Natural Gas: State of the Industry

This panel will present views on the current state of affairs from different perspectives throughout the natural gas industry landscape. These perspectives will include discussion on regional supply restrictions, financial markets, localized infrastructure, and production.

Moderator: Brent Archer, President and COO
Columbia Gas of Virginia

Panelists: Jennifer Fordham, Senior Vice President, Government Affairs
Natural Gas Supply Association

Bernadette Johnson, Vice President, Market Intelligence
Drilling Info, Inc.

Christopher B. McGill, Vice President, Energy Analysis and Standards
American Gas Association

Kenneth W. Yagelski, Managing Director of Gas Supply
Southern Company Gas
Brent Archer has served as President of Columbia Gas of Virginia since April 2015. With headquarters in Chester, Columbia Gas of Virginia serves more than 260,000 residential, commercial and industrial natural gas customers in 91 communities in Virginia.

He has served in a variety of leadership positions at the Columbia Gas companies, most recently as director of business policy having responsibility of the company’s legislative, regulatory and customer energy efficiency programs. He has nearly 33 years of experience in the natural gas industry in communications, government and regulatory affairs, beginning his career with Columbia Gas in 1986.

He holds a Bachelor of Arts degree in Journalism from Marshall University, and an MBA from the West Virginia University Graduate College. He is the immediate past President of the Virginia Oil & Gas Association, which represents natural gas producers, transporters and distributors in the Commonwealth. He is a 2009 graduate of Lead Virginia serves on the boards of directors of the Virginia Chamber of Commerce and the Virginia Business Council. Archer and his wife Dr. Andrea Archer and their two children live in Midlothian.
Jenny Fordham is senior vice president, government affairs for the Natural Gas Supply Association (NGSA). She joined NGSA in 2005.

As senior vice president, government affairs, Jenny is responsible for the association’s legislative and policy advocacy related to the competitive natural gas market. She represents the association with the administration, the Federal Energy Regulatory Commission (FERC), the Commodity Futures Trading Commission (CFTC), U.S. Congress, media, industry and the public, serving as a spokeswoman for the association on natural gas market issues.

Jenny’s diverse 28-year energy career helps provide the commercial relevance that is characteristic of NGSA advocacy. Prior to joining NGSA, Fordham led the state and regulatory affairs team for Washington Gas Light Company (WGL), the natural gas utility serving the Washington, DC metropolitan area; held a seat on the WGL Political Action Committee Board of Directors; and was a fuels consultant for Pace Global Energy Services. Fordham’s expertise is further augmented by her investor relations and financial planning experience for NiSource, Inc.’s predecessor, Columbia Energy Group. Her experience negotiating energy contracts, working with investors on energy project valuation and implementing corporate compliance standards for market behavior rules make her insights distinctive to the NGSA team.

At NGSA, Jenny specializes in creating long-term strategic advocacy partnerships that broaden policymaker support for business-relevant positions. Fordham created the first “agriculture and energy” partnership, NGSA and the National Corn Growers Association, credited with securing the end user protections in Dodd-Frank financial reform legislation and recognized in CEO Update. Jenny’s work helped establish NGSA as an industry leader on CFTC Dodd-Frank implementation advocacy, often covered by S&P Platts Gas Daily and Energy Risk magazine.

Jenny Fordham graduated cum laude from Shepherd University where she received a Bachelor of Science degree in economics and political science. She is part of The Leadership Foundry Class of 2017 and an Individual Director Member of the National Association of Corporate Directors. She sits on the board of directors for the Washington D.C. Chapter of the Women’s Energy Network.
Bernadette Johnson
Drilling Info

Bernadette Johnson serves as Vice President, Market Intelligence for Drilling Info and is responsible for helping to grow and expand DI’s forward-looking product offerings. She joined Drilling Info through the acquisition of products and services from Ponderosa Advisors. With over 10 years’ experience in the energy industry, Bernadette has earned the reputation of industry expert with extensive experience providing crude, natural gas, and NGL fundamentals analysis and advisory services to various players in the North American and Global energy markets. A regular commentator for and speaker to the energy industry, her specific market expertise spans: financial trading, production forecasts, demand forecasts by sector, infrastructure analysis, midstream analysis, storage value analysis, and price forecasts.

Prior to joining Ponderosa, and now DI, Bernadette was Senior Research Analyst for Sasco Energy Partners in Westport, CT where she provided analytics and research support for a team of financial traders active in natural gas, power and oil futures markets. Bernadette began her career with BENTEK Energy, LLC as a Senior Energy Analyst, Natural Gas Market Fundamentals and consulting project team lead. In addition to her current role at Drilling Info, Bernadette remains a partner and shareholder in Ponderosa Advisors’ remaining businesses.

Bernadette holds a MS Degree in International Political Economy of Resources and a BS Degree in Economics, from the Colorado School of Mines.
Chris McGill is the Vice President Policy Analysis at the American Gas Association (AGA), which is headquartered in Washington, D.C. AGA is a national trade association providing services and advocacy for more than 200 local natural gas utility and other members.

Mr. McGill's work is in the assessment of future supplies of natural gas, natural gas production, unconventional gas operations and completion technologies, underground storage, key pipeline transportation issues, winter heating season planning, key developments in natural gas markets and other related topics in the gas industry. He guides the analytical support for policy initiatives at the association and is an active spokesperson on many natural gas topics, representing local gas utility points of view to industry, regulators, legislators and the public.

Mr. McGill previously worked as an exploration geologist before joining AGA. He holds a Bachelor of Science degree in Geology from Madison College in Harrisonburg, Virginia (1975) and a M.B.A. from Old Dominion University in Norfolk, Virginia (1988). Mr. McGill has been a member of the American Association of Petroleum Geologists for more than 30 years.
KEN YAGELSKI is Managing Director of Gas Supply for Southern Company Gas. Ken is accountable for gas supply activities for the Company’s distribution operations. In addition, he directs business advocacy in proceedings before the Federal Energy Regulatory Commission on behalf of Southern Company Gas’s seven local distribution companies: Atlanta Gas Light (Georgia), Chattanooga Gas (Tennessee), Elizabethtown Gas (New Jersey), Elkton Gas (Maryland), Florida City Gas (Florida), Nicor Gas (Illinois) and Virginia Natural Gas (Virginia).

Ken received his Bachelor of Science in electrical engineering from Purdue University concentrating on the study of power systems and has studied business at the University of Illinois – Springfield. He has extensive practical experience in the natural gas and electric power industries with previous management positions at UGI Energy Services, Washington Gas and Illinois Power (now Ameren), and as a consultant to the North American energy industry.

Throughout his career, Ken has held leadership and committee positions with professional and community organizations, such as the American Gas Association (AGA), the Virginia Oil and Gas Association (VOGA), the North American Energy Standards Board (NAESB), the Institute of Electrical and Electronic Engineers (IEEE), and the Metropolitan Washington Council of Governments (COG).

Ken and his wife, Laura, reside in Virginia Beach, Virginia.

Southern Company Gas is a wholly owned subsidiary of Atlanta-based Southern Company (NYSE:SO), America’s premier energy company. Southern Company Gas serves approximately 4.5 million natural gas utility customers through its regulated distribution companies in seven states and more than 1 million retail customers through its companies that market natural gas and related home services. Other nonutility businesses include investments in interstate pipelines, asset management for natural gas wholesale customers and ownership and operation of natural gas storage facilities. For more information, visit Southern Company Gas at southerncompanygas.com.
CONSTITUTION PIPELINE COMPANY, LLC,

Petitioner,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION; BASIL SEGGOS, Acting Commissioner, New York State
Department of Environmental Conservation; JOHN FERGUSON, Chief Permit
Administrator, New York State Department of Environmental Conservation,

Respondents,

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

Intervenors.

Before: KEARSE, WESLEY, and DRONEY, Circuit Judges.

Petition for review of respondents' decision denying application for certification

* The Clerk of Court is directed to amend the official caption to conform with the above.
pursuant to § 401 of the Clean Water Act, 33 U.S.C. § 1341, that petitioner's proposed interstate
natural gas pipeline would comply with New York State water quality standards ("§ 401
certification"). Respondents denied the application on the ground that petitioner had not complied
with requests for relevant information. Petitioner contends (1) that respondents exceeded the statutory
time limitations for the State's review of the application and that they must therefore be ordered to
notify the United States Army Corps of Engineers ("USACE") that the State waives its right to issue
or deny § 401 certification, thereby allowing USACE to issue a permit to petitioner under § 404 of
the Clean Water Act, see 33 U.S.C. § 1344(a); and (2) alternatively, that respondents' decision should
be vacated on the ground that the denial of the application was arbitrary, capricious, and ultra vires,
and that respondents should be ordered to grant the requested § 401 certification. To the extent that
petitioner challenges the timeliness of respondents' decision, we conclude that we lack jurisdiction
over that challenge. As to the merits, we conclude that respondents' actions were within their
statutory authority and that the decision was not arbitrary or capricious.

Petition dismissed in part and denied in part.

JOHN F. STOVIAK, Philadelphia, Pennsylvania (Saul Ewing,
Philadelphia, Pennsylvania; Elizabeth Utz Witmer, Saul Ewing,
Wayne, Pennsylvania; Yvonne E. Hennessey, Barclay Damon,
Albany, New York, on the brief), for Petitioner.

BRIAN LUSIGNAN, Assistant Attorney General, Albany, New York
(Eric T. Schneiderman, Attorney General of the State of New
York, Barbara D. Underwood, Solicitor General, Andrew B.
Ayers, Senior Assistant Solicitor General, Frederick A. Brodie,
Assistant Solicitor General, Lisa M. Burianek, Deputy Bureau
Chief, Albany, New York, on the brief), for Respondents.
KARA E. PAULSEN**, White Plains, New York (Karl S. Coplan, Todd D. Ommen, Anne Marie Garti, Pace Environmental Litigation Clinic, Inc., White Plains, New York, on the brief), for Intervenor Stop the Pipeline.

MONEEN NASMITH, New York, New York (Deborah Goldberg, Christine Ernst, Earthjustice, New York, New York, on the brief), for Intervenors Catskill Mountainkeeper, Inc., Sierra Club, and Riverkeeper, Inc.


KEARSE, Circuit Judge:

Petitioner Constitution Pipeline Company, LLC ("Constitution"), petitions pursuant to 15 U.S.C. § 717r(d)(1) for review of an April 22, 2016 decision of the New York State Department of Environmental Conservation ("NYSDEC" or the "Department") denying Constitution's application

** Law student appearing pursuant to Local Rule 46.1(e).
for certification pursuant to § 401 of the Federal Water Pollution Control Act, more commonly known as the Clean Water Act (or "CWA"), 33 U.S.C. § 1341 ("§ 401 certification"), that Constitution's proposed interstate natural gas pipeline would comply with New York State (or "State") water quality standards (or "WQS"). NYSDEC denied the application on the ground that Constitution had not provided sufficient information. In its petition, Constitution contends principally (1) that NYSDEC exceeded the § 401(a) time limitations for the State's review of the application and that NYSDEC must therefore be ordered to notify the United States Army Corps of Engineers ("USACE" or "Army Corps of Engineers" or "Army Corps") that the State has waived its right to act upon Constitution's § 401 certification application, thereby allowing USACE to issue a permit to petitioner under § 404 of the Clean Water Act, see 33 U.S.C. § 1344(a); and (2) alternatively, that Constitution submitted sufficient information and that NYSDEC's decision should be vacated on the ground that its denial of the application was arbitrary, capricious, and ultra vires, and that NYSDEC should be ordered to grant the requested § 401 certification. To the extent that Constitution challenges the timeliness of the NYSDEC decision, we dismiss the petition for lack of jurisdiction. As to the merits, we conclude that NYSDEC's actions were within its statutory authority and that its decision was not arbitrary or capricious, and we deny the petition.

I. BACKGROUND

Constitution proposes to construct a 121-mile interstate natural gas pipeline in Pennsylvania and New York, approximately 98 miles of which would be in New York. In connection with this project (the "Project"), Constitution applied for, to the extent pertinent here, a "certificate
of public convenience and necessity" from the Federal Energy Regulatory Commission ("FERC"), 15 U.S.C. § 717f(c), a CWA § 401 water quality certification (or "WQC") from New York State that the Project would comply with State water quality standards (see 6 N.Y.C.R.R. parts 701 to 704), and a CWA § 404 permit from the Army Corps of Engineers to allow discharges into United States navigable waters.

A. Proceedings Before FERC

In September 2012, FERC announced that it would prepare an environmental impact statement ("EIS") for Constitution's Project and asked Constitution to submit a feasibility study explaining how it would install the pipeline across waterbodies (generally using that term to refer to streams but not wetlands). For such installations, there is a trenched method--a dry open-cut crossing-which involves diverting a stream, digging a trench through the banks and stream bed, installing and burying the pipeline, and then allowing the stream to resume flowing in the stream bed. (See, e.g., FERC Final Environmental Impact Statement ("FEIS") pages 2-21 to 2-22.) There are also trenchless crossing methods--including Horizontal Directional Drill (or "HDD"), Direct Pipe (or "DP"), and conventional bore--which involve digging pits on either side of a waterbody and boring or drilling underneath the stream. FERC asked Constitution to provide information with regard to trenchless construction methods for crossing several categories of streams, including those classified by the states as sensitive or high quality and those greater than 30 feet wide where a dry construction method would not be feasible.
1. Constitution's Trenchless Feasibility Study

Constitution submitted to FERC a study discussing trenchless crossing methods. (See Constitution, Feasibility Study: Trenchless Construction Methods for Sensitive Environmental Resource Crossings (Nov. 2013) ("Constitution 2013 Feasibility Study" or "Study") pages 1-3 to 1-5.) Trenchless methods do not disturb soil or organisms in the stream banks, stream bed, or in the stream itself, but require disturbing surrounding areas to clear space for installation pits; there are also risks of mid-project drill breakage, with leakage of drill fluid into the waterbody. (See Constitution 2013 Feasibility Study page 2-3; FEIS page 2-24.) Use of the trenched method does not require as much installation space or present the risk of drill failure; but it requires stream diversion and digging into the stream bed and banks. (See, e.g., FEIS pages 2-21 to 2-22.)

The Constitution feasibility study dealt principally with locations where the waterbody was designated by New York or Pennsylvania as sensitive or high quality. (See Constitution 2013 Feasibility Study pages 2-2 to 2-3.) As a result, Constitution eliminated from consideration for trenchless crossings all but 89 of the 251 New York waterbodies that would be crossed by the pipeline or affected by pipeline construction.

The remaining 89 locations were addressed in three phases. The Study's "Phase I[] Desktop Analysis" (id. pt. 1.0 page 1-1) further reduced the number of New York waterbodies considered by Constitution for trenchless crossings from 89 to 26, in part by eliminating streams less than 30 feet wide, even if they were classified by New York as sensitive or high-quality (see id. pages 2-1, 2-3). Constitution stated that trenchless crossings for such narrower waterbodies would potentially require workspace requirements significantly greater than those generally needed for a conventional dry crossing method. (See id. page 2-3.) Thus, unless such a waterbody was
immediately associated with a larger wetland and/or waterway complex crossed by the Project or was located in the immediate vicinity of a proposed rail or roadway crossing, "Constitution did not evaluate waterbody crossings less than 30 feet in width" (id.).

Phase II was a "Cost/Time/Construction Workspace Impact Analysis." (Id. page 3-1; see also id. pt. 1.0 page 1-1 ("Trenchless construction methods are limited" not only by such matters as "underlying geology, available workspace, [and] available time," but also by "available finances budgeted for a capital project.").) This phase eliminated waterways from trenchless-crossing consideration largely on the basis of expense; as a result, there remained only 13 waterbody crossings in New York for which Constitution planned to investigate a "formal trenchless construction design." (Id. pages 3-2 to 3-4 & tbl.3.2-1.) The Study stated that Phase III, a "geotechnical field analysis" of each of the 13 locations, was in progress. (Id. page 5-1.) Constitution thus planned to use the trenched method for 238 of the 251 New York waterbodies to be crossed.

2. NYSDEC Comments and the FEIS

In connection with FERC's announcement of a planned EIS for the Constitution pipeline--and its subsequent draft EIS ("DEIS")--NYSDEC submitted numerous letters to FERC. The first noted that NYSDEC's preferred method for crossing waterbodies is a trenchless method, in particular

Horizontal Directional Drilling (HDD) because it has the advantages of minimizing land disturbance, avoiding the need for dewatering of the stream, leaving the immediate stream bed and banks intact, and reducing erosion, sedimentation and Project-induced watercourse instabilities.

(November 7, 2012 Letter from NYSDEC to FERC at 3 (emphasis added).) Stating that the DEIS should identify the New York classification of each stream the proposed pipeline would cross,
NYSDEC urged FERC to "evaluate cases where other methods are proposed" and have Constitution
"explain why HDD will not work or is not practical for that specific crossing." (Id. (emphasis
added)).

A May 2013 letter again stated that "NYSDEC's preferred methodology for all stream
crossings is . . . (HDD)"; that letter also stated that "[w]ithin stream crossings, pipelines should be
buried at least 6' below a stream bottom. Minimum cover depth is not subject to variance based on
field conditions." (May 28, 2013 Letter from NYSDEC to FERC ("NYSDEC May 2013 Letter")
at 1-2 (emphasis added).

In September 2013, NYSDEC wrote to join a request by the Army Corps for additional
analysis of whether the Constitution pipeline could be routed along a certain interstate highway, a
route referred to as "Alternative M." (September 25, 2013 Letter from NYSDEC to FERC at 1.)
Constitution responded by arguing that Alternative M would have greater environmental impact than
Constitution's proposed route and noting likely difficulties in obtaining highway agencies' approvals.
(See October 22, 2013 Letter from Constitution to NYSDEC at 2-4.)

In 2014, FERC issued its DEIS, which drew criticism from several sources including
NYSDEC. (See, e.g., March 24, 2014 Letter from NYSDEC to FERC and Army Corps at 1-2 (urging
a revised DEIS to include "geotechnical feasibility studies for all trenchless crossing locations," as
well as "site specific blasting plans that include protocols for in-water blasting and the protection of
aquatic resources and habitats" (emphasis added)); April 7, 2014 Letter from NYSDEC to FERC and
Army Corps ("NYSDEC April 2014 Letter") at 1-5 (adding additional comments and requesting
additional analysis of Alternative M which, in NYSDEC's view, would reduce the amount of
disturbance of higher-quality waterbodies).)
FERC issued its FEIS in 2014 without significantly expanding on several aspects of the DEIS. It did not address NYSDEC's concern that Constitution had not developed site-specific blasting plans. (See FEIS pages 4-15 to 4-16; DEIS page 4-16.) The FEIS added discussion of two new versions of Alternative M proposed by NYSDEC (see FEIS pages 3-46 to 3-47), but rejected them without analyzing disturbances to high-quality waterbodies (compare id. pages 3-32 to 3-47 with NYSDEC April 2014 Letter at 3-4). And the FEIS stated that the pipeline would be buried 60 inches below streams in normal soil conditions and 24 inches in areas of "consolidated rock" (FEIS page 2-16), as contrasted with the NYSDEC May 2013 Letter's statement that the pipe needed to be buried "at least 6' below a stream bottom" (NYSDEC May 2013 Letter at 2).

The FEIS expanded on the DEIS's waterbody crossing information but repeated DEIS explanations for why relatively few crossings were slated to be crossed by trenchless techniques, stating, inter alia, that "[a]ccording to Constitution, trenchless crossing methods are not practical [except in limited circumstances] for waterbody crossings less than 30 feet in width" and that "Constitution indicated that such crossings would be impractical due to minimum length requirements, depth of pipeline considerations, and workspace requirements," and describing the areas that would be required for trenchless crossing "[a]ccording to Constitution" (FEIS page 4-50). The FEIS stated that

*The potential impacts on waterbodies associated with the use of conventional bore or Direct Pipe trenchless crossing methods are considered minimal when compared to other crossing methods.* The waterbody and its banks, and typically the entire immediate riparian zone, would not be disturbed by clearing or trenching; rather, the pipe would be installed below the feature.

(Id. page 4-56 (emphasis added).) FERC added:

*We concur with Constitution's assessment that it is not practicable to use trenchless crossing methods where waterbodies were listed as ephemeral or*
intermittent (because these waterbodies are likely to be dry at the time of crossing) or for waterbodies less than 30 feet in width (as extra workspaces needed would offset potential benefits). . . .

(FEIS, App'x S, page S-52 (emphases added).) The FEIS noted that Constitution had completed geotechnical feasibility studies at only two New York sites. (See FEIS page 4-4.)

B. Proceedings Before NYSDEC

While its application to FERC for a certificate of public convenience and necessity was pending, Constitution submitted an application to the Army Corps for a CWA § 404 permit for the discharge of dredged or fill material while constructing the pipeline and to NYSDEC for a CWA § 401 certification that the Project would comply with State water quality standards. In December 2014, NYSDEC issued a notice that Constitution’s application was complete; but on December 31, it asked Constitution for more information about stream crossings. In January-March 2015, Constitution submitted more information to NYSDEC, and on April 27, 2015, at NYSDEC’s request, Constitution withdrew and resubmitted its § 401 application. (Constitution had also withdrawn and resubmitted its § 401 application at NYSDEC’s request in May 2014.)

1. Stream-Crossing Information Requests by NYSDEC

On January 23, 2015, staff from Constitution and NYSDEC met to discuss trenchless stream-crossing methods (see January 14, 2015 email from NYSDEC Project Manager Stephen M Tomasik to Constitution engineering consultant Keith Silliman; January 27, 2015 email from Tomasik to Constitution Environmental Project Manager Lynda Schubring ("NYSDEC January 27, 2015 email")). Prior to that meeting, Constitution wrote to NYSDEC stating that it had
conducted subsurface geotechnical investigations at the majority of the proposed . . . (HDD) and . . . (DP) trenchless locations. Results of the subsurface geotechnical investigations revealed crossing locations that present a high risk of failure if a trenchless method is used. As a result, trenchless crossing locations with a high risk of failure are not feasible and have been modified to a dry open cut design. Since the last . . . submissions to the USACE, three (3) HDD or DP locations affecting six (6) wetlands or waterbodies have changed to an open cut construction method . . . .

(January 22, 2015 Letter from Schubring to Tomasik at 1.) Constitution also stated that six other originally proposed trenchless crossings would be crossed by a trenched method, "to address various concerns raised by [state and local] authorities relative to the trenchless crossings of specific public roadways and associated infrastructure." (Id. at 2.) After the January 23 meeting, NYSDEC requested additional documents that Constitution personnel had said informed its decision to use the trenched crossing method at two locations, as well as "information about stream crossings that we requested on 12/31/2014." (NYSDEC January 27, 2015 email).

In response, Constitution submitted feasibility evaluations based on geotechnical studies for four locations: two wetlands crossings and two waterbody crossings. One of the waterbody feasibility evaluations concluded that using either HDD or DP was infeasible due to subsurface soil conditions; the other did not address the feasibility of trenchless crossing methods, and instead discussed only a contingency open-cut crossing to be used if the proposed DP crossing failed.

In February 2015, Constitution submitted to NYSDEC a document titled "Draft Trenchless Feasibility Study Edits" ("Constitution 2015 Feasibility Draft") that appears to be a version of part of the 2013 trenchless feasibility study that Constitution had submitted to FERC, merely expanding on the manner in which each trenchless method operates. Again there was no discussion of stream crossings site-by-site. The Constitution 2015 Feasibility Draft stated that

Constitution recognizes that, in general, performing . . . (HDD) for streams
less than 30 feet in width causes greater net environmental impacts than a dry
open cut method and this threshold is an industry recognized standard.
Constitution has not identified any NYSDEC regulation, formally adopted
policy or guidance document that would warrant deviating from this standard.

(Id. at 1 (emphases added).) It also discussed the Direct Pipe method, stating that "it is likely that
additional forest will require clearing to perform DP for most of the protected stream crossings," and
that "[m]any" streams are in valleys whose slopes make the DP method infeasible. (Id. at 2-3
(emphases added).) In addition, the Constitution 2015 Feasibility Draft stated that DP technology is
of "limited availability," leading Constitution to conclude that using "DP technology for . . . streams
less than 30 feet in width is not a realistic or viable expectation within a reasonable period of time."
(Id. at 3 (emphasis added).)

In March 2015, NYSDEC sent Constitution a list of 20 waterbody locations that
NYSDEC "wants crossed via HDD," stating that NYSDEC "is still expecting an evaluation as to
whether an HDD is technically feasible for each of these streams." (March 17, 2015 email from
NYSDEC Major Project Management Unit Chief Christopher M. Hogan to Silliman (emphasis
added).) In April 2015, as indicated above, Constitution withdrew and resubmitted its § 401 WQC
request.

2. Subsequent Discussions

In May 2015, NYSDEC noted that it had agreed to "eliminate" four streams from
"further consideration for trenchless crossing methods." (May 22, 2015 email from Tomasik to
Schubring, Silliman, et al.)

In July 2015, a member of NYSDEC's staff emailed to certain Army Corps staff
members a "Confidential" message attaching a "VERY PRELIMINARY version of a Constitu:ion
permit" (July 20, 2015 email from Tomasik to Kevin J. Bruce et al., Army Corps), which included a table of 19 locations that "shall be crossed using a trenchless construction method"—unless an "experienced and qualified engineer" concludes that the techniques are "not constructible or not feasible" (Confidential Draft NYSDEC Certification Conditions at 17). The draft, however, required Constitution, "prior to beginning construction of any trenchless stream crossing," to "submit a[...]

Trenchless Crossing Plan' for each trenchless stream crossing," including "detailed engineering plans" for each location. (Id. at 18 (emphases added).)

In September 2015, Constitution submitted to NYSDEC an Environmental Construction Plan, attached to which was a Blasting Plan. (See Constitution, Environmental Construction Plan 50 (Aug. 2015).) This plan listed 253 "[a]reas of shallow depth to bedrock crossed by the [pipeline]" in New York, but stated that "[a] final determination on the need for blasting will be made at the time of construction." (Constitution, Blasting Plan (Aug. 2015) ("Blasting Plan") pages 1-1, 1-2 & tbl.1.2-2, 4-1.) The Blasting Plan identified regulations and a permit that would govern blasting in Pennsylvania, but stated that "[a]ll blasting operations in New York will be conducted in accordance with an in-stream b[il]asting protocol to be prepared by Constitution." (Id. page 4-1 (emphasis added).)

C. NYSDEC's Decision Denying § 401 Certification

In a 14-page letter to Constitution dated April 22, 2016, NYSDEC denied Constitution's application for CWA § 401 certification ("NYSDEC Decision" or "Decision"), stating that "the Application fails in a 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," NYSDEC Decision at 1. Although also
noting the lack of adequate information as to such issues as the feasibility of the Alternative M route,
blasting information, pipe burial depth, and wetlands crossings, see, e.g., id. at 11-14, the Decision
focused principally on Constitution's failure to provide information with respect to stream crossings.
NYSDEC noted that Constitution's Project "would disturb a total of 251 streams . . .,
87 of which support trout or trout spawning," and that "[c]umulatively, construction would disturb
a total of 3,161 linear feet of streams and result in a combined total of 5.09 acres of temporary stream
disturbance impacts." NYSDEC Decision at 8. It stated that although

[f]rom inception of its review of the Application, NYSDEC directed
Constitution to demonstrate compliance with State water quality standards and
required site-specific information for each of the 251 streams impacted by the
Project[, and] NYSDEC informed Constitution that all 251 stream crossings
must be evaluated for environmental impacts and that trenchless technology
was the preferred method for stream crossing[, and that this information was
conveyed to Constitution and FERC on numerous occasions since November
2012[,] . . . Constitution has not supplied the Department with the necessary
information for decision making.

Id. (emphasis in original).

The Decision stated that because some form of trenchless technology is the "most
protective method for stream crossings,"

NYSDEC directed Constitution to determine whether a trenchless technology
was constructible for each stream crossing. On a number of occasions
NYSDEC identified the need to provide information so that it could evaluate
trenchless stream installation methods (see Table 2, below); however,
Constitution has not provided sufficient information . . . .

Id. (footnote omitted) (emphasis added).

Table 2 in the Decision principally chronicled NYSDEC's requests of Constitution--
both directly and indirectly in its submissions to FERC--and noted Constitution's resistance, including
the following:

- In June 2012, "NYSDEC stated in a letter to Constitution that for protected streams and wetlands, trenchless technology is the preferred method for crossing and should be considered for all such crossings (emphasis added)."

- On November 7, 2012, "[i]n comments to FERC, NYSDEC stated that for streams and wetlands the preferred method for crossing is trenchless technology," and that as to each crossing where another method is proposed "Constitution should explain why trenchless crossing technology will not work or is not practical for that specific crossing."

- On April 9, 2013, "FERC[] ... directed Constitution to address all of the comments filed in the public record by other agencies ... including all comments from the NYSDEC."

- On May 28, 2013, at a "[m]eeting" of "Constitution and NYSDEC staff... NYSDEC reiterated[d] that acceptable trenchless technology was the preferred installation method and that stream crossings should be reviewed for feasibility of using those technologies."

- In July and August 2013, on "[f]ield visits of proposed stream crossings prior to permit applications to the Department[, a]t each crossing, NYSDEC emphasized to Constitution staff that trenchless technology is preferred/most protective."

- In its November 2013 Trenchless Feasibility Study, Constitution "arbitrarily eliminated from any consideration for trenchless crossing methods" "all streams less than 30' wide."

- On December 31, 2014, at a meeting with Constitution staff, "NYSDEC indicated that the Trenchless Feasibility Study was inadequate, e.g. provided insufficient justification and removed all streams less than 30 feet in width from analysis." NYSDEC gave Constitution "an informational request table including required technical information."

- On January 13, 2015, an "Army Corps of Engineers letter reiterate[d] a request for a feasibility analysis of trenchless crossings."

- At a January 23, 2015 "[m]eeting between Constitution and NYSDEC staff ... Constitution stated it was unable to complete the [informational request] table [it received from NYSDEC] on December 31, 2014[.]. NYSDEC staff indicated that the justification for stream crossing methods was insufficient and that appropriate site specific information must be provided."
In a January 28, 2015 "[c]onference call[,] NYSDEC reiterated its request for a site specific analysis of trenchless stream crossings for all streams including those under 30 feet wide."

On February 5, 2015, "Constitution provided an updated example of a trenchless feasibility study but that example continued to exclude streams up to 30 feet wide from analysis and did not provide detailed information of the majority of streams."

NYSDEC Decision at 9-10 (emphases added).

Although the Decision's Table 2 ended with the February 2015 entry, the Decision noted that Constitution's "unwillingness to provide a complete and thorough[] Trenchless Feasibility Study" persisted:

In May 2015, Constitution provided detailed project plans for 25 potential trenchless crossings, but only two of those plans were based on full geotechnical borings that are necessary to evaluate the potential success of a trenchless design. Detailed project plans including full geotechnical borings for the remaining stream crossings have not been provided to the Department.

Id. at 11 (emphasis added). The NYSDEC Decision stated that due to the lack of detailed project plans, including geotechnical borings, the Department has determined to deny Constitution's WQC Application because the supporting materials supplied by Constitution do not provide sufficient information for each stream crossing to demonstrate compliance with applicable narrative water quality standards for turbidity and preservation of best usages of affected water bodies. Specifically, 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.¹⁰

Furthermore, the Application remains deficient in that it does not contain sufficient information to demonstrate compliance with 6 NYCRR Part 701 setting forth conditions applying to best usages of all water classifications. Specifically, "the discharge of sewage, industrial waste or other wastes shall not cause impairment of the best usages of the receiving water as specified by the water classifications at the location of the discharge and at other locations
that may be affected by such discharge,\textsuperscript{11}

\textsuperscript{10} 6 NYCRR § 703.2.
\textsuperscript{11} 6 NYCRR § 701.1.

NYSDEC Decision at 12 & nn.10-11. The Decision added that

\textsuperscript{[c]umulatively, impacts to both small and large streams from the
construction and operation of the Project can be profound and include loss of
available habitat, changes in thermal conditions, increased erosion, creation of
stream instability and turbidity, impairment of best usages, as well as
watershed-wide impacts resulting from placement of the pipeline across water
bodies in remote and rural areas (See Project Description and Environmental
Impacts Section, above). Because the Department's review concludes that
Constitution did not provide sufficient detailed information including site
specific project plans regarding stream crossings (e.g. geotechnical borings)
the Department has determined to deny Constitution's WQC Application for
failure to provide reasonable assurance that each stream crossing will be
conducted in compliance with 6 NYCRR §608.9.

NYSDEC Decision at 12; see 6 N.Y.C.R.R. § 608.9(a)(2) ("The applicant" for a CWA § 401
certification "must demonstrate compliance with sections 301-303, 306 and 307 of the Federal Water
Pollution Control Act, as implemented by . . . water quality standards and thermal discharge criteria
set forth in Parts 701, 702, 703 and 704 of this Title . . . ").

II. DISCUSSION

In its petition for review (or "Petition"), Constitution contends principally (1) that
NYSDEC failed to issue its Decision within a reasonable time as required by § 401 and thus must be
required to inform USACE that NYSDEC has waived its right to rule on Constitution's application
for a WQC, thereby enabling the Army Corps to grant Constitution a permit for its pipeline Project,
or (2) alternatively, that Constitution submitted sufficient information and that NYSDEC's decision
should be vacated on the ground that its denial of the application was arbitrary, capricious, and ultra
vires, and that NYSDEC should be ordered to grant the requested § 401 certification. For the reasons
that follow, we (1) conclude that Constitution's first contention, which would have us treat NYSDEC's
Decision as an act that is void, lies beyond the jurisdiction of this Court, and (2) conclude that
NYSDEC's Decision was not ultra vires, arbitrary, or capricious.

A. Constitution's Argument that NYSDEC Waived Its § 401 Authority

The Natural Gas Act (or "NGA"), 15 U.S.C. §§ 717-717z, sets out provisions with
respect to, inter alia, the construction of transportation facilities for natural gas, see id. § 717f. Such
projects are also subject to restrictions under other federal statutes, including provisions of the Clean
Water Act, sec, e.g., id. § 717b(d)(3). Section 401 of the CWA requires an applicant for a federal
permit to conduct any activity that "may result in any discharge into the navigable waters" of the
United States to obtain "a certification from the State in which the discharge . . . will originate . . . that
any such discharge will comply with," inter alia, the state's water quality standards. 33 U.S.C.
§ 1341(a)(1).

As to petitions for review relating to such applications, § 717r of the NGA divides
jurisdiction between the Circuit in which the facility is proposed to be constructed and the United
States Court of Appeals for the District of Columbia Circuit. It states, in pertinent part, as follows:

(1) In general

The United States Court of Appeals for the circuit in which a facility
subject to . . . section 717f of this title is proposed to be constructed . . . shall
have original and exclusive jurisdiction over any civil action for the review of
an order or action of a Federal agency (other than [FERC]) or State
administrative agency acting pursuant to Federal law to issue, condition, or
deny any permit, license, concurrence, or approval (hereinafter collectively

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referred to as "permit") required under Federal law . . .

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than FERC) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law . . .

15 U.S.C. §§ 717r(d)(1)-(2) (emphases added). We regard subsection (2)--titled "Agency delay"--as encompassing not only "an alleged failure to act" but also an allegation that a failure to act within a mandated time period should be treated as a failure to act. This is the nature of Constitution's first argument.

Constitution points out that CWA § 401 provides that "[i]f" a "State . . . agency" from which an applicant for a federal permit has sought a water quality certification "fails or refuses to act on [the] 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." 33 U.S.C. § 1341(a)(1). Constitution argues that NYSDEC did not issue its Decision until 32 months after Constitution submitted its initial application, 16 months after NYSDEC issued notice that that initial application was complete, 15 months after the deadline imposed by FERC, nearly a year ("359 days") after Constitution's 2015 withdrawal-and-resubmission of its application--and eight months after Constitution claims it was advised by NYSDEC that NYSDEC "had everything it needed to issue a Section 401 Certification." (Constitution brief in support of Petition at 28-29.) Constitution argues that NYSDEC "waived its right" to rule on the certification application and must be required to so notify the Army Corps. (Id. at 37.)

We note first that there is nothing in the administrative record to show that NYSDEC
received the information it had consistently and explicitly requested over the course of several years—
much less anything to support Constitution's claim that NYSDEC said "it had" all of the information
it required "to issue" the requested certification (id. at 29). Although Constitution proffered in this
Court non-record declarations from certain of its personnel, those "outside-the-record declarations and
associated portions of [Constitution]'s brief" were stricken. Constitution Pipeline Co. v. Seggos, No.

Second, Constitution's "waive[r]" argument is that the NYSDEC Decision must be
treated as a nullity by reason of NYSDEC's "failing to act within the prescribed time period under the
CWA" (Constitution brief in support of Petition at 37 (emphasis added)). Such a failure-to-act claim
is one over which the District of Columbia Circuit would have "exclusive" jurisdiction, 15 U.S.C.
§ 717r(d)(2). See generally Weaver's Cove Energy, LLC v. Rhode Island Department of
Environmental Management, 524 F.3d 1330, 1332 (D.C. Cir. 2008). Accordingly, we dismiss
Constitution's timeliness argument for lack of jurisdiction.

B. Constitution's Challenge to the Merits of NYSDEC's Decision

Judicial review of an administrative agency's denial of a CWA § 401 certificate is
limited to grounds set forth in the Administrative Procedure Act, 5 U.S.C. §§ 701-706. We review
the agency's interpretation of federal law de novo; if the agency correctly interpreted federal law, we
review its factual determinations under the arbitrary-and-capricious standard, see id. § 706(2)(A);
Islander East Pipeline Co. v. McCarthy, 525 F.3d 141, 150 (2d Cir. 2008) ("Islander East II")
Islander East Pipeline Co. v. Connecticut Department of Environmental Protection, 482 F.3d 79, 94
(2d Cir. 2006) ("Islander East I").
1. Federal Law

Constitution argues that as a matter of law, NYSDEC's "jurisdiction to review"--and "in effect, veto"--FERC determinations is preempted by FERC's performance of its obligations under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h, to prepare a DEIS and a FEIS. (Constitution brief in support of Petition at 37, 39.) We disagree that NYSDEC's action was preempted.

Although NEPA requires federal-agency review of virtually any possible environmental effect that a proposed action may have, see generally 40 C.F.R. § 1502.16, it does not impose substantive standards. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). "[T]hrough a set of action-forcing procedures," NEPA "require[s] that agencies take a hard look at environmental consequences," but it is "well settled that NEPA itself does not mandate particular results[; it] simply prescribes the necessary process." Id. (internal quotation marks omitted). Thus, NEPA states, in pertinent part, that "[n]othing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency . . . to act, or refrain from acting contingent upon the recommendations or certification of any . . . State agency." 42 U.S.C. § 4334.

We note also that while the Natural Gas Act generally preempts state laws, it states that "[e]xcept as specifically provided[,] . . . nothing" in the NGA "affects the rights of States under . . . the [CWA] (33 U.S.C. § 1251 et seq.)," 15 U.S.C. § 717b(d). CWA § 511, in turn, preserves the states' authority to determine issues of a planned project's effect on water quality. See 33 U.S.C. § 1371(c)(2)(A). CWA § 401(a)(1) requires that an entity such as Constitution, proposing to construct an interstate pipeline, obtain from each state in which the pipeline is to be constructed a certification that "any . . . discharge" from a proposed activity "will comply with the applicable provisions of [33
U.S.C. §§ 1311, 1312, 1313, 1316, and 1317." 33 U.S.C. § 1341(a)(1). Sections 1311, 1312, 1316, and 1317 establish, and allow the Environmental Protection Agency ("EPA") to establish, standards governing numerous aspects of water quality; and § 1313 allows states to develop their own water quality standards and submit them to the EPA for approval. If the EPA approves a state's water quality standards, it publishes a notice of approval and they become the state's EPA-approved standards, regulating water quality in that state. See 33 U.S.C. §§ 1313(a), (c).

The New York State water quality standards, approved by the EPA, see generally 42 Fed. Reg. 56,786, 56,790 (Oct. 28, 1977), are found in 6 N.Y.C.R.R. parts 701 to 704, and were invoked by the NYSDEC Decision, which stated that "[d]enial 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." NYSDEC Decision at 7; see also id. at 12 nn.10-11 and accompanying text (quoted in Part I.C. above). The State standards classify waterbodies in terms of, inter alia, potability and their suitability for various activities such as swimming and fishing, see 6 N.Y.C.R.R. pt. 701; they set standards for characteristics such as water odor, color, and turbidity, see id. pt. 703; and they regulate thermal discharges into waterbodies, see id. pt. 704.

Thus, the relevant federal statutes entitled NYSDEC to conduct its own review of the Constitution Project's likely effects on New York waterbodies and whether those effects would comply with the State's water quality standards.

CWA § 401(a)(1), as pertinent here, states that "[n]o license or permit shall be granted if [a § 401] certification has been denied by the State," 33 U.S.C. § 1341(a)(1). Thus, we have indeed referred to § 401 as "a statutory scheme whereby a single state agency effectively vetoes an energy
pipeline that has secured approval from a host of other federal and state agencies." Islander East II, 525 F.3d at 164 (emphases added); accord Keating v. FERC, 927 F.2d 616, 622 (D.C. Cir. 1991) ("Through [the § 401 certification] requirement, Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval." (emphasis added)).

Constitution also argues that NYSDEC's demands for information with regard to, e.g., possible alternative routes for the planned pipeline (see, e.g., NYSDEC Decision at 3 (NYSDEC "asked Constitution to analyze alternative routes that could have avoided or minimized impacts to an extensive group of water resources")), as well as Constitution's planned blasting sites and the depth at which the pipe would be buried, exceeded NYSDEC's authority (Constitution brief in support of Petition at 38). We need not address all of these contentions. 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. See, e.g., Islander East II, 525 F.3d at 151-52. And 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. See, e.g., id. at 158.

2. Application of the Arbitrary-and-Capricious Standard

Under the arbitrary-and-capricious standard, "[a] reviewing court may not itself weigh the evidence or substitute its judgment for that of the agency." Islander East II, 525 F.3d at 150. "Rather," we "consider[] whether the agency 'relied on factors which Congress has not intended it to
consider, entirely failed to consider an important aspect of the problem, offered an explanation for its
decision that runs counter to the evidence before the agency, or is so implausible that it could not be
ascribed to a difference in view or the product of agency expertise." *Id.* at 150-51 (quoting *Motor
Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance
Co.*, 463 U.S. 29, 43 (1983) ("State Farm").

[W]ithin the prescribed narrow sphere, judicial inquiry must be searching and
careful. . . . Notably, a court must be satisfied from the record that the agency
. . . examine[d] the relevant data and articulate[d] a satisfactory explanation for
its action. . . . Further, the agency's decision must reveal a rational connection
between the facts found and the choice made.

*Islander East II*, 525 F.3d at 151 (internal quotation marks omitted). If there is "sufficient evidence
in the record to provide rational support for the choice made by the agency," we must uphold its
decision. *Id.* at 152.

Usually, the agency's choice concerns whether the applicant's submission of the
relevant information warrants the granting of the application. In the present case, as summarized in
Part I.C. above, NYSDEC denied Constitution's application because Constitution refused to provide
information that NYSDEC had repeatedly requested with regard to, *inter alia*, issues such as those
just discussed in Part II.B.1. above, and issues as to the feasibility, site-by-site, of trenchless methods
for most of the 251 stream crossings planned in New York. Constitution does not contend that those
requests were not made. Indeed, in its own brief in this Court, Constitution acknowledges that the
NYSDEC Decision (the "Denial") explained that NYSDEC had requested but had not received
sufficient information with regard to:

♦ construction methods and site-specific project plans for stream crossings
  (Denial at 8-11 . . .);

♦ alternative routes (*Id.* at 11 . . .);
pipeline burial depth in stream beds (Id. at 12-13 . . .);

procedures and safety measures Constitution would follow in the event that blasting is required (Id. at 13 . . .);

Constitution's plans to avoid, minimize, or mitigate discharges to navigable waters and wetlands (Id. at 13-14 . . .); and

cumulative impacts (Id. at 3, 5, 7, 14 . . .).

(Constitution brief in support of Petition at 21-22.) Nowhere does Constitution claim to have provided the above categories of information; rather, it insists that it provided NYSDEC with "sufficient" information (Id. at 52-62) because use of trenchless crossing methods for streams less than 30 feet wide is not "an industry recognized standard" (Constitution 2015 Feasibility Draft at 1).

However, in order to show that an agency's decision--or its request for additional information as to alternative methods--is arbitrary and capricious, "it is not enough that the regulated industry has eschewed a given [technology]." State Farm, 463 U.S. at 49. Industry preferences do not circumscribe environmental relevance.

In Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989), the Supreme Court considered whether a federal agency, presented with new evidence, should have been required to file a new supplemental environmental impact statement; the Court stated that the matter of whether additional information is "significant" is "a classic example of a factual dispute the resolution of which implicates substantial agency expertise," as to which the courts "must defer to the informed discretion of the responsible . . . agencies," id. at 376-77 (internal quotation marks omitted). We cannot conclude that any less deference is due an agency's determination that it should not grant a permit application where it has already determined that additional information is needed, and the applicant refuses to supply it. Cf. University of Iowa Hospitals & Clinics v. Shalala, 180 F.3d 943,
955 (8th Cir. 1999) (where agency regulations required substantiation of costs for which reimbursement was sought, denial of reimbursement based on inadequate documentation was not arbitrary and capricious); *Mendoza v. Secretary, DHS*, 851 F.3d 1348, 1356 (11th Cir. 2017) (denial of visa application where applicants declined to answer relevant questions relating to eligibility was not arbitrary and capricious; the applicants "were free to refuse to answer [the agency's] questions . . . but they did so at their own peril"). Indeed, an agency's decision may be found "arbitrary and capricious" for "issuing a permit with insufficient information." *Utahns For Better Transportation v. United States Department of Transportation*, 305 F.3d 1152, 1192 (10th Cir. 2002) (emphasis added).

Here, the record amply shows, inter alia, that Constitution persistently refused to provide information as to possible alternative routes for its proposed pipeline or site-by-site information as to the feasibility of trenchless crossing methods for streams less than 30 feet wide—i.e., for the vast majority of the 251 New York waterbodies to be crossed by its pipeline—and that it provided geotechnical data for only two of the waterbodies.

In sum, NYSDEC is responsible for evaluating the environmental impacts of a proposed pipeline on New York waterbodies in light of the State's water quality standards. Applying the arbitrary-and-capricious standard of review, we defer to NYSDEC's expertise as to the significance of the information requested from Constitution, given the record evidence supporting the relevance of that information to NYSDEC's certification determination. We conclude that the denial of the § 401 certification after Constitution refused to provide relevant information, despite repeated NYSDEC requests, was not arbitrary or capricious.
CONCLUSION

We have considered all of Constitution's arguments and have found in them no basis for granting the petition for review. Insofar as the petition contends that the NYSDEC Decision is a nullity on the ground that it was untimely, the petition is dismissed for lack of jurisdiction; to the extent that the petition challenges the NYSDEC Decision on the merits, the petition is denied.
BILLY OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.
VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee

Costs of printing appendix (necessary copies )

Costs of printing brief (necessary copies )

Costs of printing reply brief (necessary copies )

(VERIFICATION HERE)

______________________________
Signature
BILL OF COSTS TRANSMITTAL

To: ADMINISTRATIVE ATTORNEY

From: Yenni Liu Ext: 8541

A copy of the docket sheet and the bill of costs in the above captioned case is being sent to you for the preparation of the statement of costs. The mandate is due on September 8, 2017.
Supreme Court won’t hear pitch that N.Y. overstepped in Constitution pipeline denial

Washington (Platts) -- 30 Apr 2018 224 pm EDT/1824 GMT

The US Supreme Court has turned aside another attempt by Williams to revive the 121-mile, 650 MMcf/d Constitution Pipeline project, declining to take up a case in which the natural gas industry had argued that New York was usurping federal authority.

The project has been stalled since April 2016 when the New York State Department of Environmental Conservation rejected a water quality certification, finding the pipeline developer failed to supply pertinent information about the feasibility of trenchless stream crossings.

Designed to transport up to 650 MMcf/d of Northeast Pennsylvania production to Interconnects with Iroquois Gas Transmission and Tennessee Gas Pipeline in upstate New York, the project would allow for additional takeaway capacity out of the constrained northeast Pennsylvania production region in addition to potentially displacing imports from Eastern Canada into New York.

Williams had doggedly pursued a variety of avenues in an attempt to overturn the state denial, including a petition at the 2nd US Circuit Court of Appeals, a failed federal district court suit and a request that the US Federal Energy Regulatory Commission f unc the state water quality review waived. FERC recently denied that request as well.

WILLIAMS TO CONTINUE SEEKING RELIEF AT FERC

Williams said it was disappointed that the high court won’t consider its appeal of the 2nd Circuit ruling, but it said it would continue pressing its case for rehearing at FERC.

The attempt at the Supreme Court to appeal the 2nd Circuit decision upholding New York drew support from trade groups, including the National Association of Manufacturers, the Interstate Natural Gas Association of America, the Natural Gas Supply Association, the American Petroleum Institute and the American Fuel & Petrochemical Manufacturers, which filed a joint amicus brief.

The industry has increasingly raised alarms that New York has been acting as a veto on federal pipeline permitting decisions. They argued that if left un-reviewed, the 2nd Circuit decision would give states a roadmap for blocking construction of FERC-approved pipelines and deprive states and the nation of the benefits of the centralized process set out in the Natural Gas Act. Moneen Nasmith, staff attorney with Earthjustice, which argued on behalf of environmental intervenors, said her group was happy but not surprised "by the recognition by the court that the petition had no merit."

ENVIRONMENTALIST CHEERS WIN FOR STATE AUTHORITY

"We’re definitely elated that the court agreed to allow the 2nd Circuit’s decision to stand and that the state’s authority to say no to a thoroughly deficient application will remain in place," she said Monday. Industry statements about the degree to which the decision would stop natural gas development from going forward are "wildly exaggerated," she said, adding the decision was important in preserving the status quo of allowing states to exercise independent authority to determine if a project complies with the Clean Water Act.

In the decision in question, the 2nd US Circuit Court of Appeal in August 2017 found there was nothing in the record to show NYSDEC had received the information from Constitution it had “consistently and explicitly” sought over the course of several years (Constitution Pipeline v. NYSDEC, 16-1568).

It also upheld New York’s ability to apply state water quality standards in reviewing the permit application, and found that consideration of route alternatives that would lessen impact on state waterbodies is “plainly within the state’s authority.”

Williams in its Supreme Court petition focused on the aspect of the decision that related to alternative routes. It argued the state’s denial of the CWA Section 401 water quality permit on the basis of receiving inadequate information about alternative routes exceeded its limited authority and interfered with FERC’s exclusive jurisdiction, particularly as the state was seeking to apply state water quality standards.

Environmental groups emphasized that the decision was not based on a single finding that state agencies may consider alternative routes.
Rather, they argued that the 2nd Circuit based its decision on a thorough review of a detailed record and found Constitution failed to provide multiple categories of information the state needed.

Williams spokesman Christopher Stockton said, "While we are disappointed in the Supreme Court's decision not to hear our case, we are still fully committed to pursuing our primary avenue of relief, which is the pending rehearing request with [FERC] of its order denying our petition for declaratory order that New York failed to act within 'a reasonable period of time' on Constitution's Section 401 application and any necessary appeal to the D.C. Circuit."

He argued the project is "much-needed energy infrastructure designed to bring natural gas to a region of the country that this past winter experienced the highest natural gas prices in the world."

Cathy Landry, a spokeswoman for INGAA, said it may not be possible to read much into the Supreme Court denying the writ of certiorari, since the high court hears very few cases.

"Since the denial was without a statement, it's impossible to know why the Supreme Court decided not to hear the case," she said.

"There's no precedent established by this," added Howard Nelson of Greenberg Traurig, agreeing that "there's any number of reasons the Supreme Court decides to grant cert." The 2nd Circuit's focus on information New York said was lacking "takes it one further step removed from the issue on the merits [of] whether a state can require an examination of alternatives that FERC didn't," he said. -- Maya Weber, maya.weber@spglobal.com

-- Edited by Richard Rubin, newsdesk@spglobal.com

https://www.platts.com/latest-news/natural-gas/washington/supreme-court-wont-hear-pitch... 05/03/2018
Mich. agency approves permits for DTE Energy's new 1,100-MW gas-fired plant

Monday, April 30, 2018 6:41 PM ET

By Stephanie Tsao

Over the objections of clean energy advocates and large industrial users, the Michigan Public Service Commission approved permits that will allow a DTE Energy Co. utility subsidiary to build a 1,100-MW combined cycle plant, slated to begin operations by 2022.

On April 27, the commission granted three permits, or certificates of necessity, for the project. The DTE Electric Co. plans to build the plant at the site of the Belle River coal-fired power plant, which DTE co-owns with the Michigan Public Power Agency and wants to retire in 2030, according to November 2017 DTE presentation.

One permit allows DTE Electric to recover in customer rates the $951.8 million that will be needed to build the new plant, down from the $989 million DTE had originally requested. Another two permits confirm a need for power and that a gas-fired power plant is the "most reasonable and prudent" resource, the PSC said in a release.

DTE President and COO Trevor Lauer, in a statement, said the approval of the gas plant is an "important step" toward achieving its long-term goal of cutting its carbon footprint by 80% by 2050. However, clean energy advocates have opposed issuing the permits.

DTE's long-term integrated resource plan failed to thoroughly consider alternatives as required by state law, according to a March 12 reply brief filed by the Environmental Law and Policy Center's Senior Staff Attorney Margrethe Kearney. The Chicago-based policy and research group ELPC filed the brief on behalf of the Solar Energy Industries Association, or SEIA; Union of Concerned Scientists; Vote Solar; and Ann Arbor, Mich.-based environmental group the Ecology Center.

In particular, Kearney said DTE failed to consider a hybrid portfolio that included a mix of energy conservation, demand response and battery storage to offset the need for some of the gas capacity, according to the reply brief.

The commission "authorized a $1 billion plant that would not pass muster with Michigan's laws if it were proposed today," Sean Gallagher, SEIA's vice president of state affairs, said in an April 27 statement.

A membership of large industrial customers represented by the Association of Businesses Advocating Tariff Equity, or ABATE, opposed the certificates because DTE allegedly did not consider running their coal plants longer instead of modeling them to retire prematurely, Robert Strong, general counsel for ABATE, said April 27 in an interview. The new gas capacity would partially replace 2,100 MW of coal capacity DTE plans to retire between 2020 and 2023 at its River Rouge, St Clair and Trenton Channel plants, the PSC said.

Strong said he was not ready to comment on whether ABATE plans to appeal. *(Michigan PSC Case No. U-18419)*
S&P Global

Southern reveals plan for cutting nearly all greenhouse gas emissions by 2050

Monday, April 23, 2018 6:16 PM ET

By Esther Whieldon

Following pressure from investors, Southern Co. has released a report outlining an ambitious goal of cutting nearly all of its greenhouse gas emissions by 2050.

The report, posted April 20, explained how the company expects to reach its long-term goal of transitioning to "low- to no- carbon operations" by 2050, which Southern Co. Chairman, President and CEO Thomas Fanning first announced April 9.

In the short term, Southern plans to cut 50% of its emissions across all operations by 2030 from 2007 levels. The company has already reduced its emissions 36% from 2007 levels. Southern estimated it emitted about 97 million metric tones of greenhouse gas emissions in 2017.

The report is meant to address concerns from investors that the goals of the Paris Agreement on climate change could prove costly for Southern if the company does not take steps to address potential challenges early on.

Southern also contends its business model, which relies heavily on state-regulated electric and gas investments and long-term contracted energy infrastructure, as well as its annual updates to its integrated resource planning process, ensures the financial risk to its rate-regulated assets of the low-carbon transition "is low."

"I am confident that we are prepared and well positioned to meet the needs of our customers well into the future and to succeed in this transition to a low-carbon future," Fanning said in a statement attached to the report. Southern's 11 regulated utilities serve 9 million customers in nine states, mostly in the Southeast.

Southern Co.'s capacity mix (MW)

As of April 23, 2018.
Only includes operating capacity.
Excludes pumped storage.
Source: S&P Global Market Intelligence

Southern is the latest in a string of publicly traded companies that have responded to pressure from investors to act on climate issues. In 2017, 46% of Southern's shareholders backed a resolution to have the company report on its climate change strategy. Although the resolution did not pass, Southern worked with the proponents of the measure over the past year and has met with its 100 largest shareholders to discuss more broadly environment, social and governance issues, it said in the report.

While Southern has set some relatively aggressive targets, its assessment of what will be needed to reach its goals are relatively similar to those other utilities listed in their climate reports. Southern said the transition will require technology advances, state regulatory approvals and continued investments in natural gas, nuclear, renewables and energy efficiency. And like other utilities, Southern does not expect to invest in any new coal-fired generation.

The plan also included cutting the fugitive methane emissions from its natural gas distribution operations to 1% or less of total natural gas production.

Southern expects to add 3,000 MW more renewable generation capacity by 2022 and to begin operating units 3 and 4 of Georgia Power Co.'s Alvin W. Vogtle Nuclear Plant and their
combined capacity of about 2,200 MW in 2021 and 2022. The report also talked about continuing research and development efforts in several areas including carbon capture, usage and sequestration from coal- and gas-fired plants.

Southern invested billions in the Plant Ratcliffe (Kemper County IGCC) power plant with the aim of capturing 65% of its carbon dioxide emissions but suspended that part of the project amid large cost overruns. The Vogtle expansion has also run into major development issues.

Southern on its website said it will "soon" issue a sustainability report using the Edison Electric Institute's environment, social and governance template and its current report conforms with the June 2017 recommendations of the Task Force on Climate-Related Financial Disclosures.
Calif. regulators to consider appropriate utility response to climate change

Thursday, April 26, 2018 6:15 PM ET

By Jeff Stanfield

Convinced that climate change is already causing California to experience rising temperatures, extended drought, increasingly severe windstorms, wildfires and floods, the Public Utilities Commission on April 26 opened a proceeding to consider how electric and gas utilities should respond to the worsening conditions.

The first phase of the rulemaking will involve PG&E Corp. subsidiary Pacific Gas and Electric Co., Edison International subsidiary Southern California Edison Co., Sempra Energy subsidiaries San Diego Gas & Electric Co. and Southern California Gas Co. as well as nine other electric and gas companies, including gas storage operations. Investor-owned telecommunications and water utilities will be subject to later phases of the proceeding and are invited, but not required, to participate now.

The utilities were directed in the order launching the rulemaking to help the commission determine what measures the companies should undertake to respond to climate change challenges to their operations. The PUC wants to incorporate climate change adaptation measures in specific proceedings, such as those used to set rates and reliability requirements. The commission already takes a similar approach to safety and risk mitigation.

The commission said it intends to have utilities incorporate climate change adaptation measures in their investment plans, programs and operations. For example, utilities may be asked to conduct vulnerability assessments.

Commissioner Carla Peterman said other agencies are already taking climate change adaptation steps and emphasized a need to coordinate with them. For instance, the PUC order recalled that the U.S. Department of Energy in a 2016 report projected climate change hazards and their implications for the electric sector, and the California Natural Resources Agency in January updated its report on climate change impacts, vulnerabilities and possible solutions. And in March, Gov. Jerry Brown and legislative leaders announced a coordinated effort to develop solutions to make California more resilient to natural disasters and climate change.

Commission President Michael Picker said the commission intends to adopt a distinctly different role in combining its focus on climate change prevention with new efforts to make sure utilities have the resources to adapt to the consequences of climate change that are already occurring.

"The commission has recognized the challenges of climate change and what we can do to prevent it, but we need to adapt to it and acknowledge we are now living with the effects of climate change," Picker said.

Picker noted that Commissioner Liane Randolph, who is the presiding commissioner for the climate change adaptation proceeding, used to be the deputy secretary and general counsel at the California Natural Resources Agency.