

No. 17-1009

IN THE
Supreme Court of the United States

CONSTITUTION PIPELINE COMPANY, LLC,
Petitioner,

v.

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 OF *AMICI CURIAE* NATIONAL
ASSOCIATION OF MANUFACTURERS,
AMERICAN PETROLEUM INSTITUTE,
NATURAL GAS SUPPLY ASSOCIATION,
AMERICAN GAS ASSOCIATION,
AMERICAN FUEL & PETROCHEMICAL
MANUFACTURERS, AND INTERSTATE
NATURAL GAS ASSOCIATION OF AMERICA
IN SUPPORT OF PETITIONER**

CARTER G. PHILLIPS*
RYAN C. MORRIS
TOBIAS S. LOSS-EATON
SIDLEY AUSTIN LLP
1501 K St. NW
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

February 20, 2018

* Counsel of Record

[Additional counsel listed on inside cover]

LINDA E. KELLY
PETER C. TOLSDORF
NATIONAL ASSOCIATION
OF MANUFACTURERS
733 10th St. NW, Ste. 700
Washington, D.C. 20001

*Counsel for National
Association of
Manufacturers*

JOAN DRESKIN
VICE PRESIDENT AND
GENERAL COUNSEL
INTERSTATE NATURAL
GAS ASSOCIATION OF
AMERICA
20 F St. NW, Ste. 450
Washington, D.C. 20001

*Counsel for Interstate
Natural Gas Association
of America*

MICHAEL L. MURRAY
GENERAL COUNSEL
AMERICAN GAS
ASSOCIATION
400 N. Capitol St. NW
Washington, D.C. 20001

*Counsel for American Gas
Association*

STACY R. LINDEN
ANDREA S. MILES
MARA E. ZIMMERMAN
AMERICAN PETROLEUM
INSTITUTE
1220 L St. NW
Washington, D.C. 20005

*Counsel for American
Petroleum Institute*

DENA E. WIGGINS
NATURAL GAS SUPPLY
ASSOCIATION
1620 I St. NW, Ste. 700
Washington, D.C. 20006

*Counsel for Natural
Gas Supply Association*

RICHARD MOSKOWITZ
GENERAL COUNSEL
TAYLOR HOVERMAN
AMERICAN FUEL &
PETROCHEMICAL
MANUFACTURERS
1667 K St. NW, Ste. 700
Washington, D.C. 20006

*Counsel for American
Fuel & Petrochemical
Manufacturers*

QUESTION PRESENTED

Whether a State's refusal to issue a water-quality certification for a federally approved interstate pipeline under Section 401 of the Clean Water Act for failure to provide sufficient information regarding alternative routes for the pipeline exceeds the State's limited Clean Water Act authority and interferes with the Federal Energy Regulatory Commission's exclusive jurisdiction over interstate pipeline routing.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTERESTS OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. NATURAL GAS PIPELINES OFFER SIGNIFICANT ECONOMIC, ENVIRONMENTAL, AND NATIONAL SECURITY BENEFITS	6
II. CONGRESS EMPOWERED FERC TO BE THE KEY DECISIONMAKER IN APPROVING INTERSTATE PIPELINES	10
A. FERC Has Exclusive Authority Over Pipeline Routing.....	10
B. FERC Has Primary Authority To Evaluate Environmental Impacts.....	12
C. The Clean Water Act Delegates To States Only The Limited Authority To Certify A Reasonable Assurance That The FERC-Approved Project Will Not Violate EPA-Approved State Water-Quality Standards.....	18
III. THE DECISION BELOW DISTORTS THE CONGRESSIONAL DESIGN AND THREATENS TO DEPRIVE THE NATION AND OTHER STATES OF SIGNIFICANT BENEFITS	20
CONCLUSION	24

TABLE OF AUTHORITIES

CASES	Page
<i>California v. FERC</i> , 495 U.S. 490 (1990)	21
<i>City of Tacoma v. Taxpayers of Tacoma</i> , 357 U.S. 320 (1958)	12
<i>E. End Prop. Co. No. 1, LLC v. Kessel</i> , 851 N.Y.S.2d 565 (N.Y. App. Div. 2007)	11
<i>First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n</i> , 328 U.S. 152 (1946)	5, 20, 21, 22
<i>Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.</i> , 426 U.S. 776 (1976)	14
<i>Guardian Pipeline, LLC v. 529.42 Acres of Land</i> , 210 F. Supp. 2d 971 (N.D. Ill. 2002)	11
<i>Islander E. Pipeline Co. v. Conn. Dep't of Env'tl. Prot.</i> , 482 F.3d 79 (2d Cir. 2006)	18
<i>Kern River Gas Transmission Co. v. Clark Cty.</i> , 757 F. Supp. 1110 (D. Nev. 1990)	12
<i>Midcoast Interstate Transmission, Inc. v. FERC</i> , 198 F.3d 960 (D.C. Cir. 2000)	10, 15
<i>N. Natural Gas Co. v. Iowa Utils. Bd.</i> , 377 F.3d 817 (8th Cir. 2004)	11
<i>Niagara Mohawk Power Corp. v. DEC</i> , 624 N.E.2d 146 (N.Y. 1993)	19, 22
<i>No Tanks Inc. v. Pub. Utils. Comm'n</i> , 697 A.2d 1313 (Me. 1997)	11, 12, 15
<i>Office of Consumers' Counsel v. FERC</i> , 655 F.2d 1132 (D.C. Cir. 1980)	10
<i>Power Auth. v. Williams</i> , 60 N.Y.2d 315 (N.Y. 1983)	19
<i>PUD No. 1 v. Wash. Dep't of Ecology</i> , 511 U.S. 700 (1994)	20
<i>Rapanos v. United States</i> , 547 U.S. 715 (2006)	22
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332 (1989)	14

TABLE OF AUTHORITIES—continued

	Page
<i>Schneidewind v. ANR Pipeline Co.</i> , 485 U.S. 293 (1988)	10, 11
<i>Skyview Acres Co-op., Inc. v. Pub. Serv. Comm’n</i> , 558 N.Y.S.2d 972 (N.Y. App. Div. 1990)	11, 12, 13, 15
<i>Wash. Gas Light Co. v. Prince George’s Cty. Council</i> , 711 F.3d 412 (4th Cir. 2013)	11, 12

STATUTES AND REGULATIONS

15 U.S.C. § 717b(d).....	13
§ 717f(c)(1)(A)	10
§ 717n(b)(1)	13, 21
§ 717r	12, 15
33 U.S.C. § 1313	19
§ 1341(a).....	4, 19
42 U.S.C. § 4332(C)	13
18 C.F.R. § 380.6(a)(3).....	14
§ 380.7	14, 15
40 C.F.R. § 121.2(a)(3).....	4, 19
§ 1501.7(a)(1).....	13
§ 1502.9	14
§ 1503.1(a).....	14
§ 1508.9(a).....	13

ADMINISTRATIVE DECISIONS

<i>Constitution Pipeline Co., LLC Iroquois Gas Transmission Sys., L.P.</i> , 149 FERC ¶ 61,199 (2014), <i>reh’g denied</i> , 154 FERC ¶ 61,046 (2016)	15, 16, 17
<i>Constitution Pipeline Co., LLC Iroquois Gas Transmission Sys., L.P.</i> , 154 FERC ¶ 61,046 (2016)	18

TABLE OF AUTHORITIES—continued

	Page
<i>Order Approving Elec. & Gas Rate Plans</i> , No. 15-E-0283, 2016 WL 3386590 (N.Y. Pub. Serv. Comm’n June 15, 2016)	7, 23

OTHER AUTHORITIES

2015 N.Y. State Energy Plan, Vol. 2, <i>Sources</i> , http://energyplan.ny.gov/Plans/2015	7
EPA, <i>Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks</i> (Feb. 2018).....	8
Dr. David Gordon et al., Ctr. for a New Am. Sec., <i>Energy, Economic Growth, and U.S. National Security</i> (Nov. 2017), https://goo.gl/BoRQHx	9
Agnia Grigas, <i>America’s Natural Gas Hurdles</i> , N.Y. Times (Jan. 30, 2018), https://goo.gl/F6q7nb	7
IHS Economics, <i>The Economic Benefits of Natural Gas Pipeline Development on the Manufacturing Sector</i> (May 2016), http://www.nam.org/Data-and-Reports/Reports/Natural-Gas-Study/Energizing-Manufacturing-Full-Report/	6, 7, 8, 10
INGAA Found., <i>North American Midstream Infrastructure Through 2035: Leaning into the Headwinds</i> (Apr. 12, 2016), http://www.ingaa.org/File.aspx?id=27961&v=db4fb0ca	6, 7, 9
Elizabeth Roesenberg, Ctr. for a New Am. Sec., <i>Energy Rush: Shale Production and U.S. National Security</i> (Feb. 2014), https://goo.gl/Gv15td	9

INTERESTS OF *AMICI CURIAE*¹

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs more than 12 million men and women, contributes \$2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The American Gas Association (AGA), founded in 1918, represents more than 200 state regulated or municipal natural gas distribution companies. AGA members serve 95 percent of the 74 million natural gas customers, representing more than 160 million people, in the United States. These customers daily rely on AGA members to provide safe, reliable, and affordable natural gas service as a basic life necessity or for business purposes. AGA and its members are committed to continuing to improve the already high level of safety and reliability throughout the natural gas industry, in-

¹ Pursuant to Supreme Court Rules 37.2 and 37.6, *amici* state that (a) counsel of record for all parties have been notified of *amici's* intent to file this brief and have consented to its filing, and (b) no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici* and their counsel, made any monetary contribution towards the preparation or submission of this brief.

cluding interstate transmission. Numerous AGA programs and activities focus on the safe and efficient delivery of natural gas to customers.

The American Petroleum Institute is the only national trade association that represents all aspects of America's oil and natural gas industry. Its over 625 corporate members, from the largest major oil companies to the smallest of independents, come from all segments of the industry. They are producers, refiners, suppliers, marketers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry.

The Interstate Natural Gas Association of America (INGAA) is a trade association representing the interstate natural gas pipeline industry, including virtually all of the interstate pipelines in the United States. Its members transport over 95% of the Nation's natural gas through a network of over 200,000 miles of pipelines.

The Natural Gas Supply Association (NGSA) represents the major integrated and independent companies that produce and market U.S. natural gas. Founded in 1965, NGSA focuses on producer-marketer issues related to the downstream natural gas industry and has been involved in a substantive manner in every one of the Federal Energy Regulatory Commission's significant natural gas rulemakings since FERC's creation in 1977.

The American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association whose members comprise virtually all U.S. refining and petrochemical manufacturing capacity. AFPM's members supply consumers with a wide variety of products that are used daily in homes and businesses.

As some of the largest producers, transporters, and users of natural gas in the country, many of *amici*'s members are affected by the decision under review, which affirmed the denial of a certification necessary for the construction of an important interstate pipeline. Further, *amici* are concerned by the broader impacts of the decision below on the development of much-needed energy infrastructure. Total natural gas demand, driven in particular by manufacturing and power generation, is poised to increase by 40 percent over the next decade, and the U.S. supply is expected to increase by 48 percent over the same period. *Amici* thus have a strong interest in promoting Congress's policy for the efficient, transparent, and predictable approval of natural gas pipelines. *Amici* are concerned that the decision below stymies that policy and will have negative effects on the development of other types of energy infrastructure as well.

SUMMARY OF ARGUMENT

This case raises critical questions regarding the careful federal-State balance Congress struck in the process for approving interstate pipeline projects.

Interstate pipelines offer significant benefits to the Nation. Their construction, operation and maintenance boost economic activity, and they can lead to lower natural gas and electricity prices, which have benefits throughout the economy, particularly in manufacturing and for consumers. These pipelines offer substantial environmental benefits, by increasing the use of clean-burning natural gas. And they bolster the Nation's energy independence.

Left to the States, however, the development of interstate pipelines would be hamstrung. Individual States, naturally focused on what might happen

within their own borders rather than on the national public interest, could use state law to block the development and construction of new interstate pipelines, depriving other States and the Nation of these many benefits. Recognizing this risk, Congress, through the Natural Gas Act (NGA), occupied the field of interstate natural gas transportation and empowered the Federal Energy Regulatory Commission (FERC) to be the central decisionmaker in the approval of natural gas and other pipeline projects.

Pursuant to this authority, FERC undertakes a robust review of every proposed pipeline, carefully accounting for potential environmental impacts and—critically—determining the route the pipeline will follow. FERC’s routing analysis accounts for potential environmental concerns, with significant input from stakeholders, including the environmental agencies of affected States. FERC’s routing authority is exclusive: States have no power to second-guess or collaterally attack FERC’s routing determinations.

Section 401 of the Clean Water Act (CWA) creates a narrow carve-out from FERC’s otherwise-exclusive authority. Section 401 requires any project that might result in a “discharge into the navigable waters” to obtain a Water Quality Certification (WQC) from the State where the discharge originates. States are limited to determining whether there is a “reasonable assurance” that “any such discharge” will not violate state water-quality standards approved by the federal Environmental Protection Agency (EPA). 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 121.2(a)(3). Thus, a State can deny a WQC if the proposed project will violate water-quality standards, but it cannot use the Section 401 process as a pretext to force changes to a route FERC has approved.

The decision below upsets this carefully balanced cooperative-federalism regime. The Second Circuit affirmed the New York Department of Environmental Conservation’s (DEC’s) denial of a WQC based on Petitioner’s ostensible failure to provide DEC with sufficient information regarding “possible alternative routes for the planned pipeline”—alternative routes that FERC evaluated and rejected after considering DEC’s views. Pet. App. 29a. The court held—contrary to every other court to consider the question—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.*

If left unreviewed, this decision will serve as a roadmap for States to block the construction of FERC-approved pipelines based on a consideration—routing—that is not merely beyond the scope of the States’ power under Section 401, but is at the core of FERC’s exclusive authority under the NGA. “Such a veto power easily could destroy the effectiveness of” the NGA regime by “subordinat[ing] to the control of the State the ‘comprehensive’ planning” that Congress assigned to FERC. *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm’n*, 328 U.S. 152, 164 (1946). That result does violence to Congress’s design, which gives FERC the final word on matters of interstate pipeline routing, and would deprive other States and the Nation of the many benefits that prompted Congress to establish this centralized structure in the first place. And while this case concerns a natural gas pipeline, State “water quality” vetoes of other interstate energy projects raise similar concerns. Given these important federal interests, this Court should grant the petition.

ARGUMENT

I. NATURAL GAS PIPELINES OFFER SIGNIFICANT ECONOMIC, ENVIRONMENTAL, AND NATIONAL SECURITY BENEFITS.

The petition in this case arises in an area that significantly affects uniquely national interests.

a. The nation currently needs greater natural gas infrastructure development. Recent economic developments—including access to abundant supply, low commodities prices, and uncertainty in the global economy—have underscored the need for natural gas infrastructure growth. One study estimates that capital expenditures on midstream oil and gas infrastructure—which includes natural gas gathering, transport, and storage—will range from \$471 billion to \$621 billion over the next 21 years, with roughly \$267 billion to \$352 billion going to natural gas infrastructure. See INGAA Found., *North American Midstream Infrastructure Through 2035: Leaning into the Headwinds* 8–9 (Apr. 12, 2016), <http://www.ingaa.org/File.aspx?id=27961&v=db4fb0ca> (*Headwinds*). Moreover, between 167,400 to 208,600 miles of natural gas gathering and transmission pipeline must be built during the same period. Studies like this “clearly demonstrate that much new infrastructure is needed,” with even less optimistic economic projections “requir[ing] significant infrastructure development.” *Id.* at 11. Indeed, there are currently “bottlenecks in some parts of the U.S. where there is insufficient transmission pipeline capacity to move the [natural gas] to market.” IHS Economics, *The Economic Benefits of Natural Gas Pipeline Development on the Manufacturing Sector* 4 (May 2016), <http://www.nam.org/Data-and-Reports/Reports/Natural-Gas-Study/Energizing-Manufacturing->

Full-Report/ (*Economic Benefits*). This winter, such bottlenecks “led to significant increases in oil-fired and dual-fuel electricity generation to meet energy demands in New England” and “soaring” natural gas prices. Agnia Grigas, *America’s Natural Gas Hurdles*, N.Y. Times (Jan. 30, 2018), <https://goo.gl/F6q7nb>. New York State itself has recognized “the need to improve the capacity to transport [natural] gas into New York.” 2015 N.Y. State Energy Plan, Vol. 2, *Sources* 87, <http://energyplan.ny.gov/Plans/2015>.

Such investments bring significant benefits: Projected infrastructure development over the next two decades could “add \$655 billion to \$861 billion of value to the U.S. and Canadian economies and result in employment of 323,000 [to] 425,000 people per year.” *Headwinds*, at 11. These benefits are not limited to companies and States directly involved in midstream operations; “there are many indirect and induced benefits that occur in many other industries, and a substantial number of service sector jobs are created as a result.” *Id.* at 12. In turn, such growth can increase tax revenues. Simply put, “[a]ll sectors and regions of North America benefit from infrastructure development.” *Id.*; see also *Economic Benefits*, at 4 (“[M]any firms across a diverse set of industry sectors are beneficiaries of tens of billions of dollars in capital expenditures and operating and maintenance ... expenditures”). The same, of course, is true of other types of energy infrastructure development.

These benefits include the lower natural gas prices that can result from increased capacity. Natural gas has a variety of uses: electricity generation, residential, commercial, and industrial. *Economic Benefits*, at 5–6; see also *Order Approving Elec. & Gas Rate Plans*, No. 15-E-0283, 2016 WL 3386590, at *39 (N.Y. Pub.

Serv. Comm’n June 15, 2016) (*PSC Order*) (“[T]he expansion of natural gas service will bring more affordable heat to New York homes and businesses.”). In all of these areas, “lower natural gas prices will result in benefits to consumer purchasing power and confidence, higher profits among businesses, and improvements in cost-competitiveness for domestic manufacturers relative to their international competitors.” *Economic Benefits*, at 4.

Lower natural gas prices can also lead to lower electricity prices and reduce costs in “energy-intensive industries such as chemicals, metals, food, and refining.” *Id.* at 4, 34–37. Likewise, “[m]any industries use [natural gas] as a fuel or a feedstock for production,” *id.* at 5, and thus cheap and plentiful natural gas is a boon to the growth or resurgence of manufacturing across the country, see *id.* at 21. In 2015 alone, “economic benefits from increased domestic shale gas production and the accompanying lower [natural gas] prices include[d] contributions of \$190 billion to real gross domestic product (GDP), 1.4 million additional jobs, and \$156 billion to real disposable income.” *Id.* at 4.

b. Natural gas projects also offer significant environmental benefits. Pipeline development enables and encourages access to and use of natural gas, which has broadly recognized environmental benefits. Conversely, obstructing natural gas infrastructure development frustrates efforts to transport abundant supplies of clean-burning fuel to power and heat American homes and businesses. See EPA, *Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks* ES-4 (Feb. 2018) (“substitution from coal to natural gas” contributed to “decrease in CO₂ emissions”). Studies anticipate that much growth in electricity demand will be met by natural gas generation and renewable capacity,

which are economic to build to meet new demand. See *Headwinds* at 25.

c. Energy infrastructure growth, including natural gas development, also benefits the Nation's energy security, and, in turn, its national security. Increased U.S. energy supplies, combined with (among other unpredictable forces) "growth in Asian demand for energy" and continued "global oil supply disruptions" have produced "a dynamic new map of energy trading partners and supply routes." Elizabeth Rosenberg, Ctr. for a New Am. Sec., *Energy Rush: Shale Production and U.S. National Security* 6 (Feb. 2014), <https://goo.gl/Gv15td>. In turn, these developments create opportunities for the United States to "use ... new energy supplies to pressure or support international actors and underscore strategic policy," *id.*, and to "promote more open energy markets globally, which is positive for both the U.S. economy and U.S. national security interests," Dr. David Gordon et al., Ctr. for a New Am Sec., *Energy, Economic Growth, and U.S. National Security* 1 (Nov. 2017), <https://goo.gl/BoRQHx>. For example, energy supply resiliency "provided by the U.S. shale revolution" has "alleviated fears that sanctions [on Iran] would lead to an oil price spike" and has "prevented the dramatic uptick in political tension and instability in the Middle East from being transmitted to the rest of the world in the form of higher oil prices." *Id.* at 8. "Open U.S. energy markets also deepen foreign interdependence with the United States and create interests in continued U.S. economic strength." *Id.* By contrast, where U.S. infrastructure is inadequate, the Nation must rely on imports from volatile areas or strategic adversaries.

All of these benefits can be realized, however, only if energy infrastructure keeps pace with increased demand. “New pipeline and processing infrastructure expansion will be a key to connecting new supply sources with new and growing sources of demand.” *Economic Benefits*, at 20.

II. CONGRESS EMPOWERED FERC TO BE THE KEY DECISIONMAKER IN APPROVING INTERSTATE PIPELINES.

Given how important pipeline infrastructure is to the Nation’s economy and wellbeing, Congress gave FERC the key decisionmaking authority over pipelines, including any routing and environmental issues.

A. FERC Has Exclusive Authority Over Pipeline Routing.

Under the NGA, “a natural gas company must obtain from FERC a ‘certificate of public convenience and necessity’ before it constructs, extends, acquires, or operates any facility for the transportation or sale of natural gas in interstate commerce.” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 302 (1988); see 15 U.S.C. § 717f(c)(1)(A). In assessing the “public convenience and necessity,” FERC considers “all factors bearing on the public interest,” see *Office of Consumers’ Counsel v. FERC*, 655 F.2d 1132, 1146 (D.C. Cir. 1980), including any potential environmental impacts, *e.g.*, *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967–68 (D.C. Cir. 2000). “FERC will grant the certificate only if it finds the company able and willing to undertake the project in compliance with the rules and regulations of the federal regulatory scheme.” *Schneidewind*, 485 U.S. at 302.

FERC’s authority under the NGA is exclusive: “Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce.” *Id.* at 305. “FERC’s exclusive purview” includes the regulation of “facilities [that] are a critical part of the transportation of natural gas and sale for resale in interstate commerce.” *Id.* at 308. In this “exclusively federal domain,” States may not regulate. *Id.* at 305; see, e.g., *N. Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 819–20, 822–24 (8th Cir. 2004) (NGA preempted state-law environmental provisions); *E. End Prop. Co. No. 1, LLC v. Kessel*, 851 N.Y.S.2d 565, 571 (N.Y. App. Div. 2007) (similar); *No Tanks Inc. v. Pub. Utils. Comm’n*, 697 A.2d 1313, 1315 (Me. 1997) (similar).

Pipeline routing is the paradigmatic example of an issue committed to FERC’s exclusive authority. See *Wash. Gas Light Co. v. Prince George’s Cty. Council*, 711 F.3d 412, 423 (4th Cir. 2013) (“the NGA gives FERC jurisdiction over the siting of natural gas facilities”); see also, e.g., *Guardian Pipeline, LLC v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 975 (N.D. Ill. 2002) (where “FERC has approved the route ... [a]ny objections to the condemnation of public land for the construction of a natural gas pipeline [are] preempted”); *Skyview Acres Co-op., Inc. v. Pub. Serv. Comm’n*, 558 N.Y.S.2d 972, 975 (N.Y. App. Div. 1990) (State’s “authority [was] preempted ... to the extent that it purported to approve the route of an interstate gas pipeline”); cf. *No Tanks*, 697 A.2d at 1315 (“[State] review of safety and environmental issues surrounding the siting of the [natural gas] tank would be an attempt to regulate matters within FERC’s exclusive jurisdiction”). Nor could it be otherwise. Determining an interstate pipeline’s route—including which States it will cross, where it will do so, and how far it will travel

within their borders—is a task that must be completed by a centralized body with the entire Nation’s public interest in mind, not by local “agencies with only local constituencies.” *Id.* at 1316. Otherwise, each State would be free to say, “Not in my backyard,” thereby depriving other States and the Nation of the pipeline’s benefits and undermining the NGA’s purpose of “ensur[ing] that natural gas consumers have access to an adequate supply of natural gas at ‘just and reasonable rates.’” *Wash. Gas*, 711 F.3d at 422–23.

Because FERC’s authority in this area is exclusive, there is only one method for interested parties—including States—to attempt to influence a pipeline’s route. First, they can participate in FERC’s environmental review or intervene in the FERC proceedings. See *Skyview Acres*, 558 N.Y.S.2d at 975. Second, if they are aggrieved by FERC’s ultimate determination, they can seek rehearing and then judicial review under 15 U.S.C. § 717r. A party that fails to do so cannot later challenge or second-guess FERC’s determinations within its exclusive jurisdiction. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); see, e.g., *Kern River Gas Transmission Co. v. Clark Cty.*, 757 F. Supp. 1110, 1116 (D. Nev. 1990) (“once the location of a route for the transportation of natural gas is approved by the FERC, an aggrieved party may seek [judicial] review”; a party that fails to do so is “estopped from seeking a court-ordered new route for the gas pipeline”).

B. FERC Has Primary Authority To Evaluate Environmental Impacts.

FERC also has primary authority to consider a pipeline project’s potential environmental impacts, which includes consideration of the most environmentally beneficial route. Under the NGA, FERC is “the lead

agency ... for the purposes of complying with” the National Environmental Policy Act (NEPA). 15 U.S.C. § 717n(b)(1). Thus, “FERC undertakes its own environmental analysis pursuant to the requirements of” NEPA, “which ... FERC considers in reaching its ultimate routing determination.” *Skyview Acres*, 558 N.Y.S.2d at 975. This authority is likewise exclusive, except as to the narrow question of water-quality compliance under Section 401. 15 U.S.C. § 717b(d)(3); see *infra* p. 18.²

1. NEPA requires federal agencies to prepare “a detailed statement,” known as an Environmental Impact Statement or EIS, on “the environmental impact of” any “major Federal action[] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). An EIS must describe “(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] (iii) alternatives to the proposed action.” *Id.*³

The preparation of an EIS has three basic stages: First, the agency must “determin[e] the scope of issues to be addressed,” with the input of (among many others) “affected Federal, State, and local agencies.” 40 C.F.R. § 1501.7(a)(1). Second, the agency prepares a

² The NGA also preserves States’ authority under the Coastal Zone Management Act and the Clean Air Act, 15 U.S.C. § 717b(d)(1)–(2), which are not at issue here.

³ Agencies typically begin by preparing an Environmental Assessment, or EA, which must “provide sufficient evidence and analysis for determining whether” the project will have a “significant impact.” 40 C.F.R. § 1508.9(a). If so, an EIS must be prepared. If not, the EA’s thorough assessment helps ensure NEPA compliance. *See id.*

draft EIS, which must “disclose and discuss ... all major points of view on the environmental impacts of the alternatives including the proposed action.” *Id.* § 1502.9(a). The agency must then obtain comments from any other federal agency with relevant jurisdiction or expertise, “[a]ppropriate State and local agencies,” and the public. *Id.* § 1503.1(a). Finally, the agency must prepare a final EIS that “respond[s] to comments,” “discuss[es] ... any responsible opposing view,” and “indicate[s] the agency’s response to the issues raised.” *Id.* § 1502.9(b).

These “action-forcing’ procedures” serve to ensure “that agencies take a ‘hard look’ at environmental consequences.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Affected parties—including States—can challenge the adequacy of an agency’s NEPA review and its consideration of an EIS by seeking judicial review of the final agency determination. See *id.* at 345–46. The courts carefully review an agency’s NEPA compliance to ensure that its “duty ... to consider environmental factors not be shunted aside in the bureaucratic shuffle.” *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Okla.*, 426 U.S. 776, 787 (1976). “NEPA itself does not mandate particular results,” however: “If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.” *Robertson*, 490 U.S. at 350.

2. In keeping with NEPA’s requirements, FERC’s regulations require the preparation of an EIS for “[m]ajor pipeline construction projects ... using rights-of-way in which there is no existing natural gas pipeline.” 18 C.F.R. § 380.6(a)(3). A FERC EIS must comply with the NEPA regulations and also summarize

the project’s “significant environmental impacts”; any “alternative ... that would have a less severe environmental impact,” which includes alternative routes; any potential “mitigation measures” and impacts that cannot be mitigated; and studies that might provide useful data. *Id.* § 380.7.

FERC’s “public convenience and necessity” analysis carefully accounts for these environmental impacts, alternatives, and potential mitigation measures. Based on this comprehensive process, FERC may deny approval, or it may require the adoption of alternatives or mitigation measures. *E.g.*, *Midcoast Interstate*, 198 F.3d at 966, 968. FERC’s “environmental assessment ... is not subject to modification” by State agencies; instead, they must intervene in the FERC proceedings to offer their input and then, if necessary, seek judicial review. *Skyview Acres*, 558 N.Y.S.2d at 975; see 15 U.S.C. § 717r(a). And with good reason: “Allowing all the sites and all the specifics to be regulated by agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate needs.” *No Tanks*, 697 A.2d at 1316.

3. FERC’s approach in this case illustrates its thorough consideration of a pipeline project’s environmental impacts, including as to routing. FERC’s environmental review of the Interstate Project—in which DEC was an active participant—began in April 2012. *Constitution Pipeline Co., LLC Iroquois Gas Transmission Sys., L.P.*, 149 FERC ¶ 61,199, 62,212 (2014). FERC issued a notice of intent to prepare an EIS, which was published in the Federal Register and “sent to more than 2,100 interested entities ... including federal, state, and local agencies” and “environmental and pub-

lic interest groups.” *Id.* The notice described the project and announced three public meetings regarding the scope of the environmental review. See *id.* One-hundred-and-one speakers provided comments at those meetings, and FERC received 750 written submissions. *Id.* FERC repeated this process in late 2012, see *id.*, and again in 2013, see *id.* at 62,212–13.

FERC staff issued a draft EIS in February 2014. Notice was again published in the Federal Register, and the draft EIS was again mailed to interested entities. Four more public meetings were held in early 2014. “A total of 246 speakers provided comments at the meetings, and more than 600 stakeholders submitted a total of 884 letters in response to the draft EIS.” *Id.* at 62,213. In response, FERC opened two more limited comment periods for affected landowners. See *id.* DEC submitted four comments on the draft EIS. Pet. 11.

FERC issued the final, 450-page EIS in October 2014. The final EIS addressed comments on the draft and discussed a wide range of issues. 149 FERC at 62,213. The EIS concluded “that if the projects are constructed and operated in accordance with applicable laws and regulations, the projects will result in some adverse environmental impacts. However, these impacts ... will be reduced to less-than-significant levels with the implementation of Constitution’s and Iroquois’ proposed mitigation and [FERC] staff’s recommendations” *Id.*

FERC took all of these factors into account in its December 2014 decision to approve the Interstate Project. It devoted significant attention to the “[m]ajor issues of concern addressed in the final EIS,” including “the pipeline project’s route” and commenters’ (including DEC’s) desire “for additional analysis of alternatives, including a major route alternative, identified as

alternative M.” *Id.* at 62,213, 62,218. FERC explained that “these alternatives do not convey significant environmental advantages compared to the proposed route.” *Id.* at 62,219. FERC also noted that “Constitution evaluated 371 route realignments over the course of the project development and incorporated many of these into the proposed route Constitution changed over 50 percent of its originally considered pipeline route due to incorporation of alternatives and smaller realignments” *Id.* at 62,218–19. Further, Constitution continued to adjust its route during the review process. *Id.* at 62,219.

After careful consideration of these issues, FERC concluded “that the projects, if constructed and operated as described in the final EIS, are environmentally acceptable.” *Id.* at 62,223. FERC also “accept[ed] the environmental recommendations in the final EIS” and included those recommendations “as conditions ... to” its approval. *Id.* at 62,223–24. In all, FERC imposed 43 separate conditions, including requirements that “Constitution ... adopt additional mitigation measures or additional minor route variation[s].” See *id.* at 62,219, 62,225–30; see also *id.* at 62,221–24.

Based on this exhaustive environmental review and its thorough consideration of other relevant factors, FERC ultimately found that “the benefits that the Constitution Pipeline Project will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities,” and that, with the appropriate environmental conditions imposed, “the public convenience and necessity requires approval of Constitution’s proposal.” *Id.* at 62,206–07. FERC subsequently denied rehearing, again address-

ing in detail the EIS process, the environmental impacts, alternatives, and conditions. *Constitution Pipeline Co., LLC, Iroquois Gas Transmission Sys., L.P.*, 154 FERC ¶ 61,046 (2016).

In all, FERC's review lasted two years and seven months. FERC received hundreds of public comments from stakeholders. DEC intervened in the FERC proceedings and was an active participant, submitting at least nine detailed written comments regarding the project's potential environmental effects and possible route alternatives. Pet. 12. DEC did not, however, seek rehearing or judicial review.

C. The Clean Water Act Delegates To States Only The Limited Authority To Certify A Reasonable Assurance That The FERC-Approved Project Will Not Violate EPA-Approved State Water-Quality Standards.

Section 401 of the CWA creates a carefully cabined exception to FERC's exclusive authority in this area by permitting States to certify whether a federally licensed project will comply with EPA-approved State water-quality standards. Section 401 certification "is not a sovereign state right." *Islander E. Pipeline Co. v. Conn. Dep't of Env'tl. Prot.*, 482 F.3d 79, 93 (2d Cir. 2006). Rather, a State has "only such authority [over such projects] as has been delegated by Congress" through the CWA. *Id.* And because the certification process allows a State to intrude into FERC's otherwise-exclusive domain, courts have—until the decision below—carefully cabined this authority to avoid permitting States to second-guess FERC's judgment on matters beyond strictly determining whether the pipeline project as approved by FERC satisfies the State's EPA-approved water-quality standards.

Section 401 provides that an “applicant for a Federal license or permit” for (inter alia) “construction or operation of facilities, which may result in any discharge into the navigable waters” must obtain “a certification from the State in which the discharge originates ... that any such discharge will comply with the applicable provisions of” the CWA, 33 U.S.C. § 1341(a), including EPA-approved state water-quality standards under 33 U.S.C. § 1313. Such a certification, or WQC, determines “that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.” 40 C.F.R. § 121.2(a)(3).

Until now, courts—including the New York State courts—have consistently and correctly construed this limited delegation as “[r]elinquish[ing] only one element of the otherwise exclusive jurisdiction granted [to FERC] It authorizes States to determine and certify only the narrow question whether there is ‘reasonable assurance’ that the construction and operation of a proposed project ‘will not violate applicable water quality standards.’” *Niagara Mohawk Power Corp. v. DEC*, 624 N.E.2d 146, 149 (N.Y. 1993). “Congress did not empower the States to reconsider matters”—such as routing—“unrelated to their water quality standards, which [FERC] has within its exclusive jurisdiction” *Power Auth. v. Williams*, 60 N.Y.2d 315, 325 (N.Y. 1983). Such second-guessing would “countermand the carefully worded authority of section 401(a)(1)” and “usurp the authority that Congress reserved for FERC.” *Niagara Mohawk*, 624 N.E.2d at 150. Thus, Section 401 does not empower a State to

deny a WQC because it might prefer another route to the one FERC approved.⁴

III. THE DECISION BELOW DISTORTS THE CONGRESSIONAL DESIGN AND THREATENS TO DEPRIVE THE NATION AND OTHER STATES OF SIGNIFICANT BENEFITS.

The decision below seriously undermines the federal-State balance Congress created by permitting states to deny WQCs—and thus to block construction of FERC-approved interstate pipelines—based on considerations beyond the narrow scope of Section 401. The Second Circuit held 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.” Pet. App. 29a. But that holding contradicts every other decision to consider the question, *supra* pp. 10–12, and renders FERC’s routing decision superfluous. More significantly, it allows one State to deprive other States and the Nation of the many benefits that natural gas pipelines bring.

This Court has repeatedly explained, in a closely related context, that giving States an unfettered “veto power” over federally licensed projects would “subordinate to the control of the State the ‘comprehensive’ planning which [federal law] provides shall depend upon the judgment of” the federal regulator. *First Iowa*, 328 U.S. at 164 (discussing hydro-power projects

⁴ DEC has elsewhere argued that *PUD No. 1 v. Wash. Dep’t of Ecology*, 511 U.S. 700 (1994), construed Section 401 more broadly. Not so—that case dealt only with the power to conditionally *grant* a WQC under Section 401(d), not to deny it outright under Section 401(a). See *id.* at 711 (arguments based on Section 401(a)’s narrower scope have “considerable force”).

under the Federal Power Act); see also *California v. FERC*, 495 U.S. 490, 506–07 (1990) (“[A]llowing California to impose the challenged [environmental] requirements would be contrary to congressional intent regarding the Commission’s licensing authority and would ‘constitute a veto of the project that was approved and licensed by FERC.’”). Indeed, “[s]uch a veto power easily could destroy the effectiveness of the federal act.” *First Iowa*, 328 U.S. at 164.

That reasoning applies fully here. FERC is “the lead agency” with respect to natural gas pipelines, 15 U.S.C. § 717n(b)(1), with exclusive authority over all matters not explicitly carved out by federal law, *supra* pp. 10–18. FERC thus considers every issue touching on the public interest, including environmental questions. “The detailed provisions of the [NGA] providing for the federal plan of regulation leave no room or need for conflicting state controls.” *First Iowa*, 328 U.S. at 181. “It is [FERC] rather than [DEC] that ... must pass upon these issues on behalf of the people of [New York] as well as on behalf of all others.” *Id.* at 182.

Section 401 should not be construed as a broad grant of authority to the States to thwart this comprehensive federal regime. See *id.* at 175–76 (rejecting a broad construction of the Federal Power Act’s savings clause that would result in “duplication of federal and state jurisdictions”). Although the States play a legitimate role in the pipeline approval process under Section 401, the decision below vastly expands that role by permitting a single State to veto a federally approved interstate pipeline based on its disagreement with FERC over a matter within FERC’s exclusive authority. That is not the congressional design. “Review by State agencies that would overlap or duplicate the Federal purview and prerogatives was not contemplated and

would infringe on and potentially conflict with an area of the law dominated by the nationally uniform Federal statutory scheme.” *Niagara Mohawk*, 624 N.E.2d at 148; see *First Iowa*, 328 U.S. at 181. New York’s role is limited to determining, on a yes-or-no basis only, whether the applicant has demonstrated a reasonable assurance that a project, *as approved by FERC*, will not violate EPA-approved State water-quality standards. New York is not empowered at the eleventh hour, following robust analysis and public comment, to send FERC and the project sponsors back to the drawing board to determine whether some alternative routes might be “better” for waterways.

This issue has broad importance. Virtually any interstate pipeline construction project could result in a “discharge” within the scope of Section 401, see generally *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion), giving each State along the route an unconstrained veto under the Second Circuit’s reasoning. Likewise, oil pipeline and electric-transmission construction projects (although regulated differently by FERC) typically require WQCs; the decision below would allow a State to use Section 401 to block such a project even if it would not cause a water-quality violation.

Moreover, the decision below threatens to impose significant harm on the Nation’s energy infrastructure by depriving other States and the Nation as a whole of the important benefits of natural gas infrastructure projects. As described above, natural gas infrastructure development—which is much needed, and will only become more so in future years—can offer a wealth of economic and other benefits. These include the direct and indirect benefits of pipeline construction, operation, and maintenance (in particular, job

creation in a variety of sectors) as well as the many upsides of lower natural gas prices. Further, some policies rely on the growth of natural gas energy production to pursue climate-change-mitigation goals. *E.g.*, *PSC Order*, 2016 WL 3386590, at *39. And increased natural gas supplies strengthen the Nation's strategic position abroad. *Supra* pp. 6–10. FERC considers these benefits during the pipeline approval process. State agencies concerned only with local environmental issues—or parochial political concerns—do not.

An expansive reading of Section 401 also will have harmful effects beyond the specific project at hand by increasing the regulatory risk for pipeline investors, chilling new infrastructure development. Obtaining FERC approval for a proposed pipeline is a long, thorough, and costly process. Denials like the decision under review will deter investors.

In short, the many benefits of natural gas projects, which span State borders and sectors of the economy, are precisely why Congress made FERC the key decisionmaker. FERC is ideally situated to take into account these broader benefits *and* the local impacts that may concern a State regulator. Permitting an individual State to second-guess FERC's determinations within its exclusive jurisdiction—as the decision below does—upends this statutory regime and has significant detrimental impacts on the economy, the environment, and the national interest.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant certiorari.

Respectfully submitted,

LINDA E. KELLY
PETER C. TOLSDORF
NATIONAL ASSOCIATION
OF MANUFACTURERS
733 10th St. NW, Ste. 700
Washington, D.C. 20001

*Counsel for National
Association of
Manufacturers*

CARTER G. PHILLIPS*
RYAN C. MORRIS
TOBIAS S. LOSS-EATON
SIDLEY AUSTIN LLP
1501 K St. NW
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Amici Curiae

STACY R. LINDEN
ANDREA S. MILES
MARA E. ZIMMERMAN
AMERICAN PETROLEUM
INSTITUTE
1220 L St. NW
Washington, D.C. 20005

*Counsel for American
Petroleum Institute*

JOAN DRESKIN
VICE PRESIDENT AND
GENERAL COUNSEL
INTERSTATE NATURAL
GAS ASSOCIATION OF
AMERICA
20 F St. NW, Ste. 450
Washington, D.C. 20001

*Counsel for Interstate
Natural Gas Association
of America*

DENA E. WIGGINS
NATURAL GAS SUPPLY
ASSOCIATION
1620 I St. NW, Ste. 700
Washington, D.C. 20006

*Counsel for Natural Gas
Supply Association*

MICHAEL L. MURRAY
GENERAL COUNSEL
AMERICAN GAS
ASSOCIATION
400 N. Capitol St. NW
Washington, D.C. 20001

*Counsel for American Gas
Association*

February 20, 2018

RICHARD MOSKOWITZ
GENERAL COUNSEL
TAYLOR HOVERMAN
AMERICAN FUEL &
PETROCHEMICAL
MANUFACTURERS
1667 K St. NW, Ste. 700
Washington, D.C. 20006

*Counsel for American
Fuel & Petrochemical
Manufacturers*

* Counsel of Record