

No. 17-1009

IN THE
Supreme Court of the United States

CONSTITUTION PIPELINE COMPANY, LLC,
—v.— *Petitioner,*

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF IN OPPOSITION FOR INTERVENORS-
RESPONDENTS CATSKILL MOUNTAINKEEPER, INC.;
RIVERKEEPER, INC.; AND SIERRA CLUB**

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QUESTION PRESENTED

Whether the Second Circuit erred in concluding that the New York State Department of Environmental Conservation (“NYSDEC” or the “Department”) acted reasonably and in accordance with applicable law when it denied the application of the Constitution Pipeline Company (“Constitution”) for a water quality certification under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, on the grounds that Constitution failed to provide sufficient information on the construction methods to be used at each waterway crossed by its 124-mile pipeline, the water quality impacts of potential alternative routes, cumulative impacts, and other site-specific aspects of the proposed project.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Catskill Mountainkeeper, Inc.: Catskill Mountainkeeper, Inc. has no parent companies, and there are no publicly held companies that have a 10 percent or greater ownership interest in Catskill Mountainkeeper, Inc.

Catskill Mountainkeeper, Inc., a corporation organized and existing under the laws of the State of New York, is a nonprofit organization dedicated to being the strongest and most effective possible advocate for the Catskill region. Catskill Mountainkeeper, Inc., works through a network of concerned citizens to promote sustainable growth and protect the natural resources essential to healthy communities in the Catskill region.

Riverkeeper, Inc.: Riverkeeper, Inc. has no parent companies, and there are no publicly held companies that have a 10 percent or greater ownership interest in Riverkeeper, Inc.

Riverkeeper, Inc., a corporation organized and existing under the laws of the State of New York, is a nonprofit organization dedicated to protecting the environmental, recreational, and commercial integrity of the Hudson River and its tributaries, and to safeguarding the drinking water of nine million New York City and Hudson Valley residents.

Sierra Club: Sierra Club has no parent companies, and there are no publicly held companies that have a 10 percent or greater ownership interest in Sierra Club.

Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

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INTRODUCTION

In enacting the Natural Gas Act (“NGA”), Congress gave the Federal Energy Regulatory Commission (“FERC” or the “Commission”) primary authority over interstate gas pipelines but preserved the authority of states under three environmental statutes: the Clean Air Act, the Coastal Zone Management Act, and the Clean Water Act. Acting within that reserved authority, NYSDEC reviewed Constitution’s application for certification that its 124-mile gas pipeline would not violate the State’s water quality standards. Over a period of years, NYSDEC repeatedly asked Constitution for information relating to whether and to what extent the pipeline might affect the water quality of the 251 waterways the project would cross in the state. Constitution persistently refused, however, to provide much of that information, including site-specific data and analyses of whether less damaging construction methods could be used. Consequently, NYSDEC was unable to certify that the pipeline would comply with the Clean Water Act’s requirements and denied Constitution’s application without prejudice.

Constitution appealed the denial, but the Second Circuit held that Constitution failed to demonstrate that NYSDEC’s information requests were arbitrary, capricious, or outside the bounds of Section 401. Indeed, based on its review of the record, the court concluded that Constitution ignored NYSDEC’s requests for information related to potential water quality impacts and simply failed to meet its burden to demonstrate that its project could be certified.

The Second Circuit's record-based and well-reasoned determination does not warrant review by this Court; does not conflict with any existing federal law; and, contrary to the overblown claims by Constitution and its amici, presents absolutely no threat to federalism, interstate commerce, or national security. The Court should deny the petition for certiorari.

STATEMENT OF THE CASE

This case concerns the U.S. Court of Appeals for the Second Circuit's decision to uphold NYSDEC's denial of an application under Section 401 of the Clean Water Act to Constitution for its 124-mile natural gas pipeline. The pipeline would cut through both Pennsylvania and New York, and cross 251 streams, disturb 3,161 linear feet of streams, and affect at least 95.2 acres of wetlands during construction in New York State alone. (Pet. App. 39a–40a.)

Because of the Project's potential to degrade water quality, Constitution was required to obtain approval for the pipeline from both FERC and NYSDEC. FERC has authority under the NGA to determine whether the project is in the public convenience and necessity, *see* 15 U.S.C. § 717f, and also is required to review the project's environmental impacts by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* The Commission reviewed Constitution's project and approved it, subject to conditions, including that New York State grant or waive certification of the

project under Section 401 of the Clean Water Act.¹ CA2 JA1667–1724.²

Although FERC has primary jurisdiction under the NGA and NEPA, the NGA expressly preserves state authority under Section 401 of the Clean Water Act. See 15 U.S.C. § 717b(d)(3). Section 401 directs states to review and certify whether potential discharges from projects receiving federal approval would comply with all relevant provisions of the Act. 33 U.S.C. § 1341.

On August 21, 2013, Constitution submitted its application to NYSDEC for a certification under Section 401. (Pet. App. 44a.)³ NYSDEC provided notice that the application was incomplete on September 12, 2013, because the application contained insufficient information for the Department to proceed with its review. (Pet. App. 44a, 50a.) Still lacking a complete application, on May 9, 2014, Constitution voluntarily withdrew and then resubmitted its application. (Pet. App. 44a.) On December 24, 2014, NYSDEC issued a Notice of Complete Application under New York state law, which commenced a comment period that was extended until February 27, 2015. (*Id.*) The comments submitted raised numerous substantive

¹ The adequacy of FERC's review of the Project's environmental effects under NEPA has been challenged in a separate proceeding that still is pending before the Second Circuit. Pet. for Review, *Catskill Mountainkeeper, Inc. v. FERC*, No. 16-345 (2d Cir. Feb. 5, 2016).

² CA2 JA refers to the Joint Appendix filed in the Second Circuit proceeding.

³ Constitution also requested a 401 Certification for the 25 miles of the pipeline located in Pennsylvania. That request was granted on September 5, 2014. See CA2 JA1056.

concerns about Constitution's application and, as a result, NYSDEC sent Constitution additional requests for information. (Pet. App. 45a.) To give Constitution time to supplement its application and address the deficiencies commentators and NYSDEC identified, Constitution again voluntarily withdrew and then resubmitted its application to NYSDEC on April 27, 2015. (*Id.*)

After considering the information it received, including the comments submitted by the public, NYSDEC issued a denial of Constitution's application on April 22, 2016. (*See* Pet. App. 35a–65a.) The Department explained that Constitution had failed to provide NYSDEC with enough information to allow the Department to certify that the potential discharges from its pipeline would comply with the Clean Water Act, as implemented by New York State. (*See id.* 36a; *see generally id.* 35a–65a.) In particular, Constitution failed to provide enough information to demonstrate that the potential discharges from the pipeline would not “materially interfere with or jeopardize the best usages” of each waterbody crossed and therefore comply with the State's water quality standards. (*Id.* at 50a.) Because NYSDEC based its determination on Constitution's failure to provide sufficient information, NYSDEC stated that Constitution was free to submit another application curing the deficiencies described in the NYSDEC's denial. (*Id.* at 65a.)

Rather than resubmit its application and supply NYSDEC with the missing information, Constitution filed suit in the Second Circuit, challenging NYSDEC's decision. Constitution contended that (1) NYSDEC missed its deadline for acting under the NGA and the Clean Water Act, (2) the denial

exceeded NYSDEC's scope of authority under the Clean Water Act, (3) the denial was a collateral attack on FERC's decision, and (4) NYSDEC's decision was not supported by the record and was arbitrary and capricious. Final Br. for Pet'r at 23–66, *Constitution Pipeline Co. v. Seggos*, No. 16-1568 (2d Cir. Oct. 17, 2016). Catskill Mountainkeeper, Inc.; Riverkeeper, Inc.; and Sierra Club sought leave and were granted permission to intervene. Order, *Constitution Pipeline Co. v. Seggos*, No. 16-1568 (2d Cir. June 17, 2016). FERC elected not to participate in the proceedings.

After extensive briefing and oral argument, the Second Circuit issued a unanimous decision rejecting Constitution's arguments and upholding NYSDEC's decision. (Pet. App. 1a–34a.) The panel held that it lacked jurisdiction over Constitution's claim that the NYSDEC decision was untimely, because the NGA clearly gave the Court of Appeals for the District of Columbia exclusive jurisdiction to hear such challenges. (Pet. App. 25a–26a (citing 15 U.S.C. § 717r(d)(2)).)

The Second Circuit also denied Constitution's challenge on the merits. (Pet. App. 33a–34a.) The court concluded that NYSDEC's denial was lawful and squarely within the state's power under the Clean Water Act. (*Id.*) The court rejected Constitution's argument that FERC's authority under NEPA and the NGA preempts NYSDEC's ability “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.” (Pet. App. at 28a.) Indeed, the court found that in enacting NEPA, the NGA, and the Clean Water Act, Congress endorsed a “statutory scheme

whereby a single state agency [can] effectively veto[] an energy pipeline that has secured approval from a host of other federal and state agencies.” (*Id.* at 28a–29a (internal citations omitted) (quoting *Islander East Pipeline Co. v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008) (“*Islander East II*”), *cert. denied*, 555 U.S. 1046 (2008)).)

The court concluded that NYSDEC’s denial was reasonable, because Constitution failed to provide the information necessary to process the application:

[T]here 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 the information it required to issue the requested certification.

(Pet. App. at 25a (internal citations omitted).)

The Second Circuit also rejected Constitution’s claims that (1) the information NYSDEC sought on construction methods was unnecessary and (2) the information NYSDEC requested on alternative routes was outside NYSDEC’s ability to consider. (*See id.* at 29a.) Constitution claimed that it was not obligated to provide information on the feasibility of using the construction method NYSDEC determined caused fewer impacts to water quality, because that method was not the industry-recognized standard. (*See id.* at 31a–32a.) But the Second Circuit concluded that “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]. Industry preferences do not circumscribe environmental relevance.” (*Id.* at 32a (internal citations omitted).) With respect to NYSDEC’s requests for information on alternative routes, the court found that “[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.” (*Id.* at 29a.)

Following the Second Circuit’s unanimous decision, Constitution sought reconsideration and rehearing en banc. Both were denied. (Pet. App. 66a–67a.) Separately, Constitution also filed a request with FERC seeking to have the Commission nullify NYSDEC’s denial based on the timeliness of the Department’s decision. Petition for Declaratory Order, Docket No. CP18-5-001 (FERC Oct. 11, 2017). FERC’s commissioners unanimously rejected Constitution’s request in an order dated January 11, 2018. *In re Constitution Pipeline Co.*, 162 FERC ¶ 61,104 (Jan. 11, 2018). On February 12, 2018, Constitution filed a rehearing request, asking that FERC reconsider and reverse its decision. *See Request for Rehearing of Constitution Pipeline Co., In re Constitution Pipeline Co.*, Docket No. CP18-5-000 (FERC Feb. 12, 2018). The rehearing request was tolled on March 14, 2018. *See Order Granting Rehearing for Further Consideration, In re Constitution Pipeline Co.*, Docket No. CP18-5-001 (FERC Mar. 14, 2018).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

Constitution's petition does not present any remotely compelling reason for the Court to review the Second Circuit's decision. Contrary to Constitution's assertions, the decision is not based on the single finding that state agencies may consider alternative routes for gas pipelines under FERC's jurisdiction. The Second Circuit based its ruling on a thorough review of a detailed and highly technical record and concluded that Constitution failed to provide multiple categories of information the state needed to evaluate the proposed project's potential to degrade water quality. As a result, the Second Circuit's decision does not conflict with any decision by this Court or other courts of appeals and does not raise any federalism or national security concerns. Constitution's petition therefore fails to present any issue that would warrant consideration by the Court.

I. Constitution Mischaracterizes the Second Circuit's Holding.

Constitution and its amici wrongly represent that the Second Circuit's decision is based entirely on NYSDEC's request for information on alternative routes. (Pet. App. 7; Br. of Amici Curiae Nat'l Ass'n of Mfrs. et al. 5 ("Amici Br.")). The court's holding, in fact, rests on Constitution's "persistent[]" failure to provide NYSDEC with information on three major issues: (1) site-by-site information on the feasibility of using NYSDEC's preferred crossing method for "the vast majority of the 251 New York waterbodies to be crossed by its pipeline," (2) geotechnical data for 249 of the 251

waterbodies, and (3) possible alternative routes. (Pet. App. 33a.) The court made clear that Constitution's refusal to provide information across *all* these categories defeated Constitution's claim that NYSDEC's denial was arbitrary, capricious, or unlawful. (*See id.*) Indeed, even if the court had agreed with Constitution that NYSDEC's request for information on alternative routes was improper, that alone would not have changed the outcome of the case, given how much information on other issues remained missing from Constitution's application.

Constitution also is wrong that the Second Circuit's decision gives states newfound authority to summarily reroute a FERC pipeline. (*See* Pet. 18–19; Amici Br. 19–20.) The opinion below merely rejects Constitution's argument that NYSDEC's request for information about alternative routes by itself invalidated the entire denial. (*See* Pet. App. 29a.) The court found that when “consideration of a possible alternative route ... [could] result in less substantial impact on its waterbodies,” it is within the state's authority to ask for information on those alternative routes. (*Id.*) Because Constitution never provided NYSDEC with information on alternative routes, it would be pure speculation to conclude that NYSDEC would have ordered a rerouting of the pipeline or vetoed the pipeline solely because it was not routed to avoid impacts to water quality. Whether the state has the authority to take such actions was not directly addressed by the Second Circuit's opinion.

II. The Second Circuit's Decision Is Wholly Consistent with Federal Law.

When read accurately, it is clear that nothing in the decision below is inconsistent with this Court's precedent, the precedent of other Circuit courts, or federal statutes. FERC's authority over gas pipelines is not exclusive, because the NGA expressly preserves state authority under the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act intact. 15 U.S.C. § 717b(d); *see also AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120, 123 (4th Cir. 2008). Thus, using the authority given to it in Section 401, 33 U.S.C. § 1341, a state that cannot certify a gas pipeline's compliance with the Clean Water Act may veto the project, even if FERC has issued the approvals committed to its jurisdiction under the NGA and NEPA. *See Islander East II*, 525 F.3d at 164.⁴ Constitution therefore is wrong that allowing NYSDEC to prevent the pipeline at issue here from moving forward is at odds with any federal law.

Allowing a state agency to consider information on alternative routes also does not conflict with any federal precedent or law. Federal courts, in fact, have found that a wide range of factors can be

⁴ Because of the express preservation of state authority by the NGA, this Court should reject the suggestion that NYSDEC cannot issue a decision under Section 401 that is contrary to FERC's findings on the project's potential impacts to water quality, without challenging FERC's decision under the judicial review provisions of the NGA. Constitution's arguments (*see, e.g.*, Pet. App. 20–21; Amici Br. 12) are completely at odds with the different and independent authority provided to state agencies with powers under the Clean Water Act and reflect a total misunderstanding of the environmental review process undertaken by FERC under NEPA.

considered as part of the Section 401 review. The Court in *PUD No. 1 of Jefferson County* concluded that the state could consider water quantity as part of the inquiry whether a project could be granted a 401 water quality certification. See *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 717–19 (1994). In *Islander East II*, the Second Circuit found that consideration of anchor strikes and cable sweeps on the bottom of the waterway properly fell within the state's authority under Section 401. See 525 F.3d at 157. Considering options, such as alternative pipeline routes, that would reduce or eliminate potential impacts to water quality is equally related to determining whether a project will comply with the Clean Water Act.

The cases Constitution claims conflict with the decision below are wholly inapposite, as they involve instances where states attempted to assert control well beyond the powers reserved to them under the NGA. In *Schneidewind v. ANR Pipeline Co.*, this Court found that the NGA preempted a requirement that certain public utilities obtain state agency approval before issuing long-term securities. 485 U.S. 293, 310 (1988). In *National Fuel Gas Supply Corp. v. Public Service Commission of the State of New York*, the Second Circuit nullified the state's attempt to require that a FERC-approved pipeline obtain a state certificate of need and environmental compatibility, where the certificate was wholly a creature of state law and had nothing to do with the state's reserved role under any federal statute. See 894 F.2d 571, 579 (2d Cir. 1990). In *Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council*, the First Circuit found that a state's

additional dredging permitting requirement—which was not included in the authority provided to it under the Coastal Zone Management Act—was preempted by the NGA. 589 F.3d 458, 472–74 (1st Cir. 2009). There is no conflict between precedent from other circuits and the decision below.

III. The Second Circuit’s Decision Is Unrelated to Issues of Federalism or National Security.

There are no Supremacy Clause or federalism issues implicated by the decision below that would warrant this Court granting certiorari. Despite Constitution’s protestations to the contrary, by exempting the exercise of state authority under the Clean Water Act from the NGA’s preemptive scope, Congress consciously created a system where states play a role in determining whether a gas pipeline project may proceed. Here, the State of New York acted within its authority under Section 401 to request information relating to the project’s potential impacts to water quality. When Constitution failed to provide that information and meet its burden under Section 401, the State rightfully declined to certify that the project would comply with the Clean Water Act. This exercise of reserved power is consistent with the cooperative federalism Congress sought to create in passing the Clean Water Act and allowing states to retain water quality certification authority for projects otherwise under FERC’s jurisdiction.

Similarly, there are absolutely no national security concerns related to the Second Circuit’s decision. Constitution and its amici provide no support whatsoever for their suggestion that this pipeline is tied to any issue of national security.

The policy arguments made by Constitution and the amici also paint a one-sided picture of the purported economic and policy benefits of gas infrastructure projects. By preserving state power to review and reject projects under three environmental statutes, Congress rejected the idea that the so-called benefits of gas touted by industry trump all project costs. State agencies—the experts in regional and local environmental matters—retain the authority to ensure that the environment and the health and wellbeing of communities also are protected. Consistent with Congress’ intent, New York State acted to protect the quality of its waterways, and Constitution has not presented any compelling reason for this Court to review the Second Circuit’s decision deferring to NYSDEC’s findings.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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March 22, 2018