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Court of Appeals
of the
State of New York

NATIONAL FUEL GAS SUPPLY CORPORATION,
Petitioner-Appellant,

– against –

JOSEPH A. SCHUECKLER, THERESA F. SCHUECKLER,
Respondents-Respondents,

EUGENE HEWITT, and WILLIAM BENTLEY,
Respondents.

BRIEF FOR PETITIONER-APPELLANT

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RULE § 500.1(f) DISCLOSURE STATEMENT

Appellant National Fuel Gas Supply Corporation certifies that it is a wholly owned subsidiary of National Fuel Gas Company, a publicly held corporation. No other publicly held entity owns more than 10 percent of Appellant's stock.

National Fuel Gas Supply Corporation has no subsidiaries, but has the following affiliates: Leidy Hub, Inc.; National Fuel Gas Distribution Corporation; National Fuel Gas Supply Holdings Corporation; National Fuel Gas Supply, LLC; Empire Pipeline, Inc.; National Fuel Resources, Inc.; Pennsylvania Gas Holdings Corporation; Seneca Resources Company LLC; National Fuel Gas Midstream Company LLC; Kane Gas Processing Plant Joint Venture; Roystone Gas Processing Plant Joint Venture; Highland Field Services, LLC; NFG Midstream Wellsboro, LLC; NFG Midstream Clermont, LLC; NFG Midstream Tionesta, LLC; Seneca-NFG Midstream Owls Nest, LLC; NFG Midstream Mt. Jewett, LLC; NFG Midstream Trout Run, LLC; NFG Midstream Processing, LLC; Whitetail Processing Plant, LLC; and NFG Midstream Covington, LLC.

STATEMENT OF RELATED LITIGATION

Under this Court's Rule 500.13(a), Appellant National Fuel Gas Supply Corporation identifies the following potentially related litigation:

On February 5, 2019, the U.S. Court of Appeals for the Second Circuit vacated the New York Department of Environmental Conservation's (DEC) decision denying National Fuel's application for a water quality certification under the Clean Water Act for National Fuel's natural gas pipeline project, on which the decision below relied. *Nat'l Fuel Gas Supply Corp. v. N.Y. State DEC*, No. 17-1164, 2019 WL 446990 (2d Cir. Feb. 5, 2019). The Second Circuit has not yet issued the mandate, but the time to seek rehearing has now expired.

On August 6, 2018, the Federal Energy Regulatory Commission (FERC) ruled that DEC had waived its authority to grant or deny a water quality certification for National Fuel's pipeline project. R.248, *reported at* 164 FERC ¶61,084 (2018). DEC, among other parties, has sought rehearing of that decision before FERC. FERC has not yet acted on those requests.

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PRELIMINARY STATEMENT

Although this case touches the complex federal regulatory regime for interstate natural gas pipelines, it ultimately turns on two simple questions of New York law: (1) Must an appellate court take judicial notice of a federal agency decision issued, with immediate effect, while the appeal is pending? And (2) does a "certificate of public convenience and necessity" from the Federal Energy Regulatory Commission count as "a certificate of public convenience or necessity" from a "federal … commission," EDPL 206(A), which exempts the holder from the Eminent Domain Procedure Law's (EDPL) notice-and-hearing process? The answer to both questions is yes. And an affirmative answer to either one requires reversal.

National Fuel Gas Supply Corporation plans to build and operate a 99-mile natural gas pipeline from Pennsylvania into western New York. National Fuel thus obtained from FERC a "certificate of public convenience and necessity" for the pipeline. That federal approval triggers the Natural Gas Act's eminent domain provision, which empowers the "holder" of such a certificate to acquire the land it needs "by the exercise of the right of eminent domain." 15 U.S.C. § 717f(h).

FERC's certificate also has consequences under the EDPL. Normally, a party cannot exercise eminent domain until it completes EDPL Article 2's notice-and-hearing process. But the Legislature has decided that when a party has already shown another governmental body that a project is in the public interest, there is no point in requiring the same showing again under the EDPL. The statute thus "exempt[s]" a party from complying with the usual process if it "obtains … a certificate of public convenience or necessity" from a "federal … commission." EDPL 206(A). FERC is a "federal … commission," and National Fuel obtained a "certificate of public convenience and necessity" from it. National Fuel is therefore exempt from the EDPL's requirements and empowered to exercise its eminent domain authority now.

The decision below concluded otherwise. Over a two-Justice dissent, the Appellate Division reversed the grant of National Fuel's eminent domain petition for failure to comply with EDPL 206(A). The majority acknowledged that National Fuel holds a FERC certificate for the pipeline, but it demanded more. It said that, to satisfy EDPL 206(A), a party must have "a federal permit that (at a minimum) authorizes construction of the public project for which the condemnor seeks to exercise

its power of eminent domain." R.373. And National Fuel lacked such a permit, in the majority's view, because New York State had denied National Fuel's application for a water quality certification under the federal Clean Water Act. Without a water quality certification, National Fuel could not build the pipeline, and thus, the majority said, it could not satisfy EDPL 206(A).

This decision is wrong as a matter of law for two reasons. *First*, even if the majority's interpretation of EDPL 206(A) were correct, National Fuel has everything it needs to satisfy the statute. Although the State purported to issue an order denying National Fuel's water quality certification, FERC later determined—after Supreme Court ruled, but before the Appellate Division did—that the State's denial was void. The Clean Water Act gives the State up to one year to act on such an application, but the State took longer. FERC thus held that the State waived its Clean Water Act authority, and the State's denial order was invalid.

The majority did not dispute that FERC's waiver order removed the obstacle on which the majority's decision depended. But it refused to take judicial notice of the FERC order. That was error. The Legisla-

ture has commanded that New York courts "shall take judicial notice" of federal "common law" and federal agency "ordinances," CPLR 4511(a)–(b), as many cases show.

The majority's two reasons for declining judicial notice—that the waiver order is outside the record and is "not final"—are mistaken. Materials subject to judicial notice are outside the record by definition; if they were in the record, judicial notice would not be necessary. And FERC's waiver order constituted a change in controlling federal law, which the Appellate Division was obligated to apply. Indeed, FERC's orders have immediate, binding effect unless they are stayed, which did not happen here. The chance that the order will later be vacated on appeal does not justify ignoring it. A Supreme Court judgment can also be vacated on appeal, yet New York law has long treated such judgments as immediately final. So too here.

In short, FERC's waiver order is dispositive even under the majority's reading of EDPL 206(A) because it removes the one obstacle—the denied water quality certification—on which the majority's rationale depended. And there is no basis to ignore this binding order from the federal agency that Congress empowered to regulate natural gas pipe-

lines. The Court can thus reverse the decision below on this basis alone.

Second, reversal is warranted for the independent reason that the majority erred as a matter of law in interpreting EDPL 206(A). On its face, EDPL 206(A) "exempt[s]" a party from the statute's usual notice-and-hearing requirements if that party "considers and submits factors similar to those enumerated in [EDPL 204(B)] to a … federal … commission" and "obtains … a certificate of public convenience or necessity … from such … commission." There is no dispute that all of that happened here: National Fuel showed FERC that its pipeline project is, among other things, in the public interest; FERC agreed; and FERC issued a "certificate of public convenience and necessity." Under the statute's plain language, that should be the end of the matter.

The majority, however, held that FERC's certificate did not satisfy the statute. It concluded that EDPL 206(A) requires "a federal permit that (at a minimum) authorizes construction of the public project for which the condemnor seeks to exercise its power of eminent domain." R.373. And FERC's certificate of public convenience and necessity did not count, in the majority's view, because the certificate was issued in

an order imposing various conditions on the construction of the pipeline, including that National Fuel obtain the water quality certification from the State. Thus, the certificate was not "valid and operative." R.372.

Both aspects of this reasoning are wrong. To start, EDPL 206(A) simply does not require "a federal permit that (at a minimum) authorizes construction." It requires only "a certificate of public convenience or necessity," and National Fuel has precisely that. Under the statute's plain language, nothing more is required.

The majority also erred in concluding that the FERC certificate is not "valid and operative" until the conditions in FERC's order are satisfied. The majority overlooked that FERC's approval process has two basic steps: First, it issues the certificate, imposing various conditions the applicant must satisfy before it begins construction and while construction is ongoing. Second, once the pre-construction conditions are satisfied, FERC issues a "notice to proceed" with construction. The conditions in a FERC certificate thus limit the ability to begin construction. They do not limit the certificate's effectiveness, and—as FERC and the federal courts have held—they do not limit the certificate holder's eminent domain power.

The majority's contrary conclusion would lead to absurd results. Some of FERC's conditions cannot be satisfied until National Fuel acquires the land it needs. But on the majority's view, the certificate is not valid—and thus eminent domain is unavailable—until all the conditions are satisfied. The result is a Catch-22 in which a FERC-approved project can never go forward. Nothing in federal or New York law requires this self-defeating result.

At bottom, the majority appeared to believe that eminent domain should not be permitted in service of a project that is not yet ready to be built. But the Legislature made a different choice. It aligned the EDPL with the Natural Gas Act, so both statutes permit the exercise of eminent domain based on FERC's issuance of a certificate of public convenience and necessity. Because that key requirement is satisfied here, National Fuel has a right to exercise its eminent domain power, and the decision below should be reversed.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under CPLR § 5601(a) and CPLR § 5611 because the Appellate Division, Fourth Department, issued a final order in which two Justices dissented on a question of law in favor of Appellant National Fuel. R.366, 375. National Fuel timely noticed its appeal in Supreme Court, Allegany County, within 30 days of service on National Fuel of the Appellate Division's order with notice of entry. R.364.

QUESTIONS PRESENTED

1. Did the Appellate Division majority err by refusing to take judicial notice of a FERC order issued while the appeal was pending, which would have satisfied the majority's construction of EDPL 206(A)?

Answer: Yes. The Appellate Division erred as a matter of law. Federal agency decisions and ordinances must be judicially noticed. That FERC's order is subject to judicial review is irrelevant; FERC's orders have immediate effect unless stayed, and there is no stay here.

2. Did the Appellate Division majority err by construing EDPL 206(A)'s reference to "a certificate of public convenience or necessity" to additionally require "a federal permit that (at a minimum) authorizes construction of the public project for which the condemnor seeks to exercise its power of eminent domain"?

Answer: Yes. The Appellate Division erred as a matter of law. On its face, EDPL 206(A) is satisfied by "a certificate of public convenience or necessity." National Fuel obtained such a certificate from FERC. The statute's plain language cannot be construed to impose any additional requirements, and in any event the court misconstrued the federal regulatory regime to impose conditions that do not apply here.

STATEMENT OF THE CASE

A. Statutory background.

1. The Natural Gas Act authorizes eminent domain for FERC-approved pipeline projects.

The federal Natural Gas Act comprehensively regulates facilities used in the interstate transportation and sale of natural gas. *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 143–44 (2d Cir. 2008); *see also* 15 U.S.C. § 717b. An applicant must obtain from FERC a "certificate of public convenience and necessity" before it constructs, extends, acquires, or operates any facility for the transportation or sale of natural gas in interstate commerce. 15 U.S.C. § 717f(c)(1)(A). "FERC will grant the certificate only if it finds the company able and willing to undertake the project in compliance with the rules and regulations of the federal regulatory scheme." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 302 (1988).

In assessing the "public convenience and necessity," FERC considers "all factors bearing on the public interest." *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959). FERC's consideration follows its Certificate Policy Statement, which states its goal of "appropriately consider[ing] the enhancement of competitive transportation

alternatives, the possibility of overbuilding, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain." Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,737 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000); *accord* R.76, 78–79, 102.

The Natural Gas Act also designates FERC as "the lead agency for the purposes of coordinating all applicable Federal authorizations" for such projects. 15 U.S.C. § 717n(b)(1). That includes any water quality certification, or "WQC," required under Section 401 of the Clean Water Act. Under Section 401, an "applicant for a Federal license or permit" for any activity that could cause a "discharge into the navigable waters" must obtain a WQC from the affected state—unless the state waives this requirement by failing to act "within a reasonable period of time (which shall not exceed one year) after receipt of" the application. *See* 33 U.S.C. § 1341(a)(1). A WQC certifies "that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 C.F.R. § 121.2(a)(3). The Department of Environmental Conservation ("DEC") is responsible

for acting on WQC applications for the portions of projects in New York. 6 NYCRR § 608.9.

Federal law thus gives FERC the lead role in approving and coordinating permits for natural gas projects, and narrowly delegates federal authority to the states for purpose of reviewing WQC applications. Otherwise, FERC's "jurisdiction with respect to such projects preempts all State licensing and permit functions." *Matter of Power Auth. of State of N.Y. v. Williams*, 60 N.Y.2d 315, 325 (1983); *accord Niagara Mohawk Power Corp. v. N.Y. State DEC*, 82 N.Y.2d 191, 200–01 (1993).

Once FERC has determined that a project is in the public interest and approved it, the Natural Gas Act empowers the applicant to obtain necessary land through eminent domain: "When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line," it may "acquire the [land] by the exercise of the right of eminent domain" in federal district court "or in the State courts." 15 U.S.C. § 717f(h); *see also* R.76 (FERC considers "the unneeded exercise

of eminent domain" in determining whether a project serves the public interest).

2. EDPL 206(A) authorizes eminent domain based on a federal certificate of convenience and public necessity.

The Eminent Domain Procedure Law establishes the procedure to acquire property "by exercise of the power of eminent domain in New York state." EDPL 101. That procedure has two steps. "First, under EDPL article 2, the condemnor must make a determination to condemn the property …." *In re City of N.Y. (Grand Lafayette Props. LLC)*, 6 N.Y.3d 540, 543 (2006). "Second, pursuant to EDPL article 4, the condemnor must seek the transfer of title to the property by commencing a judicial proceeding known as a vesting proceeding." *Id.* At the first step, the EDPL offers two options: The condemnor may use the default "hearing and findings procedures of EDPL 203 and 204," or it may follow the "alternative procedure permitted by EDPL 206." *Id.*

The default procedures require a hearing "to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents of the locality where such project will be constructed," EDPL 201, 203, preceded by public notice of

the project and hearing, EDPL 202. After the hearing, the condemnor must make public findings specifying "(1) the public use, benefit or purpose to be served by the proposed public project; (2) the approximate location for the proposed public project and the reasons for the selection of that location; (3) the general effect of the proposed project on the environment and residents of the locality"; and other relevant factors. EDPL 204(B).

EDPL 206's alternative procedures allow a condemnor to skip the notice-and-hearing process when the acquisition would be *de minimis* or when the default process would be redundant with another legal procedure that ensures public notice and a public purpose. *See City of N.Y.*, 6 N.Y.3d at 546–47; 1974 Report of State Commission on Eminent Domain at 36 (Section 206 "was included to avoid duplicate hearings which would be repetitive, expensive and unnecessarily prolong the acquisition procedure"). As relevant here, EDPL 206(A) "exempt[s]" a condemnor "from compliance with" the default hearing procedure "when … pursuant to other state, federal, or local law or regulation it considers and submits factors similar to those enumerated in [EDPL 204(B)] to a state, federal or local governmental agency, board or com-

mission before proceeding with the acquisition and obtains a license, a permit, a certificate of public convenience or necessity or other similar approval." EDPL 206(A). When these criteria are satisfied, "the condemnor need not rely on the hearing and findings procedures of EDPL 203 and 204." *Hargett v. Town of Ticonderoga*, 13 N.Y.3d 325, 328 n.* (2009); *City of N.Y.*, 6 N.Y.3d at 546.

Once a party has complied or dispensed with Article 2's requirements, it must (if it has not already done so) "make [an] offer prior to acquiring the property" in an "amount which it believes to represent just compensation," which may not be "less than [its] highest approved appraisal" for the property. EDPL 303; *see* EDPL 401(A). If the offer is rejected and the condemnor cannot acquire the property through negotiation, *see* EDPL 301, it may "obtain an order to acquire such property and for permission to file [an acquisition] map by presentation of a verified petition to the supreme court in the judicial district where the real property to be acquired." EDPL 402(B); *see* EDPL 501(B).

B. Procedural history.

1. FERC issues a certificate of convenience and public necessity for National Fuel's pipeline project.

National Fuel intends to build and operate about 99 miles of natural gas pipeline, along with related facilities, in northwestern Pennsylvania and western New York. The New York portion would extend around 71 miles, with roughly 78 percent of the pipeline running along existing rights-of-way. *See* R.77, 112.

National Fuel applied to FERC for a certificate of public convenience and necessity under the Natural Gas Act to construct and operate the pipeline. R.69. After an extensive environmental review, *see* R.91–93, FERC approved the project, finding that it would "provide benefits to all sectors of the natural gas market by providing producers access to multiple markets throughout the United States and Canada and increasing the diversity of supply to consumers in those markets." R.79. Based on these benefits, "the lack of adverse effects on existing customers, other pipelines, and their captive customers; and the minimal adverse effects on landowners or communities," FERC found that the project satisfied the Commission's policies implementing the Natural Gas

Act. *Id.*; *see* R.76 (FERC "balances the public benefits against the potential adverse consequences"); R.77 (specifically finding that the project had "minimize[d] … the potential need for reliance on eminent domain"); R.14 (National Fuel obtained about 95 percent of the necessary land by negotiating with landowners).

FERC also determined that the project's minimal environmental impacts would be appropriately mitigated. After considering various alternatives to the project proposal and the likely effects on natural resources, *see* R.103–120, FERC "conclude[d] that if constructed and operated in accordance with National Fuel's … application and supplements, and in compliance with the environmental conditions in Appendix B of this order, our approval of this proposal will not constitute a major federal action significantly affecting the quality of the human environment," R.144. FERC therefore issued a certificate of public convenience and necessity for the project. R.79, 144; *see* R.150 (recognizing "National Fuel's right of eminent domain").

Other parties sought to stay the FERC order granting the certificate, but FERC denied those requests. R.249. Several parties also

sought rehearing of the FERC order. FERC dismissed or denied those requests. *See id.*

2. New York denies National Fuel's water quality certification for the pipeline.

In parallel with its application to FERC, National Fuel began working with New York's DEC to obtain a WQC for the project, submitting a formal application in March 2016. *See* R.261. Over the next year, National Fuel supplemented its application and communicated often with DEC staff. In April 2017, however, DEC sent National Fuel a letter denying the WQC application. R.228. The letter asserted that National Fuel's "Project fails to avoid or adequately mitigate adverse impacts to water quality and associated resources." R.231. The letter was notable for its brevity, and the fact that it did not contain a single citation to the many thousands of pages of record materials that National Fuel had submitted. R.228–240.

National Fuel thus sought judicial review of the WQC denial in the Second Circuit. And because DEC did not act until over a year after National Fuel first submitted its application, National Fuel asked FERC to rule that DEC had waived its right under the Clean Water Act

to grant or deny a WQC for the project at all.[1] As described below, National Fuel ultimately succeeded in both challenges.

3. National Fuel negotiates with the Schuecklers to buy their property.

Most of the FERC-approved route for the pipeline project runs along existing rights-of-way, but some of it by necessity crosses private property. R.77, 100, 110, 112. That includes a portion of the Schuecklers' property in Clarksville, New York. National Fuel thus sought a permanent easement and temporary construction easements for the necessary part of the Schuecklers' land. *See* R.47.

National Fuel obtained about 95 percent of the rights-of-way needed for the project by negotiating with landowners, and it went to great lengths to do the same here. R.14. It engaged in extensive negotiations with the Schuecklers and their attorneys over the course of two years. *Id*. National Fuel's final offer was for 100% of the highest appraised fair market value for the easements. *See* R.176–180. Although

[1] The Natural Gas Act requires this bifurcated review scheme, under which (1) only the federal circuit where "a facility … is proposed to be constructed" can "review" the *merits* of a state WQC decision, and (2) only the D.C. Circuit or FERC can hear a claim based on the state's " failure to act," *i.e.*, waiver. *See* 15 U.S.C. § 717r(d)(1)–(2); *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 700 (D.C. Cir. 2017).

National Fuel believed the parties came close to reaching a deal, they were unable to do so. R.14–15.

4. Supreme Court grants National Fuel's eminent domain petition based on the FERC certificate of public convenience and necessity.

National Fuel thus petitioned under EDPL 206 and 402 to acquire the necessary easements in Allegany County Supreme Court. R.46. After briefing and argument, Supreme Court granted the petition. R.33. It found that National Fuel had completed the prerequisites to acquiring the easements: National Fuel "has shown that FERC has issued it an order granting a certificate of public convenience for its pipeline project, exempting it from the requirements of Article 2 of the EDPL." R.35. And National Fuel "has made an offer to respondents that it believes to represent just compensation for the real property to be acquired, satisfying the requirements of EDPL Article 3." *Id.*

Supreme Court also rejected the Schuecklers' argument that National Fuel lacked eminent domain power because it had not completed all of the conditions in the FERC certificate. The court interpreted the certificate's conditions as applying to the authorization to begin building the pipeline, not to the effectiveness of the certificate itself or Na-

tional Fuel's eminent domain authority. Relying on a recent federal court decision rejecting the same argument, the court pointed out that the Schuecklers' argument would defeat the purpose of the Natural Gas Act, since various conditions in the certificate cannot be completed without an effective certificate: "'[I]f [National Fuel] were not allowed to exercise eminent domain authority until it had satisfied all the conditions in the FERC Order, the Project could never be constructed.' … the FERC Order cannot reasonably be read to prohibit [National Fuel] from exercising eminent domain authority until it has complied with all conditions set forth in the Appendix." R.37 (quoting *Constitution Pipeline Co. v. Permanent Easement for 0.81 Acres*, No. 14-cv-2050, 2015 WL 12556143, at *2 (N.D.N.Y. Feb. 21, 2015) (omission in original)).

The Schuecklers appealed Supreme Court's order.

5. FERC finds that New York waived its authority to grant or deny a water quality certification for the pipeline.

After the Schuecklers' appeal had been briefed and argued, but before the Appellate Division ruled, FERC issued an order holding that DEC waived its ability to grant or deny a WQC for the project. Its reasoning was straightforward: Under the Clean Water Act, "[i]f the state

'fails or refuses to act on a request for certification within a reasonable period of time (not to exceed one year) after receipt of such request,' then the certification requirement is waived." R.261, *reported at* 164 FERC ¶61,084 (2018) (quoting 33 U.S.C. § 1341(a)(1)). New York breached that requirement: "The agency received the companies' application on March 2, 2016, and was obligated to act on the application within one year. New York DEC failed to act by March 2, 2017, and so waived its authority under section 401 of the Clean Water Act." R.266.

National Fuel promptly submitted a copy of the waiver order to the Appellate Division, complying with a request from the court at oral argument to advise it of any new developments in the FERC proceedings. R.245. National Fuel explained that "FERC's Order concludes that New York State waived its water quality certification authority under Section 401." *Id.*

The Schuecklers filed a lengthy opposition. R.318–359. They did not argue that the FERC waiver order was not subject to judicial notice or was somehow outside the record. Rather, they argued that FERC's waiver order was ineffectual because it was still subject to rehearing and appeal. R.319, 322–323. They also collaterally attacked both

FERC's waiver holding, R.320, and its earlier finding that the project satisfied the public interest, R.322. And they tried to relitigate the technical issues presented in the water quality certification proceeding. R.320–321.

6. The Appellate Division majority holds that New York's denial of the water quality certification prohibits National Fuel from exercising eminent domain.

Three months after FERC issued the waiver order, the Appellate Division reversed Supreme Court's order granting National Fuel's eminent domain petition. The three-Justice majority acknowledged that National Fuel had obtained a certificate of public convenience and necessity from FERC, but concluded that the certificate was not sufficient to satisfy the EDPL.

In the majority's view, the key question was whether National Fuel had every authorization required to actually begin building the pipeline: "Although it is true that [FERC] issued a certificate of public necessity approving petitioner's pipeline project, the certificate nevertheless authorized construction of the pipeline 'subject to' various conditions, including … the State's issuance of a WQC." R.372. Because DEC had denied National Fuel's WQC application, the majority con-

cluded that National Fuel had "lost its contingent right to construct the public project that undergirds its demand for eminent domain in this proceeding." *Id.* That is, "as a result of the State's WQC denial, petitioner does not currently hold a qualifying federal permit for purposes of EDPL 206(A), *i.e.*, a federal permit that (at a minimum) authorizes construction of the public project for which the condemner seeks to exercise its power of eminent domain." R.373. "Without a qualifying federal permit under EDPL 206 (A), petitioner is not entitled to bypass the standard hearing and findings procedure of EDPL article 2." *Id.*

The majority rejected National Fuel's argument that "the WQC requirement is only a condition precedent for the construction of the pipeline, not a condition precedent of the certificate itself." R.373. This was "a semantical game," the majority said, because the "certificate has no purpose except to authorize construction of the pipeline and to set the conditions precedent for such construction." *Id.* Likewise, the majority saw no distinction between authorization to construct and authorization to exercise eminent domain: The "*public project* authorized by the certificate," not the "certificate itself," was the "the lodestar of petitioner's eminent domain power." R.373–374. To "expropriate respond-

ents' land in furtherance of a pipeline project that, as things currently stand, cannot legally be built" would, in the majority's view, "turn[] the entire concept of eminent domain on its head." R.375.

Finally, the majority acknowledged that FERC had "issued a new ruling"—the waiver order—"that calls into question the timeliness of the State's WQC denial." R.371 n.2. The majority did not question that FERC's waiver order, if accepted, would reverse the outcome of the case under the majority's own reasoning. *See id.* But the majority "decline[d] to take judicial notice of" the waiver order because it was still "subject to administrative rehearing as well as to judicial review" and was "dehors the appellate record and did not exist when Supreme Court rendered its determination." *Id.* The majority saw its role as "decid[ing] whether Supreme Court properly granted the instant petition *based on the record before it,* not whether its determination could or should have been different had it been made under different circumstances with a different record." *Id.*

Justice Lindley, joined by Presiding Justice Carni, dissented. The dissent identified two errors in the majority's legal reasoning.

First, it was "undisputed" that FERC "has determined" in the waiver order "that the DEC waived its WQC certification authority under section 401 of the Clean Water Act. Thus, as things now stand, the DEC's denial of the WQC is no longer an impediment to construction of the pipeline." R.375. And FERC's waiver order is subject to judicial notice because it is "binding unless and until it is vacated or overturned on appeal." *Id.* Indeed, the waiver order "is no less final than the DEC's denial of the WQC," which was then subject to a pending petition for review in the Second Circuit. *Id.* The waiver order thus vitiated "the majority['s] reli[ance] on the DEC's denial of the WQC to conclude that the pipeline will not be built." *Id.*

Second, the dissent explained that the majority erred by construing EDPL 206(A) to require anything besides a FERC certificate of public convenience and necessity. "[A]lthough the issuance of a WQC by the DEC is a condition that must be met prior to construction of the pipeline"—absent waiver—"it is not … a condition precedent to the commencement of this eminent domain proceeding." R.376. In fact, conflating the ability to exercise eminent domain with the ability to begin construction on the pipeline would defeat the statutory scheme:

"There are … various other conditions in the authorizing FERC order, many of which cannot be met until *after* petitioner has obtained possession of the rights of way for the pipeline." *Id.* "If petitioner is prohibited from exercising its eminent domain authority until it satisfies all of the conditions of the FERC order, as the majority holds, the pipeline can never be built." *Id.*

Finally, the dissent explained that FERC had rejected the majority's position: "FERC has clearly and unambiguously stated that the conditions in its initial order need not be satisfied prior to [National Fuel] commencing a taking proceeding under the eminent domain law … ' … *Congress did not establish any prerequisite for eminent domain authority beyond the Commission's decision to issue a certificate.*'" *Id.* (quoting R.258). FERC's position, the dissent noted, was also "consistent with federal case law," while "the majority cite[d] no authority for the proposition that the conditions in the FERC order are conditions precedent to petitioner's exercise of its eminent domain authority, and we could find none." R.376–377.

After the Appellate Division ruled, the Second Circuit granted National Fuel's petition to review DEC's denial of the WQC and vacated

DEC's decision for failing to explain its reasoning and identify supporting record evidence. *See Nat'l Fuel Gas Supply Corp. v. N.Y. State DEC*, No. 17-1164, 2019 WL 446990, at *2–3 (2d Cir. Feb. 5, 2019). But that decision is ultimately beside the point because FERC's waiver order means that DEC had (and has) no power to act on the water quality certification.

STANDARD OF REVIEW

Point I involves the Appellate Division's refusal to take judicial notice, which this Court reviews for "abuse[ ] [of] discretion as a matter of law." *Lerner v. Karageorgis Lines*, 66 N.Y.2d 479, 487 (1985). "The refusal to take judicial notice of pertinent laws and regulations constitutes reversible error." *Chanler v. Manocherian*, 151 A.D.2d 432, 433 (1st Dep't 1989). Point II "presents a question of pure statutory interpretation, meriting de novo review." *Jones v. Bill*, 10 N.Y.3d 550, 553 (2008) (citation omitted).

ARGUMENT

I. FERC's waiver order satisfies even the Appellate Division's erroneous construction of EDPL 206(A).

The Appellate Division majority reversed the grant of National Fuel's eminent domain petition because, "as a result of the State's WQC

denial, [National Fuel] does not currently hold a qualifying federal permit for purposes of EDPL 206(A), *i.e.*, a federal permit that (at a minimum) authorizes construction of" the pipeline. R.373. But even if that were the correct standard under EDPL 206(A)—and it is not, as explained in Point II below—the majority's decision would still be wrong. That is because, while the appeal was pending, FERC issued the waiver order, finding that "New York DEC … waived its authority under section 401 of the Clean Water Act." R.266. The waiver order thus nullifies the "State's WQC denial" on which the majority relied. R.373. And there was no basis to "decline to take judicial notice of" this binding order issued by a federal agency with immediate effect. *See* CPLR 4511(a)–(b); *contra* R.371 n.2. This Court therefore can reverse the decision below on this basis alone.

A. FERC's waiver order provides the authorization the Appellate Division said was required.

FERC's waiver order, which found that DEC waived its authority to issue or deny a WQC for the project, R.266, provides precisely the authorization that the Appellate Division majority said was lacking. In the majority's view, the FERC certificate did not satisfy EDPL 206(A) because "FERC's authorization to build the pipeline was explicitly con-

ditioned on" National Fuel's "acquisition of a WQC from the State of New York," and the State had "denied [the] application for a WQC." R.370. That is, "following the State's WQC denial, petitioner no longer holds a qualifying federal certificate for purposes of the EDPL 206(A) exemption." R.372.

FERC's waiver order makes this analysis irrelevant. The Clean Water Act imposes an absolute one-year deadline for a state to grant or deny a WQC: "If the State … fails or refuses to act on a request for certification, within a reasonable period of time (*which shall not exceed one year*) after receipt of such request, the certification requirements of this subsection *shall be waived*." 33 U.S.C. § 1341(a)(1) (emphases added). If a state agency breaches this deadline, the applicant "can go directly to FERC and present evidence of the … waiver." *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 701 (D.C. Cir. 2017). That is what happened here. National Fuel sought a waiver determination, and FERC held that DEC breached the statute's one-year deadline: DEC "received [National Fuel's] application on March 2, 2016, and was obligated to act on the application within one year. New York DEC failed to act by

March 2, 2017, and so waived its authority under section 401 of the Clean Water Act." R.266.

The waiver order thus nullifies the WQC denial on which the majority's reasoning depended. Indeed, the majority did not dispute that the waiver order satisfies its reading of the statute. Rather, it acknowledged that National Fuel's eminent domain petition would be viable "[i]f the State's WQC denial is finally annulled or withdrawn." R.375. That time has come, thanks to the waiver order. FERC has "annulled" the "State's WQC denial." *Id.* Thus, as the dissent below observed, "the DEC's denial of the WQC is no longer an impediment to construction of the pipeline." R.375 (Lindley, J., with Carni, J.P., dissenting). In turn, National Fuel now has—on the majority's own view—"a qualifying federal certificate for purposes of the EDPL 206(A) exemption." R.372.

B. The Appellate Division erred by ignoring FERC's waiver order.

Despite the waiver order's decisive effect, the majority below "decline[d] to take judicial notice of" it. R.371 n.2. That was error. "Every court shall take judicial notice without request of the "common law … of the United States," CPLR 4511(a), and judicial notice "shall be taken … if a party requests" of the "ordinances and regulations of officers, agen-

cies or governmental subdivisions … of the United States," *id.* 4511(b); *see* Siegel, *New York Practice* § 216 (6th ed. 2018) ("Federal … law must be given judicial notice without even being requested by a party"); *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 19 (2d Dep't 2009) (explaining that "official promulgations of government" are "particularly appropriate for judicial notice" (collecting examples)).

Accordingly, this and other New York courts have long taken judicial notice of federal agency rules, orders, and publications. *See, e.g.*, *Cricchio v. Pennisi*, 90 N.Y.2d 296, 309 & n.6 (1997) ("We have taken judicial notice of a Memorandum issued by" "the Federal agency charged with interpreting Medicaid requirements"); *Quaker Oats Co. v. City of N.Y.*, 295 N.Y. 527, 536 (1946) (taking judicial notice of amended federal regulation pursuant to CPLR 4511's predecessor statute), *aff'd*, 331 U.S. 787 (1947); *Kingsbrook Jewish Med. Ctr.*, 61 A.D.3d at 19–20 (taking judicial notice of "the diagnosis and procedure codes key maintained by the United States Government on its HHS Web site"); *see also Med. Malpractice Ins. Ass'n v. Superintendent of Ins.*, 72 N.Y.2d 753, 764–65 (1988) (taking judicial notice of regulatory impact statement filed by state agency). In fact, the Third Department has taken judicial

notice of a FERC order issued, as here, while the appeal was pending. *See Albany Eng'g Corp. v. Hudson River*, 110 A.D.3d 1220, 1223–24 (3d Dep't 2013) ("We take judicial notice of the fact that, after Supreme Court's order, FERC issued an order determining headwater benefits … for the years at issue here"). The court relied on that order to shape the relief to which the appellant was entitled. *See id.*

Federal courts similarly take judicial notice of FERC orders. For example, in *Lichoulas v. City of Lowell*, the First Circuit both (i) held that the district court "was entitled, so far as relevant, to take judicial notice of [a] FERC proceeding" related to the plaintiff's license to operate a hydroelectric power project, and (ii) relied on the fact that, "[s]ince the district court's dismissal, FERC has entered an order terminating the license." 555 F.3d 10, 12–13 (1st Cir. 2009) (Boudin, J.).[2]

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[2] *See, e.g.*, *In re W. States Wholesale Nat. Gas Antitrust Litig.*, No. 03-cv-01431, 2007 WL 2178054, at *4 (D. Nev. July 27, 2007) ("a court appropriately may take judicial notice of matters of public record, including FERC orders") (citations omitted); *E. & J. Gallo Winery v. EnCana Energy Servs., Inc.*, No. 03-cv-5412, 2005 WL 2435900, at *5 (E.D. Cal. Sept. 30, 2005) (taking notice of "six orders issued by FERC"), *aff'd*, 503 F.3d 1027 (9th Cir. 2007); *see also Meola v. Asset Recovery Sols., LLC*, No. 17-cv-1017, 2018 WL 4660373, at *3 (E.D.N.Y. Sept. 28, 2018) ("Examples of judicially noticeable sources include … public filings by and with federal agencies.") (collecting cases).

This case is no different. FERC's waiver order is an "official promulgation[ ] of" the federal government, *Kingsbrook Jewish Med. Ctr.*, 61 A.D.3d at 19, which must be judicially noticed under CPLR 4511. FERC's adjudicatory order is both the "common law … of the United States," in the same manner as a court decision, CPLR 4511(a), and an "ordinance[ ]" of "an agenc[y] … of the United States," CPLR 4511(b); *see* Black's Law Dictionary (10th ed. 2014) (an "ordinance" is an "authoritative law or decree"). The Appellate Division was therefore required to take judicial notice of the waiver order after National Fuel (at the court's request) brought it to the court's attention. Even putting aside the compulsory language in CPLR 4511(a)–(b), it is unsurprising that courts uniformly take judicial notice of FERC adjudications and publications; "reliable uncontested governmental records" are "widely accepted and unimpeachable" sources fit for judicial notice. *Kingsbrook Jewish Med. Ctr.*, 61 A.D.3d at 20 (citation omitted).

The majority below did not apply these established rules of judicial notice. *Cf.* R.371 n.2 (citing CPLR 4511 in passing). Instead, it offered two reasons to disregard FERC's waiver order: (1) the waiver order "is not final" because "it is subject to administrative rehearing as

well as to judicial review," and (2) the waiver order is outside the appellate record. *Id.* The first point is mistaken, and the second is irrelevant.

1. The waiver order took effect immediately.

The majority was wrong to conclude that FERC's waiver order is interlocutory or non-final. As the dissent correctly explained, the waiver order "is binding unless and until it is vacated or overturned on appeal," and that has not happened. R.375 (Lindley, J., with Carni, J.P., dissenting).

As a matter of law, "[u]nless otherwise ordered by [FERC], rules or orders are effective on the date of issuance." 18 C.F.R. § 385.2007(c)(1). Thus, the Commission's orders are immediately "effective unless stayed" by FERC or a reviewing federal court of appeals. *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 45 (1st Cir. 2001); *accord Mountain Valley Pipeline, LLC v. Simmons*, 307 F. Supp. 3d 506, 514 (N.D. W. Va. 2018), *aff'd sub nom. Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197 (4th Cir. 2019); *see* 15 U.S.C. § 717r(c). Here, FERC has not stayed the waiver order despite requests to do so, *see* R.319, R.325, and no court has done so either. Because "no stay of

the order was granted," the Court "must assume its validity for purposes of this case." *Transwestern Pipeline Co. v. FERC*, 988 F.2d 169, 172 (D.C. Cir. 1993) (relying on FERC order despite a pending petition for review in another federal court).

The majority's finality argument resembles a claim that defendants often raise—never successfully—in federal eminent domain cases. As explained above, once FERC issues a certificate for a project, the holder may "acquire the [necessary land] by the exercise of the right of eminent domain" in state or federal court. 15 U.S.C. § 717f(h). Landowners often urge the courts to reject or delay these proceedings because the relevant FERC certificate "is not final because of [pending] requests for rehearing" or judicial review. *E.g.*, *Sabal Trail Transmission, LLC v. 7.72 Acres*, No. 3:16-cv-173, 2016 WL 8900100, at *3 (M.D. Ala. June 3, 2016). The courts have uniformly rejected this argument, holding that a FERC "[c]ertificate remains effective while these legal challenges proceed" and granting the "gas company immediate possession of private property along an approved pipeline route." *Mountain Valley Pipeline*, 915 F.3d at 210, 214 (citation omitted); *see*, *e.g.*, *Transcon. Gas Pipe Line Co. v. 6.04 Acres*, 910 F.3d 1130, 1155 (11th Cir.

2018) (affirming district court's ruling that "the certificate of public convenience and necessity produced by Transcontinental was final and enforceable, as neither FERC nor any federal court of appeals had stayed, modified, or reversed FERC's issuance of that certificate"), *petition for cert. filed sub nom. Goldenberg v. Transcon. Gas Pipe Line Co.*, No. 18-1174 (U.S. Mar. 11, 2019). These cases underscore that "pending applications for rehearing" or review "do not nullify the [waiver order's] effect in [this] eminent domain proceeding." *Mountain Valley Pipeline*, 307 F. Supp. 3d at 514.

The majority's conclusion also goes against basic finality principles under New York law. "The fact that the time in which to appeal [a] judgment is still open, or even that an appeal has in fact been taken and is pending, does not divest the judgment of its finality in New York." Siegel, *New York Practice* § 444. The majority's decision is thus akin to ignoring a Supreme Court judgment in a related case because it might be reversed. That is not the law. *See*, *e.g.*, *id.*; *Mandell v. Bd. of Elections in N.Y.*, 164 A.D.3d 444, 444 (1st Dep't 2018) (Supreme Court

order in a different case, issued while the appeal was pending, obviated the need to address the same issues on appeal).[3]

Finally, FERC's orders are conclusive and binding on any issue the Commission decided. Those orders can be challenged only through a petition for rehearing before the Commission and then a petition for review in the federal courts of appeals. *See* 15 U.S.C. § 717r(a)–(b). This statutory review scheme "preclude[s] *de novo* litigation" of "all issues inhering in the controversy, and all other modes of judicial review." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). "[A]ll objections to the order, to the license it directs to be issued, *and to the legal competence of the licensee to execute its terms*, must be made in the Court of Appeals or not at all." *Id.* (emphasis added).

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[3] The majority cited no case holding that a still-appealable order is not subject to judicial notice. *See* R.371 n.2. It relied primarily on a 57-year-old dissenting opinion opposing judicial notice of an ambiguous foreign statute, which had not been interpreted by the foreign courts or proved by affidavit. *Babcock v. Jackson*, 17 A.D.2d 694, 701–02 (4th Dep't 1962) (Halpern, J., dissenting), *rev'd*, 12 N.Y.2d 473 (1963). The majority then cited a nearly 60-year-old Supreme Court decision declining to take judicial notice of New Jersey law on an unsettled issue, *Majestic Co. v. Wender,* 24 Misc. 2d 1018 (Nassau Cty. 1960), and another dated Supreme Court decision declining to take judicial notice of a county court's records, *In re Bach,* 81 Misc. 2d 479 (Dutchess Cty. 1975), *aff'd,* 53 A.D.2d 612 (2d Dep't 1976).

In short, as a matter of settled federal law FERC's waiver order was final and binding the moment it was issued. Since it has not been stayed or vacated, the New York courts "must assume [the order's] validity." *Transwestern Pipeline*, 988 F.2d at 172.

2. The waiver order was a change in controlling law.

The majority's observation that the waiver order "is dehors the appellate record and did not exist when Supreme Court rendered its determination," R.371 n.2, is equally unavailing. FERC's waiver order was a change in controlling law that must be given effect on appeal.

The majority's contrary conclusion rested on the premise that an appellate court's "function is to decide whether Supreme Court properly granted the instant petition based on the record before it, not whether its determination could or should have been different … with a different record." *Id*. That is true as far as it goes, but the majority's conclusion does not follow. Matters subject to judicial notice are, by definition, outside the record. Otherwise, judicial notice would not be necessary. Yet appellate courts can—and, under CPLR 4511(a)–(b), often *must*—take judicial notice, including of developments that post-date the lower court's decision. *E.g.*, *Matter of N.Y. Ass'n of Convenience Stores v. Ur-*

bach, 92 N.Y.2d 204, 213 (1998) ("we must take judicial notice" of "new development[s]" specified in CPLR 4511(a)); *Matter of Shaida W.*, 85 N.Y.2d 453, 458 (1995) (taking notice of events occurring "since the Appellate Division issued its determination"); *Roberts v. Community Sch. Bd. of Community Dist. No. 6*, 66 N.Y.2d 652, 654 n.2 (1985) (taking judicial notice of agency-promulgated "circular [that] was not before Special Term"); *Quaker Oats Co.*, 295 N.Y. at 536 (taking judicial notice of and applying a federal regulation "not as it read at the trial, but as it reads today in its amended form … since rights and other legal relations are to be determined as of the time they are declared"); *Albany Eng'g Corp.*, 110 A.D.3d at 1223–24 (taking notice of FERC order issued while appeal was pending); *L-3 Communications Corp. v. SafeNet, Inc.*, 45 A.D.3d 1, 8 (1st Dep't 2007) ("Although the dismissal of the Maryland action obviously postdated the motion court's ruling in this case, we are required to take judicial notice of the common law of our sister states (CPLR 4511[a]) . . . .").[4]

[4] *See also Caprio v. N.Y. State Dep't of Taxation & Fin.*, 25 N.Y.3d 744, 756 (2015) ("we take judicial notice as a matter of public record" of a Department of Taxation and Finance publication); *State v. Green*, 96 N.Y.2d 403, 408 n.2 (2001) ("Although the State did not rely below on

While appellate courts typically may not consider new facts outside the record, Karger, *Powers of the New York Court of Appeals* § 17:7 & n.2 (2018) (collecting cases and noting exceptions), the opposite is true of new *legal* developments. As this Court explained, quoting Chief Justice Marshall: "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed …." *Matter of Boardwalk Seashore Corp. v. Murdock*, 286 N.Y. 494, 498–99 (1941) (quoting *United States v. Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)). It is thus "settled law … that a court applies the law as it exists at the time of appeal, not as it existed at the time of the original determination." *Post v. 120 E. End Ave. Corp.*, 62 N.Y.2d 19, 28–29 (1984); *accord Matter of Alscot Inv. Corp. v. Incorporated Vill. of Rockville Ctr.*, 64 N.Y.2d 921, 922 (1985); Karger, *supra*, § 17:7 & n.1 (collecting cases).

FERC's waiver order changed the federal law governing National Fuel's pipeline project. Before the waiver order, National Fuel was le-

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the environmental lien provisions, we may take judicial notice of these provisions and their legislative history.") (citation omitted).

gally required to obtain a WQC from the State of New York before it could begin construction. *See* 15 U.S.C. § 717n; 33 U.S.C. § 1341(a)(1). After the waiver order, it was not. *See Millennium Pipeline Co.*, 860 F.3d at 700 ("Once the Clean Water Act's requirements have been waived, the Act falls out of the equation."). That is no less a change in controlling law than an intervening judicial decision, *Kelly v. Long Is. Light. Co.*, 31 N.Y.2d 25, 29 n.3 (1972), an amendment to the Administrative Code of the City of New York, *Matter of Guerriera v. Joy*, 64 N.Y.2d 747, 748 (1984), a change to a town zoning rule, *e.g.*, *Marasco v. Zoning Bd. of Appeals*, 242 A.D.2d 724, 725 (2d Dep't 1997), or a revision to the CPLR, *Klepper v. Klepper*, 120 A.D.2d 154, 157–58 (4th Dep't 1986), all of which must be given effect in a pending appeal. The Appellate Division was therefore required to consider and give effect to the waiver order even though it did not "exist[] at the time of the original determination." *Post*, 62 N.Y.2d at 28–29.

* * *

The majority below rejected National Fuel's eminent domain petition because, under its construction of EDPL 206(A), "the State's WQC denial" meant that National Fuel "no longer holds a qualifying federal

certificate." R.372. But FERC's waiver order (in the majority's words) "annul[s]" the WQC denial on which that holding depends. R.375. And there is no legal basis to disregard this binding order applying federal common law, issued with immediate effect, by the federal agency in adjudication. That is enough to require reversal. *See* R.375 (Lindley, J., with Carni, J.P., dissenting).

II. National Fuel's FERC-issued certificate of public convenience and necessity satisfies EDPL 206(A).

The majority erred as a matter of law in interpreting EDPL 206(A), which provides an independent basis for reversal. On its face, EDPL 206(A) is satisfied by a "certificate of public convenience or necessity" from a "federal … commission" that addresses "factors similar to those enumerated in" EDPL 204(B). Those requirements are met here. FERC concluded that National Fuel's project is in the public interest and issued a certificate of public convenience and necessity for it. The statute cannot be read to require anything more. And the majority's atextual interpretation would defeat the purpose of the statutory regime.

A. A "certificate of public convenience or necessity" satisfies EDPL 206(A).

"[T]he starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998). "[W]here the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used." *Matter of Amorosi v. S. Colonie Indep. Cent. Sch. Dist.*, 9 N.Y.3d 367, 372 (2007). Here, the statutory text is clear: A "condemnor shall be exempt from compliance with the provisions of" EDPL Article 2 when

> [1] pursuant to other state, federal, or local law or regulation
>
> [2] it considers and submits factors similar to those enumerated in [EDPL 204(B)] to a state, federal or local governmental agency, board or commission before proceeding with the acquisition and
>
> [3] obtains a license, a permit, a certificate of public convenience or necessity or other similar approval from such agency, board, or commission.

EDPL 206(A) (line breaks added). National Fuel satisfied all three criteria.

First, National Fuel sought FERC's approval for the pipeline "pursuant to other state, federal, or local law or regulation." National Fuel

applied to FERC "pursuant to" the Natural Gas Act. *See* 15 U.S.C. § 717f(c)(1)(A).

Second, the *Federal* Energy Regulatory *Commission* is a "federal … commission," *see* 42 U.S.C. § 7134, and National Fuel's application to FERC included "factors similar to those enumerated in" EDPL 204(B); *see* R.76–79, 101–144 (discussing, among other factors, public interest analysis and environmental assessment). FERC's review follows its Certificate Policy Statement, which "establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest." R.76. As then-Justice Stein has explained, "FERC clearly consider[s] factors that are similar to those contained in EDPL 204 (B), with the primary consideration being the public's use and … benefit." *Eagle Creek Land Res., LLC v. Woodstone Lake Dev., LLC*, 108 A.D.3d 71, 77 (3d Dep't 2013).[5]

That is what FERC did here: It found that the pipeline would "provide benefits to all sectors of the natural gas market," including by

[5] The EDPL 204(B) factors are "(1) the public use, benefit or purpose to be served by the proposed public project; (2) the approximate location for the proposed public project and the reasons for the selection of that location; (3) the general effect of the proposed project on the environment and residents of the locality; (4) such other factors as [the condemnor] considers relevant."

"increasing the diversity of supply to consumers in those markets," and would have "minimal adverse effects on landowners or communities." R.79. And it found that the pipeline's route will "minimize both the number of landowners from which new right-of-way will need to be acquired and the potential need for reliance on eminent domain." R.77; *see* R.105 (National Fuel changed the proposed site for a compressor because the old site "would [have] require[d] the use of eminent domain to take the property rights"). FERC thus concluded that "the public convenience and necessity require approval and certification of the project." R.79.

Third, National Fuel "obtain[ed] … a certificate of public convenience or necessity … from such … commission." EDPL 206(A). Indeed, that is precisely what the FERC certificate is called: FERC "order[ed]" that a "certificate of public convenience and necessity is issued to National Fuel Gas Supply Corporation." R.144; *see* R.372 (acknowledging "that a federal commission issued a certificate of public necessity approving petitioner's pipeline project"). It is not a coincidence that EDPL 206(A) and FERC use the same term. The Legislature clearly had federal approvals like this in mind.

Because National Fuel satisfied EDPL 206(A)'s three requirements, Supreme Court correctly held that National Fuel is "exempt[ ] … from the requirements of Article 2 of the EDPL." R.35; *see* R.38 (same). That should have been the end of the Appellate Division's analysis too. *See* R.376–377 (Lindley, J., with Carni, J.P., dissenting) ("[T]here is no basis to reverse Supreme Court's order, which grants petitioner easements over respondents' land.").

B. The statute does not require a federal permit that authorizes immediate construction of the project.

The majority below did not dispute that the statute's requirements were satisfied on their face. But it effectively rewrote EDPL 206(A) to require more. It said "the dispositive issue" is "whether a FERC certificate authorizing the construction of a pipeline 'subject to' a particular condition constitutes a qualifying federal permit under EDPL 206(A) upon the failure of that condition." R.374 n.3. The majority's answer was no. It concluded that "a qualifying federal permit for purposes of EDPL 206(A)" is "a federal permit that (at a minimum) authorizes construction of the public project for which the condemnor seeks to exercise its power of eminent domain." R.373.

The short answer is that the statute does not say that. EDPL 206(A) is satisfied by "a certificate of public convenience or necessity," not "a certificate of public convenience or necessity [that authorizes construction of the public project for which the condemner seeks to exercise its power of eminent domain]." When the statutory language is clear—and this language is very clear—"there is no room for construction and courts have no right to add to or take away from that meaning." *Majewski*, 91 N.Y.2d at 583 (citation omitted).

The longer answer is that the majority erroneously assumed that conditions on National Fuel's *ability to construct the pipeline* were conditions on the *effectiveness of the FERC certificate*. The majority agreed with the Schuecklers that National Fuel lacked a "valid and operative" federal approval because "the certificate [ ] authorized construction of the pipeline 'subject to' various conditions." R.372. Until those conditions were fulfilled, the majority reasoned, National Fuel had no "contingent right to construct the public project that undergirds its demand for eminent domain in this proceeding." *Id.* But the certificate's validity—and National Fuel's eminent domain power—in no way depend on its present ability to begin construction.

The majority's contrary conclusion rested on its assumption that the "certificate has no purpose except to authorize construction of the pipeline," R.373, so the certificate could not be valid until the construction conditions are met. But these are distinct steps in FERC's approval process. A certificate holder cannot start building a FERC-approved project until it shows FERC that it has satisfied the conditions and FERC issues a "notice to proceed" with construction. *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 399 (D.C. Cir. 2017); *see also, e.g., Town of Dedham v. FERC*, No. 15-cv-12352, 2015 WL 4274884, at *2 (D. Mass. July 15, 2015) (describing FERC's issuance of a certificate, the applicant's request for "authorization to begin construction," and FERC's "partial notice to proceed"); *Sane Energy Project v. Hudson River Park Tr.*, Index No. 103707-2012, 2013 WL 417758 (Sup. Ct. N.Y. Cty. Jan. 16, 2013) (similar).

Thus, FERC's certificate and its construction approval are separate. And this two-step process means that, if the majority's construction of EDPL 206(A) were right, a FERC certificate could *never* satisfy the statute, because a certificate itself does not "authorize[ ] construction of the public project." R.373. That conclusion is impossible to

square with the Legislature's specific reference to a "certificate of public convenience or necessity" in EDPL 206(A).

The majority's erroneous assumption that the "certificate has no [other] purpose," R.373, caused it to misread FERC's order granting National Fuel's certificate. This is the operative language in FERC's order: "The Commission orders: … A certificate of public convenience and necessity *is issued* to National Fuel Gas Supply Corporation authorizing it to construct and operate the Northern Access 2016 Project, as described and conditioned herein, and as more fully described in its application." R.144 (emphasis added). The certificate was thus "issued" by FERC in 2017. It is the "authoriz[ation] … to construct and operate" the pipeline that is "conditioned," not the effectiveness of the certificate itself. *See id.*; R.145 (the "authority" conferred by the certificate is "conditioned" on taking the specified actions).

The "subject to" language the majority quoted—which appears in the body of the order, not the decretal section—simply makes the same point: FERC's approval "under section 7 of the NGA," R.79, which is required for the "construction or extension of any facilities" for the "transportation or sale of natural gas," 15 U.S.C. § 717f(c)(1)(A), is "sub-

ject to the environmental and other conditions in this order."[6] And the FERC certificate elsewhere makes clear that National Fuel's right to exercise eminent domain has attached with the certificate's issuance. The order merely imposes certain conditions on *how* National Fuel exercises that right. R.150 (referring to "National Fuel's right of eminent domain *granted* under the Natural Gas Act Section 7(h)" (emphasis added)).

Federal law confirms that a condemnor's eminent domain power is triggered by the FERC certificate, not by the eventual authorization to begin construction. The "holder of a certificate of public convenience and necessity"—not the holder of a notice to proceed, or an authorization to construct—"may acquire the same by the exercise of the right of eminent domain." 15 U.S.C. § 717f(h). Thus, FERC has repeatedly explained that "Congress did not establish any prerequisite for eminent domain authority beyond the Commission's decision to issue a certificate." R.258 & n.49 (collecting prior FERC orders); *see* R.376–377. And,

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[6] In construing the FERC order, the majority relied on *Moran v. Erk*, which interpreted the words "'subject to' or 'contingent upon'" in "a real estate contract." 11 N.Y.3d 452, 456 (2008); *see* R.372. This common-law contract case sheds no light on whether a FERC certificate satisfies the EDPL.

as the dissent observed, the federal appeals courts agree: "Once FERC has issued a certificate, the NGA empowers the certificate holder to exercise 'the right of eminent domain' over any lands needed for the project." *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 818 (4th Cir. 2004) (quoting 15 U.S.C. § 717f(h)); *see supra* p. 36. Thus, "the [Natural Gas Act] does not require FERC certificate holders to satisfy all the certificate's conditions before exercising eminent domain." *Transcon. Gas Pipe Line Co. v. Permanent Easements*, 907 F.3d 725, 732 (3d Cir. 2018).

Of course, the fact that federal law authorizes eminent domain at the certificate stage is, as the majority emphasized, distinct from "the dispositive issue of *state law*"—whether EDPL 206(A) is satisfied. R.374 n.3. But whether the FERC certificate is "valid and operative," R.372, *is* a federal law question, which the majority answered incorrectly. And the Legislature has provided a clear answer to the state law question. As already explained, EDPL 206(A) is satisfied by a "certificate of public convenience or necessity." *Supra* § II.A. Thus, while the "certificate itself is not the source of petitioner's authority to condemn," R.373–374, it triggers the federal and New York laws that *are* the source of that authority.

The only EDPL case the majority cited supports this view. *See In re Cty. of Tompkins*, 237 A.D.2d 667 (3d Dep't 1997) (cited at R.373). *Tompkins* held that the U.S. Department of Agriculture's "approval of [a dam] project *for funding*"—not for construction—"constituted 'other similar approval' from a Federal agency" that satisfied EDPL article 2. *Id.* at 669. On the majority's view, *Tompkins* would be wrong because a mere approval "for funding" does not "authorize[] construction of the public project." R.373. But *Tompkins* is not wrong, because the EDPL does not require a federal construction approval, only a certificate of public convenience or necessity.

The majority's view would also lead to absurd results. As both Supreme Court and the dissent observed, there are "various other conditions in the authorizing FERC order, many of which cannot be met until *after* [National Fuel] has obtained possession of the rights of way for the pipeline." R.376; *see* R.37. For example, one condition requires National Fuel to provide status reports to FERC "on a weekly basis until all construction and restoration activities are complete." R.152. This condition is impossible to satisfy before construction. And so on. The courts have never held that such conditions defeat a petitioner's reli-

ance on EDPL 206(A). On the contrary, in affirming that a petitioner had satisfied EDPL 206(A) by obtaining FERC licensure, then-Justice Stein recognized that FERC's license was conditioned on maintaining "a public recreational area" and "articulated that *acquisition of the easement* [through eminent domain] was a prerequisite to the continuation of [applicant's] license to operate the project." *Eagle Creek*, 108 A.D.3d at 74, 77 (emphasis added).

The majority's position has no basis in law and would put National Fuel in a Catch-22: It could not obtain the land it needs by eminent domain because it has not satisfied the conditions, and it could not satisfy the conditions without the land. Neither Congress nor the Legislature has adopted such a self-defeating regime.

Finally, the majority said that its "conclusion is consistent with the WQC's key role in the federal regulatory scheme": The Clean Water Act allows states to block projects that do not comply with water quality standards by denying a WQC, and "if [National Fuel] is allowed to continue its pursuit of eminent domain in furtherance of a project that has been lawfully blocked by the State, then 'the state's power to block the project would be meaningless.'" R.373 (quoting *City of Tacoma v.*

FERC, 460 F.3d 53, 67 (D.C. Cir. 2006)). But—setting aside that FERC's waiver order nullified the State's WQC denial—this does not follow. As the majority noted in the very next paragraph, "the pipeline's *construction* is conditioned on the issuance of a WQC." *Id.* Unless a WQC is either granted or (as here) waived, a project cannot be built, whether or not the builder has obtained land by eminent domain. *See Del. Riverkeeper*, 857 F.3d at 399. The State's veto under the Clean Water Act is thus unaffected by any eminent domain proceedings.[7]

Conflating the State's WQC authority with the EDPL's requirements also misunderstands the separate purposes of these distinct regimes. The Clean Water Act does not give the State a veto on new construction for its own sake. The statute "authorizes States to determine and certify only the narrow question whether there is 'reasonable assurance' that the construction and operation of a proposed project 'will not violate applicable water quality standards' of the State." *Williams*,

[7] *City of Tacoma*, from which the majority quoted the "would be meaningless" language, R.373, does not support the majority's view. That case, which says nothing about eminent domain, simply explains that FERC cannot license *construction* of a project that requires a WQC without ensuring that a WQC has been issued (or waived). 460 F.3d at 67; *see also Del. Riverkeeper*, 857 F.3d at 399 (explaining that FERC may issue a certificate for a project before the state has issued a WQC, since the certificate itself does not authorize construction).

60 N.Y.2d at 324–325. The point is to protect water quality, not property rights. The EDPL, by contrast, serves to (among other things) "give due regard to the need to acquire property for public use as well as the legitimate interests of private property owners." EDPL 101.

Treating the EDPL as an enforcement mechanism for the WQC process thus expands the States' veto power beyond the narrow limits Congress imposed, and requires precisely the duplicative public-purpose determinations that EDPL Article 2 was designed to avoid. If Congress intended the states to be able to veto not just construction but also eminent domain, it would have said so. Instead, it said the opposite. *See* R.258 & n.49. Likewise, if the Legislature wanted all condemnors to follow the EDPL's default notice-and-hearing process unless they obtained a WQC, it would not have created an express statutory exception based on the acquisition of a federal certificate that legally may, and often does, come before a WQC is issued. *See Del. Riverkeeper*, 857 F.3d at 399. As the dissent said, "although the issuance [or waiver] of a WQC by the DEC is a condition that must be met prior to construction of the pipeline, it is not … a condition precedent to the commencement of this eminent domain proceeding." R.376.

Ultimately, the majority's decision seemed to be driven by the policy concern that eminent domain should not be allowed in service of a project that cannot yet be built. *See* R.374 ("In a constitutional order such as ours, jealous as it is of the right to own property and do with it as one pleases, only a viable public project can force respondents to surrender their rights in their land."). Thanks to FERC's waiver order, that is not this case. But even setting the waiver order aside, the majority's position cannot be squared with the language of the statute. "Public policy … is powerless to create an exception when the language is plain and all-comprehensive." *Matter of Morse*, 247 N.Y. 290, 299 (1928). If the Legislature believes that any exercise of eminent domain should await a federal authorization to begin construction, it can (within the bounds of federal preemption) amend the statute to say so. Until then, "the courts are not free to legislate and if any unsought consequences result, the Legislature is best suited to evaluate and resolve them." *Amorosi*, 9 N.Y.3d at 372.

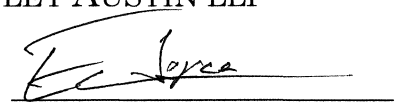
CONCLUSION

For these reasons, the decision of the Appellate Division should be reversed.

Dated: New York, New York
March 15, 2019

Respectfully submitted,

SIDLEY AUSTIN LLP

By: 

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CERTIFICATE OF COMPLIANCE

Under this Court's Rule 500.13(c), I certify that:

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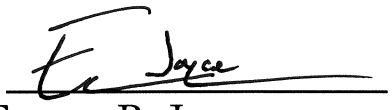
By: 

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