No. 17-1009

IN THE

Supreme Court of the United States

CONSTITUTION PIPELINE COMPANY, LLC,

Petitioners,

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 IN OPPOSITION FOR NEW YORK STATE RESPONDENTS

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
ANDREW D. BING
Deputy Solicitor General
FREDERICK A. BRODIE
Assistant Solicitor General
BRIAN LUSIGNAN
Assistant Attorney General
Environmental Protection Bureau
120 Broadway
New York, NY 10271
(212) 416-8020
barbara.underwood@ag.ny.gov
**Counsel of Record*

QUESTION PRESENTED

Whether the State of New York acted arbitrarily and capriciously when it denied a water-quality certification for a natural gas pipeline under Clean Water Act § 401, 33 U.S.C. § 1341, because the applicant failed to provide material information about the project's anticipated impacts on state water quality, despite the state agency's repeated requests for such information.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Laws

STATEMENT OF THE CASE

A. Introduction

Following a comprehensive administrative process, the State of New York concluded that petitioner Constitution Pipeline Company, LLC failed to establish that its proposed construction of 100 miles of new natural gas pipeline across undeveloped lands in central New York, which would have crossed 220 streams and impacted more than 80 acres of wetlands, would comply with water-quality standards. (Pet. App. 25a-65a.) Accordingly, the State denied Constitution's application for a water-quality certification under Clean Water Act § 401, 33 U.S.C. § 1341. Without a water-quality certification, the project could not go forward as originally planned. In a thorough decision, the Second Circuit upheld the State's denial of the § 401 certification, prompting Constitution to seek review here.

This Court should deny the petition for certiorari, which rests entirely on Constitution's misreading of the Second Circuit's decision. Contrary to Constitution's argument, the Second Circuit did not hold that the State, rather than the Federal Energy Regulatory Commission (FERC), had authority over the siting of natural gas facilities. Rather, among other things, that court held that New York's denial of the § 401 certification was reasonable because Constitution had "persistently refused" to provide information relating to the methods it would use to minimize adverse water-quality impacts where the proposed pipeline crossed streams and wetlands. (Pet. App. 33a.)

All the conflicts that Constitution posits between the Second Circuit's decision and the Natural Gas Act,

this Court's precedent, other circuit court decisions, and federal energy policy, rest on its mistaken reading of the Second Circuit's decision and therefore are illusory. This Court's review is not warranted.

B. The Pipeline and FERC Proceedings

Under § 401 of the Clean Water Act, an applicant for a federal license or permit that may result in discharges into navigable waters must obtain a certification from the State that the project would comply with applicable water-quality standards. 33 U.S.C. § 1341(a)(1). The State's review covers both state and federal water-quality standards. *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.,* 547 U.S. 370, 374 (2006). State water-quality certifications are required for natural gas pipelines, just as they are for other projects: the Natural Gas Act specifically does not "affect[] the rights of States" under the Clean Water Act. 15 U.S.C. § 717b(d)(3). A project cannot be licensed without a State water-quality certification. *See S.D. Warren*, 547 U.S. at 374; *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 707-08 (1994).

In 2013, Constitution applied to FERC for a certificate of public convenience and necessity under Natural Gas Act § 7, 15 U.S.C. § 717f, for construction of 124 miles of 30-inch-diameter natural gas pipeline, temporary and permanent access roads, and various related facilities. The proposed pipeline would stretch from Susquehanna County, Pennsylvania to Schoharie County, New York. (CA2 J.A. 132-133, 294.) The pipeline would traverse roughly 100 miles in New York State, almost all previously undisturbed and undeveloped land. (CA2 J.A. 296, 1060, 1067.) It would disrupt more than 80 acres of wetlands and cross 220

waterbodies in New York, while an additional 30 waterbodies would fall within the construction right-of-way. (CA2 J.A. 1218, 1235.)

FERC issued a certificate of public convenience and necessity for the pipeline, but the certificate was expressly "conditioned on" Constitution's compliance with environmental conditions recommended by FERC staff in the environmental impact statement. (CA2 J.A. 1712, 1714.) Among those conditions was the requirement that Constitution obtain "all applicable authorizations required under federal law"—including a Clean Water Act § 401 certification—before beginning construction. (CA2 J.A. 1717.) FERC reiterated the environmental impact statement's conclusion that "[c]onstruction and operation-related impacts on waterbodies and wetlands will be further mitigated by Constitution's compliance with conditions of the . . . Section 401 permit[] required under the [Clean Water Act]," which FERC expected Constitution to apply for and obtain. (CA2 J.A. 1691.)

On rehearing of the certificate, FERC noted that until the State issued a § 401 certification, "Constitution may not begin an activity, i.e., pipeline construction, which may result in a discharge into jurisdictional waterbodies." (CA2 J.A. 2745-2746.) Moreover, FERC recognized that "[i]f and when [the State] issues" a § 401 certification, Constitution would be "required to comply" with its conditions. (CA2 J.A. 2748-2749.) FERC also observed that the State had the authority to require Constitution "to materially modify its project to satisfy any conditions imposed." (*Id.*)

C. The State's Comprehensive Administrative Review

In August 2013, while FERC's administrative review was still pending, Constitution applied for a Clean Water Act § 401 certification from the State. (CA2 J.A. 208.) The Second Circuit's opinion and the State's ruling both detail the extensive correspondence between Constitution and the State regarding the application. (*See* Pet. App. 11a-22a, 44a-62a.)[1]

Following an initial, partial review, the State notified Constitution that the application was incomplete, and listed a number of additional materials that would be required. (CA2 J.A. 214.) Among other things, the State asked Constitution to submit "all details for proposed stream crossings". (CA2 J.A. 216.) The State also repeatedly indicated its preference for "trenchless" waterbody crossing methods, which minimize impacts to water quality by drilling under—rather than digging through—streams and wetlands. (CA2 J.A. 77, 89, 166.)

Constitution submitted supplemental permit application materials in November 2013, but refused to provide some of the materials the State requested. (CA2 J.A. 301, 379-382.) In particular, Constitution

---

[1] Constitution's suggestion that the State agreed to "rely" on FERC's environmental review (Pet. 12), does not accurately reflect the record. The State told Constitution that, "*[a]long with the permit applications*, the [State] also intends to rely on the federal environmental review prepared pursuant to [NEPA] to determine if the Project will comply with applicable New York State standards." (CA2 J.A. 75-76 [emphasis added]; *accord* CA2 J.A. 164). The State thus intended to conduct its own review of Constitution's "permit application[]" to assess the project's impacts to state water quality.

refused to evaluate the feasibility of trenchless crossings at any streams less than 30 feet in width, effectively eliminating most of the crossings from consideration for use of the more protective technology. (CA2 J.A. 307, 319.)

On May 9, 2014, Constitution voluntarily withdrew and re-submitted the application so the parties could continue to develop it without risking expiration of the one-year deadline for state action set by § 401 of the Clean Water Act. (CA2 J.A. 851.)

In July 2014, the State requested additional information to be included in a revised application. (CA2 J.A. 891-95.) Constitution supplemented its application in August 2014, but the supplement included only "a portion" of the items the State had requested. (CA2 J.A. 898.) Constitution submitted further information in November 2014 (CA2 J.A. 1665); however, much of the information the State sought was not provided.

In December 2014, the State published a Notice of Complete Application, which opened a public comment period on the application. (CA2 J.A. 1725.) The State's determination to treat the application as complete did not preclude the agency from requesting further information. *See* N.Y. Comp. Codes, Rules & Regs. tit. 6, § 621.14(b) ("6 N.Y.C.R.R."). Rather, the State's regulations required a Notice of Complete Application before public comment could be solicited. 6 N.Y.C.R.R. § 621.7(a). The State received more than 15,000 public comments on the application. (CA2 J.A. 2853.) Active review of the application continued throughout the comment period and the following months. (CA2 J.A. 1853-1855.)

Constitution again supplemented its application in February and March 2015. The new material still did not include all the information relating to waterbody impacts that the State had requested almost a year earlier. (CA2 J.A. 2061.) In particular, Constitution still refused to evaluate the use of trenchless crossing technologies for any stream less than 30 feet in width. (CA2 J.A. 1895.) At the small number of crossings Constitution did evaluate, Constitution did not complete full geotechnical evaluations as requested by the State, and refused to provide the State with the evaluations it had completed. (CA2 J.A. 307, 353-59, 2055-2057, 2095-2097.) Constitution ultimately submitted geotechnical evaluations for only two stream crossings. (CA2 J.A. 1855, 2079; Pet. App. 20a, 33a.)

On April 27, 2015, Constitution voluntarily withdrew and resubmitted its application a second time (CA2 J.A. 2072), thus giving the State additional time to consider the recent supplemental submission and the thousands of public comments it had received. During the ensuing year, the State's review of the application and public comments continued, as did active discussions with Constitution regarding geotechnical investigations, third-party environmental monitoring, and other topics relevant to the water-quality impacts on the many streams and other waterbodies that would be affected.[2] (CA2 J.A. 2248,

---

[2] Contrary to Constitution's claim that the State "shut down substantive communications . . . during the eight month period" before the denial (Pet. 14), the record includes at least 188 entries for that period reflecting ongoing communications between the State and Constitution on a range of issues related to water quality.

2529-2533, 2594, 2602, 2607, 2612-2614, 2621, 2624, 2805.)

D. The State's Denial

On April 22, 2016, the State denied Constitution's request for a § 401 certification. (Pet. App. 35a-65a.) The State concluded that Constitution had "fail[ed] in a meaningful way to address the significant water resource impacts that could occur from this Project" and "failed to provide sufficient information to demonstrate compliance with New York State water quality standards." (Pet. App. 36a.) The State outlined the project's large impact to numerous streams and wetlands, including many classified as sensitive or unique. (Pet. App. 38a-43a.)

The State determined that Constitution had failed to provide sufficient information on the feasibility of trenchless crossing methods at stream crossings. (Pet. App. 51a-52a.) The State described its numerous requests, dating back to June 2012, for technical information on the feasibility of trenchless crossings, and Constitution's continued failure to provide adequate and complete information on that issue. (Pet. App. 53a-57a.) Instead, the State found, Constitution provided a patchwork of insufficient information based on limited analysis to support its conclusion that only 11 of the more than 250 streams could be crossed using trenchless methods. (Pet. App. 59a.) In particular, the State noted Constitution's continued unwillingness to evaluate the feasibility of trenchless crossing technologies at streams less than 30 feet wide or to provide site-specific analyses, including geotechnical evaluations, for the handful of crossings it did evaluate. (Pet. App. 58a-59a.) Based on Constitution's failure to provide adequate information on trenchless crossings

and other water-quality protection measures, the State concluded that Constitution had failed to demonstrate that the project would comply with New York's water-quality standards. (Pet. App. 60a.)

The State identified several additional bases for denying the § 401 certification. First, the State observed that Constitution had provided limited analysis of pipe-burial depth covering only 21 of the more than 251 streams, making it impossible for the State to determine whether the proposed depth would be sufficient to protect water-quality standards. (Pet. App. 62a-63a.) Further, Constitution had failed to provide site-specific information on whether and when blasting would be required in waterbodies and wetlands. (Pet. App. 63a.) Finally, Constitution had failed to provide sufficient information on wetlands crossings. (Pet. App. 64a.)

In describing the project's background, the State noted that it had asked Constitution to evaluate alternative routes that would minimize environmental impacts by co-locating the pipeline with existing highway or power-line rights-of-way. (Pet. App. 38a-39a.)

E. Proceedings Below

Constitution petitioned for review of the denial in the Second Circuit pursuant to Natural Gas Act § 19(d), 15 U.S.C. § 717r(d). The Second Circuit unanimously rejected all of Constitution's arguments. The Court observed that the denial was not an improper collateral attack on FERC's permitting process, because "the relevant federal statutes entitled [the State] 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. 28a.)

The Second Circuit noted 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.) It then observed that it was unnecessary to address Constitution's numerous arguments that the State was exceeding its authority in this consideration, because "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." (Pet. App. 29a [citation omitted].)

The Second Circuit went on to explain that, apart from Constitution's failure to provide information on alternative routes, the State had ample basis for denying the certification—namely, Constitution's failure to provide multiple categories of requested information. The court outlined the areas of information that the State had requested but not received, and observed that Constitution did not even "claim to have provided" that information. (Pet. App. 31a-32a.) Accordingly, the Court concluded that "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." (Pet. App. 33a [emphasis added].)

The Second Circuit unanimously denied Constitution's motion for panel rehearing or rehearing en banc. (Pet. App. 67a.)

REASONS FOR DENYING THE PETITION

The petition should be denied for three reasons. First, it does not squarely present the issue on which Constitution seeks review—both the State and the Second Circuit rested their decisions on grounds separate from and independent of the failure to consider alternative routes. Second, the decision below does not conflict with any decision of this Court or any other court. Third, the case does not present the issues of national security and federalism that petitioner seeks to raise.

I. This Case Does Not Present the Question of Whether A Water Quality Certification Can Be Denied for Failure to Consider Alternative Routes.

The petition should be denied because this case does not squarely present the issue that Constitution seeks to have reviewed, namely, whether a State may deny a certification under § 401 of the Clean Water Act "on the basis of purportedly receiving insufficient information regarding alternative routes for [an] interstate natural gas pipeline" (*see* Pet. ii). The State based its denial on Constitution's failure to support its application in multiple areas. Thus, even if Constitution's failure to provide information regarding "alternative routes" were one of the areas on which the Second Circuit relied—and, as shown below, it was not—the State denied Constitution's application for a water-quality certification based on numerous independent grounds.

Contrary to Constitution's argument, the Second Circuit did not hold that the "single cognizable rationale" for the denial was "the issue of alternative

routes" (Pet. 16). Rather, the Second Circuit observed that the State was authorized to request information regarding alternative routes. (Pet. App. 29a.) The court added, however, that it "need not address" Constitution's contention that the State relied on improper factors because the State's decision was independently sustainable on other grounds 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." (Pet. App. 29a [record citation omitted].)

The Second Circuit observed that the State had "requested but had not received sufficient information with regard to" multiple issues, including not only "alternative routes," but also "construction methods and site-specific project plans for stream crossings"; "pipeline burial depth in stream beds"; "procedures and safety measures Constitution would follow in the event that blasting is required"; "plans to avoid, minimize, or mitigate discharges to navigable waters and wetlands"; and "cumulative impacts" from the project. (Pet. App. 31a; *see also* Pet. App. 15a-22a, 33a [Second Circuit]; 50a-52a, 58a-64a [administrative denial].) The court recognized that "[n]owhere does Constitution claim to have provided the above categories of information." (Pet. App. 32a.) Constitution's failure to provide information as to any one of those other matters—all of which fall within New York's authority under § 401—suffices to uphold the denial.

Indeed, the Second Circuit made clear that the State had "focused principally on Constitution's failure to provide information with respect to stream crossings." (Pet. App. 16a [record citation omitted].) Apart from the refusal to provide information as to possible

alternative routes, the Second Circuit ultimately concluded that the denial could be upheld because Constitution "persistently refused" to submit "site-by-site information as to the feasibility of trenchless crossing methods for streams less than 30 feet wide—*i.e.*, the vast majority of the 251 New York waterbodies to be crossed by its pipeline." (Pet. App. 33a.)

Accordingly, reading the decision below in context, the Second Circuit held that the failure to provide information regarding waterbody-crossing technologies constituted *at least* one valid reason supporting the State's denial. That reason would support the denial independently, even if the State's request for information regarding possible alternative routes had been improper. (*See* Pet. App. 29a-33a.) Thus, contrary to the suggestion of *amici* (Br. for National Ass'n of Mfrs. et al. at 21), the State did not act "based on its disagreement with FERC over a matter within FERC's exclusive authority." Rather, the State denied the certification because Constitution had not provided information on stream-crossing methods and other issues directly within the State's authority under Clean Water Act § 401.

Further, the State did not require that the proposed pipeline be rerouted. The State simply expressed its dissatisfaction with Constitution's failure to explore fully an alternative route that would co-locate the pipeline with an existing right-of-way instead of clearing 100 miles of new right-of-way. (Pet. App. 38a-39a, 60a.) Such analysis reasonably fell within the State's overarching mission under § 401(a) to enforce state water-quality standards. Examining impacts on water quality necessarily requires the State to examine a project's location. *See, e.g., Islander E.*

Pipeline Co., LLC v. McCarthy, 525 F.3d 141, 151-52 (2d Cir.), *cert. denied*, 555 U.S. 1046 (2008).

In sum, even if the State's observations regarding possible alternative routes exceeded its authority under Clean Water Act § 401 (and they did not), the Second Circuit upheld the denial based on other valid grounds. As shown above, the Second Circuit confirmed the State's denial of a water-quality certification based on Constitution's failure to provide information on many issues, most notably the means by which Constitution would minimize impacts on the many streams the pipeline would cross. Therefore, this case does not squarely present the question of whether failure to provide information on alternative routes can justify denying a water-quality certification, and this Court's resolution of the issue proposed by Constitution would be an academic exercise. Accordingly, the petition should be denied.

II. The Second Circuit's Decision Does Not Conflict with the Governing Statutes, Any Decision of This Court, or the Decisions of Other Circuit Courts.

The Court should deny certiorari for the additional reason that the Second Circuit's decision does not conflict with any decision of this Court or any other court of appeals.

First, the Second Circuit's decision is a straightforward application, on the specific administrative record in this case, of the Clean Water Act's carve-out for state water-quality regulation, which the Natural Gas Act expressly preserves. As the Second Circuit recognized (Pet. App. 28a-29a), Clean Water Act § 401 authorizes States to deny certification to a federally

approved project when the applicant fails to establish that the project will comply with state water-quality standards. *See* 33 U.S.C. § 1341(a)(1), (d). If a State denies a § 401 certification, "[n]o license or permit shall be granted" for the project by the federal permitting agency. *Id.* § 1341(a)(1). The Natural Gas Act broadly preserves the States' authority over water-quality issues by providing that "nothing in [the Natural Gas Act] affects the rights of States under" the Clean Water Act. 15 U.S.C. § 717b(d)(3).

Second, the decision below is consistent with this Court's decisions. This Court has recognized that § 401 "was meant to 'continu[e] the authority of the State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.'" *S.D. Warren*, 547 U.S. at 380 (*quoting* S. Rep. No. 92-414, at 69 [1971]). No similar express preservation of state rights was at issue in *Schneidewind v. ANR Pipeline Co.*, relied on by Constitution, which held that the Natural Gas Act occupied the field with respect to the issuance of securities of natural gas companies, preempting a state law attempting to regulate in that arena. 485 U.S. 293, 309-11 (1988).

Third, the two circuit cases cited by Constitution to show a conflict (Pet. 16-17) miss the mark. The Second Circuit's decision in *National Fuel Gas Supply Corp. v. Public Service* Commission did not involve the State's federally granted authority under the Clean Water Act. Instead, it concerned regulations under the State's Public Service Law, which were not federally sanctioned. *See* 894 F.2d 571, 574-75 (2d Cir.), *cert. denied*, 497 U.S. 1004 (1990). Moreover, even if *National Fuel Gas* conflicted with the decision below (and it does not), an intra-circuit conflict does not

merit this Court's review. Notably, the Second Circuit denied Constitution's petition for panel rehearing or rehearing en banc. (Pet. App. 67a.)

As for *Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council*, that case concerned a Rhode Island state licensing program for coastal dredging. 589 F.3d 458, 472 (1st Cir. 2009). As relevant here, the First Circuit held that the state dredging regulation could not block the construction of a liquefied natural gas terminal when FERC had exercised its federal authority to permit the dredging. *Id.* at 473-74. Again, the State's separate, federally preserved right to review water-quality impacts under § 401 of the Clean Water Act was not implicated.

III. This Case Does Not Implicate the National Security and Federalism Concerns Cited by Petitioner.

This case does not raise the national security and federalism concerns that Constitution seeks to invoke.

Nothing in FERC's conditional certificate or rehearing order indicated that the agency considered Constitution's proposed pipeline to be necessary as a matter of national security. (*See* CA2 J.A. 1668-1686, 1711-1713, 2723-2798.) Rather, the Certificate reflected FERC's judgment that the benefits of the project would outweigh the costs *only if* Constitution complied with certain environmental conditions, including satisfying the State that the project would comply with state water-quality standards. (CA2 J.A. 1668, 1711-1712, 1717.) Thus, there is no basis for petitioner's claim that national security concerns warrant this Court's review.

Nor does the decision implicate federalism concerns. Constitution's argument that the Second Circuit's decision would violate the Supremacy and Commerce Clauses of the U.S. Constitution (Pet. 21-25) is premised on the incorrect proposition that the State exceeded its authority in denying the application for a Clean Water Act § 401 certification. To the contrary, as demonstrated above (at 13-14), the Second Circuit's decision is consistent with the cooperative federalism framework established by § 401 of the Clean Water Act and § 717b(d)(3) of the Natural Gas Act. Therefore, federalism concerns do not support a grant of certiorari.

Finally, the State's denial of the § 401 certification was effectively without prejudice: Constitution remains free to re-apply for a § 401 certification and provide the information the State determined to be deficient. (Pet. App. 65a.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
ANDREW D. BING
Deputy Solicitor General
FREDERICK A. BRODIE
Assistant Solicitor General
BRIAN LUSIGNAN
Assistant Attorney General
Environmental Protection Bureau
barbara.underwood@ag.ny.gov

March 2018

**Counsel of Record*