To be Argued by:
EAMON P. JOYCE
(Time Requested: 20 Minutes)

APL-2018-00225
Appellate Division Docket No. CA 17-02021
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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.

REPLY 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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REPLY STATEMENT[1]

On the first question presented, Respondents abandon the judicial notice-based reasoning of the majority below but nonetheless ask for affirmance based on the premise that "DEC denied a [Clean Water Act] § 401 [WQC]" for National Fuel's pipeline project, "effectively blocking the Project and rendering FERC's certificate ineffective." Resp. Br. 20. Without a WQC, they say, the FERC certificate is merely "incipient" and thus cannot satisfy EDPL 206(A), preventing National Fuel from obtaining their land through eminent domain. So the crux of the case, as Respondents describe it, is "the actual denial of a federal approval"—the WQC—"required by FERC." *Id.* at 22; *see id.* at 18, 20.

But there is no such denial. The Second Circuit vacated DEC's WQC denial decision. *See* Opening Br. 27–28. And FERC has held that DEC waived its authority to enter the denial in the first place, *id.* at 21–23, and recently reaffirmed that ruling on rehearing, *Nat'l Fuel Gas Supply Corp./Empire Pipeline, Inc.*, 167 FERC ¶ 61,007 (2019). There is thus no WQC denial in place now, and FERC's waiver order means that any new denial, if DEC attempts one, will be void. The WQC re-

[1] Defined terms have the same meaning here as in National Fuel's opening brief ("Opening Br.").

quirement cannot block National Fuel's pipeline project. And that means that all of Respondents' arguments about the FERC certificate and its conditions are beside the point (in addition to being wrong). Respondents never dispute that—even under the mistaken reasoning of the majority below—but for a WQC denial, National Fuel would satisfy EDPL 206(A). Thus, without the denial, their arguments fail.

Respondents urge the Court to ignore FERC's waiver order, as the majority below did, and FERC's subsequent affirmance of that order. Resp. Br. 24–25. But Respondents do not defend the majority's rationale for doing so or respond to National Fuel's showings that the waiver order is subject to mandatory judicial notice and is a change in controlling law that must be given effect here. Instead, they argue—for the first time—that "FERC lacks the authority to make this [waiver] determination" at all. *Id.* at 25. That is incorrect. As both the D.C. Circuit and the Second Circuit have repeatedly held, a pipeline company "can present evidence of waiver directly to FERC" to obtain a determination that "the Clean Water Act's requirements have been waived." *E.g.*, *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 700 (D.C. Cir. 2017). And even if FERC's authority were less than crystal clear, Re-

spondents' challenge is an improper collateral attack on the validity of the waiver order. In short, the waiver order is valid and binding, was immediately effective when issued, and FERC reaffirmed it during this appeal's pendency. That is enough to reverse.

In all events, the WQC denial and the FERC waiver order are—and always should have been—a sideshow. As the dissent below correctly recognized, *see* R.376–377, DEC's Clean Water Act authority is simply irrelevant to National Fuel's entitlement to invoke eminent domain under EDPL 206(A). *See* Opening Br. 43–57. Respondents fail to demonstrate otherwise. This Court should reject Respondents' attempt to rewrite National Fuel's FERC certificate of public convenience and necessity, which is all that EDPL 206(A) requires. And it should reject Respondents' view of FERC's approval framework, which has no basis in law and is undermined by the very cases on which they rely.

To start, Respondents argue that a FERC certificate is "without force or effect"—and thus cannot support eminent domain—until its conditions are satisfied. Resp. Br. 13. But Respondents elsewhere concede that, as many federal courts have held, pending certificate conditions are "not a defense against the exercise of eminent domain." *Id.* at

22. That concession is fatal. Under the Natural Gas Act, the FERC certificate is the trigger for eminent domain. 15 U.S.C. § 717f(h). If—as Respondents admit—"FERC certificate conditions need not be satisfied prior to exercising eminent domain" under federal law, Resp. Br. 22, that necessarily means that a certificate *is* valid and effective even before its conditions are met (just as National Fuel's opening brief showed). In turn, National Fuel's certificate is valid—and satisfies EDPL 206(A)—*whether or not* all of its conditions are satisfied.

Respondents' argument also fails on its own terms. As just explained, Respondents concede that "pending" certificate conditions do not preclude eminent domain. They argue, however, that "fail[ed]" conditions are different. Resp. Br. 22. But even if case law supported that distinction (it doesn't)—and even setting aside FERC's waiver holdings—this case does not involve a "fail[ed]" condition: The Second Circuit vacated DEC's WQC denial. Moreover, even DEC's denial itself invited National Fuel to reapply. Thus, at worst, the WQC condition in the FERC certificate is merely "pending." On Respondents' own account, that is not a basis to reject National Fuel's eminent domain petition. *Id.* at 22–24.

Furthermore, FERC's own orders contradict Respondents' premise that a FERC certificate is "incipient" and ineffective until its conditions are satisfied. As the opening brief explained (at 47–57), the certificate's conditions are prerequisites to the start of *construction*, but they do not invalidate the certificate or impede National Fuel's eminent domain powers. Respondents simply ignore that explanation. In doing so, Respondents also ignore National Fuel's showing that, if a certificate were invalid until its conditions were satisfied, a pipeline could never be built because some conditions cannot be satisfied until after land is acquired by eminent domain.

Finally, without acknowledging that these contentions failed below, Respondents raise the same standing and mootness arguments that Supreme Court rejected. But Respondents waived their standing defense by failing to raise it in their answer. And Respondents' standing argument fails on its own terms because National Fuel has suffered a cognizable injury. Respondents' contrary claim relies only on the vacated WQC denial. Respondents also conflate federal and New York standing requirements, and they confuse a pipeline company's standing to challenge state-law permitting requirements with its ability to exer-

cise eminent domain. This case presents a real, concrete dispute over whether National Fuel has a right to use eminent domain as to Respondents' land. That dispute is not moot.

ARGUMENT

I. FERC's waiver order is fatal to Respondents' arguments.

A. All of Respondents' arguments depend on the WQC denial.

Respondents' central premise is that DEC has denied National Fuel's WQC application for the pipeline project, and thus the FERC certificate is invalid. In service of that point, Respondents spend large portions of their brief surveying the Natural Gas Act, the EDPL, and the Clean Water Act. None of this, however, changes the bottom line: Without the WQC denial, Respondents' arguments fail.

Respondents first contend that "[n]either the Natural Gas Act nor FERC confers the power to exercise eminent domain; only a court may do so." Resp. Br. 8–12. True enough. *See* 15 U.S.C. § 717f(h). But, pursuant to EDPL 206(A), National Fuel applied for and obtained an order *from Supreme Court* "authorizing the acquisition of the permanent and temporary easements." R.6. Thus, Respondents are wrong to suggest (at 9) that National Fuel is trying to avoid the "New York pro-

cedures that govern the exercise of eminent domain." And Respondents' contention (at 12) that an EDPL 206(A) exemption "can be made only by the Appellate Division" is mistaken. The Appellate Division has exclusive authority to review a "condemnor's determination and findings made pursuant to [EDPL 204]." *See* EDPL 207(A)–(B). But this case does not involve a "determination and findings" under EDPL 204, and it did not begin with a judicial review petition under EDPL 207. National Fuel petitioned Supreme Court as authorized by EDPL 402(B), and Supreme Court had jurisdiction under EDPL 501(B). That procedure was proper. *See*, *e.g.*, *Matter of City of New York (Grand Lafayette Props. LLC)*, 6 N.Y.3d 540, 543–47 (2006) (affirming EDPL 206 approval originally granted by Supreme Court); *Eagle Creek Land Resources, LLC v. Woodstone Lake Dev., LLC*, 108 A.D.3d 71, 76–78 (3d Dep't 2013) (Stein, J.) (affirming "Supreme Court's determination that [petitioner] was entitled to an exemption pursuant to EDPL 206(A)").

Respondents next assert that the conditions in FERC's certificate of public convenience and necessity granted to National Fuel "must be satisfied before FERC will issue approval to commence construction." Resp. Br. 13–17. In the same vein, they point out that Clean Water Act

§ 401 allows a state to block a FERC-approved project that would violate water-quality standards by denying a WQC. *Id.* at 18–22. Not only do these points fail to speak to when the ability to exercise eminent domain arises, *see infra* § II, but they also are irrelevant unless DEC has validly denied National Fuel's WQC. Indeed, this discussion underscores a basic point of agreement: Absent the WQC denial, FERC's certificate satisfies EDPL 206(A). Respondents concede that if National Fuel "has received all applicable authorizations required under federal law (*or [shown] waiver thereof*)," the FERC certificate is valid and National Fuel can skip EDPL 204's public-hearing process. *See* Resp. Br. 5 (emphasis added) (quoting R.153). We thus turn to FERC's waiver order, which is dispositive here.

B. FERC's waiver order nullifies the WQC denial.

Respondents concede that FERC's waiver order held "that DEC waived its [WQC] authority" over National Fuel's pipeline project. Resp. Br. 24; *see id.* at ii; R.306. They also acknowledge that FERC has now "denied a request for rehearing of the waiver order from DEC." Resp. Br. 24; *see Nat'l Fuel Gas Supply Corp./Empire Pipeline, Inc.*, 167 FERC ¶ 61,007 (2019). And they do not defend the Appellate Division

majority's reasons for refusing to take judicial notice of the waiver order, *compare* Resp. Br. 24–28, *with* R.371 n.2, or respond to National Fuel's demonstration that the CPLR requires judicial notice here, *see* Opening Br. 31–43.

Instead, Respondents contend, for the first time, that "FERC lacks the authority to make this [waiver] determination." Resp. Br. 25. That is as wrong as it is novel. A pipeline company "can present evidence of waiver directly to FERC to obtain the agency's go-ahead to begin construction." *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 700 (D.C. Cir. 2017); *see also Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (whether a state "satisfied the terms of section 401(a)(3)" is a question "for FERC to decide in the first instance"). In fact, the D.C. Circuit recently vacated a FERC order for *not* finding waiver. *See Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1103 (D.C. Cir. 2019); *see also Nat'l Fuel Gas Supply Corp.*, 167 FERC ¶ 61,007, at ¶¶ 11–12, 14, 19–20, 24 (applying *Hoopa Valley* to DEC's waiver here).

Likewise, the Second Circuit said—in this very matter—that National Fuel is "free to present any evidence of waiver to FERC in the first instance." *Nat'l Fuel Gas Supply Corp. v. NYSDEC*, 761 F. App'x

68, 72 (2d Cir. 2019); *see also infra* pp.12–13 (discussing Second Circuit's decision). Additionally, *DEC* agrees that FERC "is the proper forum to consider [a] claim that [DEC] waived its right to deny" a WQC. *See* Brief for Respondents at 20–22, *Millennium Pipeline Co. v. Seggos*, No. 16-1415, 2017 WL 411266, at *20–22 (D.C. Cir.). Nor did the majority below question FERC's authority to decide waiver. R.371 n.2. For that matter, *Respondents themselves* tacitly recognize FERC's waiver authority. They rely (at 20–22) on FERC's no-waiver decision in *Constitution Pipeline Co.*, where FERC said that the question of waiver "is correctly before the Commission," 162 FERC ¶ 61,014, at ¶ 12 (2018).

While ignoring these principles and the many cases holding that FERC can decide waiver, Respondents rely on a series of cases holding that FERC's interpretations of the Clean Water Act do not receive *Chevron* deference. *See* Resp. Br. 25. But that is a different question from whether FERC has jurisdiction to make waiver determinations. In fact, Respondents' lead case on this topic notes that FERC "may determine … whether a state has issued a certification within the prescribed period." *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 110 (2d Cir. 1997). Likewise, in *Alcoa Power Generating, Inc. v. FERC*, the court upheld

FERC's no-waiver determination on the merits, without questioning its jurisdiction. 643 F.3d 963, 965 (D.C. Cir. 2011). And in *AES Sparrows Point LNG, LLC v. Wilson*, FERC was not even a party; the court reviewed the state's WQC denial directly. 589 F.3d 721, 722 (4th Cir. 2009). None of these cases supports Respondents' view.

In any event, Respondents' challenge to FERC's waiver authority is an impermissible collateral attack. Any challenge to a FERC order must be brought through a petition for rehearing before FERC and then a petition for review in a federal court of appeals. 15 U.S.C. § 717r(a)–(b); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). The cases Respondents' cite (at 22–23) recognize this rule. *See Columbia Gas Transmission, LLC v. 76 Acres*, No. CIV.A. ELH-14-0110, 2014 WL 2960836, at *6 (D. Md. June 27, 2014) ("The validity and conditions of the FERC Certificate cannot be collaterally attacked …."), *aff'd in part, vacated in part*, 701 F. App'x 221 (4th Cir. 2017); *Tenn. Gas Pipeline Co. v. 104 Acres in Providence Cty.*, 749 F. Supp. 427, 430 (D.R.I. 1990) ("Questions of the propriety or validity of the certificate must first be brought to" FERC). Respondents cannot challenge FERC's power to enter the waiver order in this forum.

Respondents are simply wrong in contending (at 26) that National Fuel asked the Second Circuit to decide waiver and was rebuffed. National Fuel argued specifically that *FERC* should decide waiver, *see* Petitioners' Final Brief at 9 & n.1, *Nat'l Fuel Gas Supply Corp. v. NYSDEC*, No. 17-1164, 2017 WL 3842965 (2d Cir. Sept. 1, 2017), and the Second Circuit agreed, *see Nat'l Fuel*, 761 F. App'x at 72. Thus, of course, the Second Circuit "d[id] not find DEC waived its authority." Resp. Br. 26. It certainly also did not reach the opposite conclusion, but instead left the question to FERC as National Fuel advocated. And FERC found waiver—twice.

In turn, Respondents' speculation (at 28) that the Second Circuit would affirm a new DEC decision denying the WQC misses the point. Given FERC's waiver order, any new DEC decision on the WQC for National Fuel's pipeline would be void *ab initio*. Respondents' reliance on *Islander East* is thus misplaced. In that case, the Second Circuit vacated an initial WQC denial, *Islander E. Pipeline Co. v. Connecticut Dep't of Envtl. Protection*, 482 F.3d 79 (2d Cir. 2006), but later affirmed a better-reasoned, better-supported denial decision, *Islander East Pipeline Co., LLC v. McCarthy,* 525 F.3d 141 (2d Cir. 2008). But there was no

waiver finding (or even assertion) in *Islander East*. *Islander East* is thus inapposite.

* * *

In short, everyone—National Fuel, Respondents, and the majority and dissenting Justices below—agrees that, but for the WQC denial, National Fuel holds a valid and effective FERC certificate that satisfies EDPL 206(A). FERC has now found—twice—that the WQC denial is void because DEC waived its authority. Respondents have abandoned the majority's mistaken refusal to take judicial notice of FERC's waiver ruling, and their attack on that FERC's waiver holdings are both wrong on the merits and foreclosed in this forum. FERC's waiver order and its reaffirmance of that order nullify the WQC denial on which Respondents' arguments and the decision below depend. That is dispositive.

II. Even without FERC's waiver order, the FERC certificate satisfies EDPL 206(A).

Respondents also fail to undermine National Fuel's showings that the Clean Water Act and the FERC waiver order always were a red herring given what EDPL 206(A) actually requires. Respondents offer no support for the position staked out by the majority below that a FERC

certificate of public convenience and necessity cannot satisfy EDPL 206(A) until the certificate's conditions are satisfied.

As the dissent below recognized (R.376–77) and as National Fuel's opening brief explained (at 26–27, 43–48), EDPL 206(A)'s requirements are straightforward. The statute requires a "certificate of public convenience or necessity" from a "federal … commission" that addresses "factors similar to those enumerated in" EDPL 204(B). *See* EDPL 206(A). There is no dispute that FERC (a federal commission) issued to National Fuel a "certificate of public convenience and necessity." R.69. And Respondents agree that "FERC considered the factors for determining whether the public interest will be served by the proposed acquisition consistent with EDPL § 204(B)." Resp. Br. 12. The statute's plain language requires no more. *See* Opening Br. 43–48.

Ignoring the statutory text, Respondents reprise the Appellate Division majority's argument that a FERC certificate is not valid and effective—and thus cannot serve as the basis for an eminent domain action—until its conditions are satisfied. Resp. Br. 2, 13–17. There are three basic problems with this claim.

First, Respondents' other arguments effectively concede that a FERC certificate is valid when it is issued, not when its conditions are met. Respondents accept the many federal cases "holding that FERC certificate conditions need not be satisfied prior to exercising eminent domain, or holding that a conditional FERC certificate is not a defense against the exercise of eminent domain." Resp. Br. 22; *see, e.g.*, *Transcon. Gas Pipe Line Co. v. Permanent Easements*, 907 F.3d 725, 732 (3d Cir. 2018) ("the [Natural Gas Act] does not require FERC certificate holders to satisfy all the certificate's conditions before exercising eminent domain"), *petition for cert. filed sub nom. Like v. Transcon. Gas Pipe Line Co.* (U.S. Mar. 18, 2019) (No. 18-1206). And Respondents agree (at 8) that a FERC certificate serves as the predicate for the "exercise of the right of eminent domain" under the Natural Gas Act. 15 U.S.C. § 717f(h). Together, these two concessions give the game away. A FERC certificate can authorize eminent domain before its conditions are satisfied only if its validity does not depend on those conditions. Otherwise, there would be no basis for eminent domain. *See* Resp. Br. 8; 15 U.S.C. § 717f(h). In turn, Respondents' claim that a FERC certifi-

cate is "without force or effect" "until the conditions … are satisfied" (Resp. Br. 13, 15), is wrong.

Although Respondents do not question the many cases allowing eminent domain before a certificate's conditions are met, they try to distinguish those cases as involving "pending" conditions rather than "fail[ed]" ones. Resp. Br. 22–24. As will be shown in a moment, this pending/failed distinction is meritless, *see infra* pp.17–21, but even on Respondents' view, this case would belong in the "pending" category, because there is "no final decision[ ] denying the[ ]" WQC. Resp. Br. 23. The Second Circuit vacated DEC's WQC denial because it failed to "explain[] any rational connection between facts found and choices made," "relied in part on mistakenly identified project features," and "failed to address evidence in the record that supported [FERC's] findings." *Nat'l Fuel*, 761 F. App'x at 70-71. Thus, even setting aside FERC's waiver rulings, there is thus no denial in place, let alone a final one. And—again, putting aside DEC's inability to act on the WQC going forward due to waiver—even if DEC were to adhere to the same result in a new denial, that would not be a "final," conclusive failure of the WQC condition. DEC's first denial invited National Fuel to submit "a new joint

application" "to address the … deficiencies" DEC identified. R.240; Resp. Br. 32. Respondents contend (at 4, 19, 30) that DEC would not approve a new application without major changes to the project, but that is just speculation. Thus, even without the waiver order, no condition in the FERC certificate has conclusively failed, and therefore—even on Respondents' own view of the case law—the certificate is valid and effective.

In any event, Respondents cite no case suggesting that their pending-versus-failed distinction is relevant to eminent domain. On the contrary, Respondents' cases contemplate "the possibility that approval will not be granted" and the condition will fail, but hold that this scenario "do[es] not operate as a 'shield' against the exercise of eminent domain power." *Tenn. Gas Pipeline*, 749 F. Supp. at 433 (cited in Resp. Br. 23). That is exactly right.

Second, even if Respondents' attack on the FERC certificate's validity were not contradicted by precedent and their own admissions, it is wrong on the merits. Respondents, like the court below, continue to wrongly conflate the certificate with authorization to begin building the pipeline. As the opening brief explained (at 48–49), these are discrete

steps in the FERC approval process, and the conditions apply to the latter. Nor could it be otherwise, since Respondents' position would create a Catch-22: As Supreme Court and the dissent below observed, there are conditions in the FERC certificate that "cannot be met until *after* [National Fuel] has obtained possession of the rights of way for the pipeline." R.376; *see* R.37. If the certificate needs to be valid before National Fuel can obtain possession, but the certificate is not valid until National Fuel satisfies all the conditions by obtaining possession, the project can never be built. *See* Opening Br. 49–50, 53–54.[2] "To read the statute [that way] would be to deny the 'respect for the policy of Con-

[2] Respondents mislead by suggesting that National Fuel somehow hid from this Court Appendix B to FERC's certificate, which set forth various conditions. Resp. Br. 4–5 ("Another part crucial for understanding the posture of this case, 'Appendix B — Environmental Conditions', accompanies the published decision." (citing the FERC reporter, not the record)); *id.* at 15. In fact, National Fuel included Appendix B in the record, R.149–157, and *relied on it*, *see* Opening Br. 17, 51 (citing R.150, which makes clear that National Fuel's right of eminent domain attached with the granting of the certificate). In addition to Appendix B's provisions specifically addressing eminent domain, it otherwise makes clear that National Fuel may need to possess any land subject to the project to satisfy various conditions before construction. *See* R.149–50 ¶ 4 (requiring detailed survey maps); R.150 ¶ 5 (requiring descriptions of existing land use); R.153 ¶ 9 (requiring National Fuel to provide information to all affected landowners).

gress [that] must save us from imputing to it a self-defeating, if not disingenuous purpose.'" *Dalia v. United States*, 441 U.S. 238, 254 (1979).

Respondents ignore all of this. Instead, they rely on certain FERC orders saying that "a 'conditioned certificate' is 'an incipient authorization without force or effect.'" Resp. Br. 13 (quoting *Ruby Pipeline, L.L.C.,* 133 FERC ¶ 61,015, at ¶ 18 (2010)); *see also Crown Landing LLC,* 117 FERC ¶ 61,209, at ¶ 21 n.27 (2006) (cited in Resp. Br. 13). But these FERC orders make precisely the same point that National Fuel made in its opening brief: It is the *construction authorization*, not the certificate itself, that is "incipient" until the conditions are met.

Ruby Pipeline said that FERC's "orders granting NGA authorization subject to conditions [are] 'incipient authorization[s] without current force and effect,' since absent action by the applicant and other state and federal agencies, and following that further action on the part of the Commission, *construction cannot begin.*" 133 FERC ¶ 61,015 at ¶ 18 (second alteration in original) (emphasis added) (quoting *Crown Landing*, 117 FERC ¶ 61,209, at ¶ 21). Consistent with National Fuel's showings, FERC reiterated that a conditional certification is "a final order granting authorization for a project" and explained that "such or-

ders set forth the conditions under which *a project may proceed*, but until [the conditions] are met, the applicant remains unable to exercise its *construction authority* under its NGA certificate." *Id.* ¶ 19 (emphases added). *Crown Landing* says the same thing: "Our order is an incipient authorization without current force and effect, since it does not yet allow Crown Landing to begin the activity it proposes." 117 FERC ¶ 61,209, at ¶ 21. The "activity," of course, is the "construction and operation of the… project." *Id.* ¶ 23.

Thus, no FERC order says that a certificate-holder cannot exercise eminent domain until the certificate's conditions are met. On the contrary, 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). Indeed, FERC noted in *Ruby Pipeline* that "it may be impossible for an applicant to obtain all approvals necessary to construct and operate a project in advance of the Commission issuing its authorization without unduly delaying the project." 133 FERC ¶ 61,015 at ¶ 20. FERC thus "approv[es] projects with *conditions precluding construction* pending the applicant's compliance." *Crown Landing LLC*,

117 FERC ¶ 61209 at ¶ 29 (emphasis added). And again, any other reading of the statute would be self-defeating. "If every aspect of a project were required to be finalized before any part of the project could move forward, it would be very difficult, if not impossible, to construct such projects." *Id.* ¶ 28 (quoting *Millennium Pipeline Co.*, 100 FERC ¶ 61,277, at ¶ 138 (2002)).

Finally, Respondents say that National Fuel's failure to obtain a WQC defeats FERC's public-purpose finding. Resp. Br. 12, 23–24 (citing, *inter alia*, *Matter of Eagle Creek Land Resources,* 108 A.D.3d 71). But again, their own authority is to the contrary, and supports National Fuel. *See* Opening Br. 53–54. In *Eagle Creek*, the condemnor's FERC license to build a hydroelectric facility contained a condition to maintain a public recreational area nearby. 108 A.D.3d at 74–75. Before satisfying the condition, the condemnor began a vesting proceeding, relying on FERC's public-purpose findings to obtain an exemption from EDPL Article 2. *Id.* at 74, 76–77. The Appellate Division agreed. As then-Justice Stein explained, "FERC clearly considered factors that are similar to those contained in EDPL 204(B)," which sufficed to "determine whether the public interest will be served by the proposed acquisition."

Id. at 76–77. The condemnor was thus "entitled to an exemption pursuant to EDPL 206(A)." *Id.* at 78.

Likewise here, FERC has already made a public-purpose finding in favor of National Fuel. As *Eagle Creek* shows, that finding would support "an exemption pursuant to EDPL 206(A)," *id.*, *even if* the certificate's WQC condition remained unsatisfied.

In sum, this case is easily resolved because Respondents do not undermine our showing that EDPL 206(A) merely required National Fuel to hold "a certificate of public convenience or necessity" from a "federal … commission," and it is irrefutable that before National Fuel submitted its EDPL 206(A) application the Federal Energy Regulatory Commission had issued an order stating that a "certificate of convenience and necessity is issued to National Fuel." R.144.

III. Supreme Court correctly rejected Respondents' argument that National Fuel lacks standing or presents a moot claim.

Without acknowledging that Supreme Court rejected their arguments, R.39–40, or that the Appellate Division did not reach them, Respondents ask the Court to affirm on the alternative grounds that National Fuel lacks standing or this case is moot. Resp. Br. 28–34. Supreme Court correctly rejected these contentions.

First, Respondents waived any standing defense by failing to raise it in their answer to National Fuel's petition. R.181–191. Although Supreme Court elected to address the standing argument Respondents raised only in "their memorandum of law," R.39, this Court's decisions hold that a defendant's failure to raise standing in an "answer or in a pre-answer motion to dismiss" constitutes waiver. *Dougherty v. City of Rye*, 63 N.Y.2d 989, 991–92 (1984) (citing, *e.g.*, *Matter of Prudco Realty Corp. v. Palermo*, 60 N.Y.2d 656, 657 (1983)); *see Pataki v. New York State Assembly*, 4 N.Y.3d 75, 88 (2004) (standing "may be waived").

Second, like their merits arguments, Respondents' standing argument depends on the premise that DEC "has blocked the project" by denying the WQC. Resp. Br. 28; *see* R.40. They say that National Fuel's "failure to obtain DEC approval to cross streams and wetlands has removed even a contingent interest in [the] project." Resp. Br. 30. But as explained above, DEC's denial has been vacated and the WQC requirement is now waived. Respondents do not and cannot contend that National Fuel lacks standing if—as is now true—DEC's denial does not stand in the way of the project. That is enough to reject their standing argument.

In all events, Supreme Court correctly recognized that "[a]s the holder of an order granting a FERC certificate," National Fuel faced "an actual or imminent injury" because "respondents deny it has the right to initiate [eminent domain] proceedings." R.40. As explained above and in the opening brief (at 51–52), "[o]nce 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). And acquiring that land is often, as here, a necessary step to satisfy conditions precedent to construction. Because Respondents (and the decision below) are preventing National Fuel from doing what it needs—and is entitled—to do, a "real case and controversy" exists. R.40.

That would remain true even if—as is no longer the case—the FERC certificate's WQC condition were unsatisfied. Supreme Court correctly explained that the standing issue was "not whether National Fuel has or will be able to obtain the necessary water quality permits from DEC, but whether [National Fuel] may initiate eminent domain proceedings." R.39. That is a separate, concrete legal dispute. National Fuel's "ability or inability to complete the project is not relevant to

the determination of whether it has the legal right to condemnation." R.40.

National Fuel is also the prototypical party whose "interest or injury" "fall within the zone of interests protected by the statute invoked," namely EDPL 206(A). *Contra* Resp. Br. 29 (quoting *Soc'y of the Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 775 (1991)); *see, e.g.*, *Matter of Axelrod v. Sobol*, 78 N.Y.2d 112, 115–16 (1991) (per curiam) (petitioner who fell within statutes' sweep and was personally affected by challenged decision had standing). That is, National Fuel "pursuant to … federal … law or regulation … consider[ed] and submitt[ed] factors similar to those enumerated in [EDPL 204(B)] to a … federal … commission … and obtain[ed] … a certificate of public convenience or necessity." EDPL 206(A); *see* Opening Br. 14–15, 44–47. Indeed, Respondents concede that the Natural Gas Act and the EDPL "confer on the company a legal interest … in a project approved by FERC." Resp. Br. 30. Respondents are simply mistaken about what it means to have a FERC-approved project. *See supra* § II.

Respondents contend (at 31–33) that this Court should follow the federal standing analysis in *Constitution Pipeline Co. v. NYSDEC*, No.

1:16-CV-568, 2017 U.S. Dist. LEXIS 205902 (N.D.N.Y. Mar. 16, 2017). But—even setting aside that the New York and federal standing analyses are different, *see Saratoga Cty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 812 & n.6 (2003)—that case is distinguishable, as Supreme Court correctly explained. R.39–40. *Constitution*'s standing ruling turned on DEC's denial of a WQC. 2017 U.S. Dist. LEXIS 205902, at *22 ("[T]he pipeline project cannot go forward without the CWA 401 WQC that NYSDEC has denied."). Here, of course, DEC's denial has been vacated and FERC has found that DEC waived its WQC authority. That alone distinguishes this decision.

What is more, *Constitution* did not hold that the petitioner lacked standing to pursue eminent domain. In fact, the standing decision Respondents cite was not about eminent domain at all, but about standing to challenge state-law permitting requirements. *See* 2017 U.S. Dist. LEXIS 205902, at *2–3, *21–24. The court had previously held that petitioner not only had standing to pursue eminent domain, but that it had a meritorious eminent domain claim. Specifically, it held that a "certificate of public convenience and necessity issued by FERC" "authorized [petitioner] to exercise the federal power of eminent domain."

Constitution Pipeline Co. v. A Permanent Easement, No. 3:14-cv-2046 (NAM/RFT), 2015 WL 1638211, at *3 (N.D.N.Y. Feb. 24, 2015). *Constitution* thus undermines, rather than supports, Respondents' arguments here.

Finally, Respondents are wrong that this case is moot. Their suggestion that "the issues presented are no longer live or [National Fuel] lack[s] a legally cognizable interest in the outcome," Resp. Br. 33, is downright puzzling. A case is moot if "the rights of the parties cannot be affected by the determination of th[e] appeal." *Schron v. Troutman Sanders LLP*, 20 N.Y.3d 430, 433 n.5 (2013). But, as Supreme Court recognized, "the legal right to condemnation … is all that is at issue in this case," R.40, and National Fuel's interest in condemnation is all too real, given that it needs the land at issue to build the project that FERC approved. *Id.* ("[T]he only way to learn … whether petitioner will be able to complete the project is by granting the relief it seeks in this action—title to the easements.").

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

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

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