
**In the United States Court of Appeals
for the Second Circuit**

No. 16-345

CATSKILL MOUNTAINKEEPER, INC., CLEAN AIR COUNCIL, DELAWARE-OTSEGO
AUDUBON SOCIETY, INC., RIVERKEEPER, INC., AND SIERRA CLUB,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

**ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**RESPONDENT'S OPPOSITION TO
EMERGENCY MOTION FOR STAY PENDING REVIEW**

Max Minzner
General Counsel

Robert H. Solomon
Solicitor

Karin L. Larson
Attorney

For Respondent
Federal Energy Regulatory
Commission
Washington, D.C. 20426

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GLOSSARY

| | |
|----------------------------|---|
| Certificate Order | <i>Constitution Pipeline Co., LLC</i> , 149 FERC ¶ 61,199 (2014) |
| Commission or FERC | Federal Energy Regulatory Commission |
| EIS | The final environmental impact statement for the Constitution Pipeline and Wright Interconnect Projects, Docket Nos. CP13-499-000 and CP13-502-000 (Oct. 2014) |
| Marcellus Shale | A black shale formation extending deep underground from Ohio and West Virginia northeast into Pennsylvania and southern New York, containing natural gas which is developed using drilling and hydraulic fracturing techniques. |
| Movants | Petitioner-movants, Clean Air Council and Sierra Club |
| NEPA | National Environmental Policy Act |
| NGA | Natural Gas Act |
| Pipeline | Constitution Pipeline Co., LLC |
| Project | Constitution Pipeline's proposed 124-mile-long interstate natural gas pipeline, extending from Susquehanna County, Pennsylvania to Schoharie County, New York. |
| Rehearing Order | <i>Constitution Pipeline Co., LLC</i> , 154 FERC ¶ 61,046 (2016) |
| Tree Felling Authorization | <i>Constitution Pipeline Co., LLC</i> , Partial Notice to Proceed with Tree Felling and Variance Request, Docket No. CP13-499-000 (Jan. 29, 2016) |

INTRODUCTION

Movant-Petitioners Clean Air Council and Sierra Club ask this Court for the extraordinary remedy of indefinitely delaying development of a natural gas pipeline that the Federal Energy Regulatory Commission (“FERC” or “Commission”) has determined, in its expert judgment and after thorough consideration and balancing of competing values, is needed to meet the Nation’s energy needs. The emergency plea completely ignores one-half of the Commission’s public interest balance – whether the need for, and benefits from, the proposed pipeline outweigh potential adverse impacts. In their narrow focus on potential environmental impacts, Movants fail entirely to address the Commission’s findings of substantial benefits from public access to vital new sources of energy.

As to the one-half of the balance Clean Air Council and Sierra Club do address, they completely ignore an array of mitigation measures designed to minimize, if not eliminate, environmental impacts. At this point, the Commission has authorized limited pre-construction activities: namely, non-mechanical tree felling along the 20 percent of the pipeline route located in Pennsylvania. All construction activities await final federal and state authorizations. Despite hundreds of pages of submissions, Movants fail to mention that the tree-felling authorization is confined to hand-cutting, without ground disturbance. Further,

Movants fail to explain that tree cutting must cease on March 31 and was authorized at this time in order to comply with timing restrictions imposed by the U.S. Fish and Wildlife Service to protect a threatened bat species.

Consistent with its responsibilities under the Natural Gas Act (“NGA”) and the National Environmental Policy Act (“NEPA”), the Commission considered all views in its orders and in its comprehensive environmental impact statement that informed those orders. Movants’ comments – like all views from all parties and all commenters – were considered as part of the Commission’s public interest balance. The Commission is, as it must be under the statutes it administers, sensitive to all perspectives, whether economic or environmental in nature. That the Commission did not flat-out reject the pipeline proposal, as Movants implore, or develop a different set of mitigation measures, does not mean that the Commission failed to take a hard look at possible consequences or otherwise failed to carry out its public interest responsibilities.

The requested stay would upset the Commission’s public interest balance and imperil the Project; accordingly, it must be denied. This and other courts have repeatedly rejected similar efforts to halt the effectiveness of the Commission’s natural gas infrastructure decisions, prior to judicial review on the merits.¹ In the

¹ In addition, this Court earlier denied a petition for mandamus that sought to interfere with the Commission’s consideration of the pipeline project that is the subject of this case. *In re Stop the Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015).

past five years, this and other courts have denied all 11 emergency requests for stays of FERC's natural gas certificate orders (some involving similar issues and the same movants as here), including:

- *In re Clean Air Council*, No. 15-2940 (3d Cir. Dec. 8, 2015) (denying stay of construction of a natural gas pipeline project crossing four mid-Atlantic states);
- *EarthReports, Inc. v. FERC*, No. 15-1127 (D.C. Cir. June 12, 2015) (denying stay of construction of liquefied natural gas facilities);
- *Del. Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013) (denying stay of tree clearing and construction of a 40-mile pipeline); and
- *Coal. for Resp. Growth & Res. Conservation v. FERC*, No. 12-566 (2d Cir. Feb. 28, 2012) (denying stay concerning clearing of 200,000 mature trees for a 39-mile greenfield natural gas pipeline).²

Clean Air Council and Sierra Club have not presented any legitimate reason why this Court should reach any different decision here.

BACKGROUND

This case concerns FERC's authorization of a proposal by Constitution Pipeline Company, LLC ("Pipeline") to construct the Constitution Pipeline Project

² The other seven orders denying stays of FERC infrastructure orders are: *Town of Dedham v. FERC*, 2015 WL 4274884, No. 1:15-cv-12352 (D. Mass. July 15, 2015); *Del. Riverkeeper Network v. FERC*, No. 15-1052 (D.C. Cir. Mar. 19, 2015); *Minisink Residents for Env't'l Pres. and Safety v. FERC*, No. 12-1481 (D.C. Cir. Mar. 5, 2013); *George Feighner v. FERC*, No. 13-1016 (D.C. Cir. Feb. 9, 2013); *In re Minisink Residents for Env't'l Pres. and Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012); and *Summit Lake Paiute Indian Tribe and Defenders of Wildlife v. FERC*, Nos. 10-1389 & 10-1407 (D.C. Cir. Jan. 28, 2011 & Feb. 22, 2011).

(“Project”), an approximately 125-mile-long natural gas pipeline. *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,121 (2014) (“Certificate Order”), *on reh’g*, 154 FERC ¶ 61,046 (2016) (“Rehearing Order”).³ The Project will provide 650,000 dekatherms per day of transportation service. The Pipeline has already executed agreements with shippers for 100 percent of the Project’s capacity. Certificate Order PP 1, 5. The Project will provide additional transportation options to move natural gas produced from the Marcellus Shale region in northern Pennsylvania to markets in New York and New England. *Id.* P 25. In addition, the Project will provide natural gas service to homes and businesses within communities in Pennsylvania and New York that do not currently have access to natural gas. Final Environmental Impact Statement for the Constitution Pipeline and Wright Interconnect Projects at 1-2, Docket Nos. CP13-499-000 and CP13-502-000 (Oct. 2014) (“EIS”) (describing Project’s purpose) (available at <http://www.ferc.gov/industries/gas/enviro/eis/2014/10-24-14-eis.asp>).

In agency proceedings extending over two and a half years, and resulting in a 460-page EIS, the Commission thoroughly evaluated potential impacts on environmental, historic, cultural, and other values. The Commission’s

³ The Commission concurrently reviewed and approved the related application of Iroquois Gas Transmission System, L.P. (“Iroquois”) to construct and operate additional natural gas compression facilities at its existing Wright Compressor Station, the capacity from which Iroquois will lease to Constitution. *See* Certificate Order PP 2-3.

environmental analysis comprises a record containing over 2,000 documents and included consultation and coordination with numerous state and federal agencies. Certificate Order P 69. The final EIS addresses the Project's direct, indirect, and cumulative impacts on geology, soils, water resources, wetlands, vegetation, wildlife and fisheries, special status species, land use, recreation, and visual resources. *Id.* P 72. Major issues of concern addressed in the final EIS include waterbodies and wetlands, interior forests and migratory birds, rare bat species, homeowner property values, safety, induced development of natural gas production, and cumulative impacts. *Id.* P 73. The Commission ultimately found that the Project would have some adverse environmental impacts. *Id.* PP 3, 73. But those impacts would be reduced to less-than-significant levels with the numerous mandatory mitigation measures, including:

- Changing over 50 percent of the proposed pipeline route to address landowner concerns, *Id.* P 26;
- Limiting construction spaces to reduce forest disturbance and compensatory mitigation to offset the unavoidable impacts on upland forests areas, *Id.* PP 81-82; and
- Restricting tree clearing between April 1 and October 31 to minimize the impact on a potentially-endangered bat species, *Id.* P 92.

Ultimately, the Commission found a “strong showing of public benefit” from the Project (Rehearing Order P 19) and thus determined that the Project, upon the Pipeline's satisfaction of numerous environmental conditions, is consistent

with the public convenience and necessity under section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e). *Id.* P 18; *see also* Certificate Order PP 22, 29 (determining that the Project’s benefits outweigh any adverse effects on landowners and surrounding communities).

As part of the post-certificate process, Commission staff is now reviewing the Pipeline’s request to proceed with pre-construction activities. To date, Commission staff has only authorized the Pipeline to commence limited tree felling activities on the approximately 20 percent of the pipeline route located in Pennsylvania. Partial Notice to Proceed with Tree Felling, Docket No. CP13-499-000 (Jan. 29, 2016) (“Tree Felling Authorization”) (appended).

ARGUMENT

Movants Clean Air Council and Sierra Club have not justified the extraordinary remedy of a stay. An injunction is an extraordinary remedy never awarded as a right. *Munaf v. Geren*, 553 U.S. 674, 691 (2008); *UBS Fin. Servs. v. W. Va. Univ. Hosps., Inc.*, 660 F.3d 643 (2d Cir. 2011); *Thapa v. Gonzales*, 460 F.3d 323 (2d Cir. 2006). When considering whether to grant such extraordinary relief, the Court balances the following four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the

proceeding; and (4) where the public interest lies.” *In re World Trade Ctr.*

Disaster Site Litig. v. City of New York, 503 F.3d 167, 170 (2d Cir. 2007).

Contrary to Movants’ claim (Mem. of Law at 8), this Court does not automatically grant an injunction where there is a procedural violation of NEPA. *See Town of Huntington v. Marsh*, 884 F.2d 648, 652-53 (2d Cir. 1989) (holding that law of Second Circuit is “clear” that even where there is a violation of NEPA, movant must prove threat of irreparable injury to obtain injunction); *accord Sierra Club v. Hennessy*, 695 F.2d 643, 648 (2d Cir. 1982) (“[a] violation of NEPA does not necessarily require a reflexive resort to the drastic remedy of an injunction”).

The Commission’s detailed analysis and comprehensive environmental review make success on the merits unlikely. Further, given the numerous mandatory mitigation measures, the alleged harms are neither substantial nor irreparable. Last, the significant public interest in enabling the transportation of needed gas supplies to new markets weighs strongly against a stay.

I. Movants Have Not Shown A Likelihood Of Success On The Merits

Movants have not demonstrated that they are likely to succeed on the merits of their claims that the Commission failed to satisfy NEPA in evaluating the Project or has violated the Clean Water Act. Movants must make a “strong showing” that they are likely to succeed on the merits. *In re World Trade Ctr.*, 503 F.3d at 170; *see also No Spray Coal., Inc. v. City of New York*, 252 F.3d 148, 150

(2d Cir. 2001) (rigorous likelihood of success on the merits standard applicable to agency action taken in the public interest pursuant to statutory scheme). In the context of a NEPA claim, this Court has suggested that a higher standard, requiring a clear violation of NEPA procedures, applies. *See Huntington*, 884 F.2d at 653 (requiring a violation of NEPA and “substantial danger” to the environment); *see also, e.g., Cuomo v. NRC*, 772 F.2d 972, 976 (D.C. Cir. 1985) (“The NEPA violation in this case has not been clearly established . . . as should be done in order to justify injunctive relief.”).

Actions of administrative agencies taken pursuant to NEPA are entitled to a high degree of deference. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377-78 (1989). The Court’s “only role in reviewing agency action for compliance with NEPA is to insure that the agency has taken a hard look at environmental consequences.” *Nat. Res. Def. Council v. U.S. Dep’t of Agric.*, 613 F.3d 76, 84 (2d Cir. 2010) (citation omitted). Here, Movants’ assertion that FERC “refused to take a hard look” (Mem. of Law at 8) at the Project’s effects is belied by the record, the heart of which is the 460-page EIS.

A. FERC’s Indirect And Cumulative Impacts Analyses Comply With The National Environmental Policy Act

Movants focus their stay request on the Commission’s determination that, under NEPA, upstream natural gas production activities in the Marcellus shale region are neither sufficiently causally-related nor are the impacts from such future

production activities reasonably foreseeable to have required further analysis in the EIS. *See* Mem. of Law at 9-12. But Movants' argument ignores the relevant part of NEPA's definition of "indirect impacts." *See id.* at 9 (partially quoting "indirect impacts" regulation). Indirect impacts "are caused by the action" and are later in time or farther removed in distance, but are still "reasonably foreseeable."

Rehearing Order P 133 (quoting 40 C.F.R. § 1508.8(b)). Thus, to merit analysis, an environmental impact must be both causally-related to the proposed action and reasonably foreseeable. *See* Rehearing Order PP 133-35 (discussing NEPA requirements and Supreme Court precedent requiring a "reasonably close causal relationship;" something greater than "but for" causation). Here, the Commission found no reasonably foreseeable incremental gas production that would be caused by the Project. *See id.* PP 138, 147-50; Certificate Order PP 98-101; EIS 4-232; *see also Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (scope of an impacts analysis is a task assigned to the "special competency" of the agency).

FERC's conclusion is consistent with this Court's previous holding in a factually similar case: a proposed natural gas pipeline's impact on gas production in the Marcellus shale region was not "sufficiently causally-related to the project to warrant a[n] . . . in-depth [NEPA] analysis." *Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472, 474 (2d Cir. 2012) (unpublished opinion) (rejecting, following denial of stay motion, argument that the pipeline

project authorized by FERC would serve as a catalyst for Marcellus shale development in the Pennsylvania counties crossed by the pipeline). Here, Movants, like the environmental petitioners in the 2012 *Coalition* case, seek review of impacts (induced production of natural gas from the Marcellus Shale gas play) that are not “caused by” the construction and operation of the Constitution Pipeline Project. Rehearing Order PP 138, 147 (finding no connection between the Project and any specific, quantifiable induced production). As the Commission noted, gas produced in Northeastern Pennsylvania⁴ has access to alternative pipelines and other modes of transportation to reach markets; thus, production will continue with or without the Constitution Pipeline. *Id.* P 147 (also noting that a “number of factors” including “domestic natural gas prices and production cost drive new drilling”). While Movants fail to acknowledge, much less rebut, *Coalition*, the Commission distinguished both cases cited by Movants: *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067 (9th Cir. 2011), and *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003). *See* Rehearing Order PP 150, 153.

In addition, the Commission reasonably determined that “the scope of the impacts from any induced production is not reasonably foreseeable,” because the

⁴ New York currently prohibits hydraulic fracturing; thus, FERC concluded that the Project would not induce shale gas production in that state. Rehearing Order P 148; EIS 4-235.

location, scale, and timing of any additional wells are matters of speculation. *Id.* P 151; *see also* Certificate Order P 105 (drilling of wells will continue “but to an unknown extent”). While Movants are correct that NEPA requires “reasonable forecasting” (Mem. of Law at 12), it does not require an agency to “engage in speculative analysis” or “to do the impractical, if not enough information is available to permit meaningful consideration.” *N. Plains Res. Council*, 668 F.3d at 1078; *see also Fund for Animals v. Kempthorne*, 538 F.3d 124, 137 (2d Cir. 2008) (agency is not obliged to engage in endless hypothesizing as to remote possibilities); *Suffolk Cty. v. Sec’y of Interior*, 562 F.2d 1368, 1378 (2d Cir. 1977) (agencies not required to conduct “a crystal ball inquiry”).

The Commission reasonably concluded that the general “evidence” Movants presented, that “drilling of new wells is likely” (Mem. of Law at 10) or that general information is available “from other agencies” (*id.* at 11), does not assist FERC in making a “meaningful analysis of potential impacts” from this Project. Certificate Order P 107; *see also* Rehearing Order PP 139-40 (it is “impossible for [FERC] to meaningfully predict production-related impacts, many of which are highly localized”). Even where FERC knows the “general source area” of gas, a “meaningful analysis of production impacts would require more detailed information regarding the number, location, and timing of wells, roads, gathering lines, [etc.], as well as details about the production methods, which can vary per

producer,” all of which concerns information not in the Project’s record.

Rehearing Order P 139. Thus, with respect to this Project, the impacts from future gas production are “so nebulous” FERC “cannot forecast [their] likely effects.” *Id.* The Commission’s judgment is based upon its expertise and entitled to deference from this Court. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983); *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90 (2d Cir. 2000).

For many of the reasons stated above, Movants’ secondary argument (Mem. of Law at 12-14), regarding the sufficiency of FERC’s cumulative impacts analysis of natural gas production and transportation projects in the Marcellus shale region, also fails. *See* Rehearing Order PP 156-58, 162-72. The EIS belies Movant’s claim that FERC’s cumulative impacts analysis is “devoid of any *analysis*” (Mem. of Law at 13) of the environmental impacts from gas production. *See* EIS 4-232 to 4-258. Although the Commission reasonably determined that Marcellus Shale development activities are not “reasonably foreseeable” to allow for an in-depth impacts analysis, the Commission nevertheless considered the cumulative impacts of the general development of Marcellus shale gas. EIS at 4-232. For example, the Commission estimated the acreage that “might hypothetically be impacted” assuming all of the gas transported by the Project is supplied by gas produced in the county where the pipeline begins. *Id.* at 4-233. In addition, the EIS discussed “potential cumulative impacts associated with the general development of the

Marcellus Shale” on each of the specific environmental resources (e.g., geology and soils, water resources, vegetation, and wildlife) throughout its cumulative impacts analysis. *Id.* at 4-241; *see also id.* 4-241 to 4-257. Moreover, FERC’s cumulative impacts analysis fully considered all energy development projects, including natural gas wells within 10 miles of the Project. Certificate Order P 103, *see also* EIS at 4-233. The scope of the Commission’s cumulative impacts analysis is sufficient. *See Coal. for Responsible Growth*, 485 F. App’x. at 474 (rejecting argument that FERC’s cumulative impact analysis of Marcellus shale gas development, which comprised only a “short discussion,” was inadequate); *see also Marsh*, 490 U.S. at 376-77 (agencies retain substantial discretion as to the extent of the inquiry for a cumulative impacts analysis).

Where the Commission did have sufficient information, it fully considered the cumulative impacts of known activities, including pipeline projects in the Project area. EIS at 4-236 to 4-239 (describing the 11 planned, proposed or existing FERC-jurisdictional natural gas transmission projects within 10 miles of the Project, including the Northeast Energy Direct project). With respect to the Northeast Energy Direct project, the Commission’s cumulative impacts analysis is far above the “ cursory analysis” Movants claim (Mem. of Law at 13). FERC examined anticipated cumulative impacts from the Northeast Energy Direct project on geological, water, vegetation, fisheries and aquatic resources, as well as climate

change, land use, recreation, special interest areas, and cultural and visual resources, based on “publicly available information and assumptions regarding pipeline distance, collocation, right-of-way width, and pipeline diameter.”

Certificate Order P 104; EIS at 4-241 to 4-257. NEPA requires nothing more. *See Theodore Roosevelt Conserv. P’ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) (“agency need not revise an almost complete environmental impact statement to accommodate new proposals submitted to the agency”).

B. FERC’s Certificate Is Consistent With The Clean Water Act

Movants claim that the Clean Water Act requires the pipeline to obtain a water quality certification “before FERC approves projects and allows activities that could affect navigable waters.” Mem. of Law at 2 (citing *City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006)); *see also id.* 14-16. Section 401(a)(1) of the Clean Water Act provides that no federal “license or permit shall be granted until the” state certifies that any activity “which may result in a discharge into the navigable waters” will comply with the applicable provisions of the Act. 33 U.S.C. § 1341(a)(1). Consistent with the language of Clean Water Act section 401, FERC’s orders ensure that the Pipeline “must obtain all applicable authorizations required by federal law prior to commencing construction of the projects,” including the Clean Water Act permit. Certificate Order P 117 (citing

Environmental Condition 8); *see also* Rehearing Order PP 62-72 (rejecting argument the Clean Water Act prohibits FERC action).

“The plain text of the Clean Water Act does not appear to prohibit the kind of conditional certificate the Commission issued here.” *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 279 (D.C. Cir. 2015) (Rogers, J., concurring in relevant part) (discussing argument that FERC violated the Clean Water Act by issuing a conditional certificate for a pipeline project prior to the pipeline obtaining a water quality certificate from the state); *cf. Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1315, 1317-21 (D.C. Cir. 2015) (holding that FERC did not violate or preempt the Clean Air Act by issuing a conditional certificate authorizing natural gas facilities prior to the project sponsors obtaining the required Clean Air Act permits). The cases on which Movants rely (Mem. of Law 15) are inapposite as they do not involve conditional certificates of the type presented here. *See* Rehearing Order P 64; *see also Gunpowder*, 807 F.3d at 280 (distinguishing *City of Tacoma* and *PUD No. 1 v. Wash. Dep’t of Ecology*, 511 U.S. 700 (1994)).

Movants also allege that the Commission’s tree felling authorization violates the Clean Water Act as, they claim, it unlawfully authorizes an activity covered by the Act. As FERC explained, “consistent with the language of section 401 of the Clean Water Act,” the Certificate Order ensures that until New York issues the water quality certification, the Pipeline may not begin any construction activity

that “may result in a discharge into jurisdictional waterbodies.” Rehearing Order P 63. FERC’s authorization to fell trees is limited to Pennsylvania,⁵ the state in which the Pipeline has obtained a state water quality certification. The U.S. Army Corps of Engineers – the federal agency that implements the Clean Water Act – agreed that the non-mechanical tree felling activities requested by Constitution “are not considered to constitute a discharge of dredged material, and do not require authorization [under] the Clean Water Act.” *See Tree Felling Authorization* at 1 (citing Jan. 14, 2016 Letter from Army Corps to Constitution, Attachment A to Constitution’s Jan. 14, 2016 Letter Submitting Supplemental Information (appended hereto)). The Commission determined that the Pipeline has met all of the environmental conditions necessary to engage in this pre-construction activity in Pennsylvania, including obtaining federal clearances from the relevant Pennsylvania agencies and acquiring landowner access. *Id.*

II. The Alleged Harm Is Neither Substantial Nor Irreparable

Where an environmental harm is alleged, this Court has held “broader injunctive relief is appropriate, of course, where *substantial danger* to the environment, in addition to a violation of [NEPA] procedural requirements, is

⁵ Specifically, the Pipeline is authorized to fell trees at or above ground level, using equipment that will not rut soils or damage root systems such as hand rotary saws or chain saws. Tree felling is prohibited in any area within 50 feet of a waterbody. The felled trees are left in place until construction begins. *See Pipeline’s Jan. 8, 2016 Request for Partial Notice to Proceed* at 1-2 (appended).

established.” *Huntington*, 884 F.2d at 653 (emphasis added) (vacating an injunction for plaintiff’s failure to establish some actual or threatened injury even though agency conceded a NEPA violation). Thus, Movants bear the burden to establish that tree felling and Project construction will substantially endanger the environment. *See id.* at 654. As evidenced by the extensive EIS, the Project, as conditioned by the Certificate Order, poses no such threat.

The alleged injury – permanent destruction of forests (Mem. of Law at 2, 17-18) – is unsupported by the underlying record. Rather, the record shows that construction of the Project, subject to the required mitigation measures, will not significantly affect this resource. Specifically, the Commission found that no portion of the Project would cross: National forests, Pennsylvania state forests, federal or state parks, National or state-designated Wild and Scenic Rivers, or Coastal Zone Management areas. EIS at 4-129; 4-131. Although the Project will cross two state forests in New York, it will impact only 2.3 of the 6,237 acres of those forests. *Id.* at 4-131. Impacts on recreational and special interest areas would be temporary and limited to the period of active construction. *Id.* at 4-129. Last, FERC imposed an Upland Forest Plan to avoid, reduce, or minimize unavoidable impacts on forests. Certificate Order at Environmental Condition 23; *see also* Rehearing Order P 122 (discussing forest mitigation).

Movants attempt to bolster their argument regarding irreparable harm

through declarations from their members. But many of the impacts the Declarants complain of (e.g., construction noise, dust, and traffic) are temporary and not irreparable. *See* Solar Dec. ¶¶ 7, 8, 13; Holleran Dec. ¶ 7. Further, the Declarants' concerns regarding erosion and flooding (Solar Dec. ¶ 11; Holleran Dec. ¶ 5) as well as trespassing vehicles (Solar Dec. ¶ 12) are speculative. *See* EIS at 4-124 (measures addressing trespassing); Rehearing Order PP 50-51 (extensive and well-established erosion controls in place). Overall, construction of the Project will impact only 13.9 acres of residential land. EIS at 4-124. There are six residences within 50 feet of the Project work area, for which the Pipeline developed site-specific construction plans to reduce construction impacts. *Id.* at ES-7 to -8. Moreover, the Pipeline must compensate landowners for temporary and permanent easements, as well as restore property to pre-construction conditions to the extent possible. *Id.* at 4-124; 4-152 (100 percent compensation for value of loss specialty crops). In short, the EIS imposes measures to prevent, mitigate, and compensate landowners to ensure that they will not face irreparable harm.

Even if the Court finds an irreparable injury, that finding must be balanced against the other factors. "A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 129 S. Ct. 1749, 1760 (2009). Rather, a stay is an exercise of judicial discretion dependent upon the circumstances of the particular case. *Id.*; *see also* *Env'tl. Justice All. v. Giuliani*, 214 F.3d 65 (2d Cir.

2000) (despite planned destruction of approximately 600 community gardens, injunction denied where plaintiffs failed to demonstrate a likelihood of success on the merits). Here, a thorough environmental analysis of the Project was conducted in full compliance with NEPA. Any injury remaining after mitigation is outweighed by the Project's public benefits.

III. A Stay Will Substantially Injure Other Parties

The Court must also consider whether a stay would have a serious adverse effect on other interested persons. *In re World Trade Ctr.*, 503 F.3d at 170. Here, even a short stay would result in a significant delay to the Project because of restrictions on tree clearing designed to avoid adverse impacts on the threatened Northern long-eared bat. *See* Rehearing Order P 46. Specifically, Constitution must fell trees located in the Project's workspace between November 1 and March 31 to comply with the U.S. Fish and Wildlife Service's mandatory timing constraints. *See* Answer of Constitution to Motions to Stay at 2 (Jan. 15, 2016) (appended). Missing this window may jeopardize the Project's December 2016 in-service date. *See* Jan. 8 Request to Proceed at 3.

IV. The Public Interest Does Not Favor A Stay

The public interest is a crucial factor in litigation involving the administration of regulatory statutes designed to promote the public interest. *Ofosu v. McElroy*, 98 F.3d 694, 701-02 (2d Cir. 1996). In *Ofosu*, this Court stated

that, in considering whether to stay agency orders, courts give significant weight to the public interest served by the proper operation of the regulatory scheme. *Id.* at 702 (citations omitted); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (courts “should pay particular regard for the public consequences in employing the extraordinary remedy of injunction”). The Natural Gas Act charges FERC with regulating the interstate transportation and wholesale sale of natural gas in the public interest. *See, e.g., Islander East Pipeline Co. v. McCarthy*, 525 F.3d 141, 143 (2d Cir. 2008). Because the Commission is the presumptive guardian of the public interest in this area, its views indicate the direction of the public interest for purposes of deciding a request for stay pending appeal. *See CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 142 (2d Cir. 1977). Here, in issuing a certificate of public convenience and necessity to the Pipeline, the Commission found a strong showing of need for this project, *see supra* at pp. 5-6, and a stay would, at the least, significantly delay the public benefits of this Project. *See FERC v. Elec. Power Supply Ass’n*, No. 14-840, slip op. at 33 (S. Ct. Jan. 25, 2016) (“[N]ot our job,” when presented with a disputed question within the “technical understanding and policy judgment” of FERC, “to render that judgment, on which reasonable minds can differ”).

CONCLUSION

For the foregoing reasons, the stay motion should be denied.

Respectfully submitted,

Max Minzner
General Counsel

Robert H. Solomon
Solicitor

/s/ Karin L. Larson
Karin L. Larson
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel: (202) 502-8236
Fax: (202) 273-0901
Karin.Larson@ferc.gov

February 12, 2016

**APPENDIX IN SUPPORT OF
OPPOSITION OF
FEDERAL ENERGY REGULATORY COMMISSION
TO MOTION FOR STAY PENDING REVIEW**

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Appendix Item No. A-1

Constitution Pipeline Co., LLC, Partial Notice to Proceed
with Tree Felling and Variance Request,
Docket No. CP13-499-000 (Jan. 29, 2016)

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

OFFICE OF ENERGY PROJECTS

In Reply Refer To:
OEP/DG2E/Gas 4
Constitution Pipeline Company, LLC
Constitution Pipeline Project
Docket No. CP13-499-000
§ 375.308(x)

January 29, 2016
Lynda Schubring, PMP
Environmental Project Manager
Constitution Pipeline Company, LLC
2800 Post Oak Boulevard
P.O. Box 1396
Houston, Texas 77251-1396

Re: Partial Notice to Proceed with Tree Felling and Variance Requests

Dear Ms. Schubring:

I grant in part your January 8, 2016 request, as preceded by the information and variance requests described in Constitution Pipeline Company's (Constitution) Implementation Plan (IP) submitted on May 19, 2015 and as supplemented by its filings dated January 14, 2016 subject to the following stipulations:

- This letter approves limited non-mechanical tree felling in **Pennsylvania only**;
- This letter approves the workspace variances in Constitution's May 19, 2015 and January 8, 2016 requests **in Pennsylvania only, except for the variances listed in table 1 below**; and
- For each exclusion area listed in "Attachment E – Tree felling Exclusion List," of Constitution's January 14, 2016 supplement, Constitution **may not fell** trees within 100 feet of each area and **must** employ qualified archaeologists to demarcate these additional areas.

Constitution has obtained the necessary federal clearances from the Pennsylvania State Historic Preservation Office, Pennsylvania Department of Environmental Protection, as well as the U.S. Fish and Wildlife Service. The U.S. Army Corps of Engineers stated in a letter to Constitution dated January 14, 2016 that the activities as proposed would not require authorization from that agency. In addition, Constitution has acquired landowner access for the approved facilities in Pennsylvania.

In considering your January 8, 2016 request, we have reviewed Constitution's IP filed on May 19, 2015 and as supplemented on January 14, 2016. Based on our review, Constitution has provided the information necessary to meet the project pre-construction conditions in the Commission's December 2, 2014 *Order Issuing Certificates* (Order) solely as it relates to the facilities and activities approved herein. In addition, we have confirmed the receipt of all required federal authorizations relevant to the approved activities herein. This letter does **not** authorize tree felling in New York nor does it authorize the workspace variances in Constitution's May 19, 2015 and January 8, 2016 requests in New York at this time.

I remind you that Constitution must comply with all applicable remaining terms and conditions of the Order.

Sincerely,

Terry Turpin, Director
Division of Gas – Environment
and Engineering

cc: Public File, Docket No. CP13-499-000

| TABLE 1 | | |
|--|------------------------|---|
| Sites Excluded From the Notice To Proceed Approval | | |
| Access Road / Workspace Identification | Milepost | Reason For Exclusion |
| Pennsylvania | | |
| TRK#949 | 2.9 | Explanation / justification lacking for substantial additional impact to forest |
| TRK#950 | 2.9 | Explanation / justification lacking for substantial additional impact to forest |
| PAR-2C | Offline east of MP 3.3 | Explanation / justification lacking, map lacking |
| PAR-2D | 3.3 | Explanation / justification lacking |
| TRK#915 | 9.1 | Explanation / justification lacking |
| PAR-15 | 17.8 | Explanation / justification lacking |

Appendix Item No. A-2

Answer of Constitution Pipeline Co. to Motions to Stay,
Docket No. CP13-499-000 (Jan. 15, 2016)
(Attachments excluded)

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Constitution Pipeline Company, LLC

Docket No. CP13-499-000

Iroquois Gas Transmission System, L.P.

Docket No. CP13-502-000

**ANSWER OF CONSTITUTION PIPELINE COMPANY, LLC TO MOTIONS TO STAY
AND ANSWER TO REQUEST FOR PARTIAL NOTICE TO PROCEED**

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”),¹ Constitution Pipeline Company, LLC (“Constitution”) respectfully submits its Answer to Motions to Stay and an Answer in Opposition to Constitution’s Request for Partial Notice to Proceed in the above-referenced proceeding for the Constitution Pipeline Project (“Project”).² Specifically, Constitution answers the issues raised in the “Statement in Opposition to Constitution Pipeline Company’s Request for a Partial Notice to Proceed and Motion for a Stay Pending Rehearing by Stop the Pipeline” (“STP Motion for Stay”), the Motion for Stay Pending Rehearing of Catskill Mountainkeeper;

¹ 18 C.F.R. § 385.213.

² The Commission’s procedural rules provide that “[a]n answer may be made to any pleading, if not prohibited under paragraph (a)(2) of this section [18 C.F.R. § 385.213(a)(2)].” *See* 18 C.F.R. § 385.213(a)(3). Nevertheless, even if an answer were not ordinarily permitted to the submissions at issue here, the Commission may, for good cause, permit an answer. *See id.* § 385.101(e). The Commission has accepted answers when they ensure a complete and accurate record in the case and where, as here, the information provided will aid in the Commission’s decision-making process. *See, e.g., Southern Natural Gas Company*, 126 FERC ¶ 61,246 at P 24 (2009) (accepting answers where such filings assisted the Commission’s decision-making); *Dominion Cove Point, LNG*, 126 FERC ¶ 61,036 at P 30 (2009) (same); *Idaho Power Co.*, 95 FERC ¶ 61,482 at 62,717 (2001) (recognizing that an answer may be permitted when it assists in creating a complete record); *Delmarva Power & Light Co.*, 93 FERC ¶ 61,098 at 61,259 (2000) (allowing answers to ensure a complete and accurate record). Constitution’s Answer responds to mischaracterizations of the law and factual record and, thereby, assists the Commission in its decision-making process.

Clean Air Counsel; Delaware-Otsego Audubon Society; Riverkeeper, Inc., and Sierra Club” (“Mountainkeeper Motion for Stay”), and the “Office of the New York State Attorney General Answer in Opposition to Constitution Pipeline Company’s January 8, 2015 (sic) Request for a Partial Notice to Proceed” (“NYAG Answer”), which were submitted on January 13-14, 2016, in response to Constitution’s January 8, 2016 Request for Partial Notice to Proceed.

These motions and objections must be rejected because they are premised on erroneous assertions which either ignore or mischaracterize the following fundamental facts:

1. The Constitution Pipeline Project is authorized and has been approved since December 2, 2014, when the Commission issued the Order Issuing Certificates and Approving Abandonment, 149 FERC ¶61,199 (“Certificate Order”).
2. Tree felling is necessary now to comply with the United States Fish and Wildlife Service (“USFWS”) required timing constraints, which are incorporated as a condition of the Certificate Order, and in order for construction to be completed in time to comply with the Certificate Order and provide added natural gas service for the 2016-2017 heating season and increase reliability to the energy grid in the region.
3. Courts and regulatory agencies overwhelmingly do not regard non-mechanized tree felling as “construction”, nor is it a regulated activity under the Clean Water Act, as determined by the United States Army Corps of Engineers (“Army Corps”).
4. None of the objectors have identified an actual impact to New York’s water resources from non-mechanized tree felling.
5. The felling activity will only occur in areas where the landowners have already been compensated, or where such compensation has been secured by bonds required by the

U.S. District Court for the Northern District of New York and the Middle District Of Pennsylvania.

These critical points, as outlined in more detail below, demonstrate that Constitution's request for Partial Notice to Proceed should be granted.

The Constitution Pipeline Project Is Approved And the Partial NTP Request Is Timely

The fundamental premise of the STP Motion for Stay is in error, that “there can be no public interest . . . [in] **a project that has not been approved** . . .”³ The Constitution Pipeline project *is approved*, and has been approved since December 2, 2014, when the Commission issued the Certificate Order. The finality of the Commission's approval of the Project by issuing the Certificate Order has been affirmed by the Second Circuit in denying STP's earlier request for a stay of the Project,⁴ and by the United States District Courts for the Northern District of New York and for the Middle District of Pennsylvania in 83 separate orders, which rejected all of the claims made by STP's counsel, who represented in some of those actions the landowners whose Declarations are attached to STP's Motion for Stay.

The Project was approved by the Commission after issuance of a 450-page comprehensive Environmental Impact Statement and the consideration of thousands of comments by stakeholders, including affected landowners and others. The Project will result in the delivery of up to 650,000 Dkth per day of natural gas supply to meet the increased needs of customers in the New York and New England market areas. The Commission found that the Project is in the public interest, and issued a Certificate of Public Convenience and Necessity. The Project will provide new natural gas service for areas currently without access to natural gas,

³ STP Motion for Stay, p. 17.

⁴ *In re Stop the Pipeline*, Case No. 15-926 (2d Cir. 2015).

expand access to multiple sources of natural gas supply, improve operational performance, system flexibility and reliability in the New York and New England market areas and optimize the existing systems for the benefit of both current and new customers.

Constitution's request to fell trees now is intended to comply with the environmental restrictions imposed by the USFWS and incorporated into the Certificate Order, and is completely consistent with the Biological Opinion issued by the USFWS. Landowners who own land on which trees will be felled in a narrow workspace corridor have been compensated for the value of those trees, or that compensation has been bonded by orders of the United States District Court for the Northern District of New York and the Middle District of Pennsylvania. STP fails to acknowledge that the Commission has already balanced the loss of those trees as part of the process in issuing the Certificate Order. Constitution has all necessary federal authorizations to conduct tree **falling**, which is not tree **clearing**, and which is a non-mechanized activity that does not constitute a discharge under the Clean Water Act, and thereby does not require a Section 401 certification. STP's Motion for Stay is most notable not only for its hyperbole and misstatements, but also for the complete lack of any citation to authority of any agency other than FERC to regulate the felling of trees in connection with this approved interstate natural gas pipeline project. STP's Motion for Stay does not meet the standards for the grant of a stay and must be denied.

STP's Failure To Meet The Standard For Grant Of A Stay

The Commission reviews requests for stay under the standard established by the Administrative Procedure Act, 5 U.S.C. § 705, and is empowered to grant a stay "when justice so requires." *See Transcontinental Gas Pipe Line Co., LLC*, 150 FERC ¶61,183, ¶ 9 (2015). The Commission typically considers several factors: (1) whether the party requesting the stay will

suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest. *Id.* As the Commission has noted, “[o]ur general policy is to refrain from granting stays in order to ensure definiteness and finality in our proceedings. If the party requesting a stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.” *Id.* STP has not and cannot demonstrate irreparable harm.

STP’s Failure to Demonstrate Irreparable Harm

STP misrepresents the facts in its conclusory statements that STP and its members will suffer irreparable harm because Constitution “is proposing to cut down trees and plant life for a 124-mile pipeline that would cause approximately 700,000 trees in 1034 acres of forested land to be clear-cut.”⁵ Without acknowledging the compensation made or secured for landowners, STP also alleges that property owners along the Project route, including members of STP, will suffer irreparable harm because they, among other reasons, “purchased their land specifically for the land’s pristine forested environment,” and because the “destruction and deforestation of the virgin land will permanently alter the scenic views, marring the aesthetics of STP’s members’ properties forever ... and will cause valuable land to become practically worthless.”⁶ None of these general allegations, even if true, would support the issuance of a stay by the Commission.

STP fails to acknowledge the extensive analysis of environmental impact performed by the Commission in the EIS. STP’s generalized claims of harm are caused not by specific aspects of the proposed tree felling, but by the Project itself, and cannot support the grant of a stay. *See Transcontinental Gas Pipe Line Company, LLC*, 150 FERC ¶ 61,183, at ¶ 13 (“The group has

⁵ STP Motion for Stay, p. 15.

⁶ STP Motion for Stay, pp. 15-16.

provided only unsupported allegations in the form of generalized environmental assertions about the project.”); *Millennium Pipeline Company, LLC*, 141 FERC ¶61,022 at ¶¶ 14-17 (2012) (request for stay based on claims that tree cutting would cause irreparable harm to local residents, including injury to endangered species and reduced property values); *Ruby Pipeline, LLC*, 134 FERC ¶61,103 at ¶¶ 18-20 (2011) and 134 FERC ¶61,020 at ¶¶ 15-23 (2011) (allegations of environmental harm did not support grant of a stay). The courts have also denied stays in similar cases. See *Minisink Residents for Environmental Preservation and Safety v. FERC*, No. 12-1481 (D.C. Cir. Mar. 5, 2013) (order denying motion for stay); *In re Minisink Residents for Environmental Preservation and Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012) (order denying petition for stay); *Defenders of Wildlife v. FERC*, No. 10-1407 (D.C. Cir. Feb. 22, 2011) (order denying motion for stay); *Summit Lake Paiute Indian Tribe v. FERC*, No. 10-1389 (D.C. Cir. Jan. 28, 2011) (order denying motion for stay). See also *Feighner v. FERC*, No. 13-1016 (D.C. Cir. Feb. 8, 2013) (order denying motion for stay); *Delaware Riverkeeper v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013) (order denying motion for stay); *Coalition for Responsible Growth and Resource Conservation v. FERC*, No. 12-566 (2d Cir. Feb. 28, 2012) (order denying motion for stay).

STP also intentionally mischaracterizes the activity for which Constitution seeks approval, and wrongly maligns Constitution based upon a deliberate misreading of the sworn statement of the Project’s manager, Matthew Swift.⁷ Constitution seeks a limited Notice to Proceed to conduct non-mechanized tree **felling**, not tree **clearing**, activities. The difference between tree felling and tree clearing is perhaps best illustrated by pictures:

⁷ STP makes untrue and unsupported claims that “the Company is attempting to defraud the public. and subvert State and National laws.” The only entity which has engaged in deliberate deception with regard to the Project is STP.



Tree felling photograph.⁸



Tree clearing photograph.⁹

⁸ See Affidavit of Devyn Richardson, Exhibit 1.

Tree felling is not construction, and is instead an activity undertaken to comply with the environmental safeguards incorporated by the Commission in the Certificate Order and the Biologic Assessment and Addendum, as well as by USFWS in its Biological Option. Further, contrary to STP's assertions, the tree felling activity described in Constitution's NTP request is not regulated under the federal Clean Water Act, 33 U.S.C. §§ 1251, *et seq.*, and is neither contingent upon the New York State Department of Environmental Conservation ("NYSDEC") granting a Section 401 Water Quality Certification nor the Army Corps granting a Section 404 permit.

For its own convenience, STP ignores the fact that Constitution requests to hand fell trees and brush at the above-ground level using non-mechanized equipment that will not rut soils or damage root systems. The activity will leave felled trees in place, and will not take place in watercourses or waterbodies. No trees will be felled in or adjacent to New York State jurisdictional wetlands as well as other designated areas. The detailed tree felling protocol outlined in Attachment F to the NTP request is designed to protect against violating the statutes and regulations within the jurisdiction of NYSDEC and the Army Corps. The proposal carefully contemplates cutting trees in the winter months in order to protect migratory birds and bats, as required by USFWS in its Biological Opinion, and acknowledges that tree clearing, which would commence construction of the project, must await the issuance of the Section 401 and 404 permits. Tree clearing, as opposed to tree felling, is defined and discussed in Section 2.3.1 of the FEIS and involves the removal of trees, brush and other vegetation from the right of way area by mechanical means.

⁹ See Affidavit of Devyn Richardson, Exhibit 1.

STP intentionally glosses over this distinction and represents that the request at issue is for the *clearing* of trees, noting that tree “clearing... in preparation for laying pipeline in the ground is the first phase of construction,” and that Constitution’s proposal to “cut trees” cannot begin “until DEC grants a 401 water quality certificate.”¹⁰ These assertions are untrue as they relate to tree felling.

STP’s argument that the proposed tree felling is contingent upon the Army Corps granting the Section 404 permit is unfounded. Further, because the proposed tree felling activities will not result in a discharge to navigable waters, the tree felling is not subject to the Section 401 certification requirement. Under Section 401 of the Clean Water Act, any applicant for a federal Section 404 permit to construct or operate a facility that may result in a discharge to navigable waters must provide the federal permitting agency with “a certification from the State in which the discharge originates . . . that any such discharge will comply with” applicable state water quality standards. 33 U.S.C. § 1341(a)(1). According to Section 401 of the Clean Water Act, a state Water Quality Certification must precede any federal “license or permit to conduct any activity . . . which may result in any discharge into the navigable waters” 33 U.S.C. § 1341(a)(1).

The requirement to obtain a Section 401 certification is triggered when an applicant is required to obtain a Section 404 permit under the Clean Water Act. The dispositive fact here is that the tree felling activities proposed by Constitution in its January 8, 2016 request for partial Notice to Proceed **do not trigger** the requirement for a Section 404 permit, **as the Army Corps has determined**, because the activities have been designed so as to avoid the possibility of a discharge into navigable waters or New York State jurisdictional wetlands. In the absence of a

¹⁰ STP Motion for Stay, p. 6.

requirement to obtain a Section 404 permit, there is no obligation to obtain a Section 401 certification from the state.

Section 404 permits are required for the discharge of dredged or fill material into waters of the United States. 33 C.F.R. § 323.3(a). The Army Corps' regulations expressly provide that the term "discharge of dredged material" *does not* include "[a]ctivities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material." 33 C.F.R. § 323.2(d)(2)(ii).

The New York District of the U.S. Army Corps of Engineers has reviewed Constitution's January 8, 2016 request for partial Notice to Proceed. In a letter dated January 14, 2016, the Army Corps stated:

It appears that the tree felling activities currently proposed by Constitution, if carried out in compliance with the provisions set out in Attachment "F", would meet this standard [referring to 33 CFR § 323.2(d)(2)(ii)], and would not require authorization from this agency.

January 14, 2016 letter from New York District of the U.S. Army Corps of Engineers, Christopher S. Mallery, Deputy Chief, Regulatory Branch.

Nevertheless, STP cites to *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 144 (2d Cir. 2008) and argues that a Section 401 certification is "a prerequisite to the FERC granting *final* approval to commence construction of the proposed pipeline."¹¹ Here, however, Constitution is not seeking "final" approval. Constitution is seeking a partial Notice to Proceed to commence limited, non-mechanized tree felling activities necessary to comply with the U.S.

¹¹ STP Motion for Stay, p. 6.

Fish and Wildlife Services' recommendations and project-specific Biological Opinion. The Commission has granted partial Notices to Proceed in other similar circumstances. *See* Transcontinental Gas Pipe Line Company, LLC, Docket No. CP15-504-000 (March 30, 2015 letter from Office of Energy Projects to Timothy Powell); Transcontinental Gas Pipe Line Company, LLC, Docket No. CP13-551-000 (March 9, 2015 letter from Office of Energy Projects to Timothy Powell); Central New York Oil and Gas Company, Docket No. CP10-480-000 (February 13, 2012 letter from Office of Energy Projects to William F Demarest, Jr.).

As the Commission has repeatedly recognized, the Commission has the authority to authorize an activity if all permits required for that activity have been obtained. *See Ruby Pipeline*, 134 FERC ¶61,103 at ¶ 8; *Transcontinental Gas Pipe Line*, 150 FERC ¶61,183 at ¶ 8, n. 4. Here, Constitution has all of the required permits to conduct limited, non-mechanized tree felling activities.

Except to argue that NYSDEC may condition a 401 certification, which as discussed above is inapplicable to tree felling, STP cites no New York State law or regulation that would be abrogated by the proposed tree felling activity. To the contrary, by committing not to fell trees in or adjacent to New York State jurisdictional wetlands and in certain areas involving stream crossings, Constitution has intentionally designed its activity to protect against discharges. Further, contrary to STP's misrepresentation that Constitution in its NTP request claims to have obtained "approval" from NYSDEC to conduct the requested activity, which it neither solicited nor obtained, Constitution did on two occasions communicate its intent to file the NTP request with NYSDEC.

STP also relies on pure speculation regarding potential harms that could be caused in support of its Motion, stating that felled trees and limbs may lead to a violation of water quality

standards related to turbidity from scouring, and that a Section 401 Water Quality Certification could contain conditions related to such speculative events. STP fails to acknowledge that the tree felling will only occur in areas where Constitution has easements and has compensated the landowners for the use of their land, or has posted a bond to secure the payment of that compensation. Since tree felling activities do not trigger the need to obtain a Section 401 certification, such speculation cannot support a finding of irreparable harm. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Section 401(d) states: “Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant . . . will comply with any applicable effluent limitations . . . and with any other appropriate requirement of State law” STP bases its argument on the holding in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), in which the U.S. Supreme Court held that 303 water quality standards were the baseline for Water Quality Certification conditions and that the language “other appropriate requirement of State law” in 401(d) may include additional limitations necessary to assure compliance with water quality standards. The Supreme Court, however, did not rule “on what additional state laws, *if any*, might be incorporated by this language” (emphasis added).

The standard in New York for Section 401 Water Quality Certification conditions is arguably found in *Niagara Mohawk Power Corp. v. NYSDEC*, 82 N.Y.2d 191 (1993), in which the New York Court of Appeals held that the NYSDEC **could not** include conditions in its Water Quality Certification incorporating ECL Article 15, Title 5 or SEQRA, but was limited to turbidity and temperature change as specified by Parts 701 to 704. NYSDEC argued that the exclusion of section 303 from 401(d) was an indication that Congress intended to expand the

State's authority beyond water quality standards. *Id.* at 198. The court interpreted section 401(d)'s "other limitations" to allow at most conditions based on section 303 water quality standards approved by EPA. *Id.* at 196. NYSDEC conceded that water quality standards promulgated pursuant to section 303 are found only in Parts 701 to 704. *Id.* at 200. The U.S. Supreme Court denied certiorari just seven days after the *PUD* case.

Besides ignoring the decision in *Niagara Mohawk*, STP's argument ignores the fact that the Project has gone through the consultation process and that Constitution has included many protective measures in its request for Notice to Proceed.

STP Fails To Meet The Remaining Factors For A Stay

Not only does STP's Motion to Stay fail to demonstrate any irreparable harm to STP, it also fails to demonstrate that no other party would be harmed by the stay or that it is in the public interest. The public interest here is clear, and has been determined by the Commission in the Certificate Order. The public interest is in the completion of the Project. If the Project is stayed, and Constitution cannot fell the trees as requested in the Notice to Proceed, then Constitution will not be able to construct in the sequence identified in the EIS and will not be able to place the Project facilities in place by December 2, 2016, the date identified by the Commission in the Certificate Order. There is significant harm both to Constitution and to the public in the delay of this Project for at least a full year if the tree felling cannot occur now in compliance with the Certificate Order conditions.

For the above reasons, STP's Motion to Stay should be denied.

Mountainkeeper's Failure to Meet the Standard For Grant of a Stay

The Catskill Mountainkeeper and others (“Mountainkeeper”) seek a stay of the Project pending rehearing¹² based upon many of the same grounds as STP, and relying on the same mischaracterization of Constitution’s request for partial Notice to Proceed as a request “for authorization to begin construction”¹³ Mountainkeeper attaches to its Motion four Declarations, all of which describe in a general way the effects that the declarants anticipate that the construction of the Project will have on their properties or their activities. None of the Declarations describe any direct environmental impact on waterbodies from the felling of trees; instead, they all focus on the impact of the Project and its construction. Constitution incorporates its response to STP’s Motion for Stay in response to the Motion for Stay by Mountainkeeper. As with STP’s Motion, Mountainkeeper’s generalized claims of harm are caused not by specific aspects of the proposed tree felling, but by the Project itself, and cannot support the grant of a stay. *See Transcontinental Gas Pipe Line Company, LLC*, 150 FERC ¶ 61,183, at ¶ 13 (“The group has provided only unsupported allegations in the form of generalized environmental assertions about the project.”); *Millennium Pipeline Company, LLC*, 141 FERC ¶ 61,022 at ¶¶ 14-17 (2012) (request for stay based on claims that tree cutting would cause irreparable harm to local residents, including injury to endangered species and reduced property values) and *Ruby Pipeline, LLC*, 134 FERC ¶ 61,103 at ¶¶ 18-20 (2011) and 134 FERC ¶ 61,020 at ¶¶ 15-23 (2011) (allegations of environmental harm did not support grant of a stay). The courts have also denied stays in similar cases. *See Minisink Residents for Environmental*

¹² Motion for Stay Pending Rehearing of Catskill Mountainkeeper; Clean Air Counsel; Delaware-Otsego Audubon Society; Riverkeeper, Inc., and Sierra Club, hereafter “Mountainkeeper Motion for Stay.”

¹³ Mountainkeeper Motion for Stay, pp. 2, 3, 7, 8.

Preservation and Safety v. FERC, No. 12-1481 (D.C. Cir. Mar. 5, 2013) (order denying motion for stay); *In re Minisink Residents for Environmental Preservation and Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012) (order denying petition for stay); *Defenders of Wildlife v. FERC*, No. 10-1407 (D.C. Cir. Feb. 22, 2011) (order denying motion for stay); *Summit Lake Paiute Indian Tribe v. FERC*, No. 10-1389 (D.C. Cir. Jan. 28, 2011) (order denying motion for stay). *See also* *Feighner v. FERC*, No. 13-1016 (D.C. Cir. Feb. 8, 2013) (order denying motion for stay); *Delaware Riverkeeper v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013) (order denying motion for stay); *Coalition for Responsible Growth and Resource Conservation v. FERC*, No. 12-566 (2d Cir. Feb. 28, 2012) (order denying motion for stay).

Mountainkeeper has failed to carry its burden of proof, and the Motion should be denied for the reasons above and the reasons stated in Constitution's opposition to STP's Motion for Stay.

The Issues Raised By the NY Attorney General Do Not Warrant Denial of the Request for Notice to Proceed

The New York Attorney General, which takes no position on the merits of the proposed pipeline, raises three issues in its Answer to the request for partial Notice to Proceed – first, that “cutting down the trees in the Pipeline corridor constitutes construction,” second, that the Certificate Order is not “final” because rehearing requests have been filed, and third, that the tree felling is a “material change to the construction scenario” that requires a new analysis of environmental impacts.¹⁴ The first issue raised by the NYAG is essentially the same issue raised by STP and Mountainkeeper. For the reasons stated above, Constitution's partial request for Notice to Proceed is not a request to start construction.

¹⁴ NYAG Answer, pp. 1-3.

As to the NYAG's second issue, the filing of requests for rehearing of the Certificate Order do not impair the effectiveness of the Certificate Order, or impose a constructive stay of the Certificate Order. Under the Natural Gas Act, filing an application for rehearing with FERC does not, "unless specifically ordered by the Commission, operate as a stay of the Commission's order." 15 U.S.C. § 717r(c); see *Tenn. Gas Pipeline Co. v. 104 Acres of Land*, 749 F. Supp. 429, 431 (D.R.I. 1990) ("The Natural Gas Act directs that an application for a rehearing shall not operate as a stay of the Commission's order unless specifically ordered by the Commission"); *Steckman Ridge GP, LLC v. An Exclusive Natural Gas Storage Easement*, Civ. A. Nos. 08-168, 08-169, 08-177, 08-179, 08-180, 2008 WL 4346405, at * 3 (W.D. Pa. Sept. 19, 2008) ("Filing an application for rehearing with FERC does not, 'unless specifically ordered by the Commission, operate as a stay of the Commission's order.'") (quoting 15 U.S.C. § 717r(c)). Even the grant of a rehearing does not stay the original FERC Certificate absent FERC's grant of a stay. *Pa. Pub. Util. Comm'n v. FERC*, 881 F.2d 1123, 1125-26 (D.C. Cir. 1989); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968). The Commission has already issued one partial Notice to Proceed under the Certificate Order and may issue the requested Notice to Proceed.

The NYAG also questions the finality of the Certificate Order and argues that the Certificate Order is not final because requests for rehearing are pending. The NYAG cites *Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289 (D.C. Cir. 2001), but in that case, the U.S. Court of Appeals for the D.C. Circuit stated that a party's request for rehearing suspended the finality of the opinion at issue "as applied to" the party who sought rehearing. *Id.* at 296. The NYAG cites no authority supporting its conclusion that "[u]ntil the Commission issues a ruling on the merits of the rehearing request, the Certificate Order is not

final and does not constitute FERC's record of decision."¹⁵ Section 19(c) of the Natural Gas Act belies the NYAG's assertion: "The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order." 15 U.S.C. § 717r(c). The NYAG's argument that the Certificate Order is not final should be rejected.

Finally, the NYAG's contention that the construction sequence has materially changed is simply not true. In fact, the record, and the EIS, contemplated tree felling during the time periods requested in the Notice to Proceed, and are mandated by the restrictions imposed in the Biological Opinion issued by the USFWS. As discussed in the EIS at page 4-86:

Migratory bird nesting within the project area spans from mid-April through mid-August and peaks between mid-May and early August (Meade 2008). Therefore Constitution proposes to conduct the majority of tree clearing between September 1 and March 31 in order to minimize impacts on breeding birds and comply with state and federal recommendations (FWS 2012a). Constitution would conduct limited clearing activities between April 1 and August 31 for access roads and sensitive waterbodies, as necessary, to access and construct through sensitive fisheries within state-designated construction windows (see section 4.6.2).

While Constitution hoped to have all of its permits so that tree felling and clearing, as opposed to just tree felling, could occur between September 1 and March 31, the EIS and the construction schedule proposed by Constitution clearly contemplates tree felling in the proposed time period, with construction to occur later, and in the case of some regulated stream crossings, much later.

¹⁵ NYAG Answer, p. 10.

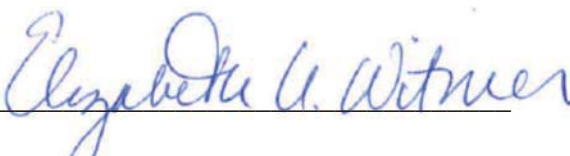
There is also no reason to believe that Constitution will not be able to move into full construction mobilization in the spring, as has always been planned and as was contemplated in the EIS.

II. Conclusion

For each of the foregoing reasons, Constitution respectfully requests that the Commission deny the Oppositions to Constitution's Request for Partial Notice to Proceed.

Respectfully submitted,

CONSTITUTION PIPELINE COMPANY, LLC

By: 

Daniel L. Merz
Excetral K. Caldwell
Senior Counsel
Constitution Pipeline Company, LLC
2800 Post Oak Blvd
Houston, Texas 77056
Telephone: (713) 215-2148
Fax: (713) 215-2229
excetral.caldwell@williams.com
dan.merz@williams.com

Elizabeth U. Witmer
Saul Ewing LLP
1200 Liberty Ridge Drive, Suite 200
Wayne, PA 19087
Telephone: (610) 215-5062
Fax: (610) 408-4400
ewitmer@saul.com

Dated: January 15, 2016

Appendix Item No. A-3

Constitution Pipeline's Letter Submitting
Supplemental Information,
Docket No. CP13-499-000 (Jan. 14, 2016)
(with Attachment A only)



CONSTITUTION PIPELINE

Constitution Pipeline Company, LLC
2800 Post Oak Boulevard (77056)
P.O. Box 1396
Houston, Texas 77251-1396
713/215-2000

January 14, 2016

Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Attention: Kimberley D. Bose, Secretary

Reference: Constitution Pipeline Company, LLC
Constitution Pipeline Project
Docket No. CP13-499-000
Supplemental Information

Ladies and Gentlemen:

On January 8, 2016, the Constitution Pipeline Company, LLC (Constitution) requested from the Federal Energy Regulatory Commission (Commission or FERC) written authorization for a partial (“Notice to Proceed”) from the Director of Office of Energy Projects to commence limited, non-mechanized tree felling activities pursuant to the Order Issuing Certificate dated December 2, 2014 (Order) under Docket No. CP13-499-000. This letter provides the following updates and supplements since the request.

- On January 14, 2016, the US Army Corps of Engineers (USACE) provided Constitution a letter with regard to the USACE jurisdiction over specific tree-clearing activities as proposed within the request for partial Notice to Proceed request. The USACE concludes that the non-mechanized tree clearing activities described in Attachment F of the request, including cutting or removing the vegetation above the ground where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging or other similar activities that redeposit excavated soil material, are not considered to constitute a discharge of dredged material, and do not require authorization from the USACE pursuant to Section 404 of the Clean Water Act. The USACE letter is provided in Attachment A.

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
January 14, 2016
Page 2

- Constitution is providing herein tables describing the limits and reason for each tree felling exclusion area proposed at this time. Tree felling exclusion areas are included in Attachment B and exclusion areas containing Privileged information are included in Attachment E under separate cover. Exclusion of ‘certain areas’, as described in the request for partial Notice to Proceed, refers to those locations where Constitution has voluntarily removed the area from felling activities. These locations include within 50-feet of a waterbody to avoid inadvertently dropping a tree into a waterbody as well as New York State jurisdictional wetlands and their adjacent areas.
- Constitution is taking several precautions to avoid felling trees in exclusion areas. These include incorporating buffers at waterbodies, placing signage/tape and/or safety fencing to demarcate specific locations that should not be cleared, communicating at daily tailgate meetings upcoming locations that should be avoided, and providing inspectors in front of clearing crews to ensure those locations remain clearly marked. In the unexpected event that a felled tree lands in an exclusion area, Constitution would coordinate with both the landowner and the third-party monitor to manage removal or redirection of the tree to avoid and minimize adverse impacts to the exclusion zone feature. Removal or redirection will be accomplished by cutting the fallen tree and carrying by hand.
- Constitution will have a designated meeting point for morning safety tailgate meetings where felling crews will determine the drop off and pick up locations along the route. To reduce roadside parking, crews would be transported by bus, dropped off, and picked up in a safe location along public roadways crossed by the Project and approved access roads not requiring improvements. Construction entrances would not need to be installed for this activity as all ingress and egress will be completed on foot from public roadways crossed by the Project and locations along the pipeline and access roads where permissions have been obtained.
- Status updates of variance request tables included within Attachment B (*Table 1- Route and Workspace Variance Requests since the May 19, 2015 Implementation Plan Submittal*) and C (*Table 2- Access Road Variance Requests since the May 19, 2015 Implementation Plan Submittal*) of the January 8, 2016 partial Notice to Proceed are included in Attachment C. Updates to the tables have been highlighted.
- Variance request tables located in Attachment 5A (*Project Changes Incorporated into Alignment Sheets but not Previously Filed with the Secretary*) and 5B (*Project Changes that have Occurred Subsequent to Alignment Sheet Development*) submitted with the May 19, 2015, Implementation Plan have been updated and can be viewed in Attachment D. Updates to the tables have been highlighted.

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
January 14, 2016
Page 3

This filing includes site-specific cultural resource information. In accordance with the Commission's regulations at 18 CFR § 380.12(f)(4), Constitution requests that this information be accorded privileged treatment and placed in a non-public file.

In accordance with the Commission's requirements, copies of this filing are being served on all parties on the service list for the above-referenced docket. Any questions regarding this submittal should be directed to Lynda Schubring at (713)215-2491 or Lynda.Schubring@williams.com.

Respectfully,

CONSTITUTION PIPELINE COMPANY, LLC
By Williams Gas Pipeline Company, LLC,
Its Operator



Lynda Schubring, PMP
Environmental Project Manager

cc: Kevin Bowman, Environmental Project Manager, Division of Gas – Environment and Engineering

Enclosures:

Public

Attachment A – January 14, 2016 USACE Letter.

Attachment B – Tree Felling Exclusion Location List (Public)

Attachment C – Updated January 8, 2016 Attachments B and C – Variance Requests

Attachment D – Updated variance request tables located in Attachment 5A and 5B submitted with the May 19, 2015, Implementation Plan

Privileged Information

Attachment E – Tree felling Exclusion Location List (Privileged Information)



CONSTITUTION PIPELINE

Attachment A

January 14, 2016, US Army Corps of Engineers Letter to Constitution



DEPARTMENT OF THE ARMY
NEW YORK DISTRICT, CORPS OF ENGINEERS
JACOB K. JAVITS FEDERAL BUILDING
26 FEDERAL PLAZA
NEW YORK, NEW YORK 10278-0090

JAN 14 2016

Regulatory Branch

SUBJECT: Department of the Army Permit Application No. NAN-2012-00449-UBR
Constitution Pipeline Company, LLC

Ms. Lynda Schubring
Environmental Project Manager
Williams Gas Pipeline Company, LLC
Operator for the Constitution Pipeline Company, LLC
P.O. Box 1396
Houston, Texas 77251-1396

Dear Ms. Schubring:

The New York District of the U.S. Army Corps of Engineers has reviewed your submittal of January 8, 2016, to the Federal Energy Regulatory Commission, in which Constitution Pipeline Company, LLC ("Constitution"), requested a written authorization (a "Notice to Proceed") from that office for the initiation of limited non-mechanized tree felling activities along the route of a proposed natural gas pipeline through Susquehanna County, in Pennsylvania, and Broome, Chenango, Delaware, and Schoharie Counties in New York. A copy of that letter (along with the relevant attachments "A", "E", and "F") is enclosed for your reference.

Based on the submitted material, and particularly the description of activities in Attachment "F", Constitution is proposing to cut trees and brush, at or above ground level, within wetlands, using equipment that will not leave ruts in the soil or damage root systems. Trees felled within wetlands would be left for possible removal, if and when Constitution receives a permit from the responsible district of this agency for the additional impacts involved in the construction of the proposed pipeline.

In accordance with Title 33 of the Code of Federal Regulations, Section 323.2 (d.2.ii) (with regard to what constitutes a discharge of dredged material during the course of work in waters of the United States, including wetlands), "[a]ctivities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing), where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material" are not considered to constitute a discharge of dredged material, and do not require an authorization from this agency pursuant to Section 404 of the Clean Water Act (Title 33 of the United States Code, Section 1344). It appears that the tree felling activities currently proposed by Constitution, if carried out in compliance with the provisions set out in Attachment "F", would meet this standard, and would not require authorization from this agency.

PLEASE USE THE ABOVE 18-CHARACTER FILE NUMBER ON ALL CORRESPONDENCE WITH THIS OFFICE

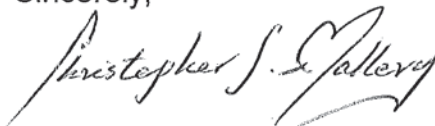
- 2 -

SUBJECT: Department of the Army Permit Application No. NAN-2012-00449-UBR
Constitution Pipeline Company, LLC

This office notes, however, that such activities in jurisdictional areas, if not carried out with proper caution and adequate training of field construction staff, could easily give rise to associated activities that would not fall within the standards cited above, and thus to situations that might constitute violations of the statutes and regulations within the jurisdiction of this agency. This office would strongly recommend the appropriate training and monitoring of field construction staff with regard to these matters be given a high level of priority, in order to avoid such situations, especially in light of the high public profile of the project.

This office appreciates your efforts to comply with the requirements of its regulatory programs. If questions arise concerning this matter, please contact me at 917-790-8418.

Sincerely,



Christopher S. Mallery, Ph.D.
Deputy Chief, Regulatory Branch

Attachments

c: Buffalo District, U.S. Army Corps of Engineers
Baltimore District, U.S. Army Corps of Engineers
Federal Energy Regulatory Commission

Appendix Item No. A-4

Constitution Pipeline's Request for
Partial Notice to Proceed
Docket No. CP13-499-000 (Jan. 8, 2016)
(Attachments excluded)



CONSTITUTION PIPELINE

Constitution Pipeline Company, LLC

2800 Post Oak Boulevard (77056)

P.O. Box 1396

Houston, Texas 77251-1396

713/215-2000

January 8, 2015

Federal Energy Regulatory Commission

888 First Street, N.E.

Washington, D.C. 20426

Attention: Kimberley D. Bose, Secretary

Reference: Constitution Pipeline Company, LLC (“Constitution”)

Constitution Pipeline Project

Docket No. CP13-499-000

Request for Partial Notice to Proceed

Ladies and Gentlemen:

The Federal Energy Regulatory Commission (Commission or FERC) issued an Order Issuing Certificate dated December 2, 2014 (Order) under Docket No. CP13-499-000 to Constitution Pipeline Company (Constitution) approving the Constitution Pipeline Project (Project). On December 3, 2014, Constitution accepted the Commission’s Order pursuant to Section 157.20(a) of the Commission’s Regulations. On May 19, 2015, Constitution filed with the Commission an Implementation Plan documenting how Constitution will comply with the Environmental Conditions provided in the Order.

In accordance with the Order and the U.S. Fish and Wildlife Service (USFWS) recommendations to avoid adverse impacts to migratory birds and ensure the Project components and conservation measures occur as outlined within the Biological Opinion for the Northern long-eared bat issued on December 31, 2015, Constitution must fell trees located within the workspace required for construction of the proposed Project between November 1 and March 31. These measures are intended to comply with USFWS recommendations and the Project specific Biological Opinion.

Constitution is therefore requesting written authorization (“Notice to Proceed”) from the Director of Office of Energy Projects to commence limited, non-mechanized tree felling activities necessary to comply with these conservation measures in the certificated

Kimberly D. Bose, Secretary
 Federal Energy Regulatory Commission
 January 8, 2015
 Page 2

workspace, in addition to the workspace identified in those variances requested within the Implementation Plan and described in Attachments B and C to this request.

Constitution proposes to fell trees and vegetation at or above ground level, using equipment that will not rut soils or damage root systems. The contractor will not be allowed to use mechanized clearing methods or heavy equipment. Trees will be felled in a manner so as to avoid watercourses and waterbodies. Constitution will access the approved workspace from roadways crossed by the Project. Waterbodies and wetlands will be crossed on foot. Equipment such as chainsaws and fuel may be carried in hand held carts. Mats and bridges will not be used. Felled trees will be left in place until construction begins, which will be after receipt of all applicable permits and approvals and FERC's issuance to Constitution of a separate notice to proceed to begin construction and earth disturbance activities.

Constitution has each applicable state and federal permit required for non-mechanized tree felling as identified in the table below. Constitution is not requesting to proceed with construction of the Project; it will do so once applicable permits are received.

Federal Permits and Authorizations Required for Non-mechanized Felling of Trees

| Administering Agency | Permit or Authorization | Status |
|-------------------------------|--|---|
| FERC | Certificate of Public Convenience and Necessity | Issued December 2, 2014 |
| USFWS | Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act | EIS and FERC Order Requirements met through Implementation Plan May 19, 2015 |
| USFWS | Section 7 Consultation | USFWS Threatened and Endangered Species Opinion filed to FERC on September 17, 2015 concerning the Indiana bat, Dwarf Wedgemussel and northern Monkshood. USFWS Biological Opinion issued December 31, 2015. |
| NYSOPRHP- SHPO PHMC - SHPO | Section 106, National Historic Preservation Act Consultation | Programmatic Agreement Executed November 10, 2015 |

NYSOPRHP- SHPO = New York State Office of Parks, Recreation and Historic Preservation – State Historic Preservation Office
 PHMC - SHPO = Pennsylvania Historical and Museum Commission – State Historic Preservation Office

Non-mechanized felling of trees and vegetation above the ground surface by hand rotary cutting and chain sawing, which does not substantially disturb the root system nor involve mechanized pushing, dragging, or re-deposition of soil material (as proposed in this request) is not a federally regulated activity under Section 404 of the Clean Water Act (CWA), as this activity will not involve substantial earth disturbance or the placement of dredged or fill material in Waters of the United States.

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
January 8, 2015
Page 3

With regard to similar proposed actions, the U.S. Army Corps of Engineers (USACE) has stated that activities that involve only the cutting or removing of vegetation above the ground surface (e.g., mowing, rotary cutting, and chain sawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material, are not regulated under Section 404 of the Clean Water Act, as they do not involve a discharge of dredged and/or fill material, and that therefore these activities do not require a permit from the USACE.

Attachment A contains letters granting similar approvals dated January 28, 2011 from USACE Baltimore District regarding Tennessee Gas Pipeline's 300 Line Project, and February 25, 2015 from the USACE Philadelphia District regarding Transco's Leidy Southeast Expansion Project.

Likewise, because this activity does not involve a discharge of dredged and/or filled material, no state certification is required for this activity, in that Section 401 of the CWA only applies to activities "which may result in any discharge into the navigable waters." Nor is this activity subject to any other federal authorization subject to New York or Pennsylvania permitting requirements.

During the course of performing the non-mechanized tree felling, as well as any other activity associated with the Project, Constitution will avoid culturally sensitive areas as detailed within the Section 106 Programmatic Agreement. Each of these areas, as well as the physical barriers and markings demarcating "no access" will be identified to the inspectors and work crews during the environmental training and during tree felling activities.

Also, in accordance with Condition No. 5 of the Order, Constitution is providing this written request for approval of Project changes submitted since the submission of the Implementation Plan on May 19, 2015. Constitution respectfully requests the Commission review the changes identified in Attachments B and C, and provide its approval for incorporation of these changes as part of this Notice to Proceed. The tables in Attachments B and C provide a description of the existing land use/cover type, documentation of landowner approval, cultural resources potentially affected or federally listed threatened or endangered species potentially affected, and whether any other environmentally sensitive areas are within or abutting the area. The project changes are also depicted on corresponding aerial based 11x17 map sheets at a scale of 1:2,400 and identify each route realignment or facility update, contractor yards, access roads, and other areas that would be used or disturbed and have not been previously identified. In Attachment D, Constitution is also providing locations where workspace removal or reductions have occurred since filing of the May 19, 2015 Implementation Plan.

In response to Ordering Condition 6h, Constitution is providing the schedule for this activity in Attachment E. Constitution respectfully requests authorization by January 15, 2016 in order to comply with USFWS recommendation as well as the Biological Opinion and meet the Project in-service date in 2016. Constitution understands that, if granted, this Notice to Proceed would be limited to the specific activities listed in this request.

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
January 8, 2015
Page 4

Constitution has provided notice of this request to the USFWS, the USACE lead New York District, USACE Baltimore and Buffalo Districts, Pennsylvania Department of Environmental Protection (PADEP), New York State Department of Environmental Conservation (NYSDEC), and the Susquehanna County Conservation District (SCCD). Each agency was consulted directly with respect to tree felling activities as further described in the Project background document included in Attachment F.

If you have any questions regarding this filing, please contact Lynda Schubring at 713-215-2491 or by email at lynda.schubring@williams.com.

Respectfully,

CONSTITUTION PIPELINE COMPANY, LLC
By Williams Gas Pipeline Company, LLC,
Its Operator



Lynda Schubring, PMP
Environmental Project Manager

cc: Kevin Bowman, Environmental Project Manager, Division of Gas – Environment
and Engineering
USFWS
USACE
NYSDEC
PADEP
SCCD

Attachment A – USACE Letters Granting Tree Felling Approvals

Attachment B – Route and Workspace Variance Requests since the May 19, 2015
Implementation Plan Submittal - Tables and Alignment Sheets

Attachment C – Access Road Variance Requests since the May 19, 2015 Implementation
Plan Submittal - Tables and Alignment Sheets

Attachment D – Workspace Removal and Reductions since the May 19, 2015
Implementation Plan Submittal - Tables and Alignment Sheets

Attachment E – Tree Felling Schedule

Attachment F – Project Background and Tree Felling Activities

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CAPTION:

Catskill Mountainkeeper, Inc., et al.

CERTIFICATE OF SERVICE*

Docket Number: 16-345

v.

Federal Energy Regulatory Commission

I, Karin L. Larson, hereby certify under penalty of perjury that (print name)

on 2/12/2016, I served a copy of Respondent's Opposition to Emergency (date)

Motion for Stay Pending Review and Addendum (list all documents)

by (select all applicable)**

- Personal Delivery, United States Mail, Federal Express or other Overnight Courier, Commercial Carrier, X E-Mail (on consent)

on the following parties:

Deborah Goldberg Earthjustice, 48 Wall St., Suite 800 NewYork N.Y. 10005

Name Address City State Zip Code

Moneen S. Nasmith Earthjustice, 48 Wall St., Suite 800 New York N.Y. 10005

Name Address City State Zip Code

John F. Stoviak Saul Ewing LLP, 1500 Market St., 38th Floor Philadelphia PA 19102

Name Address City State Zip Code

Name Address City State Zip Code

*A party must serve a copy of each paper on the other parties, or their counsel, to the appeal or proceeding. The Court will reject papers for filing if a certificate of service is not simultaneously filed.

**If different methods of service have been used on different parties, please complete a separate certificate of service for each party.

February 12, 2016 Today's Date

/s/ Karin L. Larson Signature