

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

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In the Matter of:

Constitution Pipeline Company, LLC

Docket No.: CP13-499-000

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**COMPLAINT AND PETITION BY THE OFFICE OF THE NEW YORK
STATE ATTORNEY GENERAL AGAINST CONSTITUTION PIPELINE
FOR VIOLATIONS OF LAW AND THE ORDER ISSUING
CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY**

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The Office of the New York Attorney General (“NY Attorney General”) brings this complaint and petition pursuant to Sections 13, 14, 20 and 21 of the Natural Gas Act, 15 U.S.C. §§ 717l, 717m, 717s and 717t, and the Federal Energy Regulatory Commission’s regulations, 18 C.F.R. §§ 385.206 and 385.207, related to the acts and omissions of Constitution Pipeline Company, LLC (“Constitution”) in the pipeline right of way in New York. The NY Attorney General requests that the Commission initiate an investigation and, based on the evidence set forth in this complaint and petition and any further evidence obtained by the Commission in its investigation, take appropriate legal enforcement action. Constitution’s acts and omission relate to significant tree and vegetation cutting and clear-cutting, and other ground disturbance and construction activities within the pipeline right of way in New York in violation of the Commission’s December 2, 2014 Order Issuing Certificates of Public Convenience and Necessity (the “Order”), and the legal requirements set forth in the Natural Gas Act and the Commission’s regulations. The Attorney General also requests that the Commission stay its Order until completion of the investigation and enforcement action, and until Constitution has obtained all authorizations required under federal law.

In essence, the Order and the governing legal requirements of the Natural Gas Act and the Commission's regulations prohibit cutting trees and other vegetation, conducting ground disturbance activities, and commencing pipeline construction until Constitution (1) has obtained all required authorizations under federal law, including a water quality certification issued under Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341, and (2) has received written authorization to proceed from the Commission. The conduct giving rise to this complaint and petition occurred without Constitution having obtained all authorizations required under federal law and without having the Commission's written authorization to proceed. Indeed, New York has denied Constitution's application for the federal water quality certification and the Commission staff has denied Constitution's request to cut trees and vegetation within the pipeline right of way in New York.

The evidence supporting this complaint and petition is summarized below and is more fully set forth in the accompanying affidavit of NY Attorney General Senior Investigator Kathleen Coppersmith. The evidence provides a reasonable basis to conclude that Constitution expressly or tacitly authorized, encouraged and/or condoned the tree and vegetation cutting, clear-cutting, and other ground disturbance activities within the pipeline right of way in New York on which Constitution holds easements for the sole purpose of constructing and operating the pipeline. Such conduct by a gas pipeline developer has been subject to enforcement action in New York.¹ Enforcement action by the Commission here is therefore appropriate.

¹ The New York State Public Service Commission ("NYSPSC") instituted an investigation of acts of significant tree cutting within the Bluestone Gas Corporation's natural gas pipeline right of way before obtaining the requisite NYSPSC authorization to construct the pipeline (NYSPSC, No. 11-G-0221, Order Instituting Proceeding, May 23, 2011). That matter, which was subject to NYSPSC's jurisdiction rather than the Commission's, was resolved by an order adopting an offer of settlement under which Bluestone would provide \$400,000 for a public benefit fund in favor

The evidence strongly suggests that Constitution has violated the Order, the Commission's regulations and the Natural Gas Act. Constitution's acts and omissions also have circumvented the Order, have undercut the Commission's environmental review on which the Order is based, and have undermined the integrity of the Section 7 certificate approval process. Accordingly, the NY Attorney General requests that the Commission fully investigate Constitution's acts and omissions and take appropriate legal enforcement action. As explained below, the NY Attorney General is not requesting and would oppose any enforcement action against the fee landowners on whose property the conduct giving rise to this complaint and petition took place.

In light of the irreparable harm sustained by New York as a result of Constitution's acts and omissions, the evidence submitted herewith showing the likelihood of Constitution's violations, and the equities of this matter, the NY Attorney General also requests that the Commission issue a stay of its Order until completion of its investigation and enforcement action, and until Constitution has obtained all authorizations required under federal law.

I. STATUTORY AND REGULATORY FRAMEWORK

A. The Federal Clean Water Act

1. Section 510 of the Clean Water Act preserves the primary authority of States to protect the waters within their borders. 33 U.S.C. § 1370. Section 401(a)(1) of the Act mandates that any applicant for a federal license "to conduct *any* activity, including construction and operation of facilities, which *may result* in any discharge into the navigable waters" obtain a certification from the State indicating that such discharge will comply with applicable State water quality requirements (hereinafter "water quality certification"). 33 U.S.C. § 1341(a)(1)

of the town and/or county in which the conduct occurred (NYSPSC, No. 11-G-0221, Order Adopting Terms of Offer of Settlement and Closing Investigation, April 19, 2012).

(emphasis added). Section 401(d) provides that the certification shall set forth the limitations and monitoring requirements necessary to assure compliance with water quality requirements and that the State certification “shall become a condition on any Federal license or permit subject to this section.” 33 U.S.C. § 1341(d). Section 401(a)(1) provides that no federal license or permit “shall be granted until the certification . . . has been obtained or waived” and that “[n]o license or permit shall be granted if the certification has been denied by the State. . . .” 33 U.S.C. § 1341(a)(1).

2. The New York State Department of Environmental Conservation (“NYSDEC”) implements Section 401 within New York under an authorization from the U.S. Environmental Protection Agency, and applies the narrative and numerical water quality standards set forth in NYSDEC’s laws and regulations, Environmental Conservation Law Article 17 and New York Code of Rules and Regulations title 6, Part 703. In issuing water quality certifications, NYSDEC certifies that the activities undertaken pursuant to a federal license or permit will comply with the State’s water quality requirements and will not adversely affect water quality in New York.

B. The Natural Gas Act and the Commission’s Regulations

3. The Natural Gas Act states that no natural gas company shall undertake the construction of any facility “unless there is in force” a certificate of public convenience and necessity. 15 U.S.C. § 717f(c)(1)(A). The Act provides that a certificate shall be issued “if it is found that the applicant is able and willing. . . to conform to the provisions of the Act . . . and the requirements, rules, and regulations of the Commission.” 15 U.S.C. § 717f(e). Otherwise, “such application shall be denied.” 15 U.S.C. § 717f(e). The Act gives the Commission the power “to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C. § 717f(e). The Commission is responsible for assuring compliance with the terms and

conditions of its orders and certificates, and to otherwise protect the public interest. 15 U.S.C. § 717s; see also *Federal Power Commission v. Texaco*, 377 U.S. 33, 41-42 (1964).

4. The Natural Gas Act addresses how it should be construed with other federal laws, including the Clean Water Act, and states that “nothing in this chapter affects the rights of States under— ... the Federal Water Pollution Control Act...” (33 U.S.C. 1251 *et seq.*). 15 U.S.C. 717b(d).

5. The Natural Gas Act provides that whenever it appears to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the Act, or any rule regulation, or order issued thereunder, the Commission may bring an action to enjoin such acts and otherwise enforce compliance. 15 U.S.C. § 717s(a).

6. The Natural Gas Act provides:

Any person that violates this Act, or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this Act, shall be subject to a civil penalty of not more than \$1,000,000 per day per violation for as long as the violation continues.

15 U.S.C. § 717t-1(a).

7. The Commission’s Natural Gas Act regulations provide that any ground disturbance activities undertaken “shall be consistent with all applicable law,” including the Clean Water Act. 18 C.F.R. § 157.206(b)(2). The regulations further provide that any activities authorized under a blanket certificate “shall not have a significant adverse impact on a sensitive environmental area.” 18 C.F.R. § 157.206(b)(4). The term “sensitive environmental area” is defined to include, among other things, floodplains (associated with water bodies) and wetlands. 18 C.F.R. §§ 157.202(11).

C. Commission Jurisdiction

8. Sections 20 and 21 of the Natural Gas Act give the Commission jurisdiction to enforce the Act, the regulations, and any order issued pursuant to the Act. 15 U.S.C. §§ 717s; 717u. The Commission may take enforcement action whenever it appears that a natural gas company “is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act... or of any rule, regulation or order thereunder...” 15 U.S.C. §§ 717s; 717t. Section 14 of the Natural Gas Act empowers the Commission to “investigate any facts, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate” any provision of the Act or any rule, regulation or order issued thereunder, or to aid in the enforcement of the Act. 15 U.S.C. § 717m(a).

9. The Commission has jurisdiction over all pipeline construction activities, including those involving any ground disturbance activities within a pipeline right of way. 18 C.F.R. §§ 157.201; 157.206. The Commission’s regulations prohibit any ground disturbance activities in the pipeline right of way that are inconsistent with the Clean Water Act. 18 C.F.R. § 157.206(b)(2). Clear cutting and other related activities on the pipeline right of way constitute regulated ground disturbance and construction activities under the Natural Gas Act, the regulations and the Order, and are within the Commission’s jurisdiction.

10. The Commission has jurisdiction to investigate Constitution’s acts and omissions related to tree and vegetation cutting and other ground disturbance activities within the pipeline right of way in New York undertaken after the Commission issued the Order, and to enforce the provisions of the Natural Gas Act, the Commission’s regulations, and the Order with respect to those acts and omissions. 15 U.S.C. §§ 717m; 717s; 717u. The Commission has jurisdiction to

stay the Order issued here, which conditionally approved Constitution's pipeline project. 15 U.S.C. § 717o.

11. Section 13 of the Natural Gas Act provides that any State complaining of anything done or omitted to be done by any natural gas company in contravention of the provisions of the act "may apply to the Commission by petition, which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such natural-gas company, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission." 15 U.S.C. § 717l. Rule 206 of the Commission's Rules of Practice and Procedure provide that a complaining party may proceed by filing a complaint or petition, which contains relevant facts and a cognizable claim that the Commission has the power to address. 18 C.F. R. §§ 385.206 and 385.207.

12. Under the Natural Gas Act, Constitution has the responsibility to take any action necessary to protect its rights and responsibilities regarding the use of the pipeline right of way for purposes of constructing and operating the pipeline Project in compliance with the Act, the Commission's regulations, and the Order. 15 U.S.C. § 717u.² Constitution has the responsibility to refrain from authorizing or encouraging third-parties to take actions within the pipeline right of way that Constitution itself is not authorized to take, and to refrain from condoning any such actions. Constitution may not authorize, encourage or condone the actions of third-parties and/or fail to take reasonable action to prevent activities by third-parties within the pipeline right of way of which it has knowledge that are in violation of the Natural Gas Act, the Commission's regulations and/or the Order.

² See *Columbia Gas Transmission Corp. v. Burke*, 768 F. Supp. 1167, 1173 (N.D.W.Va 1990) (gas company is entitled to injunction against property owner's refusal to halt construction of home in pipeline right-of-way because company's safety duties were being impaired);

D. Relevant New York Real Property Law

13. Under New York’s real property law, an easement holder has the dominant right to control the pipeline right of way, as well as the responsibility to maintain the right of way. 5-40 Warren's Weed New York Real Property, Easements, § 40.70. Constitution holds easements pursuant to right of way agreements on properties making up the pipeline right of way in New York, which have been clear cut and subject to construction activities (Coppersmith Aff., ¶¶ 4, 7-10, 12-14; Exhibits A, B and D).³ Constitution’s rights over the properties on which it holds easements are superior to those of the landowner/grantor and are governed by the terms of the agreements.⁴ Unless the agreements specifically reserves to the landowner/grantor timbering or other rights to use, such rights cannot be read into the agreements. 5-40 Warren's Weed New York Real Property, Easements, § 51.09. The easement agreements here do not reserve to the landowner/grantor such timbering or other rights to use.

II. FACTUAL BACKGROUND

A. Constitution’s Application for a Certificate of Public Convenience and Necessity Pursuant to Section 7 of the Natural Gas Act

14. On June 13, 2013, Constitution filed an application under Section 7 of the Natural Gas Act, 15 U.S.C. § 717f, for a blanket certificate of public convenience and necessity, and requested authorization to construct and operate a 125-mile natural gas pipeline project and associated facilities (the “Project”) from Susquehanna County, Pennsylvania to Schoharie

³ References are to the Affidavit of Kathleen Coppersmith, which is submitted in support of this complaint and petition.

⁴ See *Paine v. Chandler*, 134 N.Y. 385, 391 (1892); *Herman v. Roberts*, 119 N.Y. 37, 43 (1890) (owner of land subject to easement has right to use only if not inconsistent with rights of easement holder and rights of easement holder are paramount); *Columbia Gas Transmission Corp. v Bishop*, 809 F. Supp. 220, 222 (W.D.N.Y. 1992) (owner of land subject to easement may not use land in any way inconsistent with easement holder’s rights).

County, New York (Application, 20130613-5078 to 5080). In its application, Constitution included a list of the authorizations required under federal law to implement the Project. The list included a Clean Water Act Section 401 water quality certification issued by NYSDEC and a Section 404 dredge and fill permit issued by the U.S. Army Corps of Engineers (Application, Exhibit J). 33 U.S.C. §§ 1341 and 1344.

15. Constitution's application also included an Environmental Report identifying, among other things, protected water bodies, wetlands, floodplains, flood hazard zones, endangered/threatened species, and ecologically sensitive areas that would be impacted by construction and/or operation of the Project (20130613-5078: Exhibit F-1, pp. 2-54 to 2-107). Constitution's Environmental Report indicated that a water quality certification would be required from NYSDEC for all water body and wetland crossings (p. 2-52). Constitution's application did not propose – and the Commission did not approve – any tree cutting, clear-cutting, or other construction activities before issuance of all authorizations required under federal law, including NYSDEC's water quality certification.

16. On July 17, 2013 the NY Attorney General filed a motion to intervene in the Commission's Section 7 certificate proceeding under the Natural Gas Act in order to protect and advance the State's interests, enforce applicable laws, and otherwise protect the public health, environment, and economic interests of New York citizens (20130717-5313, pp. 5-6). The Commission granted intervention and the NY Attorney General has been an active participant in the Section 7 proceeding since that time.

B. The Commission’s Final Environmental Impact Statement for the Project

17. On October 24, 2014, Commission staff issued a Final Environmental Impact Statement (“FEIS”) for Constitution’s Project (20141024-4001).⁵ The FEIS documented the Project’s potential adverse impacts on water bodies, wetlands, water use, fisheries, vegetation, and endangered/threatened species and their habitat (FEIS, pp. ES-4 to ES-6; §§ 4.3 and 4.4; Appendices K-2, L-2, and N). The FEIS specifically recognized that the Project required close environmental compliance monitoring and recommended that Constitution be required to have environmental inspectors to implement a compliance monitoring program (FEIS, pp. ES-14; 5-19 to 5-20, ¶¶ 6-7). The FEIS listed NYSDEC’s water quality certification as one of the “major permits, approvals and consultations” applicable to the project, among others (FEIS, Table 1.5.1, p. 1-16).

18. The FEIS concluded that construction and operation-related environmental impacts would be minimized or mitigated by Constitution’s compliance with numerous environmental conditions, which involved both the sequence and timing of construction activities, and the implementation of substantive mitigation measures (FEIS, p. ES-5 to ES-7). One recommended environmental condition in the FEIS required Constitution to submit to the Commission documentation showing that it had received all authorizations required under federal law *before* commencing pipeline construction activities (p. 5-20, ¶ 8). This necessarily included documentation that Constitution had received a water quality certification from NYSDEC (ES-5 to ES-7). Many of the other conditions in the FEIS required other action prior

⁵ On February 12, 2014, Commission staff issued a draft EIS on which New York filed extensive and detailed comments (20141024-4001, pp. S-96 to S-149). NYSDEC submitted multiple comments; and the New York Attorney General, the Public Service Commission, and the Department of Agriculture and Markets also submitted comments.

to construction and before any tree or vegetation clearing (FEIS ¶¶ 3, 6, 11-14, 19, 20, 23, 25-26, 28-38, and 42).

19. After analyzing the environmental impacts of the project, the FEIS set forth 43 recommended conditions to mitigate those impacts (§ 5.2, pp. 5-17 to 5-24). All of the FEIS's recommended conditions were later adopted by the Commission in the Order, including the requirement that *prior* to commencing pipeline construction activities, Constitution submit documentation that it had received all applicable authorizations required under federal law, including a water quality certification from NYSDEC. (Compare FEIS ¶ 8, p. 5-20 with Order, Env. Cond. ¶ 8).

C. The Commission's Order Issuing Certificates of Public Convenience and Necessity

20. On December 2, 2014, the Commission issued the Order conditionally approving the Project under Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c) (20141024-4011).⁶

The Order provided in part:

(E) The certificate authority issued in Ordering Paragraphs (A) and (D) shall be conditioned on the following: ...

(2) Applicants' compliance with all applicable Commission regulations under the NGA including, but not limited to, Parts 154 and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the regulations;

(3) Applicants' compliance with the environmental conditions listed in the appendix to this order.

(Order, ¶¶ 148 (E), p. 46).

21. The Order contained the Commission's environmental analysis, which concluded that even if the Project was constructed in accordance with applicable laws and regulations, it

⁶ *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,121 (2014), *on reh'g*, 154 FERC ¶ 61,046 (2016) ("Rehearing Order").

would still result in some adverse environmental impacts (Order ¶ 73, p. 24). The Commission found that impacts on water bodies and wetlands would be mitigated by Constitution's compliance with conditions in the water quality certification issued by NYSDEC (¶ 79, p. 25). The Commission further found that adverse impacts would be reduced if Constitution implemented the Environmental Conditions in the FEIS. The Commission then incorporated 43 Environmental Conditions into the Order (¶ 73, p. 24). The Order expressly stated that the certificate "shall be conditioned" upon Constitution's compliance with the Commission's regulations and with compliance with the Order's Environmental Conditions (p. 46, ¶ E).

22. The Commission's Order included the express requirement that prior to seeking Commission approval to commence pipeline construction, Constitution submit documentation to the Director of the Office of Energy Projects ("OEP") that it had obtained *all* authorizations required under federal law:

Prior to receiving written authorization from the Director of OEP to commence construction of their respective project facilities, the Applicants shall file documentation that they have received all applicable authorizations required under federal law (or evidence of waiver thereof).

(Order, Env. Cond. ¶ 8; emphasis in original).

23. The Order also set forth requirements to protect endangered species and migratory birds if clear cutting occurred after April 1:

Immediately prior to any vegetation clearing to be conducted between April 1 and August 31, Constitution shall conduct nest surveys for birds of conservation concern performed by qualified personnel within areas proposed for clearing. Constitution shall file the results of the surveys with the Secretary and provide a buffer around any active nests to avoid potential impacts until the young have fledged. (*section 4.6.1.3*)

Prior to construction, Constitution shall develop a project- and site-specific tree clearing plan for the northern myotis if clearing occurs between April 1 and September 30 that includes the location of any potential roost trees in or adjacent to the construction corridor, and as applicable incorporate the identified mitigation measures in section 4.7.2

of the final EIS. This plan shall be filed with the Secretary for review and written approval of the Director of OEP. (*section 4.7.2*)

(Order, Env. Conds. ¶¶ 26, 29). On information and belief, Constitution has not complied with these conditions. It has not conducted nest surveys for birds of conservation concern, nor filed with the Commission the results of the surveys along with buffer areas around active nests in order to avoid potential impacts, as required by Environmental Condition 26. On information and belief, the Director of OEP has not issued a written approval of the site specific tree clearing plan for the northern myotis (Northern Long-Eared Bat), as required by Environmental Condition 29.

24. The Order delegated authority to the Commission’s Director of OEP “to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the projects,” including “the design and implementation of any additional measures deemed necessary (including stop-work authority) to ensure continued compliance with the intent of the environmental conditions as well as avoidance or mitigation of adverse environmental impact resulting from construction and operation of the projects” (Order, Env. Cond. ¶ 2).

D. The Commission’s Rehearing Order

25. Numerous stakeholders in the proceeding filed motions for rehearing of the Order. On January 27, 2015, the Commission granted rehearing, but did not rule on the claims advanced (20150127-3038). A year later, on January 28, 2016, the Commission issued an order on rehearing upholding the Order in its entirety (Reh. Order: 20160128-3064).

26. In response to stakeholder rehearing challenges that the Commission could not issue the conditional Order and blanket certificate before NYSDEC issued a water quality certification, the Commission held that the Clean Water Act had “no absolute bar” to the

Commission acting to issue the certificate (Reh. Order, ¶ 63, pp. 23-24). The Commission characterized the Order as an “incipient authorization *without current force or effect*” because Constitution is not allowed “to begin the proposed activity before the environmental conditions are satisfied” or before NYSDEC issues the Clean Water Act 401 water quality certification (¶¶ 62-63, pp. 23-24; emphasis added). The Commission reiterated that the authority given to Constitution in the Order “is subject to the applicants’ compliance with the environmental conditions set forth in the order” (¶ 43, p. 17).

27. In response to stakeholder challenges that Constitution’s compliance with the Order’s environmental conditions would not be enforced, the Commission stated that it “takes matters of compliance seriously,” and that Constitution would be subject to sanctions and civil penalties if it fails to comply (¶¶ 54-56; pp. 21-22). The Commission stated that the environmental conditions imposed under the Order are “mandatory,” and that Constitution is required to employ environmental inspectors to monitor and ensure compliance and to identify areas of non-compliance. The Commission also stated that it will ensure that Constitution is fulfilling its duties by conducting its own monitoring (¶ 171, p. 71-72). The Commission upheld its environmental analysis under the National Environmental Policy Act, 42 U.S.C. § 4334, because the Order imposed further study of certain environmental issues and “requires the completion and review of those studies prior to commencement of construction” (¶ 53, p. 21).

28. The Commission discussed NYSDEC’s water quality certification:

If and when NYSDEC issues a WQC [water quality certification] for the projects, Constitution will be required to comply with the requirements of the WQC. If Constitution is required to materially modify its project to satisfy any conditions imposed by NYSDEC, it would file a formal variance request with the Commission for any such modification.

(¶ 70, p. 27).

E. Constitution's Implementation Plan

29. On May 19, 2015, Constitution submitted its Implementation Plan to the Commission, which purported to comply with some of the Order's 43 Environmental Conditions (20150519-5135). With respect to the authorizations required under federal law as set forth in Environmental Condition 8 of the Order, including the water quality certification from NYSDEC, the Plan stated:

Constitution has applied for all authorizations required under federal law for the Project. Constitution has received or *will receive all such authorizations for each facility location prior to commencing construction at each location.* A table listing the status of all applicable authorizations is included in the Condition 8 Attachment to this IP.

(20150519-5135, pp. 9-10; emphasis added).

30. Constitution's Implementation Plan included an Environmental Construction Plan, in which it outlined the construction sequence, beginning with planning, surveying, and flagging the pipeline route; then cutting and clearing trees and vegetation, grading, installing sediment barriers and interceptor dikes; followed by trenching, pipe installation, dewatering, backfilling, testing, and cleanup (20150519-5135, p. 51). The Plan indicated that project-related "ground disturbance" would be limited to the right of way, workspace areas, contractor yards, borrow and disposal areas, access roads, and other certified and approved areas (p. 51). On information and belief, the Commission has approved the Implementation and Environmental Construction Plans.

F. Constitution's Application to NYSDEC for a Water Quality Certification

31. While its Natural Gas Act Section 7 certificate application was pending before the Commission, Constitution made several incomplete submissions to NYSDEC for a water quality certification. On or about April 29, 2015, NYSDEC issued a notice of complete application for the water quality certification, which was a necessary administrative requirement to process

Constitution's application.⁷ NYSDEC's notice describes the pipeline project's impacts on wetlands and water bodies and the agency's jurisdiction under the Clean Water Act to avoid or mitigate those impacts.

G. Constitution's Right-of-Way Agreements and Eminent Domain Proceedings

32. On information and belief, beginning in or around 2013, Constitution negotiated agreements with numerous landowners in New York to acquire the necessary right-of-way easements to construct, operate and maintain the pipeline and associated facilities. These agreements do not contain a reservation of rights for the landowners/grantors to clear cut or take any other actions on the pipeline right of way property and in fact provide that only Constitution has those rights (Coppersmith, ¶ 14, Exhibit D).

33. On information and belief, more than 50% of the property owners refused to reach an agreement with Constitution and the company then initiated eminent domain proceedings against them in the United States District Court for the Northern District of New York. On information and belief, the Court has issued several orders granting permanent easements on the pipeline right of way. Many of those proceedings are still pending.

H. USFWS Biological Opinion

34. On December 31, 2015, the U.S. Fish and Wildlife Service ("USFWS") in consultation with NYSDEC, issued a Biological Opinion analyzing the effects of the Constitution pipeline on Northern Long-Eared Bats, an endangered species protected under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.* The Opinion found that the Project

⁷ See NYSDEC April 29, 2015 Environmental Notice Bulletin, available at: <http://www1.dec.state.ny.us/enb/101473.html>; http://www1.dec.state.ny.us/enb/20150429_reg0.html#099990018100024

would have adverse impacts on bats due to disturbance from tree/vegetation removal activities during the “active season” beginning on April 1 (Bio. Op., p. 34).

35. The USFWS determined that “individuals from an estimated seven maternity colonies may be exposed to stressors that result in take of individuals in the form of death or injury associated with the removal of 68 acres of trees during the active season and individuals within 13 acres surrounding hibernacula” (Bio. Op., p. 34). The Opinion set forth specific requirements for monitoring and reporting of injured/dead bats during construction in the active season and for minimizing/mitigating the impacts. It also set specific limits on the number of acres of trees and forest habitat that could be removed (Bio. Op. pp. 35-40).

I. Constitution’s Request to Clear Cut Trees/Vegetation and Begin Construction-Related Activities in New York and Pennsylvania

36. In letters of January 8 and 14, 2016 to the Commission, Constitution requested a “Partial Notice to Proceed” to begin clear-cutting trees and vegetation within the Project’s 100-125-foot wide right of way over the entire 124-mile length of the Project in Pennsylvania and New York (20160108-5125; 20160114-5432). Constitution proposed tree/vegetation cutting activities that traversed deep forest, steep slopes, protected wetlands, and 220 water bodies in New York. Constitution asserted that the work would be done by “non-mechanized” means without heavy equipment or deep ground rutting, and indicated that after cutting, the trees/vegetation would be left in place for an undefined period of time. Constitution asserted that it was “not requesting to proceed with construction of the Project,” but that it “will do so once applicable permits are received” (p. 2).

37. At the time of Constitution’s cutting request to the Commission, NYSDEC had not rendered a final decision on the water quality certification. Constitution claimed that the tree/vegetation clear-cutting activity did not require a water quality certification (p. 3), but

presented no evidence that NYSDEC had made such a determination. In its January 14 submission, Constitution in only general terms proposed avoiding water bodies and wetlands during clear-cutting by setting up buffer areas (20160114-5432). Constitution submitted no documentation that NYSDEC had approved clear-cutting activities near water bodies or wetlands based upon that general proposal.

38. In its request, Constitution claimed that it had developed a Third Party Environmental Compliance monitoring plan in consultation with Commission staff and NYSDEC (among others) in order to “monitor compliance with all applicable regulatory approvals and authorizations during tree felling” (20160114-5432, Attachment F, p. 4).

39. Constitution also requested approval of numerous Project changes and variances to add workspace areas, expand easements, and otherwise increase the size of the project area (20160114-5432; Attachment D).⁸ Many of the variances involved water bodies, wetlands and other ecologically sensitive areas and implicated NYSDEC’s Clean Water Act water quality certification authority. For example, Constitution proposed that the Commission approve a change to the crossing method for two protected trout streams; that work space be expanded around certain water bodies; and that additional water withdrawal be approved (Attachment D: Variances, pp. 6-14).

J. NY Attorney General’s January 14, 2016 Opposition to Clear-Cutting

40. On January 14, 2016, the NY Attorney General filed opposition to Constitution’s request for approval to begin clear-cutting activities (20160114-5411). The Attorney General argued that Constitution proposed to commence pipeline construction without a water quality certification having been issued by NYSDEC and cited a Constitution project manager’s

⁸ There were limited instances where Constitution eliminated work spaces, but those limited instances were insufficient to offset the overall increases to the Project area.

affidavit, which stated that tree cutting was an element of “construction” (pp. 6-7). The Attorney General further argued that the Commission’s Order prohibited commencement of construction before Constitution had obtained authorizations required under federal law, including a water quality certification from NYSDEC under the Clean Water Act (pp. 6-8). The Attorney General argued that granting approval to cut trees would be granting approval to commence construction in violation of the Order’s condition requiring a water quality certification from NYSDEC *before* commencing construction (pp. 6-8). Pointing to the legislative history of Section 401 of the Clean Water Act, the Attorney General asserted that the intent of that provision is the protection of water quality from the very kind of activities Constitution was proposing (p. 7).⁹

41. Finally, the Attorney General noted that the Commission’s environmental review did not assess the impact of leaving cut trees and vegetation in place for an indeterminate period of time, as Constitution proposed, and that the Commission’s FEIS assumed immediate removal (pp. 11-12). The Attorney General explained that a change to the construction procedure and sequence outlined in the Order may have environmental impacts, which the Commission had not assessed (pp. 11-12).

K. Commission Staff Denial of Tree/Vegetation Clear-Cutting in New York

42. In a January 29, 2016 letter, the Commission’s Director of the Division of Gas – Environment and Engineering declined to grant approval for tree and vegetation clear cutting in

⁹ The NY Attorney General cited the CWA’s Senate report, which stated, “[t]he purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.” S. Rep. No. 92-414 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3735 (1972).

New York at that time (20160301-5098, p. 2).¹⁰ The Commission also declined to approve the numerous variances in the Project's right of way that Constitution had requested.

L. Constitution's Renewed Request to Clear Cut in New York

43. On February 25, 2016, Constitution renewed its request to commence tree and other vegetation clear-cutting in New York (20160225-5175). Constitution claimed that it had obtained all required authorizations and that the Order and the Natural Gas Act certificate were not licenses or permits subject to a Section 401 water quality certification by NYSDEC (p. 2). Constitution also argued for the first time that a separate federal authorization, the U.S. Army Corps of Engineers dredge and fill permit under Section 404 of the Clean Water Act, was the only trigger for the requirement that Constitution obtain a water quality certification from NYSDEC, and that because a Section 404 permit was not required for tree or vegetation clearing activities, a water quality certification from NYSDEC was not required for that proposed activity (pp. 2-3).¹¹ Constitution asserted that, unlike hydroelectric licenses, a certificate under the Natural Gas Act is not a federal license or permit that is subject to a water quality certification under Section 401 of the Clean Water Act, in part because a Natural Gas Act certificate is not listed in the U.S. Environmental Protection Agency's "Certification Handbook" (pp. 2-3).

44. Constitution also asserted that clear-cutting is not regulated under New York law and referenced NYSDEC's web site, which generally addresses State permits for timber harvesting, but not water quality certifications for timber harvesting (p. 2). Constitution failed to

¹⁰ Although denying Constitution's request to begin clear-cutting activities in New York, the Director did authorize such activities in Pennsylvania, involving approximately 20 percent of the pipeline route.

¹¹ Specifically, Constitution's letter stated: "It is critical to note that for natural gas pipeline projects regulated under the Natural Gas Act, it is the presence and necessity of the CWA Section 404 permit that triggers the requirement to obtain a Section 401 Water Quality Certification, not the Commission's Certificate of Public Convenience and Necessity" (p. 2).

include with its renewal letter any evidence that NYSDEC had determined that clear-cutting trees and vegetation within the Constitution pipeline right of way did not implicate water quality and did not require a water quality certification.

M. NY Attorney General's Objection to Renewed Request to Clear Cut

45. On February 29, 2016, the NY Attorney General renewed its objection to Constitution's request for approval to clear cut trees and other vegetation within the pipeline right of way in New York before obtaining a water quality certification (20160301-5098). Citing the Order's environmental conditions, the Attorney General again noted that clear-cutting and any other construction activities could not proceed under the Order in the absence of a water quality certification from NYSDEC. The Attorney General asserted that Constitution was circumventing NYSDEC's authority under Section 401 of the Clean Water Act by requesting approval from the Commission to commence cutting trees and other vegetation without a water quality certification for the Project, and that the Commission would be circumventing NYSDEC's authority as well if it approved that activity (p. 2). The Attorney General cited a water quality study published in the *Journal of Physical Science*, which demonstrated that clear-cutting was an activity that may result in discharges adversely impacting water quality. The Attorney General argued that a Section 401 water quality certification from NYSDEC is required when an activity associated with a federally-licensed project could impact water quality (p. 2, fn. 2).

N. Clear-Cutting and Other Ground Disturbance Construction Activities Undertaken in New York Without Commission Approval

46. On or about March 8, 2016, the NY Attorney General received credible evidence that clear-cutting had commenced within the pipeline right of way at several locations in New York. The Attorney General also learned that Constitution apparently was aware of the clear

cutting activities, but had not taken any action to stop such activities or to report them to the Commission. The Attorney General thereafter commenced an investigation regarding the reported clear cutting activity (Coppersmith Aff., ¶¶ 6-11).

47. The Attorney General's investigation revealed significant clear-cutting, road building, work space clearing, heavy equipment use in wetlands and in other sensitive environmental areas, and other construction-related activities at numerous locations along the pipeline right of way in Broome, Delaware and Schoharie Counties, New York (Coppersmith Aff., ¶ 9; Exhibits A and B). The investigation also revealed that Constitution had returned to the clear cut locations after the activities took place to re-stake and re-flag the right of way and to dig test pits, and therefore was aware of these activities being undertaken within the pipeline right of way (Coppersmith Aff., ¶ 9). Constitution holds easements on the property in the pipeline right of way where the activities took place (Coppersmith Aff., ¶¶ 11-13; Exhibit D). On information and belief, Constitution did nothing to stop the activities.

48. The construction-related activities on the pipeline right of way are significant in scope and geographic size and occurred during 2015 and 2016, after the Commission issued the Order. The activities continued after April 1, 2016, during the "active season" for endangered and threatened species (Coppersmith Aff., ¶ 9). The activities have impacted State-protected streams and wetlands (Coppersmith Aff., ¶ 9; Exhibits B-1, B-2, B-3, B-4 and B-10). On information and belief, the activities on the right of way were undertaken by landowners who had granted Constitution easements, or by their agents, including area logging companies. Constitution expressly or tacitly authorized, encouraged and/or condoned the tree and vegetation cutting and clear-cutting, and other ground disturbance activities.

49. The locations and site observations of activities within the right of way are summarized in the accompanying Coppersmith Affidavit (Exhibit A) and are outlined below:

Site ID.	Property Location	Site Observations
B-1	Town of Masonville, Delaware County	Clear Cut of Pipeline Right of Way
B-2	Town of Davenport, Delaware County	Tree Cutting, in and/or near Posted New York State Regulated Wetlands, Use of Heavy Equipment, Evidence of Deep Ruts
B-3	Town of Masonville, Delaware County	Clear Cutting on Stream Banks, Trees Left in Stream Causing Damming, Other Stream Disturbance
B-4	Town of Sidney, Delaware County	Clear Cutting, Use of Heavy Equipment in or near Posted New York State Regulated Stream, Evidence of Deep Ruts
B-5	Town of Franklin Delaware County	Clear Cutting, Posted Wetlands
B-6	Town of Sanford, Broome County	Clear Cutting, Multiple Logging Roads in Use, Evidence of Heavy Equipment Use
B-7	Town of Sanford, Broome County	Tree Cutting, Use of Heavy Equipment, Logging Roads
B-8	Town of Summit, Schoharie County	Clear Cutting
B-9	Town of Sidney, Delaware County	Tree Cutting
B-10	Town of Davenport, Delaware County	Tree Cutting, Posted New York State Regulated Wetlands

50. The clear-cutting, road building, work space clearing, heavy equipment use, and other construction-related activities were undertaken without compliance with certain the Environmental Conditions in the Commission’s Order. The activities were undertaken without Commission approval and without a NYSDEC water quality certification.

O. Constitution’s Withdrawal of Its Renewed Request to Clear Cut

51. On information and belief, on or about March 9, 2016, a NYSDEC Environmental Conservation Officer who had received information concerning clear-cutting and other activities within the pipeline the right of way contacted the Commission’s project manager and reported those activities. The following day, Constitution withdrew its February 25, 2016 renewed request for Commission approval to begin tree cutting in New York, stating it “is now moot and no longer needed,” and that it would file a new request for the necessary authorization at the appropriate time (March 10, 2016 Constitution letter to the Commission: 20160310-5043). Constitution’s letter did not disclose the extent of clear-cutting activities that had already occurred within the pipeline corridor in New York.

P. Constitution’s Knowledge of Clear Cutting and Other Construction Activities

52. On March 15 and 16, 2016, three parties filed letters with the Commission on the Project docket and indicated that “large scale” and “substantial” tree cutting activities were taking place within the pipeline right of way in New York (20160315-5015; 20160316-5006; 20160316-5124). The letters requested the Commission to investigate and to take other appropriate action.

53. Constitution had knowledge of the clear cutting and other ground disturbance and construction-related activities on the pipeline right of way in New York as a result of those letters and other information. For example, in the Project’s Weekly Summary Report for March

6 to March 12, 2016, the Project’s environmental compliance monitor acknowledged these activities, but downplayed them by terming them “selected tree cutting,” and blamed landowners and roadway maintenance crews for the activities. The monitor’s report also incorrectly stated that such activities were outside of the Commission’s jurisdiction:

The Compliance Monitor for Spread B inspected areas in New York where tree felling activities along the Project right-of-way at specific locations (i.e., Delaware and Schoharie Counties, New York) were reported by the public. The Compliance Monitor ascertained that there was no evidence that tree felling activities were conducted by Constitution’s staff or contractors based on site inspections, Constitution’s response to our inquiries about the subject, and Constitution’s reduction in work staff as noted above. *It appears that the selected tree cutting conducted on the Project right-of-way was performed by individual landowners and/or roadway maintenance crews, which are activities outside of the FERC’s jurisdiction.*

(20160322-5033, p. 2; emphasis added).

54. Despite the third party environmental compliance monitor’s Weekly Summary Report, Constitution’s own Weekly Report of March 15, 2016 stated: “No tree felling has occurred in New York State” and “No landowner/resident complaints that relate to compliance with the requirements of the Order have occurred. (20160315-5070). In subsequent Weekly Reports, Constitution continued to state that there were “[n]o serious violations, non-compliances, or problem areas were reported this reporting period and none are pending resolution (20160322-5033). On information and belief, Constitution has not filed any reports with the Commission disclosing the clear cutting and other activities -- or their full extent -- within the pipeline right of way in New York.

Q. Adverse Impacts of Clear Cutting, Tree Cutting, Road Building, Use of Heavy Equipment, and Other Construction Activities in the Right of Way

55. The Commission’s FEIS found that the pipeline Project would cross 220 water bodies in New York, many of which are sensitive fisheries that support trout and trout spawning (FEIS, p. 4-93); that the Project would impact approximately 80 acres of protected wetlands in

New York; and that the Project crossed over 23 miles of terrain with steep (>15%) and often very steep slopes (>30%) (FEIS, Appendix G).

56. Clear-cutting disturbs soil even if trees and vegetation remain in place. During rain and storm events, depending on intensity and duration, disturbed soil can transport nutrients (nitrogen, phosphorous), organic matter, and other materials into water bodies and wetlands, particularly in areas with steep slopes. A “buffer zone” around a water body or wetland is not always effective. The migration of materials into water bodies and wetlands after construction activities can adversely impact water quality by increasing turbidity, phosphorous, nitrogen, and conductivity, and by altering pH, all of which are regulated under NYSDEC water quality standards, 6 NYCRR §§ 703.2 and 703.3, which are implemented and enforced under Section 401 of the Clean Water Act. 33 U.S.C. § 1341.

57. Clear cutting activities involve the removal of all trees, brush and other vegetation with heavy vehicles, machinery and equipment. It is done over a wide swath of land and can be for hundreds of feet or miles. It involves building access roads and work areas. Clear cutting activities are harmful to water bodies, wetlands and overall water quality, particularly on steep slopes, because of the tremendous ground disturbance activity that results.

58. A seven-year long hydrological study on water quality demonstrates that cutting trees can increase turbidity in nearby water bodies even if the trees and vegetation are left in place.¹² Another study, also involving leaving cut trees/vegetation in place, demonstrates that

¹² Marryanna, L. *et al*, “Water Quality Response To Clear Felling Trees For Forest Plantation Establishment At Bukit Tarek F.R., Selangor,” Vol. 18[1] *Journal of Physical Science* 33-45 (2007) (experimental plot was clear cut, left in place with a 65.6 foot wide buffer next to river, and river’s turbidity increased on-average by 279%).

even five months after deforestation, nitrates had increased and pH was altered in a water body, adversely impacting water quality.¹³

R. NYSDEC’s Denial of the Water Quality Certification

59. On April 22, 2016, NYSDEC denied Constitution’s application for a Section 401 water quality certification for the Project (Exhibit A: DEC Permit # 0-999-00181/00024 Water Quality Certification Notice of Denial). NYSDEC found that Constitution had failed to address in a meaningful way the significant water resource impacts that may occur from the Project and the agency’s water quality concerns. NYSDEC further found that Constitution had failed to provide sufficient information to demonstrate compliance with New York’s water quality standards and therefore NYSDEC could not determine whether the Project would comply with those standards, as Section 401 requires. Specifically, NYSDEC stated that Constitution had failed to provide sufficient information related to stream crossings (pp. 8-12), wetlands crossings (pp. 13-14), pipeline depth (pp. 12-13) and blasting activities (p. 13).

60. NYSDEC recounted the water quality impacts associated with the Project, particularly because it proposed “trenching,” rather than a preferred alternative, to cross 251 streams, many of which presented sensitive ecological conditions, provided fish and wildlife habitat, and supported trout or trout spawning (p. 8-9). NYSDEC stated that Constitution also had submitted only a limited analysis of pipe depth in 21 of the 251 water bodies, and that pipe exposure would cause severe negative impacts if reburying was necessary (p. 12-13). NYSDEC also recounted Constitution’s failure to demonstrate that wetland crossings would minimize discharges to waters in violation of New York’s water quality standards (Exhibit A, p. 13-14).

¹³ Likens, G.L. *et al.*, “Effects of Forest Cutting and Herbicide Treatment on Nutrient Budgets in the Hubbard Brook Watershed-Ecosystem” 40 *Ecol. Monogr.* 23-47 (1970) (study also showed large increases for all major ions, except for ammonium, bicarbonate, and sulfate).

NYSDEC found Constitution's Blasting Plan to lack site specific information about where blasting would occur, but that it essentially proposed blasting in shallow bedrock over a total of 42.77 miles, crossing 84 wetlands and 27 water bodies (p. 13).

61. In its Statement of Reasons for Denial, NYSDEC stated that Constitution was required to submit an application with sufficient information to demonstrate compliance with the water quality regulations, but had failed to do so (p. 14). NYSDEC concluded that Constitution failed to demonstrate that the Project would comply with New York's water quality standards and denied the CWA 401 certification (Exhibit A, p. 14).

III. CONSTITUTION'S ACTS AND OMISSIONS HAVE HARMED NEW YORK

62. The commencement of significant clear cutting and other ground disturbance construction activities within the pipeline right of way without compliance with the Environmental Conditions in the Order has adversely affected the people of the State by circumventing NYSDEC's authority under the Clean Water Act and the underlying purpose of water quality protections. The people of the State, particularly those living in the communities along the pipeline right of way, have not been given the promised strict compliance with the Environmental Conditions, which has harmed and impaired, and threaten to further harm and impair, waters bodies, wetlands and other sensitive environmental areas in New York.

63. In compliance with Rule 206(b), 18 C.F.R. § 385.206(b), the Attorney General asserts as follows:

64. *Constitution's acts and omissions: Rule 206(b)(1).* As set forth above and in the claims below, Constitution has expressly or tacitly authorized, encouraged or condoned the tree and vegetation cutting and clear-cutting, and other ground disturbance activities within the

pipeline right of way. Those activities have harmed and impaired, and threaten to further harm and impair, waters bodies, wetlands and other sensitive environmental areas in New York.

65. *Constitution's violation of statutory or regulatory requirements: Rule 206(b)(2).*

Constitution's acts and omissions have violated the Natural Gas Act, 15 U.S.C. § 717f, which prohibits construction activities prior to having a certificate in full force and effect.

Constitution's acts and omissions have violated the Commission's regulations, 18 C.F.R. § 157.206, which require all ground disturbance activities to be consistent with the Clean Water Act, the ESA and other applicable federal laws. The tree and vegetation clear cutting and other activities were not consistent with the Clean Water Act because NYSDEC has not issued water quality certification under Section 401. Those activities were not consistent with the ESA because Constitution failed to fulfill Environmental Conditions 26 and 29 in the Order, which require Constitution to conduct bird nest surveys, establish buffers, identify bat roost trees, and incorporate mitigation measures.

66. *Environmental and other issues presented: Rule 206(b)(3).* Constitution's actions and omissions have resulted in activities that have impacted or threatened to impact: (i) water bodies because trees were deposited in and dammed a water body; (ii) wetlands because the use of heavy equipment resulted in deep ruts and destruction of wetland flora; and (iii) endangered or threatened species or species of concern because clear cutting activities occurring after April 1 without compliance with the necessary surveys, buffers, identification and plan approvals required under the Order. Constitution's act and omissions have undermined the Order, the Natural Gas Act certificate approval process, the Commission's environmental review under the

National Environmental Policy Act, and NYSDEC's water quality certification authority under Section 401 of the Clean Water Act.¹⁴

67. *Quantification of financial impact/burden: Rule 206(b)(4).* Constitution's acts and omissions precipitated an investigation and legal action at the NY Attorney General's cost. Precise quantification of the financial impact of Constitution's acts and omissions requires a calculation of direct and indirect personal service costs and attorney's fees for those persons involved in the investigation and in the preparation of this complaint and petition. Those costs will be provided upon request by the Commission.

68. *Non-financial impacts: Rule 206(b)(5).* The non-financial impacts of Constitution's acts and omissions involve irreversible cutting of trees and the alteration of a community's environmental character before Constitution obtained all approvals required under federal law to implement the Project. Constitution has still not obtained those approvals, and in fact, NYSDEC has denied the water quality certification. (See narrative for Rule 206(b)(3) above.)

69. *Issues are not Pending In Another Proceeding: Rule 206(b)(6).* The issues set forth in this complaint and petition are not presently pending in a proceeding before the Commission or in any judicial proceeding. Certain legal issues related to the Commission's Rehearing Order, the Commission's NEPA review, and associated Commission action, are pending before the United States Court of Appeals for the Second Circuit in an action brought by certain stakeholders to the Natural Gas Act Section 7 certificate proceeding (*Catskill Mountainkeeper, et al. v Federal Energy Regulatory Commission*, Docket Nos. 16-345, 16-361).

¹⁴ See *Trunkline Gas Co.*, FPC Op. No. 796-A, 58 FPC 2935, 2945 (1977) (challenged conditions in natural gas project's certificate requiring applicant to obtain permits from State and federal agencies are necessary "to assure that this project is in the public convenience and necessity").

Specific Relief Requested: Rule 206(b)(7). The NY Attorney General requests that the Commission fully investigate Constitution's acts and omissions and take appropriate enforcement action, including the imposition of civil penalties. The Attorney General is not requesting, and would oppose, any enforcement action against the fee landowners on whose property the conduct giving rise to this complaint and petition took place. The Attorney General further requests an order staying the Commission's Order pending (a) the Commission's investigation and enforcement action, and (b) the issuance of all federal authorizations, including the NYSDEC water quality certification under Section 401 of the Clean Water Act. Finally, the Attorney General requests that the Commission issue an appropriate order to prevent any further activities within the pipeline right of way in New York.

70. *Documentary evidence in support of the complaint/petition: Rule 206(b)(8).* The accompanying Affidavit of Kathleen Coppersmith and appended exhibits contain the documents and evidence supporting the NY Attorney General's complaint and petition. The Attorney General's investigation is continuing and he reserves the right to supplement this evidence.

71. *Dispute resolution: Rule 206(b)(9).* This matter is not appropriate for dispute resolution in light of the ongoing violations of law and the NY Attorney General's belief that such a process will not resolve this matter. The Commission's Enforcement Hotline and other dispute resolution mechanisms have not been utilized in an effort to resolve this matter.

72. *Notice of Complaint: Rule 206(b)(10).* The accompanying Notice of Complaint complies with the specifications of 18 C.F.R. § 385.203(d) and is suitable for publication in the Federal Register.

**IV. FIRST CLAIM – CONSTITUTION’S VIOLATION
OF THE ORDER, THE NATURAL GAS ACT, AND
THE COMMISSION’S REGULATIONS**

73. The NY Attorney General repeats and realleges the foregoing paragraphs as if fully set forth here.

74. Upon issuance of the Commission’s Order, activities within the pipeline right of way became subject to the Commission’s jurisdiction and to the Order, and specifically to the Order’s Environmental Conditions. All activities undertaken on the pipeline right of way are subject to the Commission’s jurisdiction pursuant to Section 7 of the Natural Gas Act and the terms of the Order. 15 U.S.C. § 717*f*.

75. The Order requires Constitution to comply with the Order’s Environmental Conditions and with the Commission’s regulations (Order ¶ 148(E)(2) and (3), p. 46).

76. The Natural Gas Act requires Constitution to have a blanket certificate in full force and effect before commencing pipeline construction and further requires compliance with the Order. 15 U.S.C. § 717*f*(b) and (e). The Act imposes reporting requirements on the holder of a certificate. 15 U.S.C. § 717*i*.

77. The Commission’s regulations governing blanket certificates require any “ground disturbance” activities to be consistent with applicable laws, including the provisions of the Clean Water Act, the ESA and Executive Orders 11988 and 11990 (protecting stream floodplains and wetlands). 18 C.F.R. § 157.206(b)(2)(i), (vi), (vii), and (viii).

78. Under the Order and the Natural Gas Act, Constitution has the right of use and control of the pipeline right of way for the construction and operation of the pipeline. The Order and the Act also impose duties and responsibilities on Constitution. Constitution has the responsibility to assure compliance with the Act, the Commission’s regulations and the Order

Constitution had the responsibility to take reasonable action to ensure that the actions of others within the right of way did not cause a violation of the Order, the Act or the regulations.

79. Constitution holds easements for the pipeline right of way properties where these activities have occurred. Under New York law, Constitution's rights to use and control of the pipeline right of way are superior to the rights of the easement grantor and landowner. Under the easements, Constitution has enforceable rights and responsibilities associated with the use and control of the pipeline right of way, including the responsibility to prevent tree and other vegetation clearing and any other construction activities that violate the Order, the Act or the regulations.

80. Constitution has the duty not only to comply with the Order, but to ensure that others do not cause violations of the Order within the pipeline right of way property once it knows of those activities. Constitution has the right and the duty to enforce the Order's requirements under Section 24 of the Natural Gas Act, 15 U.S.C. § 717u.¹⁵ Section 24 provides the statutory authority for Constitution to enforce its right to use and control of the pipeline right of way if another use is inconsistent with or violates the Order, the Commission's regulations or the Act. 15 U.S.C. § 717u. Constitution has failed to enforce its rights to use and control of the right of way consistent with the Act, the Commission's regulations and the Order.

81. Despite its knowledge of the activities on the pipeline right of way in New York, Constitution, upon information and belief, failed to take any action to stop it. During the activities spanning 2015 and 2016, Constitution failed to advise the landowners of the Order's

¹⁵ See *Columbia Gas Transmission Corp. v. Burke*, 768 F. Supp. 1167, 1173 (N.D.W.Va 1990) (under Section 24, gas company entitled to enjoin property owner's refusal to halt construction of home in pipeline right-of-way because company's safety duties were being impaired). *Columbia Gas Transmission Corp. v. Bishop*, 809 F. Supp. 220, 222 (W.D.N.Y. 1992) (landowner/grantor of easement may not use land subject to easement for septic system and trailer near gas well head because such use is inconsistent with gas company's rights).

Environmental Conditions and of the potential that clear cutting and other activities would violate the Order. Once aware of the activities, Constitution failed to notify landowners that such activities may have violated the Order's Environmental Conditions.

82. Constitution had the responsibility to advise New York landowners of the Commission's denial of its request to cut trees and vegetation within the pipeline right of way in New York. Constitution failed to fulfill that responsibility by not advising New York landowners of the Commission's denial to begin cutting trees and vegetation. Instead in a January 30, 2016 letter, Constitution stated its intention to begin pipeline construction in the Spring of 2016 (Coppersmith Aff., Exhibit C).

83. On information and belief, the Commission staff knew of the activities on the pipeline right of way and knew that Constitution was aware of such activities. Section 20 of the Natural Gas Act provides the statutory mechanism for the Commission to enjoin Constitution's violations of the Order, the Act, or the Commission's regulations. 15 U.S.C. 717s. On information and belief, the Commission has not taken any actions to address or enjoin Constitution's violations of the Order, the Act or the Commission's regulations, and has not otherwise taken any enforcement action against Constitution.

84. The Commission has a responsibility to exercise its discretion and take appropriate enforcement action against Constitution for its acts and omissions.

85. Constitution's violation of the specific provisions of the Order, the Commission's regulations, and the Act are set forth below.

A. Constitution's Violation of the Order's Environmental Conditions

86. The Order is expressly conditioned upon Constitution's compliance with the Order's Environmental Conditions (Order, ¶ (E)(3), p. 46). Constitution has violated several Environmental Conditions.

Violation of Environmental Condition 8: Failure to Obtain Federal Authorizations and Commission Approval to Proceed With Construction.

87. Constitution is required to obtain all authorizations for the Project required under federal law, including a water quality certification from NYSDEC, and is also required to obtain Commission approval before commencing any ground disturbance or construction-related activities on the pipeline right of way (Order, Env. Cond. ¶ 8). The Project requires a water quality certification under Section 401 of the Clean Water Act because constructing of the pipeline may result in a discharge into a water body. 33 U.S.C § 1341(a).¹⁶

88. Environmental Condition 8 provides:

Prior to receiving written authorization from the Director of OEP to commence construction of their respective project facilities, the Applicants shall file documentation that they have received all applicable authorizations required under federal law (or evidence of waiver thereof).

(Order, Env. Cond. ¶ 8; emphasis in original).

89. After the Commission issued the Order, clear cutting and other construction-related activities were undertaken within the pipeline right of way during 2015 and 2016. After the Commission denied Constitution's request to clear cut in New York, those activities continued. Constitution did not have all of the authorizations required under federal law for the Project, including a water quality certification from NYSDEC.

¹⁶ See *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 725 (4th Cir. 2009) (upholding Maryland denial of Section 401 water quality certification for a Natural Gas Act certificate); *Islander East Pipeline Co. v. McCarthy*, 525 F. 3d 141, 143-44 (2d Cir. 2008); *Islander E. Pipeline Co., LLC v. Conn. Dep't of Env'tl. Prot.*, 482 F.3d 79, 84 (2d Cir. 2006); *Islander East Pipeline Co.*, 102 F.E.R.C. 61,054, at 61,130 (2003) (order on rehearing) (state authorizations required under federal law are not preempted); see also *Gunpowder Riverkeeper v. Federal Energy Regulatory Commission*, 807 F. 3d 267, 271-275 (D.C. Cir. 2015) (FERC certificate conditioned on obtaining State CWA 401 certification does not allow construction to begin before State acts and once issued, challenge to certificate is not moot from judicial scrutiny challenging NEPA compliance).

90. Constitution has violated Environmental Condition 8: (a) by authorizing, encouraging and/or condoning significant tree and clear-cutting, workspace clearing, road building, the use of heavy equipment, and other construction activities by others within the pipeline right of way without first obtaining all of the authorizations required under federal law, including a NYSDEC water quality certification; and (b) by failing to obtain Commission approval to proceed – or to allow others to proceed - with such activities.

91. Constitution knowingly has achieved through its own acts and omissions what the Order prohibited, namely, commencement of pipeline construction activities before obtaining a water quality certification from NYSDEC.

Violation of Environmental Conditions 26 and 29: Endangered/Threatened Species¹⁷

92. Clear-cutting, workspace clearing, road building, heavy equipment use, and other construction activities have continued on the pipeline right of way after April 1, 2016 in sensitive environmental areas where endangered or threatened species and species of special concern are believed to be located.

93. Under the Order, if construction activities occur after April 1, during the “active season” for certain species, Environmental Condition 26 requires Constitution to submit migratory bird nest surveys and to identify buffer areas around active nests. On information and belief, Constitution has not submitted the foregoing nor complied with Environmental Condition 26.

¹⁷ These conditions state: “**Immediately prior to any vegetation clearing to be conducted between April 1 and August 31**” Constitution is required to conduct bird nest surveys and file with the Commission the results, providing “buffer around any active nests” (Env. Cond. ¶ 26); “**Prior to construction** Constitution shall develop a project- and site-specific tree clearing plan for the northern myotis [bat] if clearing occurs between April 1 and September 30,” including potential roost trees and mitigation measures (Env. Cond. ¶ 29) (emphasis in original).

94. Under the Order, if construction activities occur after April 1, Environmental Condition 29 requires Constitution to identify roost trees and mitigation measures for the northern myotis (bat) and to submit to the Director of OEP for approval a project- and site-specific tree clearing plan incorporating the mitigation measures (Env. Conds. ¶ 29). On information and belief, the Director of OEP has not approved the tree clearing plan. On information and belief, Constitution has not complied with Environmental Condition 29.

95. Constitution has violated Environmental Conditions 26 and 29 of the Commission's Order by allowing tree and clear-cutting, workspace clearing, road building, and other construction activities within the pipeline right of way after April 1, without having submitted the requisite surveys and buffer areas for migratory birds and without having obtained approval of site specific plans for the northern myotis from the Director of OEP.

Violation of Environmental Condition 7: Reporting

96. The Order requires monitoring during all phases of the pipeline project for the purpose of assuring compliance with all Environmental Conditions. The Order provides:

In addition, Constitution has agreed to use the Commission's third-party monitoring program, which allows environmental monitors to be in the field for the duration of construction and initial restoration. These monitors report directly to the Commission staff and provide an additional level of compliance oversight. *The inspection and monitoring programs will ensure compliance with Constitution's proposed mitigation and the environmental conditions in the attached Appendix A...*

(Order, p. 27; emphasis added).

97. Conditions 7(c) to (g) require Constitution to file weekly status reports setting forth any instances of non-compliance, the corrective actions implemented to address non-compliance, the effectiveness of the corrective actions, a description of landowner complaints

related to the non-compliance, and any correspondence concerning non-compliance. On information and belief, Constitution has failed to report instances of non-compliance.

98. Constitution has failed to report the impairment and damming of streams and the impact and/or destruction of wetlands caused by activities within the pipeline right of way (Coppersmith Aff., Exhibits B-1 to B-4).

99. Constitution has violated Environmental Condition 7 by failing to report the extent of tree and clear-cutting, workspace clearing, road building, the use of heavy equipment in wetlands, and other construction activities in New York.

B. Constitution's Violation of Section 7 of the Natural Gas Act

100. The Commission's Order is a conditional one "without force or effect" and Constitution is not authorized to begin the pipeline Project without satisfying the Order's conditions (Reh. Order ¶¶ 62-63, pp. 23-24). Constitution has violated Section 7 of the Natural Gas Act by expressly or tacitly authorizing, encouraging or condoning commencement of construction of the pipeline Project without fulfilling the conditions in the Order and without have a certificate that is in full force and effect. 15 U.S.C. § 717f. Constitution has violated Section 7 by failing to take reasonable action to prevent such activities. 15 U.S.C. § 717f. Constitution also has violated Section 10 of the Act by failing to promptly report such activities to the Commission despite its knowledge of those activities. 15 U.S.C. § 717i. At the time the activities took place, Constitution did not have all of the necessary federal authorizations for the Project in order to meet the Order's conditions. When the activities occurred on the pipeline right of way, NYSDEC had not granted the water quality certification, and has since denied it.

C. Constitution's Violation of the Commission's Regulations

101. The Order contains an express condition requiring Constitution's compliance with the Commission's regulations (Order, ¶ (E)(2), p. 46). The regulations containing the standard

conditions in all blanket certificates require any “ground disturbance” activities to be consistent with applicable laws, including the provisions of the Clean Water Act, the ESA and Executive Orders 11988 and 11990 (protecting stream floodplains and wetlands). 18 C.F.R.

§ 157.206(b)(2)(i), (vi), (vii), and (viii).

102. Ground disturbance activities in the pipeline right of way within the meaning of 18 C.F.R. § 157.206(b)(2) include the clear cutting, tree cutting, road building, workspace clearing, the use of heavy equipment, and other construction activities that are evident here.

103. Constitution has violated 18 C.F.R. § 157.206(b)(2) by allowing ground disturbance activities on the pipeline right of way and in and around streams and wetlands. These activities are inconsistent with the Clean Water Act and the Executive Orders listed in the Commission’s regulations, which protect wetlands and streams, particularly when a water quality certification has not been issued.

104. Constitution has violated 18 C.F.R. § 157.206(b)(2) by allowing ground disturbance activities after April 1 in areas where endangered species are potentially or actually present. These activities are inconsistent with the ESA if Constitution has not performed the required surveying, planning, mitigating, and reporting under the Order’s Environmental Conditions (Order, Env. Cond. ¶¶ 26 and 29). Constitution cannot be deemed in compliance with the Commission’s regulations because listed species and habitat are known to be in or near the Project’s right of way.

105. The Commission’s regulations also prohibit Constitution from undertaking activities having an adverse impact on “sensitive environmental areas.” See 18 C.F.R. § 157.206(b)(4). Sensitive environmental areas are defined to include floodplains, water bodies, wetlands, endangered species, and other protected resources. 18 C.F.R. § 157.202(b)(11).

Activities have occurred in sensitive environmental areas of the pipeline right of way in violation of this regulatory provision.

106. Constitution has violated 18 C.F.R. §§ 157.202(b) and 157.206(b), and has violated the Order's condition requiring compliance with the Commission's regulations (Order, ¶ (E), p. 46).

**V. SECOND CLAIM -- ENSURE COMPLIANCE
THROUGH APPROPRIATE ENFORCEMENT AND
ASSESSMENT OF CIVIL PENALTIES**

107. The NY Attorney General repeats and realleges the foregoing paragraphs as if fully set forth here.

108. The Commission's October 2008 Policy Statement on Compliance establishes that a gas company's development and strict adherence to a rigorous compliance program is in the public interest. The Commission's Compliance Policy requires not only preventative measures to ensure compliance, but prompt detection, cessation, and reporting of violations, followed by remediation efforts (Policy ¶ 2). To avoid an assessment of civil penalties, a party must show that it met the Policy's criteria of "prompt detection, cessation and reporting" of violations, and that it undertook remedial measures to correct the violation (Policy ¶¶ 18-21).¹⁸

109. The Commission's Policy stresses that pipeline construction triggers "very specific mandatory compliance measures" and adherence to "project-specific requirements"

¹⁸ The Commission's Compliance Policy states: "Thus, for complete elimination of a civil penalty, a company must affirmatively demonstrate (1) that its violation was not serious and (2) that its senior management has made a commitment to compliance, that the company adopted effective preventive measures, that when a violation is detected it is halted and reported to the Commission promptly, and that the company took appropriate remediation steps. All of the components must be present for complete elimination of a civil penalty; reduction of the penalty will be considered where the company meets some but not all of the requirements. The Commission retains discretion to determine whether the actions taken by a company are sufficient to meet the requirements (Policy ¶ 26).

(Policy ¶¶ 8 and 10). The Policy requires the Commission to measure not only harm posed by non-compliance, but the damage sustained to the integrity of the Commission's regulatory program (Policy ¶ 25).

110. Here, Constitution has failed to strictly comply with the Order, the Commission's regulations and the Natural Gas Act. Constitution did not promptly stop violations in accordance with the Policy when it became aware of clear cutting and other activities within the right of way. Constitution did not report the violations in accordance with the Policy and the Order's reporting requirements. Constitution did not undertake remedial measures in accordance with the Policy.

111. On January 29, 2016, the Commission denied Constitution's request to clear cut in New York (20160301-5098, p. 2). In a January 30, 2016 letter, Constitution advised New York landowners that it would begin pipeline construction in the Spring of 2016, but did not advise them that the Commission had denied the request to begin tree cutting in New York (Coppersmith Aff., Exhibit C). When Constitution sent New York landowners the January 30, 2016 letter, Constitution was fully aware that tree cutting in New York was ongoing.

112. When Constitution received the environmental monitor's Weekly Summary report for March 5 to March 12, 2016, which reported the tree cutting activities in New York (20160322-5033, p. 2), upon information and belief it still did nothing to stop or report those activities. Instead, Constitution reported in its own March 15 compliance report that *no* tree cutting had occurred in New York (20160315-5070). When Constitution representatives visited the pipeline right of way in 2015 and 2016, they saw the tree clearing activities and knew or should have known that those activities violated the Order and other legal requirements, but apparently took no action to stop those activities from continuing within the pipeline corridor.

113. Constitution's acts and omissions have caused irreversible and irreparable environmental damage from the loss of trees and vegetation and the impairment of water bodies and streams. Constitution's acts and omissions have violated the Order, the Natural Gas Act, and the Commission's regulations. As such, the NY Attorney General is likely to succeed on the merits of this complaint and petition and the equities balance in his favor. Constitution's acts and omissions also have harmed the integrity of the Commission's regulatory program under the Natural Gas Act and the Commission's regulations. Constitution's acts and omissions warrant further investigation, enforcement, and the imposition of an appropriate civil penalty in accordance with the Commission's Compliance Policy. Furthermore, the likelihood of continuing harm to the environment in New York as a result of Constitution's acts and omissions warrants a stay of the Commission's Order pending further investigation and enforcement and, most importantly, pending issuance of all required federal authorizations, including the water quality certification from NYSDEC under Section 401 of the Clean Water Act. Constitution's acts and omissions also warrant the Commission's issuance of additional relief to prohibit Constitution from expressly or tacitly authorizing, encouraging or condoning tree and vegetation cutting activities on the pipeline right of way.

VI. REQUESTED ACTION AND RELIEF

For all of the foregoing reasons, the NY Attorney General respectfully requests that the Commission:

- (1) Investigate Constitution's acts and omissions related to the matters raised in this complaint and petition and take appropriate enforcement action, including assessment of civil penalties; and
- (2) Issue an order staying the Commission's Order pending the Commission's investigation and enforcement action and pending issuance of all federal authorizations,

including the water quality certification from NYSDEC under Section 401 of the Clean Water Act; and

(3) Award other appropriate relief to prohibit Constitution from any acts or omissions that expressly or tacitly authorize, encourage or condone tree and vegetation cutting activities on the pipeline right of way.

Dated: May 13, 2016
Albany, New York

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CERTIFICATE OF SERVICE

Maureen F. Leary hereby certifies that on the 13th day of May, 2016 I served a copy of the New York Attorney General's Complaint and Petition and the Affidavit of Kathleen Coppersmith, with the attached exhibits, by electronic mail sent to each of the parties set forth on the Commission's Master Service List maintained by the Federal Energy Regulatory Commission for this proceeding, including the parties set forth below:

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EXHIBIT A

**APRIL 22, 2016 NYSDEC NOTICE OF DENIAL OF
WATER QUALITY CERTIFICATION**