January 14, 2016

Via FERC Electronic Filing
Kimberley D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: Constitution Pipeline Company, LLC’s Request for Partial Notice to Proceed and Cut Down Trees, Docket No. CP13-499-000

Dear Secretary Bose:

Following up on the letter that this office submitted yesterday, enclosed please find for submission and docketing the Office of the New York State Attorney General’s Answer in Opposition to Constitution Pipeline Company’s January 8, 2015 Request for a Partial Notice to Proceed along with a certificate of service.

Respectfully submitted,

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Tony Clark, Commissioner, FERC
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Norman C. Bay, Chairman, FERC
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of:

Constitution Pipeline Company, LLC Docket Nos.: CP13-499-000


OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL
ANSWER IN OPPOSITION TO
CONSTITUTION PIPELINE COMPANY’S
JANUARY 8, 2015
REQUEST FOR A PARTIAL NOTICE TO PROCEED

Office of the Attorney General
State of New York
120 Broadway – 26th Floor
New York, NY 10271
On January 8, 2016, Constitution Pipeline Company, LLC (Constitution) filed with the Commission a “Request for Partial Notice to Proceed” (Request to Proceed). In its Request to Proceed, Constitution seeks authorization from FERC’s Director of the Office of Energy Projects (OEP) to cut down the trees and other vegetation within an area that is between 100 and 125 feet wide and approximately 125 miles long, with some exempted areas, in order to begin construction on Constitution’s proposed natural gas pipeline (Pipeline). The proposed Pipeline corridor originates in Susquehanna County, Pennsylvania and terminates in Schoharie County, New York. The Office of the New York State Attorney General (NY Attorney General) files this answer in opposition to Constitution’s Request to Proceed. The NY Attorney General’s opposition to the Request to Proceed is procedural; the NY Attorney General takes no position on the merits of the proposed Pipeline.

The OEP must deny the Request to Proceed for three reasons. First, the Commission’s December 2, 2014 Order Issuing Certificates and Approving Abandonment (Certificate Order) mandates that Constitution receive all authorizations required under federal law before
commencing construction of the proposed Pipeline. At least two authorizations required to construct the Pipeline – a U.S. Army Corps of Engineers’ (ACE) permit pursuant to Section 404 of the federal Clean Water Act, and a New York State water quality certification pursuant to Section 401 of the federal Clean Water Act – remain outstanding. Since cutting down the trees in the Pipeline corridor constitutes construction, the OEP may not grant the Request to Proceed unless and until Constitution has obtained all of the authorizations required under federal law to construct the proposed Pipeline.

Second, numerous intervenors in the Commission’s on-going licensing proceeding have filed requests for rehearing of the Certificate Order pursuant to the Commission’s rules for licensing proceedings under the federal Natural Gas Act. Under that statute, until the Commissioners complete their review of the Certificate Order on rehearing, that order is neither final nor subject to judicial review, and thus does not constitute the agency’s record of decision. OEP may not legally grant Constitution authorization to take action that will have an adverse environmental impact prior to the issuance of a final record of decision. See 40 C.F.R. § 1506.1.

Accordingly, in the absence of a final Certificate Order, OEP must deny Constitution’s request to cut down hundreds of acres of trees in the proposed Pipeline corridor and thereby potentially cause adverse environmental impacts and irreparable environmental harm.

Third, the environmental impact review conducted by the Commission pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., did not assess the environmental impacts of cutting the trees and vegetation in the majority of the Pipeline corridor and then leaving the cut trees and vegetation in place for the indeterminate amount of time necessary to obtain the additional authorizations required pursuant to federal law to construct the proposed Pipeline. Accordingly, the OEP may not legally grant the Request to Proceed absent a
review of the environmental impacts of that material change to the construction scenario analyzed in the environmental impact statement for the project.

**BACKGROUND**

1. **The Proposed Constitution Pipeline**

   The proposed Pipeline consists of 124.4 miles of 30-inch diameter natural gas pipeline and related facilities running from Susquehanna County, Pennsylvania to points of interconnection with the existing Iroquois Gas Transmission Pipeline and Tennessee Gas Pipeline at the Wright Compressor Station located in Schoharie County, New York. The proposed Pipeline and related facilities would cross over 700 individual land parcels along its route. Final Environmental Impact Statement (FEIS) at 1-5. An estimated 99.2 miles of the pipeline route would be constructed within New York, crossing 19.7 miles of agricultural land, 58.4 miles of forest land, 10.7 miles of open land, and 8.7 miles of wetlands. FEIS 2-2, 4-119.

   Construction of the Pipeline’s right of way, temporary work spaces, contractor yards, and access roads would impact 1,871.5 acres of land. In New York, approximately 1,330.6 acres of land would be affected by construction activities associated with the Pipeline right of way, 81.5 acres would be affected by construction of contractor yards, and 43.6 acres would be affected by construction of access roads. FEIS 2-8.

2. **FERC’s Conditional Certificate of Public Convenience and Necessity**

   On June 13, 2013, Constitution filed an application under Section 7(c) of the Natural Gas Act and Part 157 of the Commission’s Rules and Regulations requesting authorization to construct and operate the Pipeline. On July 17, the NY Attorney General filed a motion to intervene in the proceeding. Submittal 20130717-5313. The NY Attorney General sought to intervene “to advance the interests of the State, enforce State laws as well as Federal laws such
as the National Environmental Policy Act, and protect the public health, the environment, and the economic interests of New York citizens,” among other reasons. See Submittal 20130717-5313 at 5, 6.

The Commission issued a draft Environmental Impact Statement (“EIS”) on February 12, 2014. Submittal 20140212-4002. Thousands of comments were submitted on the draft EIS, including comments from New York citizens as well as the NY Attorney General and many other state and federal agencies. Among the issues the NY Attorney General raised was the Commission’s analysis of route alternatives that would locate portions of the pipeline adjacent to Interstate 88, thus reducing natural resource impacts as well as the exercise of eminent domain against New York landowners. Submittal 20140416-5100 at 3. The Commission issued a final EIS on October 24, 2014. Submittal 20141024-4001.

The Commission issued the Certificate Order granting Constitution a Certificate of Public Convenience and Necessity on December 2, 2014. Submittal 20141024-4011. The Certificate Order included a number of environmental conditions. Environmental Condition 8 states: “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).” Certificate Order at 51 (emphasis in original).

Many New York residents filed motions or petitions requesting rehearing and/or reconsideration of the Certificate Order. See Catskill Mountainkeeper et al, Dec. 30, 2014 (submittal 20141230-5288), Stop the Pipeline, Jan. 2, 2015 (submittal 20150102-5158), Petition of the Henry S Kernan Trust, Jan. 2, 2015 (submittal 20150102-5100). Among other arguments, intervenors contend that the Commission violated the federal Clean Water Act and NEPA by
issuing the Certificate Order before the New York State Department of Environmental Conservation (NYSDEC) had issued a water quality certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1). On January 27, 2015, the Commission issued an Order Granting Rehearing for Further Consideration. Submittal 20150127-3038. That order did not rule on the merits of intervenors’ requests for rehearing but instead stated that “rehearing of the Commission’s order is hereby granted for the limited purpose of further consideration.” Id. It noted that “[r]ehearing requests of the above-cited order filed in this proceeding will be addressed in a future order.” Id. Under the Natural Gas Act, the Certificate Order will not become final and subject to judicial review until the Commission rules on the pending motions. 15 U.S.C. § 717r.

3. Constitution’s Application for Section 401 Water Quality Certification

Section 401(a)(1) of the Clean Water Act mandates that any applicant seeking a federal license “to conduct any activity” which “may result in any discharge into the navigable waters” must obtain “a certification from the State in which the discharge originates.” 33 U.S.C. § 1341(a)(1). Constitution has applied for but not yet obtained a Section 401 certification from the NYSDEC. NYSDEC issued a notice of complete application on April 29, 2015. See NYSDEC Environmental Notice Bulletin, April 29, 2015, available at: http://www1.dec.state.ny.us/enb/101473.html.

The Pipeline proposed by Constitution would cross a total of 220 waterbodies in New York. FEIS 4-92. Construction of the Pipeline and associated work spaces in New York would impact 80 waterbodies containing sensitive fisheries, with an additional three waterbodies impacted by temporary and permanent access roads. The Pipeline would cross one warmwater fishery (Schoharie Creek), 34 waterbodies supporting trout populations, and 52 waterbodies
supporting trout spawning. FEIS 4-93. NYSDEC has received approximately 15,000 public comments on Constitution’s application for a Water Quality Certification. This DEC proceeding is not yet complete. See, e.g., Constitution Pipeline, Co. v. A Permanent Easement for 1.80 Acres & Temporary Easement for 2.09 Acres Davenport, Del. Cnty., N.Y., 3:14-cv-02049-NAM-RFT (N.D.N.Y. Feb. 21, 2015), Memorandum-Decision and Order, at 5: 9-10 (“it is undisputed that Constitution’s reapplication for a CWA 401 certificate is still pending”).

4. Constitution’s Request to Proceed

On January 8, 2016, Constitution requested a partial Notice to Proceed from OEP to commence tree-felling activities along “the length of the [Pipeline],” with certain areas exempted. Request to Proceed (submittal 20160108-5125) at 1-2 and Attach. F at 1. Constitution requests authorization to cut trees and vegetation by hand using chainsaws or other hand-held instruments and to leave felled trees in place “until construction begins, which will be after receipt of all applicable permits and approvals and [the Commission’s] issuance to Constitution of a separate notice to proceed to begin construction and earth disturbance activities.” See Request to Proceed at 2.

POINT I

THE OEP MAY NOT AUTHORIZE CUTTING THE TREES IN THE PIPELINE CORRIDOR UNLESS AND UNTIL CONSTITUTION HAS OBTAINED ALL AUTHORIZATIONS REQUIRED PURSUANT TO FEDERAL LAW TO CONSTRUCT THE PROPOSED PIPELINE

The Certificate Order requires that Constitution receive all required federal authorizations “prior to receiving written authorization from the Director of OEP to commence construction.” Certificate Order at 51; see Certificate Order at 45 (stating that the environmental conditions listed in the Appendix to the Certificate Order are conditions of the Order). This requirement ensures that construction does not commence until it is certain that the Pipeline will be built and
that its route and all conditions have been established. Compliance with the requirement is of critical importance to the NY Attorney General because it protects New York homeowners and other property owners from irreversible alterations to their property, and New York’s potentially impacted communities and environment, until the Pipeline has received all of the necessary final approvals.

Constitution’s Request to Proceed seeks to start construction before all authorizations under federal law have been received. In particular, Constitution has not received a Clean Water Act Section 401 water quality certification from the NYSDEC or Section 404 permit from the U.S. Army Corps of Engineers. See 33 U.S.C. §§ 1341, 1344. In Attachment F to its Request to Proceed, Constitution notes that both of these authorizations are applicable to the Pipeline and that both are pending. Request to Proceed, Attach. F at 6 and 8. Furthermore, in its January 5, 2016 status report, Constitution notes that a “[Commission] Notice to Proceed (NTP) is required prior to the commencement of any other Project construction activities and is currently pending necessary federal authorizations.” Submittal 20160105-5343; see also January 12, 2016 status report, submittal 20160112-5175 (same).

Allowing Constitution to start construction before it has obtained a Section 401 water quality certification from the NYSDEC is of particular concern to the NY Attorney General because Section 401 strikes a careful balance between federal and state interests in the quality of water in a state. The legislative history of Section 401 confirms Congress’ intent, stating that “[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).
Constitution argues that its request to “commence limited, non-mechanized tree felling activities” is not a request “to proceed with construction of the Project,” which “it will do once applicable permits are received.” Constitution Request to Proceed at 1-2. Constitution’s interpretation of “construction” conflicts with the plain meaning of the term as well as documents explaining what construction of the project entails. Tree felling activities clearly constitute construction of the project. For example, the FEIS for the project contains a section entitled “General Pipeline Construction Procedures,” which in turn contains a section on “Clearing Operations.” This section explains that “[c]learing would be required to remove trees, brush, and other existing vegetation from approved work areas. . . . Hand cutting with chain saws may also be used in specific areas as needed.” FEIS at 2-19. Furthermore, the “Construction” section of the Fish and Wildlife Service’s Biological Opinion explains that during construction, land will be disturbed by tree clearing:

In its entirety, the proposed project will disturb approximately 1,946 acres of land during construction, with approximately 746 acres being permanently impacted. More than half of the total land disturbance (55 percent) is to forest where tree clearing will occur on 1,063 acres. It is also reported that of this tree clearing, approximately 487 acres of forest will be permanently converted to non-forest and 575 acres will be allowed to revert back to forest.

U.S. Fish & Wildlife Service, Dec. 31, 2015 (submittal 20160105-4002) at 19. In addition, an affidavit of a Pipeline project manager submitted by Constitution in a related matter states that “[p]ipeline construction begins with tree and vegetation clearing.” Affidavit of Matthew Swift, attached as Exhibit A hereto. Thus, tree felling clearly constitutes construction.

Constitution also argues that neither a section 401 certification nor a Section 404 permit are required to fell trees, and relies on letters from the Army Corps of Engineers with respect to the Section 404 requirement. Even if that is correct—an issue on which the NY Attorney General does not take a position—the Certificate Order does not provide that a specific
component of construction may commence once all authorizations are received for that component. Instead, it requires Constitution to obtain all required authorizations before commencing any construction. Constitution’s argument that it should be allowed to start felling trees now runs afoul of the logic of that requirement, which ensures that New York property owners do not suffer irreversible alterations to their property to build a pipeline that has not yet been fully approved.

**POINT II**

**THE OEP MAY NOT AUTHORIZE CUTTING THE TREES IN THE PIPELINE CORRIDOR UNLESS AND UNTIL THE COMMISSION DECIDES THE PENDING MOTIONS FOR REHEARING**

The OEP may not authorize Constitution to start felling trees because FERC has not finalized its final record of decision under NEPA. The regulations issued by the Council on Environmental Quality (CEQ) pursuant to NEPA place limitations on actions that may be taken by an agency prior to the issuance of a final record of decision. Those regulations specify that “no action concerning the proposal shall be taken which would: (a) have an adverse environmental impact.” 40 C.F.R. § 1501.6(a)(1). This requirement enforces the NEPA obligation of agency decisionmakers to make informed decisions. “The NEPA duty is more than a technicality; it is an extremely important statutory requirement to serve the public and the agency before major federal actions occur.” Found. on Econ. Trends v. Heckler, 756 F.2d 143 (D.C. Cir. 1985) (emphasis in original). Accordingly, the NEPA process must be completed before an agency may allow adverse environmental impacts to occur.

In late 2014 and early 2015, several intervenors filed requests for rehearing and rescission of the Certificate Order, which constitutes FERC’s record of decision under NEPA. Several of these requests argue that FERC failed to comply with NEPA. While these challenges remain
pending, FERC’s Certificate Order is not final, and action on the proposed Pipeline that causes environmental harm cannot proceed. For this reason, FERC must deny Constitution’s Request to Proceed until the Commissioners complete their review of the Certificate Order on rehearing.

A party may not obtain judicial review of a FERC order unless the party applies for rehearing within 30 days of the issuance of the order. 15 U.S.C. § 717r(a). After FERC issues an order upon an application for rehearing, the party aggrieved by that order has 60 days to file a petition for judicial review. 15 U.S.C. § 717r(b). Although a FERC order is presumably a final decision when it is issued, a petition seeking rehearing under the Natural Gas Act suspends the finality of the order until the Commission fully resolves the rehearing request by way of another final order. See Canadian Ass’n of Petroleum Producers v. FERC, 254 F.3d 289, 296 (D.C. Cir. 2001).

Thus, when intervenors sought rehearing of the Certificate Order, their requests suspended the finality of the Certificate Order. Until the Commission issues a ruling on the merits of the rehearing request, the Certificate Order is not final and does not constitute FERC’s record of decision.

Here, the proposed action will potentially cause irreparable environmental harm to thousands of acres in New York State. The FEIS identified multiple potential adverse impacts associated with the clearing of trees for the pipeline route. These adverse impacts included: soil erosion and compaction (FEIS ES-4); fragmentation of large blocks of vegetation communities of special concern such as interior forests (FEIS ES-5); drier soils and higher soil temperatures in cleared areas (FEIS, 4-78); decreased stability of trees adjacent to cleared areas (FEIS, 4-78); visual impacts (FEIS, 4-140), and the displacement and potential mortality of wildlife (FEIS, 5-6).
Since FERC’s NEPA review will not be complete until the Commission decides the NEPA claims in the motions for rehearing and issues a final order, FERC must deny any request by Constitution to take action that will potentially cause irreparable environmental harm.

POINT III

THE OEP MAY NOT AUTHORIZE CUTTING THE TREES IN THE PIPELINE CORRIDOR UNLESS AND UNTIL THE COMMISSION REVIEWS THE ENVIRONMENTAL IMPACT OF THE MATERIAL CHANGE IN THE PROPOSED PIPELINE CONSTRUCTION SCENARIO

Constitution’s Request to Proceed may not be approved because it proposes to leave felled trees in place for an indeterminate period of time until construction resumes and the environmental impacts of doing that were not examined in the FEIS for the Pipeline. Pursuant to CEQ regulations, an agency must prepare a supplement to a FEIS if “the agency makes substantial changes in the proposed action that are relevant to environmental concerns” or “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c). This requirement ensures that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal.

The FEIS assumed that felled trees would be promptly removed from the Pipeline corridor and thus does not examine the environmental impacts of leaving them in place for an indeterminate period of time until construction resumes. The “Construction Procedures” section of the FEIS describes the planned clearing operations for the Pipeline project. It explains that after felling, trees will be removed from the construction area:

Clearing would be required to remove trees, brush, and other existing vegetation from approved work areas. This would occur by mechanical means including feller-bunchers and hydroaxes. Hand cutting with chain saws may also be used in specific areas as needed. Timber would be removed from the right-of-way and sold for lumber or pulp if suitable, disposed of at an appropriate receiving facility,
or chipped on the right-of-way. . . . Timber would not be left in piles or stacks on the right-of-way.

FEIS at 2-14.

Leaving felled trees in place may cause environmental impacts beyond those analyzed in the FEIS. In the spring, for a period of time after the snow melt and before the trees and the forest floor bloom, there is an abundance of dead plant material on the forest floor. Felled trees and vegetation increase the amount of small woody debris on the ground, thus increasing the “fuel load” on the forest floor, and the risk of fire. See Exhibit B. In the event of a fire, coarse woody material from the felled trees can sustain the fire and felled vegetation can contribute to the fire’s spread. Furthermore, leaving hundreds of acres on felled trees on the ground has a negative visual impact.

Thus, the change to the construction procedure requested by Constitution may have environmental impacts. As a result, that change is “relevant to environmental concerns.” See 40 C.F.R. § 1502.9(c). Accordingly, FERC may not approve Constitution’s Request to Proceed until it examines the environmental impacts of that change in a supplement to the FEIS.

CONCLUSION

For the above reasons, the Office of the New York State Attorney General requests that FERC and its Director of the Office of Energy Projects deny Constitution’s request.

Respectfully submitted,

J. Sipos / I. Cheng / L. Heslin

Dated: January 14, 2016

John Sipos
Isaac Cheng
Laura Heslin
Assistant Attorneys General
State of New York
120 Broadway – 26th Floor
New York, NY 10271
Exhibit A

Matthew Swift Affidavit

December 11, 2014
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CONSTITUTION PIPELINE COMPANY, LLC

Plaintiff,

v.

A PERMANENT EASEMENT FOR 1.17 ACRES AND TEMPORARY EASEMENTS FOR 1.61 ACRES, IN DAVENPORT, DELAWARE COUNTY, NEW YORK, TAX PARCEL NUMBER 32.-1-14.1, ROBERT STACK, et al.

Defendants.

CIVIL ACTION

Case No. 3:14-cv-02039-NAM-RFT

Electronically Filed

AFFIDAVIT OF MATTHEW SWIFT IN SUPPORT OF OMNIBUS MOTION FOR PRELIMINARY INJUNCTION FOR POSSESSION OF RIGHTS OF WAY BY FEBRUARY 16, 2015 PURSUANT TO THE NATURAL GAS ACT AND FEDERAL RULES OF CIVIL PROCEDURE 71.1 AND 65
Matthew Swift, of full age, hereby declares, pursuant to 28 U.S.C. §1746, as follows:

**BACKGROUND**

1. I make this Affidavit for the purpose of setting forth certain facts in support of Plaintiff's Omnibus Motion for Preliminary Injunction for Possession of Rights of Way by February 16, 2015 Pursuant to the Natural Gas Act and Federal Rules of Civil Procedure 71.1 and 65 (the “Injunction Motion”). This Affidavit shall use the same defined terms set forth in the Verified Complaints filed in the series of condemnation actions at Case Numbers 1:14-cv-02000-NAM-RFT to 1:14-cv-02120-NAM-RFT.

2. I reaffirm my statements in the Affidavit of Matthew Swift filed in support of the Motion for Partial Summary Judgment in this action, with the exception of the percentage of easements acquired for the Project. Constitution has now acquired at least 80 percent of the easements needed for the Project.

3. Constitution must have possession by February 16, 2015 of the Rights of Way it is seeking to acquire on each Property in the above-referenced condemnation actions to conduct surveys and construct the Project as required by the FERC Order.

**THE CONSTITUTION PIPELINE PROJECT**

4. The Rights of Way are required to construct, operate and maintain the new pipeline facilities approved in the FERC Order.
5. The FERC Order requires that Constitution complete construction of the Project and make the new pipeline facilities available for service within twenty four months of the date of the FERC Order, or by December 2, 2016. FERC Order, Ordering Paragraph E(1).¹

6. The pipeline is approximately 124 miles long, and in order to expedite construction, Constitution has divided the pipeline into 5 construction spreads, each of which will have twelve crews to perform all construction tasks. The pipeline is illustrated in Exhibit B attached hereto, titled “Constitution Pipeline Company, LLC, CPL Unacquired Tracts,” which shows the pipeline route from Susquehanna County, Pennsylvania to Schoharie County, New York and the locations of the properties along the route which are the subject of this Omnibus Motion.

7. The construction of large-diameter natural gas pipelines is accomplished in linear segments, with a number of different crews performing different functions as part of the overall pipeline spread. Each crew follows the one ahead of it from one end of a construction spread to the other. The crews (and equipment) proceed sequentially in an assembly-like fashion along the construction corridor at a rate (distance per day) that depends on topography, road and stream crossings, and other factors. In addition, there will be specialty crews that typically do not work sequentially with the other crews. The specialty crews perform tasks such as road borings, stream installations, and trenchless crossings of environmentally sensitive areas.

8. Pipeline construction begins with tree and vegetation clearing, and installation of environmental controls, followed by grading and trenching. Thereafter, stringing, pipe bending, welding, and coating of the pipe takes place, followed by installation, backfilling, remediation,

¹ The FERC Order, Constitution Pipeline Co., 149 FERC ¶ 61,199 (2014), is available at http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13699722#. A true and
and restoration. The newly constructed pipeline will then be pressure-tested prior to being placed in service.

9. Generally once construction starts, the crews will move sequentially through all of the tasks for each pipeline segment until construction is complete.

10. Construction of the Project is also subject to significant restrictions intended to protect the environment and minimize the impact of construction on the environment. These restrictions are time sensitive and interdependent.

**CONSTRUCTION SCHEDULE**

11. FERC describes the steps necessary to initiate construction of the Project in the Final Environmental Impact Statement, issued October 24, 2014 ("FEIS"), Section 2.4, Construction Schedule. As the FEIS states, Constitution would seek to begin construction dependent upon:

- whether the Commission decides to authorize a Certificate;
- subsequent acquisition of additional survey access and easement agreements;
- completion of field surveys and submittal of permit applications;
- receipt of all necessary federal, state and local authorizations;
- other project-specific requirements such as waterbody, migratory bird, and rare bat constructions window restrictions (see sections 4.3, 4.6 and 4.7);
- satisfaction of all pre-construction conditions of any Certificate issued for the projects; and
- the FERC’s separate, post-Certificate Authorization that construction may begin.

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correct copy of the relevant excerpts from the FERC Order is attached hereto as Exhibit A.
FEIS, Section 2.4.  

12. Further, as the FEIS notes: "Winter weather, wet conditions, and other unforeseen factors could result in construction schedule delays." FEIS, Section 2.4.

13. Of the steps listed above, Constitution has obtained the Certificate authorization and is in the process of obtaining survey access and easement agreements by the initiation of the proceedings filed in this Court. Constitution has obtained some, but not all of the necessary federal, state and local authorizations.

14. Constitution will need access to the Rights of Way to finish surveys, and will then need possession of the Rights of Way in order to commence work under the FERC Order and the federal and state authorizations.

15. In order to construct the Project in compliance with the FERC Order, including all of the Environmental Conditions in the FERC Order, Constitution must have possession of all of the Rights of Ways sought in the actions filed in this Court by February 16, 2015 to be able to meet the in service date set forth in FERC's Order of December 2, 2016.

**FERC REQUIREMENTS PRIOR TO CONSTRUCTION**

16. The FERC Order requires Constitution to comply with the environmental conditions listed in the appendix to the Order. FERC Order, Ordering Paragraph E(3).

17. The Appendix contains a number of Environmental Conditions which must be completed prior to construction. Some of the significant Environmental Conditions, which restrict either the start of construction, or the time in which certain construction tasks may proceed, are listed below:

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2 The FEIS was issued by the FERC on October 24, 2014 and notice of the issuance of the FEIS was published in the Federal Register on October 31, 2014. The FEIS is available
(a) **Environmental Condition 3:** Constitution must file a statement with the Secretary that "all company personnel, environmental inspectors (EIs), and contractor personnel will be informed of the EIs’ authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities." FERC Order, Appendix, Env. Condition 3 (emphasis in original).

(i) In order to comply with this condition, Constitution will have had to survey each property on which construction is proposed to identify any of the environmental conditions for which required environmental mitigation applies. The Landowners in 80 of the remaining condemnation actions have refused access to Constitution for surveys, despite multiple requests by Constitution, and Constitution needs survey data for the Properties at issue in 81 of the condemnation actions. 3

(b) **Environmental Condition 4:** “**As soon as they are available, and before the start of construction**” Constitution shall “file any revised detailed survey alignment maps/sheets … for all facilities approved by the Order.” FERC Order, Appendix, Env. Condition 4 (emphasis in original).

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(i) In order to comply with this condition, Constitution must have access to all unsurveyed Rights of Way in order to survey them and then develop the detailed survey alignment maps/sheets required by this condition. Throughout this Project, it has taken an average of two months for the engineering teams working on the Project to issue alignment sheets after receiving new survey data, therefore, Constitution needs access to unsurveyed Properties as soon as possible.

(c) **Environmental Condition 5:** Before construction in or near an area of “route realignments or facility relocations, and staging areas, contractor yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary” Constitution must file detailed alignment maps/sheets and aerial photographs, including in the description of such areas “whether any cultural resources or federally listed threatened or endangered species would be affected and whether any other environmentally sensitive areas are within or abutting the area.” FERC Order, Appendix, Env. Condition 5.

(i) In order to comply with this condition, Constitution must have access to all unsurveyed Rights of Way in order to conduct the civil surveys and environmental surveys necessary to comply with this condition, and if an unexpected condition is discovered which would require a realignment or relocation of facilities, Constitution will then need to locate and survey those areas and provide the required alignment sheets.

(d) **Environmental Condition 6:** “**Within 60 days of the acceptance of the Certificate and before construction begins,**” Constitution must file an Implementation Plan for review and written approval by the Director of the Office of Energy Projects (“OEP”) at
FERC. That Implementation Plan must be revised as schedules change. FERC Order, Appendix, Env. Condition 6 (emphasis in original).

(i) Constitution is working on submitting its Implementation Plan, but will not be able to include detailed schedules for areas which have not yet been surveyed because of lack of access to the Rights of Way.

(c) Environmental Condition 8: “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).” FERC Order, Appendix, Env. Condition 7 (emphasis in original).

(i) Constitution has applied for all applicable federal authorizations required for the Project, and some of the agencies responsible for issuing those applications have requested survey data or further information that can only be gathered by a civil or environmental survey on Rights of Way to which Constitution currently has no access.

(f) Environmental Condition 9: Before the Project can be placed into service, Constitution must receive written authorization from the Director of OEP, and such “authorization will only be granted following a determination that rehabilitation and restoration of areas affected by the projects are proceeding satisfactorily.” FERC Order, Appendix, Env. Condition 8.

(i) Since the required in service date for the Project is in the winter (December 2, 2016), this condition requires me to plan to complete construction well before the required in service date in order to ensure that restoration and rehabilitation have begun, and that winter restoration measures required by the FEIS are in place. In order to ensure that
construction can be completed well before December 2, 2016, in time to comply with this condition, and to obtain the authorization of the Director of OEP, Constitution needs possession of all Rights of Way as soon as possible, but no later than February 16, 2015.

(g) **Environmental Condition 14:** “Prior to construction, Constitution shall file with the Secretary all outstanding geotechnical feasibility studies for trenchless crossing locations.” FERC Order, Appendix, Env. Condition 14 (emphasis added).

(i) There are two locations for which geotechnical feasibility studies have not been completed for trenchless crossings because Constitution does not have access to or possession of the Rights of Way. Those locations are both on the Property which is the subject of the action at Docket Number 3:14-cv-02115-NAM-RFT. Geotechnical feasibility studies require that Constitution bore to take samples of the subsurface conditions below the streams which are proposed for trenchless crossing locations. Once the boring is completed, the studies to determine feasibility can take up to two months, and those studies must be completed and submitted prior to the start of construction.

(h) **Environmental Condition 18:** “Prior to conducting any agricultural restoration between October 1 and May 15, Constitution shall determine soil workability in consultation with the FERC, the NYSDAM, and the agricultural inspector ("AI") for all New York agricultural parcels.” FERC Order, Appendix, Env. Condition 18 (emphasis in original).

(i) The Project impacts 387 acres of agricultural land, and since the required in service date is in the middle of this restoration restriction, I have to plan for construction to be completed well before October 1, 2016, so as not to incur delays due to failure to start or complete restoration (see Environmental Condition 9, above). In order to avoid potential delays, and also in order to comply with other restrictions, described below,
construction is scheduled to be completed no later than the third quarter of 2016, to allow
restoration activities to occur and time for the required inspections and approvals prior to the
Project being approved for service.

(i) **Environmental Condition 19:** "**Prior to construction,** Constitution shall
file with the Secretary the location of all water wells and springs within 150 feet of the pipeline
and aboveground facilities."

(i) Constitution has already performed title searches of affected
properties, and has completed other record searches for this information, but must have survey
access to the Rights of Ways in order to complete this condition prior to construction.

(j) **Environmental Condition 25:** "**Prior to construction,** Constitution shall
file with the Secretary the final, complete results of its invasive plant surveys and the planned
locations of weed wash stations for review and written approval of the Director of OEP.” FERC
Order, Appendix, Env. Condition 25 (emphasis in original).

(i) In order to complete invasive plant surveys, Constitution must
have access to the Rights of Ways for survey, and these surveys must occur early enough to
allow time for the Director of OEP to review and approve the plan.

(k) **Environmental Condition 26:** "**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."

(i) The entire area of the permanent easement and temporary
workspace for the Project must be cleared in order for the Project to be constructed. The
majority of the construction work must be completed between April 1 and August 31 in New
York, and while tree clearing is subject to other restrictions, discussed below, vegetation clearing will occur all along the Project length in this time period. Constitution must have possession of all of the Rights of Ways in order to have time to conduct these surveys and comply with this condition.

(i) **Environmental Condition 41:**

Constitution shall not begin implementation of any treatment plans/measures (including archaeological data recovery); construction of facilities; or use of staging, storage, or temporary work areas and new or to-be-improved access roads **until**:

a. Constitution files with the Secretary outstanding cultural resources survey and evaluation reports, any necessary treatment plans, site specific protection plans, and the Pennsylvania Historical and Museum Commission’s and New York State Office of Parks, Recreation and Historic Preservation’s comments, as appropriate, on the reports and plans.

b. Constitution provides documentation that it has provided cultural resources reports to the Native American Tribes which have requested them.

c. The Advisory Council on Historic Preservation is provided an opportunity to comment on the undertaking if historic properties would be adversely affected; and

d. The FERC staff reviews and the Director of OEP approves all cultural resources survey reports and plans, and notifies Constitution in writing that treatment plans/mitigation may be implemented or construction may proceed.

(i) Staging and storage areas and access roads are among the first areas to be needed for construction. In order to file the required cultural resources survey reports and receive the required approval from the Director of OEP, Constitution must perform those surveys as soon as possible after the ground thaws, and therefore requires possession of the Rights of Way no later than February 16, 2015.
OTHER RESTRICTIONS ON CONSTRUCTION

Aquatic Resources Restrictions

18. The FERC found that the pipeline will cross a total of 289 waterbodies, 69 in Pennsylvania and 220 in New York. FEIS, Section 4.6.2.1. There are sensitive fisheries subject to timing restrictions in each of the five construction spreads.

19. The FEIS includes the Timing Restrictions for Waterbodies shown in Table 4.6.2-1 of the FEIS as part of the mitigation measures adopted by Constitution:

<table>
<thead>
<tr>
<th>State</th>
<th>Fishery Classification</th>
<th>Construction Restriction Window*</th>
<th>In-Stream Work Window</th>
<th>Applicable Regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pennsylvania</td>
<td>Trout Stocked</td>
<td>March 1 through June 15</td>
<td>June 16 through June 15</td>
<td>PFBC Trout Designations</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Natural Trout Reproduction</td>
<td>October 1 through December 31</td>
<td>January 1 through September 30</td>
<td>PFBC Trout Designations</td>
</tr>
<tr>
<td>New York</td>
<td>Trout and Trout** Spawning</td>
<td>October 1 through May 31</td>
<td>September 16 through September 30</td>
<td>NY8DEC</td>
</tr>
<tr>
<td>New York</td>
<td>Warmweather Fisheries</td>
<td>March 1 through July 15</td>
<td>July 16 through February 28</td>
<td>NY8DEC</td>
</tr>
</tbody>
</table>

* Timing restrictions determined based on agency consultation with the PFBC and the NY8DEC (PFBC 201c, NY8DEC 2012g, NY8DEC 2014b)

** Trout and trout spawning classifications are denoted by a “T” and “T8” in appendix N.

20. Constitution is required to complete waterbody crossings during the appropriate in-stream construction window, and must complete open cut crossings within 24 hours and 48 hours for minor and intermediate crossings, respectively. FEIS, Section 4.6.2.3.

21. The work window for stocked trout streams in Pennsylvania and New York is very short and starts in June, 2015. There are stocked trout streams in each of the five construction spreads, and if that work cannot start in the spring of 2015, Project construction cannot be completed by the required in service date.
22. In order to start construction in the stocked trout streams, Constitution will also have to have completed the access roads to those stream crossings.

23. Essentially, Constitution will need to have possession of the easements for the Project in order to do the work necessary to access the stocked trout streams and in order to complete the work necessary in the streams during the limited work windows.

**Soil Erosion Protection**

24. To prevent soil erosion during and after construction, Constitution must follow Best Management Practices that are outlined in its state-specific Environmental Construction Plans. In particular, Constitution developed Best Management Practices for agricultural lands and prime farmlands from FERC’s Plan as well as New York State Department of Agriculture and Market’s “Pipeline Right-of-Way Construction Projects Agricultural Mitigation, through the Stages of Planning, Construction/Restoration and Follow-up Monitoring” guidance. FEIS, Section 4.2.4.

25. Constitution must have possession of the Rights of Way, and all easements needed for the Project, prior to the start of construction in order to install the measures required by the Best Management Practices outlined in the New York Environmental Construction Plan.

**Migratory Birds**

26. Migratory Birds are protected under the Migratory Bird Treaty Act, 16 U.S.C. §§703 - 711, and Executive Order 13186 directs federal agencies to identify where an unintentional take of a migratory bird is likely to have a measurable negative impact on migratory bird populations and to avoid or minimize adverse impacts on migratory birds through enhanced collaboration with the U.S. Fish and Wildlife Service. FEIS, Section 4.6.1.3.

27. Constitution must conduct the majority of tree clearing between September 1 and March 31 in order to minimize impacts on breeding birds and comply with state and federal
recommendations. Constitution would only conduct limited tree clearing activities between April 1 and August 31 for access roads and sensitive waterbodies, as necessary, to access and construct in sensitive fisheries within state-designated construction windows. FEIS, Section 4.6.1.3.

28. Taking all of these other restrictions together with the requirements of the FERC Order, in order to maintain its construction schedule and ensure that construction of the Project is completed and in service by December 2, 2016, Constitution requires possession of the Rights of Way by February 16, 2015 to conduct surveys and begin construction activities.

HARM TO THE PUBLIC INTEREST

29. Granting possession by February 16, 2015 is in the public interest, because the Project will provide additional natural gas capacity to meet the increased needs of customers in the New York and New England market areas. The Project also will provide new natural gas service for areas currently without access to natural gas, expand access to multiple sources of natural gas supply, improve operational performance, system flexibility and reliability in the New York and New England market areas and optimize the existing systems for the benefit of both current and new customers.

30. By issuance of the FERC Order, the FERC found that the construction and operation of the Project is in the public interest pursuant to the public convenience and necessity standard of Section 7(c) of the Natural Gas Act.

31. It is in the public interest that Constitution be given possession of the Rights of Way on each Property for surveys and construction of the Project so that Constitution can comply with the requirements of the FERC Order and all permits and environmental restrictions.
CONSTITUTION WILL INCUR IRREPARABLE HARM
IF CONSTRUCTION IS DELAYED; DEFENDANTS WILL SUFFER NO SIGNIFICANT HARM IF POSSESSION IS GRANTED

32. Defendants will suffer no damage as a consequence of granting possession by February 16, 2015, because any damages will be remedied by money damages and Defendants are still entitled to just compensation for the Rights of Way. Constitution is willing to post a bond in the amount of $3,200,000, or such other amount deemed appropriate by the Court, to secure just compensation to Defendants. The proposed bond amount is more than four times the total Appraised Value of the Rights of Way which were independently appraised, as set forth in the document attached to the Declaration of Elizabeth U. Witmer as Exhibit A. If Constitution is not granted possession of the Rights of Way by February 16, 2015, however, then Constitution will suffer irreparable harm.

33. Constitution has invested considerable time and money to obtain the property rights and permits necessary for the Project and the FERC has approved the Project crossing each Property.

34. Constitution cannot risk any delay to the Project because the Landowners will not grant the Rights of Way necessary for construction of the Project.

35. If Constitution does not have possession of the Rights of Way by February 16, 2015 for surveys and construction, then there is a likely risk that Constitution will not be able to begin construction in time to allow the Project to be completed by the anticipated in service date of December 2, 2016, which will cause Constitution to fail to comply with the conditions of the FERC Order and to suffer substantial damages.

36. Additionally, if Constitution has not acquired possession of the Rights of Way on each Property by February 16, 2015, Constitution could incur up to $720,000 per day ($60,000
per crew) in additional construction costs due to work suspension charges, as well as specialty crew remobilization charges. Any delay costs would, if incurred, not be recoverable.

37. Further, if Constitution’s shippers believe that Constitution is not making a reasonable effort to provide service by the promised date, Constitution – as well as the companies that jointly own Constitution – may suffer a loss of customer confidence that may have a detrimental impact on the relationship of Constitution and its owners with these particular customers and make it more difficult to contract with these shippers in the future. It may also have an adverse effect on the reputations of Constitution and its owners in the industry and could cause serious harm.

38. Finally, revenues to Constitution from the Project are estimated to be a maximum of $358,900 per day (which would be approximately $10 million per month) once service commences. Constitution would therefore suffer a substantial loss in revenue if the Project is not placed in service as soon as reasonably possible, but no later than December 2, 2016.

39. Constitution has good reason to act with diligence to meet the anticipated December 2, 2016 in service date.

40. For all of these reasons, I have determined that Constitution must have possession of the Rights of Way by February 16, 2015 for surveys and construction or Constitution will risk being unable to begin construction in time to allow the Project to be completed by the anticipated December 2, 2016 in service date, in violation of the FERC Order.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 9, 2015

MATTHEW SWIFT
Exhibit B

Article:  
“Reducing Forest Fuel Loads to Decrease Wildfire Risk”  

August 28, 2014
Reducing Forest Fuel Loads to Decrease Wildfire Risk

Reducing fuel load is one strategy forest owners can use to make their forests more resilient to fire. Moreover, the practices used to reduce fuel load also tend to make the forest more resistant to mortality from drought and bark beetles. Reduce the fuel load on your property by implementing the following practices:

- **Clear small trees out of dense areas.** Increase the height from the forest floor to the base of tree crowns by pruning branches, reducing the amount of debris directly below trees, and removing small trees that could otherwise carry fire into tree crowns. Taking these actions helps lessen the risk of a surface fire intensifying into a crown fire. Clearing small trees off the land also reduces competition for water during periods of drought. Not only can drought stress kill trees, but the lack of moisture needed to create pest-repelling sap makes it easier for bark beetles to get past a tree's defenses.

- **Reduce the amount of fuel on the ground.** Reducing excessive downed trees and other fuels diminishes fire risk. Removing slash from a site also limits the refuges available for bark beetles. Large logs typically contribute little to fire spread, so leaving two or three large logs or dead trees per acre can benefit wildlife and soils without tipping the wildfire equation toward high risk. Also, leaving a cover of some leaves and twigs can help retain soil moisture and nutrients.

- **Increase the spacing between trees.** Thinning some of the existing trees out of overt dense forest stands reduces the chance that a fire that reaches the canopy will be able to spread through the tree crowns. Increasing light to the understory also may accelerate the decay of understory fuels. When selecting which trees to keep in the forest, favor the tallest, most structurally sound trees of those species most adapted to the site for the long term. Trees with forked tops, for instance, tend to be less structurally sound. Fire-resistant species vary by location. In western dry forests, ponderosa pines, western larches, and Douglas firs all have adaptations, such as thick bark and deep roots, that allow them to thrive under conditions of frequent surface fires. In contrast, lodgepole pines, spruces, true firs, and hemlock species have thin bark and shallow roots that make them susceptible to any kind of fire. Hardwood trees, especially deciduous ones such as maples, alders, and some oaks, also tend to be resistant to fire because of relatively high moisture levels in their leaves.

The following articles provide more information about reducing the risk of damaging fire in your forest:
Thinning Forests to Reduce Risks from Wildfires

Dealing with Slash and Debris from Thinning Treatments

Contributor

Melanie Lenart, University of Arizona

For More Information


The National Fire Protection Association’s Firewise Communities program: http://www.firewise.org/

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of:

Constitution Pipeline Company, LLC  Docket Nos.: CP13-499-000

For a Certificate of Public Convenience and Necessity.

CERTIFICATE OF SERVICE

I certify that on January 14, 2016, the Office of the New York State Attorney
General electronically served the accompanying answer in opposition to the
applicant’s request for permission to proceed on the individuals and entities appearing
on the service list compiled and maintained by the Federal Energy Regulatory
Commission for this proceeding.

Dated: January 14, 2016
New York, New York

Isaac Cheng
Assistant Attorney General
State of New York
120 Broadway, 26th Floor
New York, NY 10271