

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT  
AGENCY APPEAL PRE-ARGUMENT STATEMENT (FORM C-A)**

APPLICATION FOR ENFORCEMENT

PETITION FOR REVIEW

1. SEE NOTICE ON REVERSE.

2. PLEASE TYPE OR PRINT.

3. STAPLE ALL ADDITIONAL PAGES.

CAPTION:  Stop the Pipeline,  v.  Federal Energy Regulatory Commission,  Petitioner,  Respondent.	AGENCY NAME:  FERC	AGENCY NO.:  CP18-5
	DATE THE ORDER UPON WHICH REVIEW OR ENFORCEMENT IS SOUGHT WAS ENTERED BELOW:  8/28/19 and 12/12/19	ALIEN NO : (Immigration Only)
	DATE THE PETITION OR APPLICATION WAS FILED:  January 10, 2020	Is this a cross-petition for review / cross-application for enforcement?  <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO

<b>Contact Information for Petitioner(s) Attorney:</b>	Counsel's Name:	Address:	Telephone No.:	Fax No.:	E-mail:
	Anne Marie Garti	PO Box 15 Bronx, NY 10471	718 601-9616	NA	annemarie@garti.net

<b>Contact Information for Respondent(s) Attorney:</b>	Counsel's Name:	Address:	Telephone No.:	Fax No.:	E-mail:
	Robert H. Solomon, Solicitor	888 First St., NE Washington, DC 20426	202 502-8257	202 208-2115	robert.solomon@ferc.gov

JURISDICTION OF THE COURT OF APPEALS (provide U.S.C. title and section):  15 USC 717r(a), (b)	APPROX. NUMBER OF PAGES IN THE RECORD:  20,000	APPROX. NUMBER OF EXHIBITS IN THE RECORD:  500	Has this matter been before this Circuit previously? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
			If Yes, provide the following:  Case Name: Constitution Pipeline Co. v. NYSDEC
			2d Cir. Docket No.: 16-1568

**ADDENDUM "A": COUNSEL MUST ATTACH TO THIS FORM: (1) A BRIEF, BUT NOT PERFUNCTORY, DESCRIPTION OF THE NATURE OF THE ACTION; (2) THE RESULT BELOW; AND (3) A COPY OF ALL RELEVANT OPINIONS/ORDERS FORMING THE BASIS FOR THIS PETITION FOR REVIEW OR APPLICATION FOR ENFORCEMENT.**

**ADDENDUM "B": COUNSEL MUST ATTACH TO THIS FORM: (1) THE RELIEF REQUESTED; (2) A LIST OF THE PROPOSED ISSUES; AND (3) THE APPLICABLE APPELLATE STANDARD OF REVIEW FOR EACH PROPOSED ISSUE.**

**PART A: STANDING AND VENUE**

<u><b>STANDING</b></u>	<u><b>VENUE</b></u>
PETITIONER / APPLICANT IS: <input type="checkbox"/> AGENCY <input checked="" type="checkbox"/> OTHER PARTY <input type="checkbox"/> NON-PARTY (SPECIFY STANDING):	COUNSEL MUST PROVIDE IN THE SPACE BELOW THE FACTS OR CIRCUMSTANCES UPON WHICH VENUE IS BASED:  Constitution Pipeline Co. is located in NYS. It is registered in NYS, DOS #4216816, and has two offices in NYS. 100-miles of its pipeline would be located in NYS and would require a new interconnection by the Iroquois Gas Transmission System, which is headquartered in CT.

**IMPORTANT. COMPLETE AND SIGN REVERSE SIDE OF THIS FORM.**

**PART B: NATURE OF ORDER UPON WHICH REVIEW OR ENFORCEMENT IS SOUGHT**  
(Check as many as apply)

**TYPE OF CASE:**

_____	ADMINISTRATIVE REGULATION/ RULEMAKING	_____	IMMIGRATION-includes denial of an asylum claim
_____	BENEFITS REVIEW	_____	IMMIGRATION-does NOT include denial of an asylum claim
_____	UNFAIR LABOR	_____	TARIFFS
_____	HEALTH & SAFETY	<u>  X  </u>	OTHER:
_____	COMMERCE		(SPECIFY) Environment. Jurisdiction.
<u>  X  </u>	ENERGY		Law of the case precludes FERC from issuing the orders under review.

1. Is any matter relative to this petition or application still pending below?  Yes, specify: CP18-5 is connected to CP13-499.  No  
By declaring that NYSDEC waived its rights, FERC could allow Constitution to build its pipeline without a 401 water quality certification.
2. To your knowledge, is there any case presently pending or about to be brought before this Court or another court or administrative agency which:
- (A) Arises from substantially the same case or controversy as this petition or application ?  Yes  No
- (B) Involves an issue that is substantially similar or related to an issue in this petition or application ?  Yes  No

If yes, state whether  "A," or  "B," or  both are applicable, and provide in the spaces below the following information on the *other* action(s):

Case Name: NYS Dept. of Env. Conservation. v. FERC	Docket No. 19-4338	Citation:	Court or Agency: Second Circuit
Name of Petitioner or Applicant: New York State Department of Environmental Conservation			

Date: January 24, 2020	Signature of Counsel of Record: /s/ Anne Marie Garti
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**NOTICE TO COUNSEL**

**Once you have filed your Petition for Review or Application for Enforcement, you have only 14 days in which to complete the following important steps:**

1. Complete this Agency Appeal Pre-Argument Statement (Form C-A); serve it upon your adversary, and file it with the Clerk of the Second Circuit in accordance with LR 25.1.
2. Pay the \$500 docketing fee to the Clerk of the Second Circuit, unless you are authorized to prosecute the appeal without payment.

**PLEASE NOTE: IF YOU DO NOT COMPLY WITH THESE REQUIREMENTS WITHIN 14 CALENDAR DAYS, YOUR PETITION FOR REVIEW OR APPLICATION FOR ENFORCEMENT WILL BE DISMISSED. SEE LOCAL RULE 12.1.**

# 20-158

ORAL ARGUMENT NOT YET SCHEDULED

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Stop the Pipeline,

*Petitioner,*

v.

Federal Energy Regulatory Commission,

*Respondent.*

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ADDENDA A and B

FORM C-A

PRE-ARGUMENT STATEMENT

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## **ADDENDUM A - STATEMENT OF CASE WITH RESULTS BELOW**

The Constitution Pipeline Company, LLC (“Constitution”) filed an application on June 13, 2013, with Respondent, the Federal Energy Regulatory Commission (“FERC” or “Commission”) to construct a 124-mile-long pipeline in Pennsylvania and New York. Approximately 100 miles of the proposed pipeline would be located in New York State. Constitution’s application was assigned docket number CP13-499. The Iroquois Gas Transmission System, L.P. (“Iroquois”) filed a concurrent application with FERC to connect the pipeline to two existing interstate gas pipelines in Wright, New York, where the proposed pipeline would terminate. Iroquois’ proposed interconnection was assigned docket number CP13-502. FERC issued an Order on December 2, 2014, granting both Constitution and Iroquois a Certificate of Public Convenience and Necessity. *See* Order Issuing Certificates and Approving Abandonment, 149 FERC ¶ 61,199 (2014). Stop the Pipeline (“STP”) requested rehearing and, upon issuance of a final order, petitioned this Court for review of the Commission’s orders. *See* docket number 16-361, which was consolidated with 16-345. The two cases were fully briefed in 2016, but no oral arguments have been held and no opinion issued.

Constitution applied for a 401 water quality certification from the New York State Department of Environmental Conservation (“NYSDEC”) on August 22, 2013. NYSDEC responded with a Notice of Incomplete Application on September

12, 2013. Constitution withdrew and resubmitted its application in 2014 and again in 2015. However, as this Court has already determined, over the course of the two and a half years of regulatory review by NYSDEC, “Constitution persistently refused to provide information as to possible alternative routes for its proposed pipeline or site-by-site information as to the feasibility of trenchless crossing methods for streams less than 30 feet wide – *i.e.*, for the vast majority of the 251 New York waterbodies to be crossed by its pipeline – and that it provided geotechnical data for only two of the waterbodies.” *Constitution Pipeline Co., LLC v. N.Y. State Dep’t of Env’tl. Conservation*, 868 F.3d 87, 103 (2d Cir. 2017), *reh’g denied, cert. denied*, 138 S.Ct. 1697 (2018). On April 22, 2016, NYSDEC denied Constitution’s application without prejudice. *Id.* 96.

Instead of curing the deficiencies, Constitution petitioned this Court for review and, amongst other claims, argued NYSDEC waived its right to deny the 401 water quality certification. *Constitution Pipeline*, Case No. 18-1568, Pet’r’s Final Br. 28-37, Oct. 17, 2016, ECF No. 171. STP intervened and argued that the Court did not have jurisdiction to hear the issue of waiver. *Id.* STP’s Final Br. in Opposition, 9-20, Oct. 17, 2016, ECF No. 175. The panel agreed. “We regard subsection (2) – titled Agency delay – as encompassing not only an alleged failure to act but also an allegation that a failure to act within a mandated time period should be treated as a failure to act.” *Constitution Pipeline*, 868 F.3d at 99. The

Court dismissed the waiver claim for lack of jurisdiction and instructed Constitution to bring it to the D.C. Circuit. “Such a failure-to-act claim is one over which the District of Columbia Circuit would have ‘exclusive’ jurisdiction, 15 U.S.C. 717r(d)(2).” *Id.* 100.

Constitution ignored this Court’s holding. Less than two months after the decision was issued, it filed a petition with the Commission requesting a declaratory order that NYSDEC had waived its right to deny the 401 water quality certification. *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014, P 1 (2018) (Waiver Order I). The Commission denied the petition on January 11, 2018. *Id.* Constitution requested rehearing, which was denied on July 19, 2018. *Constitution Pipeline Co., LLC*, 164 ¶ FERC 61,029, P 2 (2018) (Rehearing Order I).

Constitution petitioned the District of Columbia Circuit for review of Waiver Order I and Rehearing Order I on September 14, 2018. *Constitution Pipeline Co., LLC v. FERC*, D.C. Cir. No. 18-1251, ECF No. 1750882. On October 22, 2018, the Commission moved to place the case in abeyance pending the outcome of *Hoopa Valley Tribe v. FERC*, D.C. Cir. No. 14-1271 (filed Dec. 9, 2014) (“*Hoopa Valley*”), a case that involved the re-licensing of hydroelectric facilities under the Federal Power Act. *Constitution Pipeline*, D.C. Cir. No. 18-1251, ECF No. 1756389. The District of Columbia Circuit granted the motion on

November 5, 2018. *Id.* ECF No. 1758585. It remanded the case to FERC on February 28, 2019, after *Hoopa Valley* was decided. *Id.* ECF No. 1775259.<sup>1</sup>

The Commission requested additional briefing and then issued an order declaring that NYSDEC waived its right to deny the 401 water quality. *Order on Voluntary Remand*, 168 FERC ¶ 61,129 (Aug. 28, 2019) (“Waiver Order II”). See Exhibit A. In its request for rehearing, STP objected to the Commission’s (1) broad interpretation of *Hoopa Valley*; (2) sudden and inequitable reversal of its long-held policy that allowed the withdrawal and resubmission of a water quality certification; and (3) retroactive application of its broad interpretation of *Hoopa Valley* to a case where it had already been held that Constitution persistently failed to provide the required information to NYSDEC. See *Constitution Pipeline*, 868 F.3d at 103. STP also argued that FERC lacked jurisdiction to issue the declaratory order because this Court had already held that the District of Columbia Circuit has exclusive jurisdiction over Constitution’s “failure-to-act claim.” *Id.* 100.

FERC denied STP’s request for rehearing on December 12, 2019. *Order Denying Rehearing and Stay*, 169 FERC ¶ 61,199 (“Rehearing Order II”). See Exhibit B. STP petitioned this Court for review of Waiver Order II and Rehearing Order II on January 10, 2020.

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<sup>1</sup> Intervenors in *Hoopa Valley* subsequently petitioned for a writ of certiorari, which was denied on December 9, 2019. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), *cert. denied*, 2019 WL 6689876 (2019).

Exhibit A  
Waiver Order II  
168 FERC ¶ 61,129  
August 28, 2019



Exhibit B  
Rehearing Order II  
169 FERC ¶ 61,199

December 12, 2019

## **ADDENDUM B**

### **RELIEF REQUESTED**

Stop the Pipeline (“STP”) respectfully asks this Court to vacate two orders of the Federal Energy Regulatory Commission (“FERC” or “Commission”):

(1) 168 FERC ¶ 61,129 (Aug. 28, 2019) (“Waiver Order II”) and

(2) 169 FERC ¶ 61,199 (Dec. 12, 2019) (“Rehearing Order II”).

If the Court holds that the Commission violated the law of the case by assuming jurisdiction over Constitution’s failure-to-act claim, then the two orders should be vacated without deciding the substantive issues. If the Court upholds the Commission’s broad interpretation of *Hoopa Valley*, then the equitable issue should be considered.

### **STATEMENT OF ISSUES AND STANDARDS OF REVIEW**

STP submits the following statement of issues and standards of review.

#### **A. Threshold jurisdictional issue**

1. Whether FERC violated the law of the case by assuming jurisdiction over Constitution’s petition for a declaratory order after this Court held the District of Columbia Circuit has exclusive jurisdiction for a failure-to-act claim.

#### **Standard of review**

This Court does not acquiesce in an agency’s refusal to follow its orders. *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980). “The decision of a

federal appellate court establishes the law binding further action in the litigation by another body subject to its authority. . . . These principles, so familiar in operation within the hierarchy of judicial benches, indulge no exception for reviews of administrative agencies.” *Cleveland v. Federal Power Commission*, 561 F.2d 344, 346 (D.C. Cir. 1977).

**B. Substantive issues**

2. Whether the Commission violated the Administrative Procedure Act by expanding the holding in *Hoopa Valley* and converting it from a context-specific decision into a bright-line rule.

3. Whether the Commission violated the Administrative Procedure Act by ignoring the distinctions between the Federal Power Act and the Natural Gas Act.

4. Whether the Commission violated the Administrative Procedure Act by ignoring Constitution’s persistent refusal to provide the information requested by NYSDEC.

5. Whether the Commission violated the Administrative Procedure Act by mischaracterizing NYSDEC’s obligation to provide notice to the public and consider their comments.

**Standard of review**

This Court shall set aside any agency action that is arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See* 5 U.S.C. § 706(2)(A) (2018). The Commission’s interpretation of *Hoopa Valley* and the Clean Water Act are not entitled to deference. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629-30 (2018). “[I]t is the courts that have the final word on matters of statutory interpretation.” *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2nd Cir. 1980). This is particularly true when an agency is interpreting a statute it does not administer. *See American Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d. Cir. 1997). Therefore, the purely legal issues presented here require a *de novo* review by this Court.

**C. Equitable issue**

6. Whether the Commission’s retroactive application of *Hoopa Valley* is inequitable.

**Standard of review**

If there is a new rule of law, this Court may find that the “new rule, for well-established legal reasons, does not determine the outcome of the case.” *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758-9 (1995). Equitable tolling may be applied if parties were diligently pursuing their rights and extraordinary circumstances prevented timely action. *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755-56 (2016).

Dated: January 24, 2020

Respectfully submitted,

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