry Br. 30–32. The professed basis for seeking more penetrating judicial review in these cases is that the

⁶ The National Association of Manufacturers, Chamber of Commerce of the United States of America, Interstate Natural Gas Association of America, American Gas Association, American Petroleum Institute, American Chemistry Council, Natural Gas Supply Association, American Forest & Paper Association, and Process Gas Consumers Group, who filed an amicus brief (“Industry Br.”) in support of Constitution on July 18, 2016.

Natural Gas Act, 15 U.S.C. § 717f *et seq.*, occupies virtually the entire field of pipeline regulation and, in Industry Amici’s view, Section 401 certifications are “secondary” and should not be permitted to interfere with this arrangement except under the most pressing circumstances. *Id.* 28.

This Court has already held that state determinations under Section 401 are subject to “arbitrary and capricious” review as set out in the Administrative Procedure Act, 5 U.S.C. § 706:

If Congress were to agree with [the pipeline company] that the public interests furthered by its proposed pipeline outweigh [the state’s] water quality concerns, Congress could consider whether to dissolve the federal-state partnership it created. Until such time, however, this court is charged with reviewing the state agency’s denial only to ensure that it is not arbitrary or capricious.

Islander E. Pipeline Co. v. McCarthy, 525 F.3d 141, 163–64 (2d Cir. 2008) (internal quotation marks and alteration omitted). The same standard should be applied in reviewing DEC’s denial of 401 certification for the Pipeline. Industry Amici’s reasoning also ignores the essential fact that FERC’s jurisdiction does not extend to decisions regarding water quality impacts and water quality standards, which Congress has explicitly reserved to the states. *See infra* pp. 19–26.

POINT TWO

SECTION 401 OF THE CLEAN WATER ACT RESERVES TO THE STATE THE RIGHT TO SAFEGUARD ITS WATER QUALITY, WHICH IS SUPERIOR TO FERC'S RIGHT TO LICENSE INTERSTATE NATURAL GAS PIPELINES

A. Section 401 in Context

FERC is responsible for licensing interstate natural gas pipelines, and thus occupies much of the regulatory field. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988). For example, in accordance with the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, FERC is responsible for conducting an environmental review of any proposed interstate natural gas pipeline project. There are, however, explicit exceptions to this framework, and Section 401 is a primary example. Section 401 reserves to the states the decision as to whether a pipeline project conforms to the states’ water quality standards. 33 U.S.C. § 1341(a)(1). The statute requires that any applicant for a federal license or permit to construct or operate a pipeline that “may result in any discharge into the navigable waters” obtain “certification from the State in which the discharge originates ... that any such discharge would comply with the applicable provisions of [the Clean Water Act].” *Id.* Under Section 401, “[n]o license or permit shall be granted if certification has been denied by the State.” *Id.* Thus, FERC may not

issue any license without a state's certification as to a pipeline's effect on that state's water quality.

In this case, New York, through DEC, found that Constitution had failed to demonstrate compliance with the State's water quality standards and denied certification. DEC Letter 3. The denial effectively invalidated the license FERC granted for the Pipeline and has foreclosed the granting of any other federal permit.⁷

In their briefs, Constitution and Industry Amici purport to recognize the role accorded to the states under Section 401. *See* Pet. Br. 39–40; Industry Br. 26–27. But the thrust of their argument is that the states' consideration of water quality impacts is “*secondary* to FERC's authority under the NGA,” and that the Section 401 procedures, “*although applicable to pipeline projects ... should not displace FERC's judgment ... which already includes consideration of environmental impacts.*” Industry Br. 28–29 (emphasis added). In short, despite their admission that Section 401 empowers the states to evaluate a federally licensed projects' compliance with water quality standards, Constitution and Industry Amici contend that FERC should be accorded the role of ultimate decisionmaker in this area.

⁷ Constitution and the Industry Amici imply that the only permit or license affected by the DEC denial of water quality certification is the prospective Section 404 permit. But the license granted by FERC is equally subject to the Section 401 certification requirement. *See* 33 U.S.C. § 1341(a)(1).

This argument runs directly contrary to *the express language of Section 401*, which unambiguously provides that: (1) a state must evaluate compliance of any federally licensed project within its borders that may affect the state’s water quality standards, 33 U.S.C. § 1341(a)(1); (2) if a state denies certification, the project cannot proceed, *id.*; and (3) FERC’s review under NEPA in no way displaces the requirement for a state’s certification under Section 401, 33 U.S.C. § 1371(c)(2)(A).

Constitution and Industry Amici’s arguments also conflict with the legislative history of Section 401. As evidenced by the legislative history of Section 401, described below, Congress has always intended for the role of water quality control to be left to the purview of the states.

B. Legislative Background of Section 401

From the time Congress first addressed the subject, the control of water quality was deemed by both the federal government and the states to be a state prerogative. In 1948, the federal government first entered the field through the enactment of the Federal Water Pollution Control Act (“FWPCA”), which assigned water pollution enforcement powers to the states, while providing for a small federal supporting role for certain research, development, and financing. Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948).

In 1956, Congress amended the FWPCA to expand the federal support role for research, funding, and technical assistance, but left the states to regulate water quality using their own individual standards. *See* Federal Water Pollution Control Amendments of 1956, ch. 518, 70 Stat. 498 (1956).

In 1970, Congress reinforced the states' role in the regulation of water quality by adopting the predecessor of the Clean Water Act's Section 401 certification requirement, section 21(b) of the Water Quality Improvement Act of 1970:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate ... that there is reasonable assurance, *as determined by the State* ... that such activity will be conducted in a manner which will not violate applicable water quality standards.

Water Quality Improvement Act of 1970, Pub. L. No. 91-224, sec. 102, § 21(b)(1) (1970) (emphasis added). Notwithstanding normal principles of federal supremacy, it was the states' water quality standards that controlled when federally licensed projects were at issue, and it was the states that had the authority to decide whether or not a project complied with those standards. In short, in the area of water quality, federal law, otherwise supreme, was subordinated to state regulation.

Congress clearly intended the consequences of Section 21(b), as reflected in the conference report for the 1970 amendments, which portrayed the certification mechanism as a firm and outcome-determinative requirement:

Denial of certification ... results in a complete prohibition against the issuance of the Federal license or permit.

H.R. Rep. No. 91-940 (1970) (Conf. Rep.), reprinted in 1970 U.S.C.C.A.N. 2712, 2741.

Senator Edmund Muskie, who introduced the 1970 bill and served on the Senate Committee on Public Works, explained the purpose of the certification requirement:

No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standards. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards.

116 Cong. Rec. 8984 (1970) (statement of Sen. Muskie).

In subsequent amendments of the FWPCA, including the 1972 amendments that have collectively come to be known as the Clean Water Act, Congress has retained the states' primacy with respect to water quality standards: Section 21(b)

was adopted in the Clean Water Act as Section 401(a), employing nearly identical language.⁸ As the Senate Committee on Public Works explained:

[T]he Committee continues the authority of the State ... to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.

S. Rep. No. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3735.

Therefore, since the very beginning, it has been the states that have had the power to determine compliance with water quality standards.

C. The 2005 Reservation of States' Rights

The states' primacy in the area of water quality as it pertains to natural gas pipelines was further cemented by a 2005 amendment to the Natural Gas Act, which generally empowers FERC to regulate interstate natural gas pipelines. Through this amendment, included in the Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 313, § 19(d)(1), Congress expressly reinforced the states' right to issue or deny water quality certification under Section 401:

Except as specifically provided in this Act, nothing in this Act affects the rights of States under ... the Federal Water Pollution Control Act.

⁸ The principal changes to Section 401 as compared to Section 21(b) are that: (1) the certification must cover not only water quality standards but also effluent limitations; and (2) the certification requirement is absolute, not simply that there is "reasonable assurance" that there will be no violations of water quality standards.

15 U.S.C. § 717b(d).

The chairman of FERC at the time commented that that this new language would “maintain [its] current state ‘veto’ authority over proposed [pipeline] projects” pursuant to state powers under Section 401. 151 Cong. Rec. S6982 (daily ed. June 22, 2005) (statement of Pat Wood, III, Chairman, FERC).

D. FERC’s Own Review of the Pipeline’s Impacts on Water Resources In No Way Precludes, Preempts, or Supersedes the Role of the State in Water Quality Certification

Constitution and Industry Amici argue that: (1) in reaching its licensing decision, FERC had already taken account of the Pipeline’s environmental impacts as required by NEPA; and (2) DEC should not be permitted to second-guess that analysis. *See* Pet. Br. 25, 38, 40; Industry Br. 28–29.

This argument turns Section 401’s mandate on its head. Under Section 401, *only the state* has the right and authority to decide whether water quality standards have been met and their water resources are adequately protected. FERC’s NEPA review in no way satisfies the requirements under Section 401. 33 U.S.C. § 1371(c)(2) (“Nothing in the National Environmental Policy Act ... shall be deemed to ... authorize any Federal agency ... to review ... the adequacy of any certification under section 1341 of this title”); *see also City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006) (“FERC’s role is limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state’s power to

block the project would be meaningless.”). To the extent FERC offered its own conclusions on these subjects, they had no bearing on Section 401 certification.

Constitution’s contention that the evaluation of cumulative impacts is “a task assigned to the special competency of” FERC, Pet. Br. 48, for example, runs afoul of the Section 401 reservation of authority in the states. While FERC may be tasked with the consideration of cumulative impacts as lead agency under NEPA, FERC is accorded *no* such role in the Section 401 certification process. As explained above, while the effect of one crossing may be small, construction of multiple crossings has the potential for cumulative effects on water quality such that “the capacity of the system to recover from impact may be exceeded, and the detrimental effects of crossing construction permanent.” Levesque 407. As for all interstate natural gas pipelines proposed to run through New York, DEC had the responsibility to evaluate these impacts.

E. DEC’s Participation (or Lack Thereof) in the FERC Certification Process Has No Relevance to Its Review of the Pipeline Under Section 401

Nor does DEC’s participation in the FERC proceeding show that its environmental concerns “have been heeded” by FERC. Industry Br. 33. Although FERC may have been informed of New York’s environmental concerns through DEC’s participation in FERC’s environmental review process, it did not, in fact, heed those concerns.

Moreover, DEC's participation in the FERC proceedings is not evidence that it somehow submitted to the jurisdiction of FERC or waived its right to separately determine compliance with New York's water quality standards. *See* Pet. Br. 11–13; Industry Br. 21, 24. Indeed, if DEC had not participated and brought its concerns to FERC's attention, one can imagine Constitution arguing that DEC had waived its right to deny certification based on factors it failed to identify in the FERC review process—in fact, it has already done as much. *See, e.g.*, Pet. Br. 46.

POINT THREE

DEC RELIED ON FACTORS THAT FALL WELL WITHIN THE AMBIT OF “WATER QUALITY STANDARDS” UNDER SECTION 401 OF THE CLEAN WATER ACT

Constitution asserts, among other things, that DEC's requests for information regarding burial depth and blasting are beyond the scope of Section 401 because these activities are not explicitly identified in the regulations. Pet. Br. 49, 51. However, Constitution fails to recognize that New York's water quality standards, 6 NYCRR parts 701–704, do not regulate specific activities, such as blasting, but rather regulate the *effects* of these activities—that is, the changes in levels of sedimentation or water temperatures that result from pipeline trenching or blasting. In compliance with section 303 of Clean Water Act, 33 U.S.C § 1313(c)(2)(A), DEC promulgated its water quality standards in 6 NYCRR parts 701 to 704. In particular, Part 701 states that waste discharges “shall not cause

impairment of the best usages of the receiving water as specified by the water classifications” at affected locations. 6 NYCRR § 701.1.⁹ Part 703 sets forth, among other things, narrative water quality criteria for turbidity (“No increase that will cause a substantial visible contrast to natural conditions”); suspended, colloidal and settleable solids (“None from ... industrial wastes or other wastes that will cause deposition or impair the waters for their best usages.”); flow impairment (“No alteration that will impair the waters for their best usages”); thermal discharges (“None in amounts that will impair the waters for their best usages”). *Id.* § 703.2. Part 704 also sets a standard for thermal discharges (“All thermal discharges to the waters of the State shall assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water.”). *Id.* § 704.1.

Constitution inaccurately portrays the State’s water quality standards when it argues that blasting, for example, cannot be considered by DEC because it itself is not a water quality standard. Pet. Br. 51. 6 NYCRR § 703.2 provides the narrative water quality standard for turbidity that calls for “no increase that will cause a substantial visible contrast to natural conditions,” a standard that blasting activity

⁹ “Wastes” include: “industrial waste,” which is any “solid or waste substance ... resulting from any process of industry, ... from the development or recovery of any natural resources, that may cause or might reasonably be expected to cause pollution of the waters of the State.” *Id.* § 700.1(a)(26), (40).

could violate. As DEC stated in its decision denying 401 certification, approximately 44 percent of the pipeline route, or about 42 miles, would cut through shallow bedrock. DEC Letter 13. This may require extensive blasting to bury the Pipeline, which could adversely affect 27 waterbodies and 84 wetlands as a result of rock, sediment, and soil discharges into New York's waters. *Id.* Constitution cannot disassociate blasting from its direct water quality impacts.

The legitimacy of DEC's requests and the factors it considered are otherwise discussed in depth in the Briefs of the Respondents and the Environmental Intervenors, and we respectfully refer to those Briefs for their analyses.

CONCLUSION

For the reasons set forth above and in Respondents' and Environmental Intervenors' briefs, the Court should deny Constitution's petition.

Dated: September 19, 2016

Respectfully submitted,

/s/ Kimberly Ong
Kimberly Ong
NATURAL RESOURCES DEFENSE
COUNCIL
40 West 20th Street
New York, NY 10011
Telephone: (212) 727-4443
Facsimile: (212) 727-1773
kong@nrdc.org

Counsel for Amici Curiae

Of counsel:

Albert K. Butzel
ALBERT K. BUTZEL LAW OFFICES
1125 Park Ave, 9E
New York, NY 10128
(212) 831-9146

Of Counsel for Amici Curiae

Federal Rules of Appellate Procedure Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed.R. App. P.32(a)(7)(B) because:

this brief contains **6,532** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

this brief uses a monospaced typeface and contains [state the number of] lines of text , excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using [Microsoft Word 2010] in [Times New Roman 14 pt], *or*

this brief has been prepared in a monospaced typeface using "[state name and version of word processing program] with [state number of characters per inch and name of type style].

(s) /s/Kimberly Ong

Attorney for see addendum

Dated: 9/19/16

ADDENDUM

Appearance for:

NATURAL RESOURCES DEFENSE COUNCIL, WATER DEFENSE, WATERKEEPER ALLIANCE, EARTHWORKS, PENN ENVIRONMENT, PECONIC BAYKEEPER, AND CHESAPEAKE BAY FOUNDATION / Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September 2016, I filed the foregoing brief and served the foregoing brief on all registered counsel through the Court's CM/ECF system.

Dated: September 19, 2016

/s/ Kimberly Ong
Kimberly Ong
NATURAL RESOURCES DEFENSE
COUNCIL
40 West 20th Street
New York, NY 10011
Telephone: (212) 727-4443
Facsimile: (212) 727-1773
kong@nrdc.org

Counsel for Amici Curiae