

NEW YORK'S DENIAL OF WATER QUALITY CERTIFICATION FOR THREE FERC-AUTHORIZED PIPELINES: FLAGRANT FIAT OR VALID VETO?

Steven A. Weiler and Marcia A. Stanford[*]

Synopsis: This article examines the legal tension between two federal statutes – the Natural Gas Act (NGA), which vests the Federal Energy Regulatory Commission (FERC) with exclusive jurisdiction over interstate natural gas pipelines, and the Clean Water Act (CWA), which addresses water pollution and under which states implement federal law. In particular, the FERC regulates pipeline market entry by issuing, under NGA section 7(c), a certificate of public convenience and necessity authorizing the construction of new facilities. But a state regulatory agency, acting under CWA section 401 can effectively "veto" the certificate by refusing to certify that the construction and operation of the permitted project would not violate the state's water quality standards. The FERC recently granted NGA section 7(c) certificate authorization for the construction of three different interstate natural gas pipeline projects, but in each instance the New York State Department of Environmental Conservation (the Department) refused to issue CWA section 401 water quality certification (WQC), paralyzing the projects and forcing the sponsors, prospective shippers, and others to incur significant legal costs.

Analysis reveals that some of the Department's actions may have overstepped the bounds of CWA section 401 authority, resulting in impermissible incursions into the FERC's sole and exclusive NGA jurisdiction over interstate natural gas pipelines. Specifically, the Department imposed preempted New York environmental laws on the FERC-governed pipelines by (1) requiring the pipelines, as a condition for review of their WQC requests, to apply for other New York State environmental law permits; (2) attempting to modify FERC-approved pipeline routes; and (3) analyzing the *cumulative impact* upon *all* environmental resources (*i.e*. other than water). Furthermore, in each of the three pipeline proceedings, the Department refused to act within CWA section 401's one-year deadline, thereby injecting confusion and doubt into the efficacy of each certificated pipeline project.

But these cases represent much more than an opportunity for an academic analysis of two different congressionally created regulatory schemes or an industry update on a few kerfuffles between pipelines and state environmental regulators. When state regulators transform WQC into a shield to delay construction of FERC-authorized pipeline projects or, worse yet, a sword to slay such projects altogether, there can be serious and harmful repercussions. This practice, left unchecked, means additional natural gas supplies from the prolific Marcellus and

* Steve Weiler, a partner at Dorsey & Whitney, LLP, and Marcia Stanford are experienced Washington, DC energy lawyers who help companies navigate federal regulation at the FERC and in the courts.

Utica Shale Formations may not be available for transportation through New York to gas-starved markets in the Northeast. And, if gas-fired electric generators are denied access to sufficient natural gas supplies, electric reliability could be jeopardized both in New York and New England. Against this backdrop, the authors make several recommendations that could provide certificate holders with additional comfort and streamline the WQC review process, but still ensure that states can fulfill their obligations to protect water quality.

I. INTRODUCTION

The FERC has exclusive jurisdiction over interstate natural gas pipelines by virtue of the NGA.[1] There is, however, a limited exception. The CWA, which addresses water pollution by providing "states with the option of being deputized regulators under the authority of federal law," allows the states to "veto" a federal

1. 15 U.S.C. §§ 717-717z (2005)*; see, e.g.*, Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988).

permit by refusing to certify, under the CWA section 401, that the construction and operation of the permitted projects would not violate the state's water quality standards.[2] The limited exception recently swallowed the rule when the FERC authorized the construction of three different interstate natural gas pipeline projects.[3] However, in each instance the Department refused to issue WQC, forcing the pipelines, prospective shippers, and others to incur significant legal costs and casting doubt on each project's future, despite, in one case alone, the project sponsors' already investing almost $400 million.[4]

Is this what Congress intended? To answer this question, we (1) begin by reviewing the two very different schemes devised by Congress to regulate interstate natural gas pipelines and water pollution; (2) study the three pipelines' proceedings at the FERC and the Department; and (3) analyze whether the Department overstepped its CWA authority. Finally, after determining that the Department exceeded its limited, statutory mandate, we make several recommendations that could ease the statutory tension between the NGA and CWA, mitigate future problems, and still preserve the states' ability to protect the quality of their water.

II. REGULATORY BACKGROUND

A. Natural Gas Act

In the early twentieth century, technological advancements allowed for the development of long-distance natural gas pipelines, linking massive natural gas fields in the Southwest to consumers in the North.[5] State attempts to regulate these

2. 33 U.S.C. §§ 1251-1388 (1977)*;* Islander E. Pipeline Co. v. Connecticut Dep't of Envtl. Prot., 482 F.3d 79, 90 (1st Cir. 2006); 33 U.S.C. §1251(a); *see, e.g.*, Keating v. FERC, 927 F.2d 616, 622 (D.C. Cir. 1991).

3. *National Fuel Gas Supply Corp. & Empire Pipeline, Inc*., 158 F.E.R.C. ¶ 61,145 (2017) [hereinafter *National Fuel Certificate Order*]; *Millennium Pipeline Co., L.L.C.*, 157 F.E.R.C. ¶ 61,096 (2016) [hereinafter *Millennium Certificate Order*]; *Constitution Pipeline Company*, 149 F.E.R.C. ¶ 61,199 (2014) [hereinafter *Constitution Certificate Order*].

4. The Department denied the WQC requests in three separate letters. Letter from Thomas S. Berkman, Deputy Commissioner and General Counsel, to Ms. Georgia Carter (Aug. 30, 2017) (part of the Department's comments filed with the FERC in Millennium Pipeline Co. LLC, Docket No. CP16-17 on Aug. 31, 2017; Accession No. 20170831-5044) [hereinafter *Millennium Denial Letter*]; Letter from John Ferguson, Chief Permit Administrator, to National Fuel Gas Supply Corp. and Empire Pipeline, Inc. (Apr. 7, 2017) (in National Fuel Gas Supply Corp., Docket No. CP15-115 on April 10, 2017; Accession No. 20170410-5071) [hereinafter *National Fuel Denial Letter*]; Letter from John Ferguson, Chief Permit Administrator, to Lynda Schubring, PMP (Apr. 22, 2016) (part of the Department's Notice of Intervention, Protest, and Answer in Opposition to Petition for Declaratory Order filed with the FERC in Constitution Pipeline Co., Docket No. CP18-15; Accession No. 20171109-5128) [hereinafter *Constitution Denial Letter*]; Petition for Declaratory Order at ex. E, ¶ 6, *Constitution Pipeline Co.*, Docket No. CP18-5-000 (Oct. 11, 2017) ("As of May 16, 2016, Constitution has incurred approximately $396 million in development of the Interstate Project.").

5. *See, e.g.*, *Concise Encyclopedia of the History of Energy* at 167, ed. Robert Aryes et al. (2009). Among the technological advancements that facilitated the development of long-distance pipelines were enhancements in pipeline construction materials leading to thin-walled, high tensile strength pipe, arc welding techniques, efficient ditch digging machines, and natural gas compressors.

long-distance pipelines were rejected by the Supreme Court:[6] "The paramount interest is not local but national, admitting of and requiring uniformity of regulation."[7] As such, interstate natural gas pipelines remained unregulated until passage of the NGA in 1938, which cloaked the Federal Power Commission (the FPC, now the FERC) with exclusive regulatory responsibility for such pipelines.[8] In particular, NGA section 7 regulates entry into and exit from the interstate natural gas marketplace: Section 7(c) requires that a "natural gas company" must obtain from the FERC (1) "a certificate of public convenience and necessity" before it extends, acquires, or operates any facility for the transportation or sale of natural gas in interstate commerce, and (2) permission to abandon the certificated facilities and services.[9] The FERC grants certificate authorization only after finding that the pipeline project is required by the "public convenience and necessity," a term not defined in the NGA, but rather left to the FERC's discretion.[10] To find that the "public convenience and necessity" requires a project, the FERC considers a host of factors which have changed over the years, as pipelines have evolved from merchants to transporters.[11] These factors were memorialized in a 1999 policy statement setting forth the criteria for deciding whether to authorize the construction of major new pipeline facilities.[12]

Under the policy statement, based on the record created by the applicant, the FERC balances the public benefits of the pipeline project (*e.g.*, access to reliable natural gas service, reduced costs, *etc*.) against the potential adverse consequences

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6. *See, e.g.*, Missouri, ex rel. Barrett v. Kansas Nat. Gas Co., 265 U.S. 298 (1924) (holding Kansas and Missouri could not compel an interstate pipeline to reduce its rates for sales to local distribution companies within those states).

7. *Id*. at 309-10; *see also* Public Utils. Comm'n for Kan. v. Landon, 249 U.S. 236, 245 (1919)("That the transportation of gas through pipelines from one state to another is interstate commerce may not be doubted. Also it is clear that as part of such commerce, the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the state.").

8. 15 U.S.C. §§ 717-717z; *see also* Public Utils. Comm'n of Cal. v. FERC, 900 F.2d 269, 281 (D.C. Cir. 1990) (holding that the principal purpose of the NGA is to "encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices") (quoting NAACP v. FPC, 425 U.S. 662, 670 (1976)).

9. NGA § 7(c)(1)(A), 15 U.S.C. § 717f(c)(1)(A); § 717a(6) ("'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."); *see also* § 717a(7) ("'Interstate commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States."); § 717f(b).

10. The origin of the requirement for a public utility to obtain a certificate of public convenience and necessity prior to operation is entirely statutory, "for at common law entry was made by holding out to the public a certain kind of service." Ford. P. Hall, *Certificates of Convenience and Necessity* 28, MICH. L. REV. 107, 107 (1929); *see also In re Kansas Pipe Line & Gas Co*., 2 F.P.C. 29, 56 (1939) ("We do not view the term as meaning indispensably requisite. Rather we view the term as meaning a public need or benefit without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or comfort or both.").

11. *Kansas Pipeline Line*, 2 F.P.C. at 40-56 (establishing a 7-part test to issue a certificate). More recently FERC determined: "The public could, instead, be protected by allowing the applicant to assume the economic risk of failure of a project; in other words, market forces could be employed in determining the ultimate need for the facilities as long as the customer was protected." *ANR Pipeline Co.*, 58 F.E.R.C. ¶ 61,080 at 61,279 (1992).

12. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 F.E.R.C. ¶ 61,227 (1999). The FERC recently issued a Notice of Inquiry to determine whether it should revise its approach under the Policy Statement. *Certification of New Interstate Natural Gas Facilities,* 163 F.E.R.C. ¶ 61,042 (2018).

to three interests—existing customers, existing pipelines, and landowners or communities impacted by the route—and whether the pipeline has made efforts to eliminate or minimize any adverse effects.[13] This balancing is necessary for the FERC to satisfy its primary purpose under the NGA – "to protect the consumer."[14] Only if the benefits outweigh the potential adverse effects will the FERC take a "hard look" at environmental concerns:[15] the purpose of the "hard look" is to determine the extent to which, if any, an environmental change is caused by the "major federal action at issue," as required by the National Environmental Policy Act of 1969 (NEPA).[16]

The FERC normally prepares an environmental assessment (EA) in the first instance.[17] However, a determination that the proposed pipeline project constitutes a major federal action "significantly affecting the quality of the human environment," requires a more robust analysis involving an Environmental Impact Statement (EIS).[18] As part of its environmental review, the FERC focuses on water resources that may be impacted by the construction of pipeline facilities.[19] In conjunction, the FERC has developed Wetland and Waterbody Construction and Mitigation Procedures (Waterbody Construction Procedures) and an Upland Erosion Control, Revegetation, and Maintenance Plan (Erosion Control Plan) to minimize and mitigate the environmental impact of pipeline construction.[20]

In addition to obtaining NGA certificate authorization, a pipeline must "comply with all other federal, state, and local regulations not preempted by the

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13. The threshold inquiry, for existing pipelines, is "whether the project can proceed without subsidies from their existing customers." 163 F.E.R.C. ¶ 61,042 at 61,745. The lack of subsidies means that, in most cases, the pipeline project will be incrementally priced, so that the new customers bear the costs of construction. *Id*.

14. *See, e.g.*, Mesa Petroleum Co. v. FPC, 441 F.2d 182, 186 (5th Cir. 1971).

15. *See, e.g.*, Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) ("Neither the statute [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences . . . .") (citations omitted).

16. Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 773 (1983); 42 U.S.C. §§ 4321-4370m-12 (directing federal agencies to incorporate environmental consideration in planning and decision-making); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989)("*Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed -- rather than unwise -- agency action*.") (emphasis in original; footnote omitted); *see also* Order No. 486, *Regulations Implementing the National Environmental Policy Act*, [Reg. Preambles] FERC Stats. & Regs. ¶ 30,783, 62 Fed. Reg. 47,897 (1987) (requiring FERC to prepare an EA or EIS for any action that may have a significant adverse effect on the human environment).

17. 18 C.F.R. § 380.5(a) (2018). An EA describes the scope of the project, the consequences to the currently existing environment, and examines the alternatives. *See, e.g*., Millennium Pipeline Co., *Valley Lateral Project Environmental Assessment*, 2 (May 2016) [hereinafter *Millennium EA*]. Among the issues addressed by the EA are "geology, soils, groundwater, surface water, wetlands, vegetation, aquatic resources, wildlife, threatened and endangered species, land use, visual resources, socioeconomics, cultural resources, air quality, noise, reliability and safety, cumulative impacts, and alternatives." *Id*.

18. 42 U.S.C. § 4332(C) (1975).

19. *Id*. § 4332(A).

20. WETLAND AND WATERBODY CONSTRUCTION AND MITIGATION PROCEDURES (2013), https://www.ferc.gov/industries/gas/enviro/procedures.pdf; UPLAND EROSION CONTROL AND MAINTENANCE PLAN (2013), https://www.ferc.gov/industries/gas/enviro/plan.pdf.

NGA."[21] Accordingly, the Energy Policy Act of 2005 (EPAct) amended NGA section 15 to provide: "The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969."[22] The EPAct also provided the FERC with authority "to set a schedule for federal agencies, and state agencies acting under federally delegated authority, to reach a final decision on requests for federal authorizations necessary for proposed NGA section 3 or 7 gas projects. . . ."[23] And, in case another agency delays issuing a required permit, the United States Court of Appeals for the D.C. Circuit has the original and exclusive jurisdiction to address the matter.[24]

B. Clean Water Act

The United States' surface water resources are immense, consisting of 3.5 million miles of rivers and streams, 94,000 square miles of Great Lakes, 100,000 other lakes larger than 100 acres in size, 58,000 miles of ocean shoreline, and 278 million acres of wetlands.[25] Historically, states addressed water pollution within their borders.[26] As such, the federal government's first attempt to regulate water

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21. Dominion Transmission, Inc. v. Summers, 723 F.3d 238, 240 (D.C. Cir. 2013) (addressing state failure to act under the Clean Air Act).

22. Pub. L. No. 109-58, 119 Stat. 594 (2005).

23. Order No. 687, *Regulations Implementing the Energy Policy Act of 2005; Coordinating the Processing of Federal Authorizations for Applications Under Sections 3 and 7 of the Natural Gas Act and Maintaining a Complete Consolidated Record*, F.E.R.C. STATS & REGS. ¶ 31,232, 71 Fed. Reg. 62,912 at P 1 (2006). For this reason, the FERC's regulations require that Exhibit J to certificate applications provide, among other things, "[a] statement identifying each Federal authorization that the proposal will require; the federal agency or officer, or State agency or officer acting pursuant to designated Federal Authority, that will issue each required authorization . . . ." 18 C.F.R. § 157.14(a)(13). And, lest there be any doubt about the force and effectiveness of the agency schedule, EPAct 313(a) provides: "[e]ach Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission." Pub. L. No. 109-58, 119 Stat. 594. The FERC, in turn, delegated authority to its Director of Office of Energy Projects (OEP) to develop schedules for agencies to complete their analysis and decision-making processes for the natural gas projects. Order No. 687 at P 3, n.5; *see also* 18 C.F.R. § 375.308(bb). The FERC's regulations further require that, within 30 days of receiving an application for federal authorization, the federal agency or state agency acting pursuant to federal law must notify FERC, among other things, whether the application is ready for processing, and if not, what additional information is required, and the anticipated effective date of the agency's decision. 18 C.F.R. § 385.2013.

24. NGA § 19(d)(1), 15 U.S.C. § 717r(d)(1) (amended by EPAct § 313(b)). The Act, however, excluded delays involving required permits for the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1466. *Id*.

25. William L. Andreen, *Water Quality Today – Has the Clean Water Act Been a Success*, 55 ALA. L. REV. 537, 552-53 (2004).

26. Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards under the Clean Water Act*, 36 VAND. L. REV. 1167, 1176 (1983); *see also* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ."). Accordingly, the legislative scheme of the CWA was carefully constructed by Congress to impose "major responsibility for control of water pollution on the states." D.C. v. Schramm, 631 F.2d 854, 860 (D.C. Cir. 1980).

pollution, the Rivers and Harbors Act in 1899, banned discharges into navigable waters, not so much to curtail pollution, but rather to facilitate navigation.[27]

Fifty years later, starting with the Water Pollution Control Act of 1948, Congress began comprehensively to address water pollution.[28] Those efforts led to the Federal Water Pollution Control Act Amendments of 1972, which reorganized the clean water statutes, introduced new requirements (such as technology-based limitations to control pollution and a national permit for direct discharges of pollution), and, in large measure, represents what we now know as the CWA.[29] In enacting the law, Congress declared two national goals: one long-term, to eliminate the discharge of pollutants into the navigable waters; and the other, an interim water quality goal, to make the nations' waters "fishable and swimmable."[30]

Against this backdrop, the CWA requires each state to establish water quality standards, review those standards at least every three years, and submit changes to the Environmental Protection Agency (EPA).[31] The EPA then determines whether they satisfy minimum standards established pursuant to the CWA.[32] Section 401, in particular, provides:

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27. 33 U.S.C. § 407 (The Rivers and Harbors Act was also known as the Refuse Act); Bonnie A Malloy, *Testing Cooperative Federalism: Water Quality Standards under the Clean Water Act*, 6 ENVTL. & ENERGY L. & POL'Y J. 63, 69 (2011) (citations omitted).

28. Ch. 758, 62 Stat. 1155 (1948) (codified at 33 U.S. C. §§ 1151-1175 (1948)). The 1948 Act retained the states' primary authority in curbing water pollution, relegating the federal government to a supporting role—funding state efforts, offering technical advice, and permitting federal enforcement only when "the government could show that a particular discharge actually was 'endangering the health or welfare' of persons by pollution of 'interstate' waters." Gaba, *supra* note 26, at 1177 (quoting 33 U.S.C. § 1151(2)(d)). Congress amended the 1948 Act several times. *See, e.g.*, Water Pollution Control Act Amendments of 1956, ch. 518, 70 Stats. 498 (1956) (adding provisions to strengthen state water pollution control activities and for research, training, collection of data, and grants for construction of treatment works); Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204 (1961) (required federal agencies to consider storage to regulate stream flow to control water quality when planning for a reservoir, and delegated to the Secretary of Health, Education and Welfare measures to ward against water pollution at the request of a state).

29. For example, § 21(b) of the Water Quality Improvement Act of 1970 was amended and became the now familiar CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1) (1970). The 1972 amendments established the National Pollutant Discharge Elimination System (NPDES) permit program for "point of source discharges," as set forth in CWA § 402, 33 U.S.C. § 1342. (1972).

30. 33 U.S.C. § 1251(a)(1)-(2) (1972); *id.* § 1251(a)(2) ("it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983").

31. *Id.* § 1313(c)(1) (2000). The CWA requires that water quality standards contain two components – a designated use component and water quality criteria component. *Id*. § 1313(c)(2)(A). Designated uses are "those uses specified in water quality standards for each water body or segment whether or not they are attained." 40 C.F.R. § 131.3(f). Water quality criteria are specific technical standards needed to protect the designated use(s) of a given waterbody. *Id*. § 131.11. For instance, if the designated use of a particular water body is "primary contact recreation," *e.g.*, swimming, the associated water quality standards would set maximum concentrations of certain types of bacteria to prevent illness. If there is more than one designated use, the water quality criteria must support the most sensitive use. *Id.; see id.* § 131.21 (EPA required elements in a state's water quality standards); *see also* 33 U.S.C. § 1313(c); 40 C.F.R. § 131.20.

32. EPA provides guidance concerning these minimum standards. *Reference Library of Water Quality Standards Policy and Guidance Documents*, EPA, https://www.epa.gov/wqs-tech/reference-library-water-quality-standards-policy-and-guidance-documents (last visited Sept. 30, 2018). Although states are prohibited from adopting *less* stringent than the minimum standards, they are free to adopt *more* stringent standards. 33 U.S. C. § 1370. After submission of a standard, EPA is required to inform the State within 60 days that the standard has

> 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, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable [water quality standards of the State] . . . .[33]

Upon receipt of an application, the state has one year to certify that (1) the discharge from the project will comply with the applicable standards or (2) there is not an applicable standard.[34] Thus, Congress intended the WQC requirement to endow the states with the power to indirectly veto an otherwise validly issued federal permit.[35]

Section 401's reference to "federal license or permit" casts a broad net and includes, for example, an NGA section 7(c) certificate authorizing the construction of a pipeline project that may result in a discharge into navigable waters.[36] In particular, a pipeline's construction activity would require a section 401 WQC if installing the pipeline would disturb and release soil into nearby water or, in the

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been approved and within 90 days of disapproval. 40 C.F.R. § 131.21(b). If EPA disapproves a standard and the State does not promptly adopt a satisfactory change, EPA will propose and promulgate the applicable change. *Id*. § 131.22.

33. 33 U.S.C. § 1341(a)(1); *see also Keating*, 927 F.2d at 622 ("Through [the Section 401 certification] requirement, Congress intended that states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval."). Senator Muskie, a chief architect of the law, explained:

> No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. 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. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements.

Delaware Riverkeeper Network v. FERC, 857 F.3d 388, 398 (D.C. Cir. 2017) (quoting 116 Cong. Rec. 8984 (1970)); *see also* Office of Water, EPA, Wetlands and 401 Certification – Opportunities and Guidelines for States and Eligible Indian Tribes 10 (April 1989) (the Congressional purpose of the water quality certification was to "ensure that no license or permit would be issued 'for an activity that through inadequate planning or otherwise could in fact become a source of pollution'") (quoting 115 Cong. Rec. S28, 958-59 (Oct. 7, 1969)).

34. 33 U.S.C. § 1341(a)(1).

35. *See, e.g.*, *Keating*, 927 F.2d at 622.

36. *See, e.g.*, *Transco. Gas Pipe Line Co., LLC*, 157 F.E.R.C. ¶ 61,095 at P 42 (2016) ("state [water quality] certification is, of course, necessary before the Commission authorizes activities 'which may result in a discharge into the navigable waters.'") (footnote omitted).

CWA vernacular, if a "discharge" of a "pollutant" would be added to the "navigable waters" from a "point source."[37] These defined terms are the subject of considerable debate and litigation.[38]

III. THE DEPARTMENT "VETOES" FERC CERTIFICATE ORDERS

The potential for significant conflict between the NGA and CWA recently became a reality, when the FERC issued certificate authorization to three different interstate pipelines, but in each case the State of New York refused to grant the required WQC upon which the certificate authorization was conditioned.[39] Each of the three pipeline project sponsors participated in FERC's pre-filing process, and the Department was an active participant in each.[40] After the pipeline sponsors

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37. 33 U.S.C. § 1362(16) ("The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.") In turn, the CWA defines "discharge of a pollutant" as "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." *Id*. § 1362(12). Pollutant is defined as "dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id*.§ 1362(6); *id*. § 1362(7) ("The term 'navigable waters' means the waters of the United States, including the territorial seas."); *see also* 40 C.F.R. § 230.3(o) (EPA regulation defining "waters of the United States"). The EPA's currently effective definition is broad and includes, for example, "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." *Id*. § 230.3(o)(1)(i); *id*. § 230.3(s)(3) ("intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters.") As well as "wetlands adjacent to waters . . . [and] waste treatment systems, including treatment ponds or lagoons." *Id*. § 230.3(s)(7). "Point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id*. § 1362(14).

38. *See, e.g*., S.D. Warren Co. v. Maine. Bd. of Envtl. Prot., 547 U.S. 370, 387 (2006) (holding that WQC from a state environmental agency was required for a hydro-electric project seeking FERC relicensing, even though the dam would only continue to "discharge" water); PUD No. 1 of Jefferson County v. Washington Dep't. of Ecology, 511 U.S. 700, 723 (1994) (holding that Washington's environmental agency could, under § 401(d), condition its WQC upon a FERC-licensed hydro-electric project's maintaining specific minimum stream flows to protect salmon runs, even though the condition is not necessarily related to possible "discharges"); Rapanos v. U.S., 547 U.S. 715, 739 (2006) (defining the scope of the CWA, that is, the meaning of the "waters of the United States.") The Court held that

> the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

Id. at 739; *see also* Alia S. Miles, *Searching for the Definition of "Discharge:" Section 401 of the Clean Water Act*, 28 Envtl. L. 191, 207 (1998) (discussing applicability of § 401 to non-point sources).

39. *See supra* note 4.

40. *National. Fuel Gas Supply Corp. & Empire Pipeline, Inc*., Docket No. PF14-18-000; *Millennium Pipeline Co., L.L.C.*, Docket No. PF15-23; *Constitution Pipeline Co.*, Docket No. PF12-9. The Department filed 2 pleadings in Docket No. PF14-18-000, 5 in Docket No. PF15-23 and 5 in Docket No. PF12-9. *See, e.g*., Department's Comments, Docket No. PF15-23 (Oct. 13, 2015); Comments of Department on the Scope of Environmental Impact Statement for the Northern Access 2016 Project, Docket No. PF14-18-000 (Nov. 21, 2014); Department's Comments regarding Constitution's Environmental Construction Plan, Docket No. PF12-9-000 (May 28, 2013).

filed certificate applications, the Department intervened and was active in each proceeding.[41] In each proceeding, the FERC found that the non-environmental concerns of the Certificate Policy Statement were satisfied, so certification necessarily turned on environmental analysis.[42] The FERC conducted thorough environmental reviews, including detailed analyses of each pipeline project's impact on water resources, and ultimately found no significant environmental impacts would result from the construction and operation of the pipeline projects.[43] The Department, however, took a contrary position, effectively vetoing the FERC's orders.[44] In the following sections, we present case studies describing the pipeline projects, the water resource analysis of the FERC's environmental review, the Department WQC proceedings, and subsequent litigation.

A. Constitution

Constitution Pipeline Company, LLC (Constitution) is a proposed interstate pipeline, which would provide up to 650,000 dekatherms (Dth) per day of firm transportation service through approximately 124 miles of 30-inch diameter pipeline extending from two receipt points in Susquehanna County, Pennsylvania to a proposed interconnection with Iroquois Gas Transmission System, L.P. (Iroquois) in Schoharie County, New York.[45] Estimated to cost approximately $683 million, the pipeline would be fully subscribed by two shippers agreeing to pay negotiated rates.[46]

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41. Petition to Intervene, *Millennium Pipeline Co.*, Docket No. CP16-17-000 (Nov. 19, 2015); Department's Petition for Intervention, *Nat'l Fuel Gas Supply Corp. & Empire Pipeline, Inc.*, Docket No. CP15-115-000 (Mar. 30, 2015); Department's Motion to Intervene, *Constitution Pipeline Co.*, Docket No. CP13-499-000 (July 10, 2013).

42. *Constitution Certificate Order*, *supra* note 3, at PP 24-26; *Millennium Certificate Order*, *supra* note 3, at PP 26, 28; *National Fuel Certificate Order*, *supra* note 3, at PP 26-32.

43. *Constitution Certificate Order*, *supra* note 3, at PP 65-73; *Millennium Certificate Order*, *supra* note 3, at PP 47-52; *National Fuel Certificate Order*, *supra* note 3, at PP 89-91. FERC Staff prepared an EIS to address Constitution and an EA for Millennium and National Fuel. *Constitution Certificate Order*, *supra* note 3, at PP 77-79; *Millennium Certificate Order*, *supra* note 3, at PP 66-80; *National Fuel Certificate Order*, *supra* note 3, at PP 108-16.

44. *National. Fuel Gas Supply Corp. and Empire Pipeline, Inc.*, Docket No. CP15-115; *Millennium Pipeline Co., L.L.C.*, Docket No. CP16-17; *Constitution Pipeline Co.*, Docket No. CP13-499.

45. *Constitution Certificate Order*, *supra* note 3, at P 1 n.4. "The members of Constitution include Williams Partners Operating LLC (41 percent), Cabot Pipeline Holdings LLC (25 percent), Piedmont Constitution Pipeline Company, LLC (24 percent), and Capitol Energy Ventures Corporation (10 percent)." *Id*. at P 1. In order to accept deliveries from Constitution, Iroquois, at an existing compressor station, would construct new facilities, primarily two new compressors (each 10,900 hp) at a total cost of approximately $75 million, and pursuant to a 5-year agreement, lease the incremental facility to Constitution. *Id*. at P 12. The proposed pipeline project was developed to satisfy demands of natural gas markets in New York and New England, and interest from natural gas shippers requiring transportation capacity from the Marcellus play in Susquehanna County, Pennsylvania to the existing pipeline systems of Iroquois and Tennessee Gas Pipeline Company LLC (TGP) in Schoharie County, New York. *See also Final Environmental Impact Statement, Constitution Pipeline and Wright Interconnection Project*, Docket No. CP13-499-000 (Oct. 2014) at ES-1 [hereinafter *Constitution EIS*].

46. *See, e.g.*, *Constitution Certificate Order*, *supra* note 3, at PP 6, 8. Constitution executed binding precedent agreements equal to the full design capacity of the pipeline, specifically 500,000 Dth/d of firm service with Cabot Oil & Gas Corporation and 150,000 Dth/d with Southwestern Energy Services Company. *Id*. at P 8.

1. The FERC's Water Resource Analysis

Water issues were a prime focus of Constitution's EIS, given that the proposed pipeline would cross 289 surface waterbodies.[47] To mitigate concerns, however, Constitution proposed to use trenchless crossing methods for 21 of the crossings, dry crossing methods for the remaining waterbodies, and utilize construction techniques that avoid in-stream work to avoid or minimize impacts on surface water resources, which the FERC found acceptable.[48] And, while the pipeline would impact some wetlands, the EIS concluded that approximately 80% of the wetland impacts would be located in temporary workspaces, which would eventually return to pre-construction conditions.[49] Therefore, the "impacts on groundwater, surface water, and wetland resources would be effectively minimized or mitigated, and would be largely temporary in duration."[50]

As for construction techniques, in uplands areas without water crossings, the pipeline would be constructed using the typical trenching method.[51] Waterbody crossings would use a variety of different methods, such as dry open-cut (if dry or frozen at the time of crossing), dry crossings (flume pipe, dam and pump, or cofferdam), or trenchless crossings (conventional bore).[52] No matter the method

47. For example, given that Constitution's proposed pipeline would be located near 4 water wells used for drinking water and 18 wells or springs used for other purposes, the FERC Staff recommended that Constitution identify the specific location of any well within 150 feet of the construction path and test all wells for water quality before and after construction. *Constitution EIS*, *supra* note 45, at 4-38 to 4-39; *see also id.* at 4-52, app. K (listing 289 waterbodies that Constitution would cross, including the waterbody name, location, crossing width, flow type, fishery type, FERC classification, state water quality classification, and proposed crossing method). Of the 289 waterbody crossings, 116 are perennial waterbody crossings, 109 intermittent waterbody crossings, and 64 ephemeral waterbody crossings. *Id.* at 4-44. An additional 46 waterbodies would be within the construction right-of-way, but not crossed by the pipeline. *Id.* at 4-45.

48. *Id.* at 4-4.

49. *Id* at ES-5.The Constitution pipeline would impact a total of 95.3 acres of wetlands, of which 33.8 acres were forested wetlands, 35.4 acres herbaceous wetlands, and 26.1 acres of shrub-scrub wetlands. *Id.* However, Constitution would maintain 14.5 acres of previously forested wetlands in a scrub-shrub or herbaceous state. *Id.*

50. *Id.* at ES-5. The EIS found that any remaining impacts would be further minimized or mitigated by Constitution's compliance with the conditions imposed by the Corps, the Pennsylvania Department of Environmental Protection (PADEP), and the Department. *Id.*

51. The Constitution EIS explains:

> The trench would be excavated with a backhoe or track-mounted excavator . . . . Typically, the trench would be sufficiently deep (5.5 feet deep to 7.5 feet deep for the 30-inch-diameter pipeline) to provide for a minimum of 3 feet of cover over the pipeline. In areas with consolidated rock, the minimum amount of cover would be 24 inches.

Id. at 2-16; *see also* PHMSA's Pipeline Safety Rules, 49 C.F.R. § 192.

52. Dry open-cut crossings of waterbodies involve trenching of channels that are dry or frozen at the time of crossing (similar to the standard installation process for uplands). *Constitution EIS*, *supra* note 45, at 2-21. When using this method, Constitution committed to "complete construction and backfill within 24 hours for minor water bodies (less than 10 feet wide) and within 48 hours for intermediate waterbodies (10 to 100 feet wide)." *Id*. The flume method involves diverting the flow of water across the construction area through flume pipes placed in the waterbody and installing sandbags in the waterbody upstream and downstream of the trench area, which dam the stream and divert the water flow through the flume pipes, and removing the flume pipes and sandbags after pipeline installation. *Id*. at 2-21. The dam and pump method is similar to the flume pipe method, except that pumps and hoses are used instead of flumes to move water across or around the construction work site. *Id*. at 2-22. For waterbody crossings with high flows (which make flume or dam and pump methods untenable), a cofferdam is used, that is, a temporary structure is installed within waterbodies to isolate a portion of the

used, Constitution would only cross a waterbody during state-designated timing windows.[53] Against this backdrop, the FERC's EIS concluded that "the approval of the project would have some adverse environmental impacts, but these impacts would be reduced to less-than-significant levels."[54] Accordingly, on December 2, 2014, the FERC granted Constitution certificate authorization to construct and operate the proposed pipeline, subject to conditions, including 43 detailed environmental conditions.[55] On November 5, 2018, the FERC granted Constitution a two-year extension until December 2, 2020 to complete construction of the pipeline.[56] Related proceedings in the courts are currently pending.[57]

2. WQC Denial

Constitution filed an application for WQC on August 22, 2013.[58] However, the Department deemed the application incomplete until the FERC issued a draft

work area during construction, thereby allowing pipeline installation and construction to proceed under dry conditions. *Id*. at 2-22. As its name suggests, a conventional bore creates a tunnel-like shaft for a pipeline to be installed below Waterbodies or wetlands (other sensitive resources) without affecting the surface of the resource. *Id.* "Bore pits would be excavated on both sides of the resource to the depth of the adjacent trench and graded to match the proposed slope of the pipeline." *Id*.

53. *Id.* at 4-51.

54. *Id*. at ES-13.

55. *Constitution Certificate Order*, *supra* note 3, at Ordering Paragraph A; *id*. at app. P 8; ("Prior to receiving written authorization from the Director of OEP to commence construction of their respective project facilities, the Applicants shall file documentation that they have received all applicable authorizations required under federal law (or evidence of waiver thereof.")) (emphasis in original). Further, regarding water issues, the FERC notes: "[c]onstruction and operation-related impacts on waterbodies and wetlands will be further mitigated by Constitution's . . . implementing the wetland protection and restoration measures contained in Constitution's ECPs, including its Wetland and Waterbody Construction and Mitigation Procedures (Procedures)." *Id*. at P 79.

56. *Constitution Pipeline Co., LLC*, 165 F.E.R.C. ¶ 61,081 at P 24 (2018).

57. The FERC denied multiple parties' requests for rehearing or stay of the certificate order. *Constitution Pipeline Co.*, 154 F.E.R.C. ¶ 61,046 (2016). A number of environmental groups sought judicial review of the Commission's certificate orders from the Second Circuit. *Catskill Mountainkeeper, Inc. v. FERC*, Nos. 16-345, 16-361 (2d. Cir. filed Feb. 5, 2016). Although briefs have been filed, the court, at the FERC's request, deferred setting a date for oral argument until after the U.S. Supreme Court acts on Constitution's petition for *certiorari* requesting review of the Second Circuit's decision upholding the Department's denial of a WQC to Constitution, and the FERC acts on rehearing of its finding that the Department did not waive its right to act on Constitution's WQC, as discussed below. *Catskill Mountainkeeper, Inc. v. FERC*, Nos. 16-345, 16-361, slip op. (2d Cir. Feb. 16, 2018). The Supreme Court denied *certiorari* on April 30, 2018. *Constitution Pipeline Co. v. N.Y. State Dep't of Envtl. Conservation*, No. 17-1009, slip op. (Apr. 30, 2018). The FERC notified the court of the denial and renewed its request for deferral until after it acts on rehearing. *See generally* Letter from Holly E. Cafer, the FERC, to Catherine O'Hagan Wolfe, Clerk, *Catskill Mountainkeeper, Inc. v. FERC*, Nos. 16-345 & 16-361 (filed May 4, 2018). The FERC denied rehearing on July 19, 2018. *Constitution Pipeline Co.*, 164 F.E.R.C. ¶ 61,029 (2018). Additionally, on October 11, 2017, Constitution filed a petition for declaratory order requesting that the FERC find that the Department failed to act on Constitution's application for a WQC within a "reasonable period of time" and as such, the Department had waived its right to act. *See generally* Petition for Declaratory Order, *Constitution Pipeline Co.*, Docket No. CP18-5-000 (Oct. 11, 2017). The FERC rejected the petition. *Constitution Pipeline Co.*, 162 F.E.R.C. ¶ 61,014 at P 16, *reh'g. denied,* 164 FERC ⁋ 61,029 (2018), *appeal docketed*, No. 18-1251 (D.C. Cir. Sept. 14, 2018).

58. Petition for Declaratory Order at 1, *Constitution Pipeline Co.*, Docket No. CP18-5-000, (Oct. 11, 2017). Constitution attached to its "Petition" an appendix of relevant documents from the record submitted in the Second Circuit appeal. Petition for Declaratory Order app. at 134-39, *Constitution Pipeline Co.*, Docket No. CP18-5-000, (Oct. 11, 2017) (Constitution's August 22, 2013 transmittal letter and WQC application form) [hereinafter *Appendix to PDO*].

EIS and requested more information regarding stream crossings, freshwater wetlands, and related permits.[59] Constitution submitted the requested information on November 27, 2013.[60] Almost six months later, on May 9, 2014, the Department requested additional time to comply with section 401's one-year requirement; so Constitution withdrew and resubmitted its application, which in turn prompted another request for more information.[61] In response, Constitution supplemented its application in August, September, November, and December, 2014.[62] On Christmas Eve, 2014, the Department finally considered the application complete.[63]

Four months later, on April 27, 2015, at the request of the Department, Constitution once again withdrew and resubmitted its application.[64] On Earth Day, April 22, 2016, approximately *four years* after the Department first began working with Constitution on environmental issues at the FERC, the Department denied the application, finding that "the Application fails in an meaningful way to address the significant water resource impacts that could occur from this Project and has *failed to provide sufficient information* to demonstrate compliance with New York State water quality standards."[65] Constitution's appeal to the Second Circuit was denied, as was its subsequent petition for certiorari to the U.S. Supreme Court and request to the FERC for a declaratory order that the Department had waived its right to act.[66]

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59. *Appendix to PDO*, *supra* note 58, at 150 (Department September 12, 2013 letter accompanying NOIA); *id.* at 151-53 (Department September 12, 2013 letter accompanying NOIA).

60. *Id.* at 184-376 (Constitution's Supplemental Information dated November 2013).

61. *Id.* at 540-41, (Constitution's May 9, 2014 transmittal letter withdrawing and resubmitting WQC application); *id.* at 1121-24 (Department July 3, 2014 letter seeking information on waterbody crossings, streams and wetlands, and whether the environmental monitoring plan would include an independent third-party monitor).

62. *Id*. at 1127-33 (Constitution's August 13, 2014 transmittal letter supplementing WQC application), 1140-88 (excerpt of Constitution's September 12, 2014 supplement to WQC application), 1682-83 (Constitution's November 17, 2014 transmittal letter supplementing WQC application), 1686-96 (Constitution's November 24, 2014 transmittal letter supplementing WQC application), 1697-1699 (Constitution's December 1, 2014 transmittal letter supplementing WQC application).

63. *Appendix to PDO*, *supra* note 58, at 1759-66 (the Department's notice of complete application); *see also*, Brief for Respondents at 20, Constitution Pipeline Co. v. Seggos, 868 F.3d 87 (2d Cir. 2017) (No. 16-1568). The Department established a comment period until February 27, 2015, during which it received 15,000 comments. *Id*.

64. Petition for Declaratory Order at app at 2299-2300, *Constitution Pipeline Co.*, Docket No. CP18-5-000 (Oct. 11, 2017) (Constitution's April 27, 2015 transmittal letter withdrawing and resubmitting WQC application), 2301-02 (the Department's notice of complete application). Two days after Constitution withdrew and resubmitted its application for a second time, the Department issued a press release stating that resubmittal was at the Department's request and "is not expected to unduly delay the agency's final determination." *Id.* at 2306-07 (Department's April 29, 2015 Press Release).

65. *Id.* at 3181-94 (emphasis added).

66. *Constitution Pipeline Co.*, 868 F.3d at 98 (2d Cir. 2017) (holding that the court did not have jurisdiction to address whether the Department had waived its right to act and rejecting the argument the Department's decision was outside the scope of its authority under CWA § 401), *en banc request denied*, Constitution Pipeline Co. v. New York State Dep't of Envtl. Conservation, No. 16-1568 (2d Cir. Oct. 19, 2017), *cert. denied*, No. 17-1009 (Apr. 30, 2018); *see also* 162 F.E.R.C. ¶ 61,014 (2018) (denying Constitution's request for a declaratory order).

B. Millennium

The "Valley Lateral" project of Millennium Pipeline Company, L.L.C. (Millennium) consists of an approximately 7.8-mile, 16-inch diameter lateral pipeline and related facilities connecting Millennium's existing pipeline in Orange County, New York, with a new, 650 MW, natural-gas combined cycle electric generating facility in Wawayanda, New York being developed for $680 million by CPV Valley, LLC (CPV Valley Energy Center).[67] The electric generator agreed to pay a negotiated rate for the entire capacity of the lateral (approximately 130,000 Dth/d), and the pipeline proposed steps to minimize adverse impacts on landowners.[68]

1. The FERC's Water Resource Analysis

Millennium's EA examined the proposed route of the Valley Lateral project, which would cross 12 waterbodies (seven perennial, four intermittent, and one ephemeral).[69] Significantly, none of the waterbodies are state or federal scenic rivers.[70] The route would only impact about 1.9 acres of wetlands.[71] The primary impact of the project would be the temporary alteration of wetland vegetation from

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67. A combined cycle generating facility combines a combustion turbine that burns natural gas to create electricity with a second cycle that captures waste heat to make steam to generate additional electricity by using a steam turbine. A combined cycle facility burns less fuel than a simple cycle generator, thereby reducing greenhouse gas emissions. *Millennium Certificate Order*, *supra* note 3, at P 3; *see also* Petition of CPV Valley, LLC for an Order Granting a Certificate of Public Convenience and Necessity pursuant to Section 68 of the Public Service Law, Approving Financing Pursuant to Section 69 of the Public Service Law and Approving a Lightened Regulatory Regime (NY PSC, filed Oct. 12, 2010) at 10 (explaining the cost and financing of the generation facility). The New York Public Service Commission (NY PSC) approved the project on May 9, 2014. Order Granting Certificate of Public Convenience and Necessity, Authorizing Lightened Ratemaking Regulation, and Approving Financing, Case 10–E-0501 (May 9, 2014). The Town of Wawayanda Planning Board, acting as the lead agency under the New York State Environmental Quality Review Act, had previously accepted an EIS on February 8, 2012. *Id*. at 4. By October 2018, the cost to construct the generating facility had risen to $900 million. *CPV power plant nearly ready for full-time operation*, TIMES HERALD-RECORD (July 8, 2018). https://www.recordonline.com/news/20180708/cpv-power-plant-nearly-ready-for-full-time-operation.

68. *Millennium Certificate Order*, *supra* note 3, at P 4. Because the electric generator agreed to pay the cost of the lateral, the FERC found that the pipeline's existing customers would not subsidize the project, thereby satisfying the threshold requirement of the Certificate Policy Statement. *Id*.

69. *Id*. at 39. While *perennial waterbodies* contain standing water year-round and are typically capable of supporting populations of fish, *intermittent waterbodies* are typically dry and contain water only seasonally, and *ephemeral waterbodies* generally contain water only in response to surface runoff following precipitation or spring snowmelt. *Id*.

70. *Id*. at 39. The EA explained:

> Millennium proposes to cross each waterbody using conventional bore, HDD, or a dry ditch (dam-and-pump or flume) method if perceptible flow is present at the time of crossing. The crossings of intermittent waterbodies that do not have flowing water at the time of construction may be crossed with upland construction methods. Millennium would construct waterbody crossings in accordance with state and federal permits, and its ECS.

Id. at 40-41. In addition, the project should not impact local drinking water: no potable surface water intakes are within 3 miles of a waterbody crossing. *Id*. at 39.

71. *Millennium Certificate Order*, *supra* note 3, at 45. Of the 1.9 acres of wetlands, the vast majority (about 1.3 acres) constitute marsh growth, 0.5 acres have scrub growth, and about 0.1 acre include forested areas. *Id.*

clearing and excavation,[72] which would be avoided by Millennium's crossing about 650 feet of wetlands using horizontal directional drill (HDD) and conventional bore construction methods.[73] As such, FERC staff found that Millennium's Environmental Construction Standards (ECS), in particular wetlands minimization and mitigation measures, met or exceeded the FERC's Waterbody Construction Procedures.[74] Therefore, the FERC determined that construction, operation, and maintenance of the facilities was not expected to have significant or long-term impacts on groundwater resources or wetlands and, ultimately that "approval of the Valley Lateral Project would not constitute a major federal action significantly affecting the quality of the human environment."[75] Against this backdrop, the FERC granted certificate authorization for Millennium's Valley Lateral project,[76] subject to the pipeline's complying with 17 detailed, multi-part environmental conditions.[77] One such condition – Number 9 – required Millennium to "file documentation that it has received all authorizations under federal law (or evidence thereof) prior to construction, which includes certification under Section 401 of the Clean Water Act."[78]

2. WQC Denial

About the same time Millennium filed its FERC certificate application (November 13, 2015), it also filed with the Department an application for WQC and

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72. *Id.* at 46. While the greatest impacts on wetlands would occur during and immediately following construction, most effects would be short term, given that after revegetation, within 1-3 years the wetland would transition back to community functionality similar to that of the pre-construction state. *Id.*

73. *Id.* at 46. Millennium, in response to the Department's comments, changed its crossing methods at Department-regulated forested wetlands, as well as dry stream crossings, and its Environmental Construction Standards. *Id.* at P 48.

74. *Millennium EA*, *supra* note 17, at 47-48. Among the 10 minimization and mitigation measures, Millennium committed to limiting construction right-of-way width in wetlands to 75 feet; installing sediment barriers before disturbing ground near wetlands; installing trenchline barriers to maintain the original wetland hydrology; prohibiting the use of lime, fertilizer, or mulch during wetlands' restoration; and seeding wetlands areas with seed mixes recommended by the Department. *Id.*; *see also id.* at 11 (finding that Millennium's ECS met or exceeded the FERC's Wetland Procedures and Upland Plan, which are sets of "baseline construction and mitigation measures developed in collaboration with other federal and state agencies and the natural gas pipeline industry to minimize the potential environmental impacts of the construction of pipeline projects in general.").

75. *Id*. at 37-38. As a general matter, Millennium's construction would involve the excavation of a trench between 5 and 15 feet in depth, followed by appropriate soil cover. *Id*. at 37. But, where the water table is near the surface, "groundwater could sustain minor impacts from temporary changes in overland water flow and recharge from trenching, backfilling, and clearing and grading of the right-of-way." *Millennium EA*, *supra* note 17, at 37, 48, 125. Indeed the FERC staff found that "impacts associated with the Project would be relatively minor, and we are recommending additional measures to further reduce the environmental impacts associated with the Project." *Id*. at 111 ("We anticipate that the proposed Project would contribute to a negligible to minor cumulative impact when the effects of the Project are added to past, present, and reasonably foreseeable projects in the region of influence and would not be significant.").

76. *Millennium Certificate Order*, *supra* note 3, at P 1.

77. *Id*. at Ordering Paragraph B; *see also* app. B (Environmental Conditions).

78. *Id*. at P 24. Multiple parties requested rehearing or stay of the certificate order. The FERC denied the requests for stay but did not otherwise act on the merits of the rehearing requests prior to losing its quorum in February 2017. *Millennium Pipeline Co.*, 158 F.E.R.C. ¶ 61,086 (2017). The FERC ultimately denied rehearing and the requests for stay of the certificate order once a quorum had been reestablished. *Millennium Pipeline Co.*, 161 F.E.R.C. ¶ 61,194 (2017).

other New York environmental permits.[79] Even though the application was approximately 1,200 pages and contained maps, construction details, and an explanation of the measures Millennium planned to implement to address any water quality impacts of the project, the Department deemed the application incomplete pending the FERC's completion of the EA.[80] But, after the FERC issued the EA, the Department still considered the application incomplete and on June 17, 2016, listed more information needed to complete review of Millennium's application, most of which dealt with the project's impacts on federal and state endangered species, and other questions seeking minor clarifications regarding the project's impacts on water quality and wetlands.[81] Millennium responded with additional information on August 16 and August 31, 2016.[82]

After receiving FERC certificate authorization on November 9, 2016, Millennium urged the Department to follow suit.[83] But the Department offered only to continue reviewing the application "to determine if a valid request for a WQC has been submitted", and stated that it had, "at a minimum, until August 30, 2017 to either approve or deny the Application."[84] Frustrated with the Department's delay, on December 5, 2016 (more than year after filing a WQC application), Millennium petitioned the D.C. Circuit for review of the Department's refusal to act.[85] The D.C. Circuit rejected Millennium's petition, holding that the pipeline did not have standing to bring the petition: the pipeline was not injured by the Department's failure to act, because the Department's "inaction would operate as a waiver, enabling Millennium to bypass the [NY] Department and proceed to obtain approval from [the] FERC."[86]

After the DC Circuit's decision, Millennium waited a few more months and then, still without an order from the Department, in late July 2017 filed with the

79. Specifically, Millennium filed a Joint Permit Application for CWA§ 401 WQC, a Protection of Waters (Stream Disturbance) Permit pursuant to Article 15 of the New York State Environmental Conservation Law (ECL), a Freshwater Wetlands Permit under ECL Article 24, and, on November 23, 2015, an application for a CWA § 404 permit. *Millennium Denial Letter*, *supra* note 4, at 1.

80. *See generally* Opening Brief for Petitioner at 11, *Millennium Pipeline Co. v. Seggos* (D.C. Cir. 2016) (No. 16-1415).

81. Some of the information requested was included in the Department's comments on the FERC EA. Specifically, the June 17th notice requested information not necessarily germane to a WQC review, including: (1) an analysis of the project's impacts on state and federal endangered species; (2) revisions to wetland maps; (3) site specific plans for horizontal directional drilling; (4) the total ground disturbance area for all Department Freshwater Wetland Adjacent Areas; (5) the ROW width. Letter from Karen M. Gaidasz, Department, to John Zimmer, Millennium (June 17, 2016): Millennium Pipeline Co., L.L.C. v. Basil Seggos, et al., D.C. Cir. Case No. 16-1415, Joint Appendix (hereinafter JA) 203-208 (filed Jan. 24, 2017).

82. Letter from Ron Happach, Millennium, to Karen M. Gadaisz, Department (Aug. 31, 2016) (on file with the Energy Law Journal).

83. Millennium sent to the Department a letter with documentation to support issuance of WQC. Letter from Thomas S. Berkman, Department, to Ron Happach, Millennium (Nov. 17, 2016): Millennium Pipeline Co., L.L.C. v. Basil Seggos, et al., D.C. Cir. Case No. 16-1415, JA 418-419 (filed Jan. 24, 2017).

84. Letter from Thomas S. Berkman, Department, to Ron Happach, Millennium (Nov. 17, 2016): Millennium Pipeline Co., L.L.C. v. Basil Seggos, et al., D.C. Cir. Case No. 16-1415, JA 418-419 (filed Jan. 24, 2017).

85. Opening Brief for Petitioner, *supra* note 80, at i.

86. Millennium Pipeline Co. v. Seggos, 860 F.3d 696, 698 (D.C. Cir. 2017). The Court stated that, if the Department has delayed for more than one year, Millennium should present evidence of such waiver to the FERC to obtain the FERC's authorization to begin construction. *Id.* at 700.

FERC a request to proceed with construction of all portions of the Valley Lateral Project arguing that the Department had waived its right to issue the WCQ.[87] On August 30, 2017—21 months after Millennium filed its WQC application—the Department denied Millennium's application on the grounds that FERC's environmental review of the project was "inadequate and deficient" because the FERC's EA failed to consider downstream greenhouse gas (GHG) emissions from Millennium's electric generator shipper.[88] A couple weeks later, in a September 15, 2017, declaratory order, the FERC found that the Department had waived its WQC authority by waiting more than a year to issue an order.[89] The FERC subsequently issued a Notice to Proceed with Construction.[90] On July 9, 2018, with the construction work completed, the FERC authorized Millennium to place the new pipeline facilities into service.[91]

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87. Request for Notice to Proceed with Construction, *Millennium Pipeline Company, LLC*, Docket No. CP16-17-000 (filed July 21, 2017).

88. *Millennium Denial Letter*, *supra* note 4, at 2. The Department's position was based on a recent D.C. Circuit opinion vacating and remanding a different pipeline certificate order because FERC did not consider downstream GHG emissions. *See generally* Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017). The Department's regulations allow it to deny an application because of a material change in applicable law, and the *Sierra Club* opinion ostensibly qualified as such a material change. *See Millennium Denial Letter*, *supra* note 4, at 2; 6 NYCRR §§ 621.10(f), 621.13(a) (2006).

89. *Millennium Pipeline Co.*, 160 F.E.R.C. ¶ 61,065, *reh'g. denied,* 161 F.E.R.C. ¶ 61,186 (2017). In its order on rehearing, the FERC also denied all requests for a stay of its order finding waiver. *See also FFP Missouri 15, LLC*, 162 F.E.R.C. ¶ 61,237 (2018) (The FERC denied rehearing of its order finding that the West Virginia Department of Environmental Protection had waived its right to grant WQC because it failed to act within 1 year of receipt of the WQC application and therefore the FERC was not required to include the conditions in the WQC in the hydro license).

90. *Millennium Pipeline Co.*, Docket No. CP16-17-000 (Oct. 27, 2017) (unpublished letter order). With the Notice to Proceed in hand, Millennium filed a complaint in the U.S. District Court for the Northern District of New York seeking to enjoin the Department from preventing Millennium from beginning construction on the Valley Lateral Project; the injunction was granted on December 13, 2017. *Millennium Pipeline Co. v. Seggos*, No. 1:17-CV-1197 MAD/CFH (N.D.N.Y. Dec. 13, 2017). In the meantime, the Department requested that the Second Circuit stay, pending judicial review, the effectiveness of FERC's order finding that the Department had waived its WQC authority. *New York. State Dep't of Envtl. Conservation v. FERC*, Nos. 17-3503, 17-3770 (2d Cir. filed Nov. 17, 2017) (motion requesting stay). The Court denied both the stay requests and the appeals. *New York State Dep't of Envtl. Conservation*, Nos. 17-3503, 17-3770 (2d Cir. issued Dec. 7, 2017) (order denying stay); New York State Dep't. of Envtl. Conservation v. FERC, 884 F.3d 450 (2d Cir. 2018). The Second Circuit rejected the Department's claim that upholding FERC's waiver would force agencies to issue premature orders:

> These concerns are misplaced. If a state deems an application incomplete, it can simply deny the application without prejudice—which would constitute "acting" on the request under the language of Section 401. It could also request that the applicant withdraw and resubmit the application. Such a denial does not preclude a state from assisting applicants with revising their submissions.

Id. at 456. Although a victory for Millennium, the court's suggestions are recipes for future WQC delays. Opponents of the project filed, also before the Second Circuit, a petition for review of the Commission's certificate orders on December 8, 2017, which is still pending. *Protect Orange Cty. v. FERC*, No. 17-3966 (2d Cir. filed Dec. 8, 2017).

91. *Millennium Valley Pipeline Co.*, Docket No. CP16-17-000 (filed July 9, 2018) (unpublished letter order). Millennium subsequently notified the FERC that the project was placed into service on July 9, 2018. Valley Lateral Project In-Service Notification, *Millennium Valley Pipeline, LLC*, Docket No. CP16-17-000 (July 16, 2018).

C. National Fuel

The Northern Access Project consists of 99 miles of 24-inch pipeline from Pennsylvania to New York, as well as new and modified compression facilities, proposed by two affiliated interstate natural gas pipelines – National Fuel Supply Corporation (National Fuel) and Empire Pipeline, Inc. (Empire) – with the incremental capacity subscribed to by an affiliated producer, Seneca Resources Corporation (Seneca Resources).[92] The project would expand firm service on National Fuel's system by 497,000 Dth/d and on Empire's system by 350,000 Dth/d, all for a total cost of approximately $455 million.[93]

1. The FERC's Water Resource Analysis

On July 27, 2016, the FERC released the Northern Access EA, which found that pipeline construction would not likely result in significant impacts on groundwater resources (*i.e*., aquifers feeding springs or wells), "because the majority of construction would involve shallow, temporary, and localized excavation."[94] No public water wells and only seven private water wells are located within 150 feet of the project area.[95]

Further, of the 261 waterbodies within the project area, only 134 would be crossed by the project in New York.[96] The pipeline project would not impact any National Wild or Scenic Rivers, nor would any waterbody crossed by the Project be identified on the National Park Service's National Rivers Inventory list.[97] Of

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92. *National Fuel Certificate Order*, *supra* note 3, at PP 1, 7, 15. As described in a joint certificate application filed on March 17, 2015, National Fuel would construct 96.49 miles, 24-inch-diameter pipeline extending from a new interconnection with NFG Midstream Clermont, L.L.C. (NGF Midstream) – another affiliate – in McKean County, Pennsylvania to a new interconnection with TGP in Erie County, New York. *Id*. at P 7. On the other hand, the focus of Empire's project would be a new 22,214-hp Pendleton Compressor Station in Niagara County, New York, as well as appurtenant facilities and interconnecting pipe. *Id*. at P 15. The corporate parent of National Fuel, Empire, and Seneca Resources is National Fuel Gas Company. *Id.* at P 3.

93. *Id*. at P 1. The estimated cost of the National Fuel facilities is more than $376 million, while Empire's costs would be more than $78 million. *Id*. at PP 7, 15.

94. Northern Access 2016 Project Environmental Assessment, *National Fuel Gas Supply Corporation & Empire Pipeline, Inc.*, Docket No. CP15-115-000 at 38 (July 27, 2016) (addressing groundwater resources) [hereinafter *Northern Access EA*]. Primary aquifers, which are highly productive and used as water sources for major municipal water supply systems, are not located within the project area, and only one EPA defined sole source aquifer (an aquifer area that supplies at least 50 percent of the drinking water consumed in the area) is located within a portion of the pipeline route in New York. *Id*. at 34, 35, 38. However, the EA noted that there could be temporary impacts on ground water in cases where trench excavation in wetlands (where the water table is near the surface) changes the overland flow and recharge caused by clearing and grading or where blasting impacts nearby springs or wells. *Id.*

95. *Northern Access EA*, *supra* note 94, at 36. Five of the private water wells were located in New York. *Id.* The EA recommended that National Fuel be required to file with the FERC "a report describing any complaints it received regarding well yield or water quality, the results of any water quality or yield testing that was performed, and how each complaint was resolved." *Id.* at 38.

96. *Id.* at 40 (of the 261 waterbodies, 79 were perennial streams, 102 intermittent streams, 78 ephemeral streams, and 2 dry ditches); *id*. ("The Project would cross 134 waterbodies in New York, including 48 intermediate crossings [crossing width between 10 and 100 feet] and 86 minor crossings [crossing width less than 10 feet]."

97. *Northern Access EA*, *supra* note 94, at 41.

the waterbodies actually crossed, the greatest potential impact from pipeline construction would result from sediment loading, especially with the wet open-cut crossing method; but National Fuel planned to use that method in only one instance (at Buffalo Creek in Erie County, NY), where HDD or conventional bore methods are not feasible.[98] Construction would produce much less sediment at the proposed 195 crossings utilizing the dry crossing methods (*e.g.*, flume or dam and pump).[99] Moreover, National Fuel would utilize HDD to cross five waterbodies, thereby avoiding any direct impacts.[100] Finally, any potential impacts resulting from water crossings would be mitigated by National Fuel's Erosion and Sediment Control & Agricultural Mitigation Plan (ESCAMP), which incorporates State and Federal regulatory plans, procedurals, and manuals.[101] As a result, on February 3, 2017, FERC granted certificate authorization for National Fuel's Northern Access project, but conditioned it upon compliance with 27 detailed, multi-part environmental conditions.[102]

2. WQC Denial

National Fuel filed an application for WQC and other New York environmental permits on February 29, 2016.[103] Because the Department failed to notify National Fuel whether its application was complete, National Fuel agreed to suspend interim procedural deadlines in return for the Department's acknowledgment that National Fuel's application was received on March 2, 2016 and an order would be issued within the next year.[104] On January 19, 2017, the Department "requested" that National Fuel amend the prior agreement so that April 8, 2016 would be the deemed receipt date instead of March 2.[105] National Fuel executed the amendment on January 20, 2016 "consistent with, and in recognition of, the Commission's policy of encouraging interstate pipelines to cooperate with state and local authorities, to the extent reasonably possible, and National Fuel's at-

98. *Id*. at 42. Additionally, the pipeline proposes to utilize the "open cut with diversion" method for two waterbodies in New York. *Id*.

99. *Id.*

100. *Id.* at 43. Although the Department suggested that, to the maximum extent possible, waterbodies should be crossed using the HDD method, the EA recognized that "the moderate to steep terrain encountered along much of the project route makes it impractical to use HDD as a crossing method for many of the waterbodies." *Id*. at 45.

101. *Northern Access EA*, *supra* note 94, at 11. National Fuel's ESCAMP incorporates the FERC's Waterbody Construction Procedures, as well as the design manuals of the Department and PADEP and the conditions imposed by the Corps and other regulators. *Id*.

102. 158 F.E.R.C. ¶ 61,145 (2017); *id.* at app. B.

103. Comments of National Fuel Gas Supply Corporation and Empire Pipeline, Inc. in Support of Petition for Declaratory Order of Constitution Pipeline Co. at exh. A, Affidavit of Sandy Lare, ¶ 28, *Constitution Pipeline Co.*, Docket No. CP18-5-000 (Nov. 9, 2017) (hereinafter "Lare Affidavit").

104. 6 NYCRR § 621.6(c)(2) (2006); Lare Affidavit, *supra* note 103, at ¶ 36 & exh. 12. National Fuel supplemented its application on September 8 and November 17, 2016 in response to inquiries from the Department. *Id*. at ¶ 48.

105. Comments of Nat'l Fuel Gas Supply Corp. and Empire Pipeline, Inc. in Support of Petition for Declaratory Order of Constitution Pipeline Co. at 10 n. 41, *Constitution Pipeline Co.*, Docket No. CP18-5-000 (Nov. 9, 2017).

tempts to preserve its long-standing relationship with the [Department] (as National Fuel is a New York headquartered company)."[106] Shortly thereafter, the Department determined that the National Fuel's application was complete.[107] Nevertheless, on April 7, 2017, as amended on April 14, 2017, the Department denied National Fuel's WQC application finding that "the Application fails to demonstrate compliance with New York State water quality standards" because, among other things, "the Project fails to avoid or adequately mitigate adverse impacts to water quality and associated resources," and "the Project would materially interfere with or jeopardize the biological integrity and best usages of affected water bodies and wetlands."[108]

National Fuel and Empire appealed the Department's denial of the WQC, which is awaiting a decision from the Second Circuit.[109] In the meantime, FERC found that, by not acting within one year of National Fuel's WQC application, the Department had waived its authority to issue WQC.[110]

IV. CONCERNS

CWA section 401 empowers states with the authority to indirectly veto an otherwise validly issued federal permit.[111] That authority, however, is limited to a very narrow question of compliance with the state's EPA-approved water quality standards.[112] Thus, we next address the manner in which the Department exercised its authority to deny the WQC requests of Millennium, Constitution, and National Fuel and, in particular, examine whether the Department transformed its WQC into a weapon to slay the pipeline projects, specifically as a sword to cut down the certificates and as a shield to delay (and thereby deter) development.

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106. *Id.*

107. Notice of the complete application was published in the Environmental News Bulletin on January 25, 2017. *Environmental News Bulletin*, N.Y. DEP'T OF ENVTL. CONSERVATION (Jan. 25, 2017), http://www.dec.ny.gov/enb/20170125_not9.html. Subsequently, the Department held three public hearings between February 7 and February 9, 2017, and received approximately 5,700 oral or written comments. *Id.; see also* Brief for Respondents at 19, National Fuel Gas Supply Corp. v. New York State Dep't of Envtl. Conservation (2d Cir. 2017) (No. 17-1164).

108. *National Fuel Denial Letter*, *supra* note 4, at 4 (emphasis added). The Department denied National Fuel's requests for the state law Protection of Waters (ECL Article 15) and Freshwater Wetlands (ECL Article 24) permits for the same reasons. *Id.* at 12-13.

109. National Fuel Gas Supply Corp. v. New York State Dep't of Envtl. Conservation, No. 17-1164 (2d Cir. filed Apr. 21, 2017).

110. *National Fuel Gas Supply Corp*., 164 F.E.R.C. ¶ 61,084 at P 41 (2018). The Department subsequently filed a request for rehearing and stay, which is currently pending. Department's Request for Rehearing and Stay, *National Fuel Gas Supply Corp*., Docket No. CP15-115-000, (filed Aug. 14, 2018). The Department had previously notified the Second Circuit in Case No. 17-1164 of FERC's order finding that the Department had waived its authority to issue WQC and of the Department's intent to seek rehearing and, if necessary, judicial review. Letter from Frederick A. Brodie, New York Office of the Attorney General to Catherine O'Hagan Wolfe, Clerk, *Nat'l Fuel Gas Supply Corp. v. NYSDEC*, No. 17-1164 (filed Aug. 9, 2018).

111. *See, e.g.*, *Keating*, 927 F.2d at 622.

112. *See, e.g.*, Niagara Mohawk Power Corp. v. New York State Dep't of Envtl. Conservation, 82 N.Y.2d 191, 200-01 (N.Y. 1993) ("while DEC [the Department] is correct that Congress sought in section 401 to preserve the States' role in maintaining water quality, Congress simultaneously maintained essentially preemptive Federal control by restricting State certification to compliance with requirements issued or approved by EPA.").

A. The Sword

Analysis reveals that, in denying the pipelines' WQC requests, the Department (1) leveraged its WQC authority to require pipelines to submit to additional New York environmental regulation; (2) considered the projects' cumulative impact on all resources (not just water), and (3) second guessed the pipeline routes authorized by FERC. After briefly discussing the doctrine of preemption, we explore whether these actions were preempted by the NGA and conclude they were.

1. Preemption Doctrine

It is hornbook law that, under the Supremacy Clause of the United States Constitution, state laws which "interfere with or are contrary to" federal law are invalid.[113] Therefore, federal law preempts state law.[114] Federal laws may supersede state laws when Congress (1) expressly states that it intends to prohibit state regulation; (2) occupies a field with federal regulation so comprehensive that there is no room for supplemental state regulation; and (3) does not completely displace state regulation in a specific area, yet state law conflicts with federal law.[115] And, significantly, the Supreme Court has "held repeatedly that state laws can be preempted by federal regulations as well as by federal statutes."[116]

The legislative history of the NGA reveals that the Act's basic purpose "is to occupy the field in which the Supreme Court has held that the States may not

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113. *See, e.g.*, Hillsborough Cty. v. Automated Med. Lab., Inc., 471 U.S. 707, 712 (1985), (quoting Gibbons v. Ogden, 9 Wheat. 1, 211 (1824); *see also* U.S. Const., art. VI, cl. 2 ("This Constitution and the Laws of the United States which shall be made in Pursuance thereof; . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State Shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

114. These preemption principles apply to water regulations. Weavers Cove Energy, LLC v. R.I. Coastal Resources Mgmt Council, 589 F.3d 458, 474 n.14 (1st Cir. 2009) ("Congress's power to preempt state regulation here emanates not only from its power to regulate navigation but also from its power to regulate commerce itself."); *see also* U.S. Const. art. I, § 8, cl. 3; 43 U.S.C. § 1314(a) ("The United States retains all its navigational servitude and rights and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, [and] navigation . . . .").

115. *Hillsborough Cty*., 471 U.S. at 713 (citations omitted). Thus preemption "will be inferred where the field is one in which 'the federal interest is dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Further, preemption will occur when a conflict between state and federal law makes compliance with both a "physical impossibility" (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)) "or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objects of Congress.'" (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

116. *Hillsborough Cty*., 471 U.S. at 713 (citations omitted). In addition to the Supremacy Clause, The Constitution also endows the federal government with power over the various states. The Commerce Clause, U.S. Const. art. 1, § 8 (Congress has the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). Similarly, the Dormant Commerce Clause is a constitutional principle that limits individual states from passing legislation that discriminates against interstate commerce. *See, e.g.*, Comptroller of Treasury of Maryland v. Wynne, 135 S.Ct. 1787, 1794 (2015). However, in clashes between state and federal laws, states also have Constitutional arguments based on the 10th and 11th Amendments, which safeguard state decision-making by limiting federal interference with state affairs. U.S. Const. amend. X (reserving to the States "powers not delegated to the United States by the Constitution, nor prohibited by it to the States"); *id.* amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.").

act."[117] Further, the Court in *Schneidewind* explained that "the NGA has long been recognized as a 'comprehensive scheme'" for the regulation of interstate natural gas pipelines.[118] "This jurisdiction encompasses regulation of market entry through [the] FERC's authority to issue certificates of public convenience and necessity authorizing pipelines to transport and sell gas in interstate commerce."[119] Courts recognize that the FERC regulates the construction, extension, operation, and acquisition of interstate natural gas pipeline facilities though "extensive and detailed regulations concerning applications for certificates."[120] Therefore, a state's environmental review of a FERC-approved pipeline is an attempt to regulate in a field exclusively occupied by federal law.[121] And, application of state environmental law to delay or derail a FERC-approved pipeline project "stands as an obstacle to the accomplishment and execution of the full purposes and objects of Congress".[122]

For example, in 1990, the Second Circuit held that New York law, which required state authorization of a natural gas pipeline more than ten miles in length—after examination of, among other things, the specific location of the proposed facilities and a determination that the project represents the minimum adverse environmental impact considering the state of available technology – was preempted by the NGA.[123] The Second Circuit explained that even if limited to site specific environmental review of pipeline facilities, the law would be preempted because it "is undeniably a regulation of a facility used in the interstate transportation of natural gas."[124]

2. Attempts to Expand State Authority

a. Imposing New York Environmental Law

The Department requires pipelines to apply for certain NY environmental permits as a condition to consideration of the WQC certification application.[125] Millennium, Constitution, and National Fuel each filed a "joint application" requesting WQC for the proposed project *and* additional permits under the New

117. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 682-684, n. 13 (1954) (citing H.R. Rep. No. 709, 75th Cong., 1st Sess., 1-2 (1937); S.Rep. No. 1162, 75th Cong., 1st Sess., 1-2 (1937)).

118. *See, e.g.*, *Schneidewind*, 485 U.S. at 300-01.

119. Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 506 (1989).

120. *See, e.g.*, Colo. Interstate Gas Co. v. Wright, 707 F.Supp.2d 1169, 1177 (D. Kan. 2010) (citing 18 C.F.R. Part 157, Subpart A).

121. *See, e.g*., Northern Natural Gas Co. v. Iowa Util's. Bd., 377 F.3d 817, 821 (8th Cir. 2004).

122. *Hillsborough Cty.*, 471 U.S. at 713 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1985)).

123. *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n of N.Y.*, 894 F.2d 571, 578 (2d Cir. 1990); *id*. at 574 (describing the regulatory framework of the preempted New York law).

124. *Id*. at 576-77. Courts in other jurisdictions have also concluded that a state's environmental review of a FERC-approved pipeline is an attempt to regulate in a field exclusively occupied by federal law. *See, e.g., Northern Natural Gas Co.*, 377 F.3d at 821 ("We agree with the district court that [the Iowa environmental statute and regulations] regulate in a field that is occupied by federal law.").

125. 6 NYCRR § 621.1.

York State ECL.[126] Constitution explained that the "NYSDEC advised Constitution that it would not process the Section 401 Certification application unless Constitution applied for what the NYSDEC determined to be necessary state permits."[127] Constitution then filed the joint application under protest.[128] Under similar circumstances, the New York Court of Appeals rejected the Department's attempts to expand its limited authority to issue WQC to include impermissibly broader environmental review:

> DEC [Department] concedes that in New York the water quality standards promulgated pursuant to section 303 are linked and found only in 6 NYCRR parts 701 to 704. Thus, there is nothing . . . that would empower DEC to deny certification on the basis of broader environmental provisions of New York law or regulation . . . .[129]

Other courts in other jurisdictions have come to similar conclusions.[130]

The Department in *National Fuel* attempted to use its WQC authority as justification to consider other more expansive environmental issues, including whether the proposed project will "cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the State, including *soil*, *forests*, water, fish, shellfish, crustaceans and aquatic and *land-related environment*."[131] Thus the Department states that it is required "to consider 'all state statutes, regulations and criteria' applicable to a given activity in making an ultimate determination regarding a WQC."[132] Indeed, when denying WQC for the Northern Access project, the Department also addressed "ECL Articles 15 and 24 in one fell swoop, even though Articles 15 and 24 are state-law permitting schemes that require a different, and more expansive, environmental analysis than the CWA allows."[133]

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126. *See, e.g.*, *National Fuel Denial Letter*, *supra* note 4, at 1 (noting that the applications filed a Joint Application to obtain WQC and "Article 15, Title 5 (Protection of Waters) and Article 24, Title 23 (Freshwater Wetlands Permits)."); *see also* ECL §15-0501 (1979) ("no person or public corporation shall change, modify or disturb the course, channel or bed of any stream as defined in subdivision 2, or remove any sand, gravel or other material from the bed or banks of such a stream without a permit"); *id.* § 24-0701 (providing that permits are required for projects on freshwater wetlands).

127. Brief of Petitioner Constitution at 14, *Constitution Pipeline Co. v. Seggos*, (2d Cir. 2016) (No. 16-1568) (citing Letter from Patricia J. Desnoyers, Department, to Kimberly D. Bose, FERC Secretary at 1 (Nov. 7, 2012)) ("The Project Sponsor will also be expected to apply for applicable State Law permits as relevant to the resources impacted by the project proposal.").

128. Complaint at 15, Constitution Pipeline Co. v. New York State Dep't of Envtl. Conservation, 868 F.3d 87 (2d Cir. 2017) (No. Civ. 568) ("Nothing included in Constitution's Joint Application should be construed as an admission by Constitution, implicit or otherwise, that the proposed Project must obtain any state permits or approvals.") (citation omitted).

129. *See Niagara Mohawk*, 82 N.Y. 2d at 197.

130. *See, e.g.*, Colorado Interstate Gas Co., v. Wright, 707 F. Supp. 2d 1169, 1180-81 (D. Kan. 2010) (holding state environmental laws are preempted by the NGA and citing a litany of cases in support). The First Circuit came to the same conclusion applying the Coastal Zone Management Act (CZMA): Under its exclusive authority, the FERC considers the dredging in Rhode Island to be a part of the LNG construction. The FERC, as required by the NGA, has provided CRMC an opportunity to review the project though CZMA constancy review. CRMC cannot now avoid presumed concurrence by relying on a nearly identical state law licensing procedure. Weaver's Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt. Council, 589 F.3d 458, 479 (1st Cir. 2009).

131. *National Fuel Denial Letter*, *supra* note 4, at 5; *see also Constitution Denial Letter*, *supra* note 4, at 2 (faulting the pipeline for conducting tree falling within its right-of-way, as authorized by FERC).

132. *National Fuel Denial Letter*, *supra* note 4, at 4.

133. Petitioner's Brief at 32, National Fuel Gas Supply Corp. v. New York State Dep't (2d Cir. 2017) (No. 17-1164) (citing ECL § 15-0501(3)(b)) (*e.g.*, erosion and flood control).

Similarly, the Department in *Constitution* desired site-specific information in the pipeline's Blasting Plan to determine whether the plan "is protective of State water quality standards *and in compliance with applicable State statutes and standards*."[134] Likewise, in *Millennium*, the Department denied WQC because of "'newly discovered material information or a material change in environmental conditions, relevant technology or *applicable law or regulations . . . ,*'" namely the DC Circuit's opinion finding that the FERC should have considered, in the EIS associated with another pipeline's certificate application, GHG emissions from electric generator customers.[135] At bottom, "Congress did not empower States to reconsider matters, unrelated to their water quality standards," which are subject to the FERC's exclusive jurisdiction.[136] Instead, Congress gave "the State regulatory entity only a *limited role of review . . . .* Review by State agencies that would overlap or duplicate the Federal purview and prerogatives was not contemplated and would infringe on and potentially conflict with an area of the law dominated by the intentionally Federal statutory scheme."[137]

The Department admits that New York environmental regulation of interstate natural gas pipelines is preempted by the NGA, yet still applied state environmental laws because they are "integral to and inextricably intertwined" with its section 401 analysis.[138] The FERC had an opportunity to address this issue on rehearing of National Fuel's certificate order, but instead sidestepped the issue.[139] Interestingly, under the Supreme Court's opinion in *PUD No. 1*, the Department may have had authority under CWA section 401(d) to condition issuance of WQC upon a pipeline's adherence to other state environmental laws to ensure compliance with state water quality standards, but instead chose to deny the WQC. [140]

b. Cumulative Impact Consideration or *De Facto* Ban on Pipelines?

Citing ECL § 3-0301(1)(b), the Department claims that New York's environmental statutes require consideration of the *cumulative* impact upon all relevant

134. *Constitution Denial Letter*, *supra* note 4, at 13 (emphasis added).

135. *Millennium Denial Letter*, *supra* note 4, at 2. The Department's quote omits the words "related to the permitted activity." 6 NYCRR § 621.13(a)(5); *Millennium Denial Letter* at 2; *see* Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017).

136. Power Auth. of the State of New York v. Williams, 60 N.Y.2d 315, 325 (1983).

137. *Niagara Mohawk*, 82 N.Y. 2d at 196 (emphasis added).

138. Brief for Respondents at 32, Millennium Pipeline Co. v. Seggos, (D.C. Cir. 2017) (No. 16-1415); NYSDEC's Reply, *National Fuel*, at 11, Docket No. CP15-115-000 (Oct. 19, 2016) (citation omitted).

139. National Fuel's Request for Reconsideration and Clarification or, in the Alternative Application for Rehearing at 5-10, *National Fuel Gas Supply Corp*., Docket No. CP15-115-000 (March 3, 2017). There was no need to address the preemption issue, given that the FERC had already provided the pipeline with relief by finding that the Department had waived its right to issue WQC. *National Fuel Gas Supply Corp*., 164 FERC ¶ 61,084 at P 42 (2018). The FERC noted that "agencies administering these laws [*e.g*., CWA] appropriately determine in the first instance which requirements under state or local law are applicable or are preempted." *Id*. at P 50. FERC also stated: "[u]nless a state or local agency, either through action or inaction, interferes with the timely development of the project, the question of preemption does not arise." *Id*. at P 51.

140. *PUD No. 1*, 511 U.S. at 710; *see also* NYSDEC's Reply at 11 ("State laws and regulations thus provide the substantive criteria for NYSDEC's imposition of conditions in a CWA § 401 water quality certification that ensure compliance with State water quality requirements, as intended by § 401.").

resources when issuing WQC.[141] A threshold problem with the Department's argument is that ECL § 3-0301(1)(b) is a generally applicable New York State environmental statute and was not approved by the EPA for consideration in WQC determinations.[142] Compounding the problem, the Department in *Constitution* found the pipeline's cumulative impacts troublesome: "Impacts to . . . streams are exacerbated as the cumulative negative effects of multiple crossings are added."[143] In the end, the Department appears to indicate that its concerns could have been assuaged if Constitution had only conducted (and presumably implemented) a "Trenchless Feasibility Study" for all streams impacted by the project, even if the construction would occur when the stream was dry or if the stream was narrow.[144] Without such a study, the Department claimed it was unable to "evaluate cumulative water quality impacts."[145]

The Department in *Constitution* appears to be adopting a *de facto* "trenchless" pipeline construction policy. Similarly, the Department in *National Fuel* "recognizes that trenchless pipeline installation techniques, namely horizontal directional drilling (HDD) or conventional boring (CB), would prevent or substantially minimize impacts to regulated aquatic resources by avoiding surficial construction within these habitat areas and the associated water quality impacts."[146] Noting that National Fuel concluded that trenchless construction techniques were not feasible for 184 stream crossings, the Department claimed that it was compelled to conclude that "impacts and damage to water resources will necessarily occur where trenchless crossing methods are not employed."[147]

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141. *National Fuel Denial Letter*, *supra* note 4, at 3-4, (citing *ECL* § 3-0301(1)(b)). The Department explained:

> The Department is guided by statute to take into account the cumulative impact upon all relevant resources in making a determination in connection with any license, order, permit or certification, which in this case includes being able to evaluate the cumulative water quality impacts of right-of-way construction and operation on the numerous water bodies mentioned in this letter.

Id.

142. *See generally* 42 Fed. Reg. 56,786 (1977) (notice of state-adopted, federally-approved water quality standards for New York).

143. *Constitution Denial Letter*, *supra* note 4, at 3. The Department was also concerned with problems that "may result" from clearing riparian vegetation within the right-of-way: "Exposed hillslopes *can* become less stable and *when* appropriate stormwater controls are *not properly implemented*, erosion *can* result in increased sediment inputs to streams and wetlands. *If* these events occur they *can* affect the water quality and habitat quality of streams." *Id*. at 4 (emphasis added).

144. *Id*. at 11.

145. *Id*. at 7. Pursuant to guidance from the Council on Environmental Quality (CEQ), the FERC's NEPA review also includes analysis of cumulative impacts. *See, e.g.*, *Constitution Pipeline Co.*, 149 F.E.R.C. ¶ 61,199 at PP 102-12 (2014); *see also* 40 C.F.R. § 1508.7 (CEQ's definition of cumulative impacts). However, in stark contrast to the Department's conclusion, the FERC found:

> Staff considered the potential cumulative impacts of all known projects within the region of influence of the Constitution Pipeline Project on geology and soils; ground water, surface water, and wetlands . . . . Because the direct effects on these resources from the proposed projects would be highly localized and temporally limited primarily to the period of construction, staff concluded that the majority of overlapping cumulative impacts would be minor and temporary.

149 F.E.R.C. ¶ 61,199 at P 107.

146. *National Fuel's Denial Letter, supra* note 4, at 5.

147. *Id.*

In addition to a *de facto* "trenchless" pipeline construction policy, the Department explained that its

> recent experiences with constructing large scale natural gas pipelines across New York State, involving multiple water body crossings in multiple watersheds or basins, point to the fact that, even with stringent water quality protection conditioning, violations of water quality standards at this scale occur causing significant degradation of water quality in stream after stream along a constructed ROW.[148]

This suggests that long, linear pipeline projects may not be able to obtain WQC from the Department.[149]

c. Alternative Pipeline Routes

The Department analyzed and requested the pipelines to address alternative routes, that is, pipeline routes different from those authorized by the FERC.[150] Indeed, the Department cited Constitution's failure to substantively analyze alternative routes as a reason for denying WQC.[151] The Department claimed that using a particular alternative route "M," instead of the FERC-authorized route, could reduce impacts to waterbodies and wetlands.[152] However, the Department made the same claim in comments to the FERC, which the FERC specifically rejected, noting that the FERC staff had "completed numerous in-field reviews of the topographical constraints associated with Alternative M on foot, by car along I-88, and by helicopter," and concluding that comparison of impacts on waterbodies and "wetlands was one of several environmental parameters supporting [our] conclusion that the Alternative M segments were not preferable to the proposed route segments."[153] Constitution raised this issue on appeal, but the Second Circuit

148. *Id*. at 7.

149. Joe Mahoney, *Cuomo Explains His Concerns on Pipeline Expansion*, CNHI STATE REP. (Apr. 12, 2017), https://www.cnhinews.com/cnhi/article_5c22af72-1fd4-11e7-b517-afcc291b0aa8.html. (A few days after the Department denied National Fuel's WQC, New York Governor Andrew Cuomo maintained that, despite his administration's denying WQC, he supports natural gas pipelines, "as long as they're done well and done correctly.") Yet, he explained WQC denial in economic terms, stating while the Northern Access project would have brought about 1,000 "temporary" construction jobs, it would have created only five "permanent" jobs: "[t]he risk to the environment and the water quality and degradation to the environment outweighed the five permanent jobs." *Id.*

150. *Constitution Denial Letter*, *supra* note 4, at 11.

151. *Id.*

152. *Id*. ("Constitution's unwillingness to adequately explore the Alternative M route alternative, with the prospect of potentially fewer overall impacts to water bodies and wetlands when compared to Constitution's preferred route, means that the Department is unable to determine whether an alternative route is actually more protective of water quality standards.").

153. Letter from Patricia J. Desnoyers, Department, to Secretary Kimberly D. Bose, FERC at 1-2 (Sept. 25, 2013); *see* Final Environmental Impact Statement (FEIS), Vol. 3, app. S at SA4-2; Letter from NYSDEC to Constitution Pipeline Co. at 2, n.5 (noting that the Department had filed comments with FERC on the DEIS analyzing the benefits of using Interstate I-88 (aka Alternative M) on stream, wetland, and *interior forest habitats*); *see also* FEIS at SA4-3.

ruled: "A state's consideration of a possible alternative route that would result in less substantial impact on its waterbodies is plainly within the state's authority."[154]

The ruling of the Second Circuit in *Constitution* represents an about-face from its 1990 ruling in *National Fuel* and is at loggerheads with other court positions. As noted above, the Second Circuit in *National Fuel* struck down a New York attempt to reconsider the same information considered by the FERC because "[the] FERC expressly considered various data regarding the environmental effects of National Fuel's project before issuing a certificate of public convenience and necessity."[155] The *National Fuel* court further explained: "Such proceedings would certainly delay and might well, by the imposition of additional requirements or prohibitions, prevent the construction of federally approved interstate gas facilities."[156] A federal trial court echoed these sentiments when rejecting attempts to apply Iowa environmental statutes to interstate pipelines.[157] Similarly, the Sixth Circuit's explanation for finding Michigan state law preempted by the NGA is illustrative: "it is clear to us that this case involves the imminent possibility of a 'collision' between state and federal regulatory power that would disrupt this comprehensive [natural gas pipeline regulatory] scheme."[158] Whether the FERC's exclusive NGA jurisdiction over natural gas pipelines and their routes preempts states from examining (and requiring) alternative pipeline routes as part of their WQC review, remains an open issue and may require additional judicial or Congressional clarification.[159]

B. The Shield

Delays in obtaining regulatory authorization for the construction of new interstate natural gas pipeline projects result in uncertainty for both the pipeline developer and its prospective shippers. Delays in development timelines can produce cascading impacts that threaten the viability of an entire project. Thus, pipeline certificate applicants have historically been subject to "a series of sequential administrative and State court and Federal court appeals that kill a project with a death by a thousand cuts just in terms of time frames associated with going

154. *Constitution Pipeline Co.*, 868 F.3d at 101. The Second Circuit explained that "where an agency decision is sufficiently supported by even as little as a single cognizable rationale, that rationale, "by itself warrants our denial of [a] petition for review under the arbitrary-and-capricious standard of review." *Id*. at 101-02 (citations omitted).

155. *National Fuel*, 894 F.2d at 578.

156. *Id.* at 576-77. Courts in other jurisdictions have come to the same conclusion, that is, a state's environmental review of a FERC-approved pipeline is an attempt to regulate in a field exclusively occupied by federal law. N. Nat. Gas Co. v. Iowa Utilities Bd., 377 F.3d 817, 821 (8th Cir. 2004) ("We agree with the district court that [the Iowa environmental statute and regulations] regulate in a field that is occupied by federal law."). Similarly, acting under the guise of ensuring compliance with state safety standards, a state cannot regulate an interstate natural gas pipeline. Colorado Interstate Gas Co., 707 F. Supp. 2d at 1181.

157. Northern Natural Gas Co. v. Munns, 254 F. Supp. 2d 1103, 1111 (S.D. Iowa 2003) ("the Iowa regulatory scheme imposes impermissible delays and burdens on the construction of a pipeline that already received federal approval.").

158. Michigan Consol. Gas Co. v. Panhandle E. Pipe Line Co., 887 F.2d 1295, 1301 (6th Cir.1989).

159. *Id.*

through all those appeal processes."[160] Against this backdrop, we next address three different but related facts of Department-induced delay.

1. How long is a year?

Congress anticipated that states might delay issuance of WQC and, therefore, included the following proviso in section 401: "If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) *after receipt of such request*, the certification requirements of this subsection shall be waived with respect to such Federal application."[161] The one-year time limit is to ensure that "sheer inactivity by the State . . . will not frustrate the Federal application."[162]

When does the one-year clock commence? According to the Department, concerns with due-process militate in favor of the one-year review being triggered by a "complete" application.[163] However, section 401 does not contain the word "complete," and case law indicates that courts "cannot add to the statute what congress did not provide."[164] Furthermore, the Department's position "would permit a state agency to request supplemental information indefinitely," and place the FERC and the applicant in regulatory limbo, especially since the Department's regulations "do not address waiver or define receipt, and provide no limit on the time for the Department's action."[165]

Thus, the FERC in *Millennium* determined that, under the plain words of section 401, the "one-year" review period is triggered by the Department's receipt of the pipeline's request for WQC.[166] The FERC reasoned that using the date of receipt for triggering the one-year review provides a needed degree of certainty and does not leave the State without a remedy: "If a state agency concludes that a certification application does not meet CWA requirements, it can deny the application."[167] Accordingly, the FERC held that by waiting 15 months to deny WQC for

160. *Natural Gas Symposium: Symposium before the S. Comm. on Energy & Natural Res*., 109 Cong. 41 (2005) (statement of Mark Robinson, Director of Office of Energy Projects, FERC).

161. 33 U.S.C. § 1341(a)(1) (emphasis added).

162. Alcoa Power Generating Inc. v. FERC, 643 F.3d 963, 972 (D.C. Cir. 2011) (quoting Clean Water Act Conference Report, H.R. Conf. Rep. 91-940 at 56 (1970), reprinted in 1970 U.S.C.C.A.N. 2691, 2741).

163. Brief for Respondent Department at 27, *Millennium Pipeline Company, L.L.C. v. Seggos* (D.C. Cir. 2017) (No. 16-1415) ("For meaningful public comment to be obtained, the public must be able to evaluate a complete application."); 33 U.S.C. §1341(a)(1) (requiring certifying agencies to "establish procedures for public notice in the case of all applications for certifications"). Thus, the Department argued that *its* notice and comment period is triggered by a complete application. Brief for Respondent at 27, (citing Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs, 674 F. Supp. 2d 783, 800-02 (S.D.W. Va. 2010) ("Completion and public notice are inextricably linked. . . .")).

164. United States. v. Plaza Health Labs, Inc. 3 F.3d 643, 649 (2d Cir. 1993).

165. Brief for Respondent FERC at 33-34, *New York State Dep't of Envtl. Conservation v. FERC* (2d. Cir. 2018) (No. 17-3770) (citations omitted).

166. 160 F.E.R.C. ¶ 61,065 at P 13 (2017).

167. *Id*. at P 18.

Millennium, the Department waived its authority to issue the WQC.[168] The Second Circuit subsequently denied the Department's appeal of the FERC's waiver ruling.[169]

Ironically, even though the Department took three years to deny Constitution's WQC application, the FERC found that the Department had not waived its authority to issue the WQC.[170] Constitution withdrew and resubmitted its application multiple times, and, the FERC reasoned, each time the one-year time period began anew.[171] The FERC also rejected Constitution's arguments for case-by-case determinations of the reasonable period of time for waiver, finding that a "bright line," one-year rule struck balance between the competing interests of applicants and state agencies:

> An applicant is guaranteed an avenue for recourse after a year of inaction by filing a petition for a waiver determination before the Commission (as did the applicant in *Millennium Pipeline Company, L.L.C.*), or after a denial by filing a petition for review in the court of appeals. A state certifying agency remains free to deny the request for certification within one year if the agency determines that an applicant has failed to fully comply with the state's filing or informational requirements.[172]

Subsequently, the FERC also found that the Department had waived its authority to issue WQC for National Fuel, despite the pipeline's prior agreement to extend the one-year deadline: "Only if an applicant withdraws and refiles an application, no matter how formulaic or perfunctory the process, does the certifying agency's new "receipt" of the application restart the one-year waiver period under section 401(a)(1)."[173]

2. When is an application complete?

Similarly, the Department's position is that an application, irrespective of its size or content, is deemed incomplete until the FERC issues an EA or a draft EIS.[174] In support, the Department claims to rely on the FERC's environmental review, which acts as "a baseline for its more searching assessment of a project's impact on state water quality."[175] This reliance is necessary, it claims, because the NGA preempts State review statutes:[176]

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168. Millennium filed its WQC application on November 23, 2015, but the denial did not occur until August 30, 2017. *Id.*; *see also Millennium Denial Letter*, *supra* note 4.

169. New York State Dep't of Envtl. Conservation v. FERC, 884 F.3d 450 (2d. Cir. 2018).

170. *Id.* at 456.

171. 162 F.E.R.C. ¶ 61,014 at P 23 (2018) ("By withdrawing its applications before a year had passed, and by presenting New York DEC with new applications, Constitution gave New York DEC new deadlines.").

172. 164 F.E.R.C. ¶ 61,029 at P 18 (2018).

173. 164 F.E.R.C. ¶ 61,084 at P 41 (2018).

174. *See, e.g.*, Letter from Karen M. Gaidasz, Department, to John Zimmer, Millennium at 1, (Dec. 7, 2015): Millennium Pipeline Co., L.L.C. v. Basil Seggos, et al., D.C. Cir. Case No. 16-1415, JA 75-76 (filed Jan. 24, 2017).

175. Brief of Respondent Department at 31-32, *Seggos v. CPV Valley, LLC* (D.C. Cir. 2017) (No. 16-1415) (citations omitted).

176. *See, e.g.*, National Fuel Gas Supply Corp. v. Public Serv. Comm'n of N.Y., 894 F.2d 571, 579 (2d. Cir. 1990) (subsequent history omitted).

> Typically, an applicant for a New York State permit would be required to conduct a review of environmental impacts and mitigation methods under SEQRA [State Environmental Quality Review Act]. A permit application would not be considered complete until this environmental review has concluded.[177]

Thus, because the NGA prevents the Department from requiring SEQRA review, the Department contends it must rely on the FERC's NEPA review for the information it would otherwise obtain itself.[178]

The Department determined that Millennium's application was "deemed denied" because of an "incomplete environmental review" by the FERC, that is, the Department found fault with the FERC's EA because it failed to consider or quantify the downstream greenhouse gas emissions from the combustion of the natural gas transported by the Project as part of NEPA review.[179] This concern was raised for the first time in the WQC denial letter because the Department never raised the GHG issue during the FERC's environmental review or on rehearing.[180] Instead, 15 months *after* the FERC's certificate order was issued, the Department denied Millennium's WQC, not because of concerns with water quality standards or a failure of Millennium to submit required information, but because the FERC's EA had not considered *air quality* issues related to a downstream electric generator, an issue far beyond the scope of the limited and defined authority conferred by the CWA.[181]

3. How much information is enough?

Another issue related to the time to process a WQC application involves the amount of information required. The Department explains: "Denial of a WQC may occur when an application fails to contain sufficient information to determine whether the application demonstrates compliance with the above stated State water quality standards and other applicable State statutes and regulations due to insufficient information."[182] The Department denied Constitution's application, finding, as a general matter, that the application, "fails in a meaningful way to address the significant water resource impacts that *could* occur . . . and has failed to provide sufficient information to demonstrate compliance with the New York State water quality standards."[183] Indeed, rather than analyze whether Constitution's proposed pipeline satisfies the specific water quality standards at issue, the

177. Brief of Respondent Department at 32, *Seggos v. CPV Valley, LLC*, (D.C. Cir. 2017) (No. 16-1415) (citations omitted).

178. *Id.* Yet, despite its claims, the Department required each of the three pipelines to apply for various New York environmental permits as a condition for considering the WQC application.

179. *Millennium Denial Letter*, *supra* note 4, at 2. The Department's claim was based on the D.C. Circuit's August 8, 2017 opinion, issued 8 days earlier, finding that the FERC's EIS in another pipeline construction proceeding failed to quantify the GHG impact of natural gas transported by the pipeline and burned as fuel by downstream generators. Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017).

180. *DEC Denies Permits for Millennium Pipeline to Power CPV Plant*, MIDHUDSONNEWS.COM (Sept. 1, 2017), https://www.midhudsonnews.com/News/2017/September/01/CPV_MilPipe_DEC-01Sep17.html (concurrently with its denial of Millennium's WQC, the Department filed at FERC a request to reopen the proceeding or, alternatively, a request for rehearing for failure to consider GHG).

181. *Id.*

182. *See, e.g.*, *Constitution Denial Letter*, *supra* note 4, at 7.

183. *Id.* at 1 (emphasis added).

Department's denial instead listed unsupplied and insufficient information.[184] However, Constitution provided the Department with "tens of thousands of pages, comprising more than 40 gigabytes of information . . . ."[185] Constitution submitted, withdrew, and resubmitted its application multiple times to provide the Department with more time to review, and provided additional information when requested.[186] Similarly, "National Fuel's application and supplemental materials totaled 8,835 pages (and National Fuel provided thousands of additional pages of information more informally, *e.g.* via email), many of which were in direct response to DEC's questions . . . ."[187] Furthermore, Millennium's application was approximately 1,200 pages.[188]

C. Assessment

Review of the WQC denials reveals that the Department strayed beyond its limited mandate. To be clear, we do not question whether the Department had a legal right under section 401 to deny the WQCs. Rather, we object to the manner and means used.

First, the denials were not based solely on the pipelines' impacts on New York water quality standards. From our perspective, the Department impermissibly wandered into the realm solely and exclusively regulated by the FERC. Specifically, the Department subjected WQC applicants to a byzantine array of preempted New York environmental laws (not just water quality standards), considered the cumulative impact of pipeline construction on all environmental resources (not just water resources), and reevaluated findings made by the FERC (such as Constitution's certificated pipeline route).[189]

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184. *Id.* at 8 ("Constitution has not provided sufficient information to enable the Department to determine if the Application demonstrates compliance with 6 NYCRR Part 703 . . . ."); *id*. at 11 ("The Department . . . does not have adequate information to assure that sufficient impact avoidance, minimization or mitigation measures were considered as to each of the more than 200 streams proposed for trenched crossings."); *id*. at 12 ("the Application lacks sufficient information to demonstrate that the Project will result in no increase that will cause a substantial visible contrast to natural conditions."); *Constitution Denial Letter*, *supra* note 4, at 12 ("Constitution did not provide sufficient detailed information including site specific project plans regarding stream crossings (*e.g.*, geotechnical borings)"); *id*. ("the Application lacks required site-specific information for each of the 251 stream crossings"); *id.* at 13 ("Constitution provided only a limited analysis of burial depth for 21 of the 251 New York Streams"); *id.* ("Constitution's Blasting Plan does not provide site-specific information where blasting will occur but instead provides a list of potential blasting locations based on the presence of shallow bedrock"); *id*. at 13-14 ("the Application does not supply the Department with adequate information to assure that streams and water bodies will not be subject to discharges that do not comply with applicable water quality standards.").

185. Final Brief for Petitioner, *Constitution Pipeline Co. v. Seggos* (2d. Cir. 2016) (No. 16-1568) (emphasis in original). Although the Department claimed it lacked information on 6 different topics, Constitution claims: "NYSDEC did not raise any of these issues in its last substantive call with Constitution in July 2015, nor did it make any additional requests for information in the eight months before its Denial despite repeated inquiries from Constitution on whether any additional information was needed." *Id*. at 21-22.

186. *Constitution Denial Letter*, *supra* note 4, at 5.

187. Petitioners' Brief at 19, *National Fuel Gas Supply Corp. v. Department* (2d Cir. 2017) (17-1164-ag). Notwithstanding all the information supplied to the Department, National Fuel notes that the "denial letter does not include a single citation to the record." *Id*.

188. Opening Brief for Petitioner, *supra* note 81, at 11.

189. Notwithstanding the above, the Supreme Court in *Schneidewind* explained that "every state statute that has some indirect effect on rates and facilities of natural gas companies is not pre-empted." *Schneidewind*, 485 U.S. at 308. The FERC typically includes the following paragraph in its certificate orders:

Second, the Department unquestionably delayed ruling on the WQC requests. This delay was to the detriment of the pipelines. Despite the one-year limitation in section 401, the Department denied each pipeline's WQC request well after the deadline, 20 months late for Constitution, one and one-half months late for National Fuel, and 15 months late for Millennium.[190] This protracted process was accomplished, in part, because the Department considers a WQC request incomplete until after the FERC conducts its environmental review.[191] Indeed, the Department denied Millennium's WQC because the FERC's EA did not consider air quality issues of a downstream generator.[192] Further, the delays were also due to the "Hobson's Choice" presented to the pipeline–provide more information and/or resubmit the WQC application or accept denial.[193] Thus, the Department's claims of insufficient information led to data production delays, followed by data review delays.[194]

V. RECOMMENDATIONS

Water pollution should not be condoned, and effective measures to curb pollution should be supported. But state regulators should not be allowed to transform WQC into a shield to delay construction of FERC-authorized pipeline projects or, worse yet, a sword to slay such projects altogether. Indeed, the transmogrification of the WQC process in New York has produced untenable results, prompting the White House to request Congressional action.[195] This request has resulted in Senator John Barrasso (R. WY) and others' introducing legislation to clarify and limit the scope of CWA section 401 and, in a recent letter, requesting EPA "to determine whether new clarifying guidance or regulations are needed in light of recent abuses of the Section 401 process by certain states."[196] Likewise, during recent Congres-

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> Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local laws may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.

Constitution Certificate Order, *supra* note 3, at P 147. Accordingly, FERC, apparently in pursuit of comity, has elected not to establish a bright line of jurisdictional demarcation, but instead encouraged pipelines to cooperate with state environmental regulators and, as such, must accept some responsibility for muddying the waters of preemption.

190. *Constitution Denial Letter*, *supra* note 4, at 6-7; *National Fuel Denial Letter*, *supra* note 4, at 3; *Millennium Denial Letter*, *supra* note 4, at 1.

191. 160 F.E.R.C. ¶ 61,065 at P 5 (2017).

192. *Millennium Denial Letter*, *supra* note 4, at 2.

193. Millennium Pipeline Co. v. Seggos, 288 F. Supp. 3d 530, 535 (N.D.N.Y. 2017).

194. *Id.* at 537.

195. THE WHITE HOUSE, LEGISLATIVE OUTLINE FOR REBUILDING INFRASTRUCTURE IN AMERICA at 43, https://www.politico.com/f/?id=00000161-8a9d-d53a-a5f5-bffd597b0000. ("Amending the Clean Water Act to change the time period for issuance of a State 401 Certification by addressing the time periods for making a completeness determination and the time for a State decision would reduce this delay.").

196. Press Release, U.S. Senate Committee on Environment and Public Works, Senators Introduce Legislation to Improve Water Quality Certifications (July 31, 2018), https://www.epw.senate.gov/public/index.cfm/2018/7/senators-introduce-legislation-to-improve-water-quality-certifications. On July 31, 2018, Senator Barrasso, Chairman of the Senate Committee on Environment and Public Works (EPW), joined by Senators Shelley Moore Capito (R-WV), Jim Inhofe (R-OK), and Steve Daines (R-MT), introduced S 3303, the Water Quality

sional testimony, Secretary of Energy Rick Perry questioned whether a state's "exercise of veto power over federally-administered projects" creates national security risks.[197]

With regard to Millennium, Constitution, and National Fuel, the Department's denials of WQC have spawned appeals, complaints to trial courts, and FERC proceedings. It has also resulted in economic waste and arguably jeopardized electric reliability. Constitution, for example, has incurred approximately $400 million to develop a FERC-authorized pipeline that may never be built.[198] And, absent the FERC's waiver finding in *Millennium*, a $900 million electric generation facility authorized by the NY PSC and needed to replace, in part, a retiring nuclear facility, would have been stranded.[199] Moreover, the Department's

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Certification Improvement Act of 2018. Among other things, the bill would clarify that the scope of a § 401 review is limited to water quality impacts only and that states, when evaluating water quality, can only consider discharges resulting from the federally permitted activity itself and not from other sources. *Id.* The bill would also require states to (1) publish clear requirements for WQC requests; (2) make final decisions on whether to grant or deny a request in writing based only on water quality reasons; and (3) inform a WQC applicant within 90 days that no other information is needed to process a request. *Id.*; *see also* Letter from Senator John Barrasso M.D., et al., to Andrew R. Wheeler, Acting EPA Administrator (Oct. 4, 2018) at 1. Among other things, the senators asked the Administrator to review and revise as necessary the 2010 interim "handbook," which issued without public comment and "contains clear misstatements of law." *Id.* at 2

197. *In Support of Federal Oversight of Pipeline Projects, Perry Invokes National Security*, INSIDE FERC (May 14, 2018) at 1, 18 (testimony at a House Science, Space and Technology Committee hearing on May 9, 2018). The FERC, for its part, has stated: "Arguments that state actions under Section 401 are inconsistent with the Commission's mandate under the NGA to approve appropriate interstate natural gas projects are outside of our jurisdiction to resolve, and must be addressed to Congress or to the courts." 164 F.E.R.C. ¶ 61,029 at P 22.

198. Petition for Declaratory Order at ex. E, ¶ 6, *Constitution Pipeline Co.*, Docket No. CP18-5-000 (Oct. 11, 2017) ("As of May 16, 2016, Constitution has incurred approximately $396 million in development of the Interstate Project."). Indeed, the Department drove up Constitution's costs, only to deny the WQC: at the Department's urging, Constitution agreed to a 2.9-mile reroute to avoid a particular wetland complex; the land rights associated with the mile reroute cost Constitution $3,540,000. *Id.* ¶¶ 10-11.

199. Patrick McGeehan, *Cuomo Confirms Deal to Close Indian Point Nuclear Plant*, N.Y.TIMES (Jan. 7, 2017), https://www.nytimes.com/2017/01/09/nyregion/cuomo-indian-point-nuclear-plant.html. In January 2017, Governor Cuomo applauded an agreement to shut down the 2000 MW Indian Point nuclear generating facility located 30 miles north of New York City. *Id.* ROBERT BRYCE, AFTER INDIAN POINT: LIGHTS OUT FOR NEW YORK CITY? CLOSING THE NUCLEAR PLANT THREATENS THE RELIABILITY OF THE ELECTRIC GRID, THE MANHATTAN INSTITUTE FOR POLICY RESEARCH (2017), https://www.manhattan-institute.org/download/10530/article.pdf. The electric output of Indian Point is to be replaced by two gas-fired generation plants being developed in southeastern New York – (1) the 650 MW plant in Wawayanda to be supplied by Millennium and (2) a 1,100 MW, $1.6 billion plant in Dover, NY (located near the Iroquois pipeline system, which has no available capacity) expected to come online in 2020. *Id.* at 4.

On January 24, 2018, CPV Valley Energy Center filed with the Department a request to renew its air permit, but on August 1, 2018 the Department denied the request, claiming the plant's original state-issued air permit expired on July 31 and would not be renewed, requiring the plant to obtain from the EPA a Title V air permit in order to operate. *CPV Valley Energy Center Update*, WAWAYANDA (2013), https://townofwawayanda.com/cpv/200-cpv-valley-energy-center-update.html. Before the Department denied the request, Governor Cuomo committed to reject applications for all new natural gas-fired electric generation plants in New York. Alex Beauchamp, *On Video, Cuomo Pledges to Reject All New Gas Plants*, FOOD & WATER WATCH (May, 10, 2015), https://www.foodandwaterwatch.org/news/video-cuomo-pledges-reject-all-new-gas-plants. On August 15, 2018, a New York Supreme Court judge ruled that the generator could resume startup tests. Darrell Proctor, *Judge Rules New York Gas Plant Can Resume Startup Tests*, POWER (Aug. 15, 2018), https://www.powermag.com/judge-rules-new-york-gas-plant-can-resume-startup-tests. On October 1, 2018, CPV Valley Energy Center announced that it achieved commercial operation on natural gas. *Competitive Power Ventures Achieves Commercial Operation At 680-MW CPV Valley Energy Center New York*, CPV MEDIA

actions have thwarted the natural gas development in the Marcellus Shale Formation (which runs across Pennsylvania and New York), thereby undermining the principal purpose of the NGA – "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[200]

Compliance with state water quality standards should be a relatively narrow and limited review process, particularly with respect to FERC-regulated interstate natural gas pipelines. To that end, we offer the following eight suggestions, five to refocus the WQC process and three to reduce delays.[201]

One, the scope of section 401 could be more circumscribed. Section 401 requires WQC for federal permits that "may result in any discharge into the *navigable waters*."[202] The CWA provides: "The term 'navigable waters' means the waters of the United States, including the territorial seas."[203] In turn, EPA's currently effective regulations define "waters of the United States" broadly and include "streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds", as well as "wetlands adjacent to waters, [and] waste treatment systems, including treatment ponds or lagoons."[204] At a minimum, EPA could more narrowly define "waters of the United States," especially for purposes of section 401.[205]

Two, EPA's CWA implementing regulations could also clarify that States cannot leverage their WQC authority to require FERC-jurisdictional, interstate natural gas pipelines to apply for other state environmental permits.

Three, EPA could establish a generally applicable, reasonable standard of proof in WQC proceedings. The Department's WQC denials are based on pipelines' failure to "demonstrate compliance with State water quality standards and

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CENTER (Oct. 01, 2018), http://www.cpv.com/news/2018/10/competitive-power-ventures-achieves-commercial-operation-at-680mw-cpv-valley-energy-center-new-york/. Finally, absent the litigation, Millennium's $70 million construction costs would likely have been lower. *See* "Supplemental Information – Cost Completion Report," *Millennium Pipeline Co., L.L.C.*, Docket No. CP16-17-000 (filed Oct. 26, 2018).

200. *Public. Utils. Comm'n of Cal.*, 900 F.2d at 281.

201. For those recommendations involving EPA, EPA may already have the authority to initiate those recommendations either on its own motion or that of the FERC. *See generally* 33 U.S.C. § 1341(b); *see also* 40 C.F.R. § 121.30. FERC may already have some of the tools necessary to minimize future WQC delays. *See, e.g.*, 18 C.F.R. § 385.2013 (requiring states to notify FERC when a WQC request has been filed, whether the application is ready for processing, the studies required, and the anticipated effective date of the agency's order); *id*. § 157.22 (requiring federal authorizations to be obtained by 90 days after issuance of an EA or EIS). These regulations, coupled with FERC's ruling that the 1-year WQC review process starts when the application is filed, could allow FERC to address WQC in the certificate order, that is, either noting that the WQC has been obtained or addressing waiver due to state inactivity.

202. 33 U.S.C. § 1341(a)(1).

203. *Id*. § 1362(7).

204. 40 C.F.R. §230.3(s)(3), (7) (alteration in original).

205. EPA and the Army Corps of Engineers are proposing to repeal the Obama era definition of "waters of the United States" and returning the CWA jurisdiction to its pre-2015 status. *See generally* Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017) (to be codified at 33 C.F.R. pt. 328); *see also* Definition of "Waters of the United States" – Recodification of Preexisting Rule, 83 Fed. Reg. 32,227, 32,232 (July 12, 2018) (to be codified at 33 C.F.R. pt. 328) ("A change to the interpretation of "waters of the United States" may change the scope of waters subject to CWA jurisdiction and thus may change the scope of waters for which states may assume these responsibilities under the Act.").

other applicable State statutes and regulations."[206] This appears to demand absolute certainty of compliance with water quality standards. Courts have imposed far less strenuous standards, such as preponderance of the evidence.[207] As such, EPA's regulations could be revised to require states to use the same standard of proof required by the EPA in WQC proceedings – "reasonable assurance."[208]

Four, EPA regulations could also ensure that WQC is not to be denied when a discharge results in a temporary impact. FERC environmental review distinguishes between temporary and permanent environmental impacts; EPA's regulations could do the same.[209]

Five, EPA's existing regulations (1) set forth the required contents of an application for WQC from the EPA and (2) provide that EPA must agree with the state regulator's form of application for WQC.[210] EPA could establish a generally applicable, uniform format for WQC applications by simply extending its format to the states. A standardized format would ensure that all WQC applications – whether filed with a specific state or the EPA – submit similar information and would reduce attempts by state environmental regulators to apply preempted environmental law to interstate natural gas pipelines. Similarly, in order to prevent state environmental regulators from engaging in information "fishing expeditions" that cause delays and drive up compliance costs, EPA could provide guidance on the amount and types of information necessary to support a WQC application.[211]

Six, the CWA could be amended to provide that, to the extent a federal permitting agency conducts NEPA review, the applicable state water quality standards shall be addressed solely in the EA or EIS, and not by the state environmental regulator. In the pipeline proceedings discussed above, the EA or EIS reveal that the FERC conducted detailed analyses of water and wetlands issues as part of its environmental review. Requiring both federal and state regulators to address the same issues is not an efficient use of scarce regulatory resources, leads to conflict, and is economically wasteful. In short, the FERC could be authorized to apply a state's water quality standards (but no other state environmental laws) as part of its EA or EIS analysis; the state environmental regulator could ensure that its concerns are addressed by participating in the process as a "cooperating agency."

Seven, the CWA could be amended to (a) confirm and codify the FERC's ruling that the time period for state review begins with the submission of the WQC application and (b) shorten the review period from one-year to 180 days.[212]

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206. *National Fuel Denial Letter*, *supra* note 4, at 13.

207. Port of Seattle v. Pollution Control Hearings Bd., 90 P.3d 659, 675 (Wash. 2004).

208. 40 C.F.R. § 121.24 ("If . . . the Regional Administrator determines that there is a reasonable assurance that the proposed activity will not result in a violation of applicable water quality standards, he shall so certify.").

209. FERC OFFICE OF ENERGY PROJECTS, GUIDANCE MANUAL FOR ENVTL. REPORT PREPARATION FOR APPLICATIONS FILED UNDER THE NAT. GAS ACT 143 (Vol. I 2017).

210. 40 C.F.R. § 121.3 (stating that requirements for WQC form of application must be agreed upon by the EPA and the state); *id.* § 121.22 (requiring elements in the WQC application to be included before submission to EPA).

211. *Constitution Certificate Order*, *supra* note 3, at P 72; *Millennium Certificate Order*, *supra* note 3, at P 47; *National Fuel Certificate Order*, *supra* note 3, at P 72.

212. The 180-day limit has been proposed by the Trump administration. Jeff Beattie, *INGAA: Federal 'Recourse' Vital on Projects Halted by States*, THE ENERGY DAILY, Feb. 9, 2018 at 2; 162 F.E.R.C. ¶ 61,014 at

Eight, to the extent that a state environmental regulator denies a WQC request, an aggrieved applicant could be afforded a more simplified and streamlined review process, similar to that in the CZMA.[213] We suggest that the WQC denial would be sustained, unless the EPA Administrator finds the project is (1) consistent with the objectives of the CWA and (2) required by the public interest.[214] Enlisting the Administrator to make these determinations makes sense.[215] The EPA already has significant experience with water quality standards, having developed the baseline standards, reviewed the more stringent standards adopted by some states, and responded to WQC requests involving those states that did not adopt their own standards.[216] Significantly, the Administrator would be well positioned to ensure that only EPA-approved standards were used and properly applied in the state decision denying WQC.

VI. CONCLUSION

By enacting the NGA, Congress gave the FERC exclusive jurisdiction over interstate natural gas pipelines, including whether new pipeline facilities should be constructed.[217] Yet to fight water pollution, Congress gave states the right to block federal permits (including NGA section 7(c) certificates) that do not comply with state water quality standards.[218] We believe that, as a general matter, the two statutes have worked well together for more than a half century. But when state regulators weaponize the WQC process to defeat FERC-authorized pipeline projects, the consequences can be dire.

If pipelines cannot obtain timely WQC from the Department, additional natural gas supplies from the prolific Marcellus and Utica Shale Formations may not

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P 23; THE WHITE HOUSE, LEGISLATIVE OUTLINE FOR REBUILDING INFRASTRUCTURE IN AMERICA at 43, https://www.politico.com/f/?id=00000161-8a9d-d53a-a5f5-bffd597b0000. ("Amending the Clean Water Act to change the time period for issuance of a State 401 Certification by addressing the time periods for making a completeness determination and the time for a State decision would reduce this delay.").

213. 16 U.S.C. §§ 1451-66. This recommendation is not new. *See also* Michael L. Krancer et al., *FERC Slaps State Overreach on Federal Jurisdictional Pipelines*, THE LEGAL INTELLIGENCER (Sept. 18, 2017). Similarly, Don Santa, the Chief Executive Officer of the Interstate Natural Gas Association of America recently testified before the Senate Energy and Natural Resources Committee, saying that the pipeline industry would appreciate "clarification from Congress on the Scope of states' authorities under the Clean Water Act . . . and then some effective recourse should a state overstep its bounds or act in a way that is not in the federal interest." Jeff Beattie, *INGAA: Federal 'recourse' vital on projects halted by states*, THE ENERGY DAILY (Feb. 9, 2018). *See also The Evolution of Energy Infrastructure in the U.S. and How Lessons Learned from the Past Can Inform Future Opportunities*, Committee on Energy and Natural Resources, U.S. Senate (2018) (Statement of Donald F. Santa).

214. *Cf.* 15 C.F.R. § 930.121.

215. The Trump administration suggests a similar approach, but FERC (not the EPA Administrator) would hear the appeals. "INGAA: Federal 'recourse' vital on projects halted by states," Jeff Beattie, The Energy Daily (Feb. 9, 2018) at 2. However, that would place FERC in the position of ruling on whether a state commission had wrongly cast a "veto" of FERC's certificate order. We believe that all parties would benefit from a more impartial and objective reviewing party.

216. 40 C.F.R. § 131.4; *id.* § 131.5.

217. 15 U.S.C. § 717o; *id.* § 717; *id.* § 717f.

218. 33 U.S.C. § 1370.

be developed and transported to gas-starved markets in New York and New England, raising three significant concerns. [219] One, traditional gas consumers could be harmed: industrial facilities which use natural gas as fuel for heating, or to produce many products; or commercial entities such as schools and hospitals; as well as residential consumers -- all of which use natural gas to cook, to heat or cool buildings, and to provide lighting, among other things, will be denied access to this relatively inexpensive and environmentally-friendly fuel source.[220] Two, if gas-fired electric generators are denied access to sufficient natural gas supplies, electric reliability could be jeopardized.[221] And, paradoxically, there could also be adverse environmental consequences from prolonging generators' dependence on more GHG intensive fuel oil.[222] Three, the regulatory uncertainty involving

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219. *New England Needs More Natural Gas Pipelines*, INSTITUTE FOR ENERGY RESEARCH (2018), https://instituteforenergyresearch.org/analysis/new-england-needs-natural-gas-pipelines/. Analysis by the Institute for Energy Research published on April 23 concluded:

> New England has become heavily dependent on low cost natural gas, which accounts for about half of its power generation as the region has retired many of its coal and nuclear plants. However, because of a lack of pipeline infrastructure, New England has difficulty getting sufficient supplies of natural gas from nearby areas, such as the Marcellus Shale formation, especially during the winter months. This past winter, the region had to use dual-fuel power plants, consuming about 2 million barrels of oil during January's deep freeze, which is over twice the oil consumed in 2016, according to the Independent System Operator for New England. Because the demand for natural gas is growing faster than the infrastructure to deliver it to the region is, electricity prices will need to increase. As it is, the six New England states have the highest regional electricity rates in the lower 48 states—53 percent above the national average. If the infrastructure constraints remain in place, electricity consumers can expect a good deal of price volatility during the winter months.

Id. at 1.

220. *Hearing to Examine Interstate Delivery Networks for Natural Gas and Electricity*, Senate Committee on Energy and Natural Resources (2018) (testimony of J. Curtis Moffatt, Vice President and General Counsel, Kinder Morgan, Inc.).

221. *Operational Fuel-Security Analysis*, ISO (2018), https://www.iso-ne.com/committees/key-projects/operational-fuel-security-analysis/. In January 2018, ISO New England published an operational analysis of fuel-security challenges to the continued reliability of New England's power system, which explained:

> The natural gas system was sized and built to meet the peak demand needs of the local natural gas utilities (also called local distribution companies, or LDCs) serving heating customers. The natural gas utilities contracted for the pipeline capacity, so they have first priority for gas delivery.
>
> On many days, pipeline capacity is sufficient for both the local gas utilities and the natural-gas-fired power plants, but during the coldest weeks of the year, this natural gas delivery infrastructure can't meet all the demand for natural gas for both home heating and power generation. As a result, natural-gas-fired power plants—which typically buy pipeline capacity released by local gas utilities on the secondary market—may not be able to access natural gas.

Id. at 16. As noted above, the 2000 MW Indian Point nuclear generating facility located outside New York City is slated to shut down in 2020 and be replaced, in part, with a 650 MW gas-fired generation plant supplied by Millennium, which was denied WQC. *See, e.g.*, *supra* notes 67-68 and accompanying text (describing the generator served by Valley Lateral Project). Similarly, the denial of WQC for Constitution has created financial problems for electric generators denied access to competitively priced Marcellus gas. *See, e.g.*, Richard Metcalf, *Restructuring Advisers Revealed for N.Y. CCGT*, POWER & FINANCE RISK, May 7, 2018, at 2.

222. *See also* Letter from Thomas S. Berkson, Department, to Joseph Dean, Transcon. Gas Pipe Line Co. (April 20, 2018) (denying without prejudice WQC for the Northeast Supply Enhancement Project). On March 27, Transcontinental Gas Pipe Line Co. LLC (Transco) filed with the FERC in Docket No. CP17-101-000 a

WQC could make it harder for natural gas pipeline developers to access capital markets, which could hinder needed development and increase costs for all. [223] The modest regulatory and/or legislative changes identified above could mitigate the concerns, but complete resolution would require Congress to exempt NGA section 7(c) certificates from WQC under the CWA.

certificate application seeking authorization for a $926 million project by constructing new pipeline looping facilities in Pennsylvania, New Jersey and New York, as well as adding additional compression in Pennsylvania and New Jersey to create 400,000 Dth/d of new firm service:

> The Northeast Supply Enhancement project will provide service to National Grid – the largest distributor of natural gas in the northeastern United States. Once complete, the project will serve growing natural gas demand in the Northeast, including the 1.8 million customers served by National Grid in Brooklyn, Queens, Staten Island and Long Island. National Grid estimates that with the added capacity provided by the project, natural gas could displace the equivalent of 3,005,797 gallons of heating oil, reducing CO2 emissions by up to 2.4 million tons per year.

About the Project, NORTHEAST SUPPLY ENHANCEMENT, http://northeastsupplyenhancement.com/home/about-the-project/ (last visited Sept. 24, 2018). Transco's certificate application is still pending at FERC. *Id.*

223. *Regarding Natural Gas Pipeline Development*, Senate Committee on Energy and Natural Resources (2018) (testimony of James J. Murchie, CEO and Co-Founder, Energy Income Partners, LLC).