UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONSTITUTION PIPELINE COMPANY, LLC,

Petitioner,

-against-

BASIL SEGGOS, Acting Commissioner, New York State Department of Environmental Conservation, JOHN FERGUSON, Chief Permit Administrator, New York State Department of Conservation, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

CATSKILL MOUNTAINKEEPER, INC., THE SIERRA CLUB, RIVERKEEPER, INC., and STOP THE PIPELINE,

Intervenors.

Docket No. 16-1568

RESPONDENTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE

Respondents Basil Seggos,[1] John Ferguson, and New York State Department of Environmental Conservation (collectively, "DEC")

[1] Although Respondent Basil Seggos is named as "Acting Commissioner" in the caption, he has now been officially confirmed as Commissioner.

respectfully submit this reply memorandum in further support of DEC's motion to strike (ECF No. 66). *See* Fed. R. App. P. 27(a)(3); 2d Cir. R. 27.1. DEC moved to strike three outside-the-record declarations attached to Petitioner's opening brief and the associated portions of that brief (ECF No. 60).

Petitioner's opposition memorandum (ECF No. 91) relies on wholly inapposite cases to support its theory that this Court should conduct a *de novo* trial on whether DEC waived its right to issue or deny a Water Quality Certification under section 401 of the Clean Water Act, 33 U.S.C. § 1341 (Section 401 Certification). A *de novo* trial would be inappropriate: this proceeding simply requires the Court to review an administrative determination subject to the deferential standard of review set forth in the Administrative Procedure Act (APA), limited to the administrative record compiled by DEC. *See* 5 U.S.C. § 706; *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-744 (1985).

Petitioner is also wrong in claiming that all oral communications between DEC and Constitution should be included in the record, and misrepresents the record's contents by claiming that it reflects eight months of silence between August 2015 and April 2016. In fact, the

record contains approximately 200 documents dated between August 1, 2015 and April 2016 outlining deficient information relating to the application, wetlands, geotechnical work, environmental monitoring, and the State Pollution Discharge Elimination System stormwater permit.

To support its claim that this Court should "exercise[] *de novo* review over whether [DEC] has waived its 'right' to issue or deny a Section 401 Certification by failing to act 'within a reasonable period of time,'" Petitioner cites two cases, both of which are readily distinguishable. (Response at 4-5, quoting 33 U.S.C. § 1341 [a] [1].) First, in *American Rivers, Inc. v. Federal Energy Regulatory Commission*, this Court held that the respondent Federal Energy Regulatory Commission (FERC) was not entitled to deference on its interpretation of the Clean Water Act (CWA) because FERC "is not Congressionally authorized to administer the CWA." 129 F.3d 99, 107 (2d Cir. 1997). Here, in contrast, Congress specifically has delegated to states the responsibility to determine whether a proposed project will comply with state water quality standards and other applicable requirements and the state's determination is entitled to deference. *See*

33 U.S.C. § 1341(a)(1). Indeed, this Court and others have applied the APA's deferential standard of review to a state agency's determination to issue or deny a Section 401 Certification. *See Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Conservation*, 482 F.3d 79, 94 (2d Cir. 2006); *see also Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 243 (D.C. Cir. 2013); *AES Sparrows Point LNG, L.L.C. v. Wilson*, 589 F.3d 721, 727 (4th Cir. 2009).

The second case cited by Petitioner in support of *de novo* review, *Federal Energy Regulatory Commission v. Maxim Power Corp.*, is even less persuasive. Docket No. 3:1-cv-30113-MGM (D. Mass., July 21, 2016) (attached as Exhibit A to Response). *Maxim* involved a provision of the Federal Power Act that *specifically provided* for *de novo* review by federal district courts of "the law and facts" related to FERC penalty assessments under the Federal Power Act. (*See id.* at 8.) *See* 16 U.S.C. § 823b(d)(3)(B) (providing that court "shall have authority to review *de novo* the law and facts involved"). In contrast, neither the Natural Gas Act nor the Clean Water Act contains a provision calling for *de novo* review of a state agency's denial or alleged waiver of a Section 401 Certification.

Petitioner also cites other cases in which courts have accepted factual affidavits (Response at 6); however, these cases involved circumstances where affidavits or other evidentiary submissions were allowed under well-established case law. First, in the context of standing, the Supreme Court has permitted plaintiffs to rely on affidavits and other evidence beyond the pleadings. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999). Second, under the Freedom of Information Act, the district court must consider and weigh affidavits submitted by the agency and the challenging party to determine whether the agency has met its burden to justify withholding the subject records. *See Grand Cent. P'ship Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999). Neither of those circumstances is present here. In administrative review proceedings, judicial review "is confined to the administrative record compiled by th[e] agency when it made the decision." *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997); *see Airport Cmtys. Coal. v. Graves*, 280 F. Supp. 2d 1207, 1212-1215 (W.D. Wa. 2003) (applying record rule, and striking extra-record materials, in case where primary

issue was whether state agency waived right to issue or deny Section 401 Certification).

Petitioner's assertion that statements made by DEC personnel to Constitution are part of that record (Response at 7) is contrary to well-established case law recognizing that it is inappropriate to rely on oral representations by agency employees:

> It is not merely the possibility of fraud that undermines our confidence in the reliability of official action that is not confirmed or evidenced by a written instrument. Written advice, like a written judicial opinion, requires its author to reflect about the nature of the advice that is given to the citizen, and subjects that advice to the possibility of review, criticism, and reexamination.

Heckler v. Cmty. Health Servs., 467 U.S. 51, 65 (1984). Thus, the alleged oral statements described in Petitioner's declarations do not form part of the record—and, in any event, cannot be added to it by submitting declarations at the appellate level.

Finally, Petitioner suggests that DEC has "ample recourse" to respond to extra-record materials because it can submit its own factual declarations. (Response at 5.) DEC, however, continues to believe that, as a matter of administrative law, it would be improper to expand the

record in the manner sought by Petitioner. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). Accordingly, DEC does not intend to submit written testimony. Should this Court determine that a *de novo* trial is appropriate, however, DEC respectfully requests notice and an opportunity to submit counter-declarations at that time.

CONCLUSION

For the reasons set forth above, this Court should strike the three extra-record declarations submitted by Petitioner, as well as the portions of Petitioner's opening brief that rely on them.

Dated: Albany, New York
August 3, 2016

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Respondents

By: Frederick A Brodie
FREDERICK A. BRODIE
Assistant Solicitor General
LISA BURIANEK
Deputy Bureau Chief
BRIAN LUSIGNAN
Assistant Attorney General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2317