To be Argued by:
GARY A. ABRAHAM, ESQ.
(Time Requested: 20 Minutes)

APL-2018-00225
Appellate Division Docket No. CA 17-02021
Allegany County Clerk's Index No. 45092

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 RESPONDENTS-RESPONDENTS

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STATEMENT OF RELATED LITIGATION

On February 16, 2017, Petitioner filed a challenge to the action of the Town of Pendleton, which denied a building permit for the 22,000 horsepower compressor station required for Petitioners' Northern Access 2016 pipeline project proposal, a subject of the case at bar, (hereafter, the "Project"). *Empire Pipeline, Inc. et al. v. Town of Pendleton*, No. 1:17-cv-141 (W.D.N.Y.). (The undersigned represents the Town in this matter.) Petitioner's affiliate Empire Pipeline submitted to the Town an application for a building permit, and the Town code enforcement officer upon finding that the proposed compressor station was not a public utility providing essential services and was otherwise a prohibited use in the chosen zone, denied the permit. On March 9, 2017, an answer was filed. Briefing by the parties on Petitioner's motion for summary judgment has been completed, but no action has occurred in the case since October 10, 2018, the date the court granted Petitioner's motion to file supplemental authority, *i.e.*, the FERC waiver order discussed below.

It should be noted the above-referenced compressor station as proposed would require the taking of Town land for connecting pipelines, but Petitioner has not sought to exercise eminent domain for this purpose.

On March 3, 2017, Petitioner filed a request for administrative rehearing to

the Federal Energy Regulatory Commission ("FERC") regarding certificates of public convenience and necessity issued by FERC on February 3, 2017 for Petitioners' Project. FERC Dkt. CP15-115, Submittal 20170303-5147. On December 5, 2017, Petitioner filed with FERC a renewed motion for expedited action. *Id.*, Submittal 20171205-5113. In these filings Petitioner argued that the New York State Department of Environmental Conservation ("DEC") waived authority under section 401 of the federal Clean Water Act ("CWA") to issue or deny a water quality certification for the Project when it agreed with Petitioner on a date the CWA section 401 application would be deemed received, and DEC made its determination within 12 months of that date as subsection 401(a)(1) mandates, denying the application. On August 6, 2018, FERC treated the December 5, 2017 filing as a motion requesting a waiver determination, and determined that DEC waived authority to make its determination because the agency exceeded the mandated 12 months. R. 248, reported at 164 FERC ¶61,084 (2018). FERC's August 6, 2018 waiver order is discussed further in the parties' briefs to this Court.

On March 27, 2017, Petitioner filed the following seven vesting proceedings in Supreme Court, Erie County:

• *National Fuel Gas Supply Corporation v. Emily R. Oprea, and Grace R. Page, as Trustees for Roderick Family Trust, New York State Electric & Gas Corporation, State of New York, County of Erie, and Flint Oil & Gas Jne.,* No. 804141/2017;

• *National Fuel Gas Supply Corporation v. Ryan Secord, New York State Electric*

& Gas Corporation, and Bank of Holland, No. 2017-__;

• *National Fuel Gas Supply Corporation v. Brian Andrzejewski, Renee New York State Electric & Gas Corporation, and Midland*

Funding LLC, No. 2017 -__;

• *National Fuel Gas Supply Corporation v. 4959 Reiter, LLC, New York State Electric & Gas Corporation, Kinder Morgan as successor to Tennessee Gas Transmission Company, and U S. Energy Development Corporation,* Index No. 2017-__;

• *National Fuel Gas Supply Corporation v. Gerald J. Whittington Jr., Lori A. Whittington, New York State Electric & Gas Corporation, First Niagara Bank, N.A., and Walter* C. *Best,* No.: 2017-__;

• *National Fuel Gas Supply Corporation v. Ivan Gurov, Nikola Gurov, New*

York State Electric & Gas Corporation, and Vaiero Energy Partners as successor to Weaver Oil & Gas Corporation, No. 2017- ; and

• *National Fuel Gas Supply Corporation v. Timothy Penfold, Karen Penfold, New York State Electric & Gas Corporation, U S. Energy Development Corporation, P&S Drilling Jne., Vaiero Energy Partners as successor to Weaver Oil & Gas Company, and Crown Atlantic Company LLC*, No. 2017 -__.

On December 5, 2018, an Order issued determining the first of these cases, *National Fuel Gas Supply Corporation v. Oprea et al.*, granting Petitioner's vesting petition under New York Eminent Domain Procedure Law. On January 2, 2019 respondents filed a notice of appeal. On information and belief the appeal must be perfected by the end of May 2019. The disposition of the remainder of the seven cases listed above is unknown.

On April 21, 2017, Petitioner filed a challenge to the action of DEC denying Petitioner's application for a CWA section 401 water quality certification for Petitioners' Project, in the U.S. Court of Appeals for the Second Circuit, according to the judicial review provisions of the Natural Gas Act, 15 U.S.C. 717r(d)(1). *National Fuel Gas Supply Corp v. NYS Dept. of Environmental Conservation* (2d Cir., No. 17-1164). In the Second Circuit, Petitioner is arguing that the denial was

outside DEC's authority under the CWA and that DEC's findings were arbitrary and capricious. On February 5, 2019, the court issued a Summary Order addressing Petitioner's arbitrary and capricious claim. The court vacated and remanded DEC's denial back to the agency, asking DEC to identify the basis for its decision in the record, "express[ing] no opinion as to whether there is substantial evidence in the record to support the Department's denial." DEC has not yet filed its response to the Summary Order.

On June 1, 2017, Petitioner filed a challenge to certain inaction of FERC. *National Fuel Gas Supply Corp., et al. v. FERC, et al.* (D.C.C., Dkt. No. 17-1143). An amended petition was filed July 5, 2017. In the D.C. Court of Appeals Petitioner is arguing FERC erred by not finding that state law environmental permits, approvals, authorizations and requirements are preempted by the federal Natural Gas Act and the Commission's February 3, 2017 Certificate Order approving Petitioners' Project with conditions, and FERC erred by not finding that DEC waived its authority to act on Petitioners' Section 401 Water Quality Certification application. On July 11, 2017 the case was held in abeyance pending decision in *Allegheny Defense Project v. FERC*, No. 17-1098 in the same court. The case remains in abeyance.

On May 12, 2017, Petitioner filed a challenge to DEC's denial of state environmental permits for Petitioners' Project, under CPLR Article 78. *Empire Pipeline, Inc. et al. v. NYS Dept. of Environmental Conservation et al.*, No. E161542/2017 (Niagara Co.). On June 21, 2017, Petitioner filed an amended petition. In the amended petition, Petitioner argues that the state permits are preempted by the Natural Gas Act and FERC's February 3, 2017 conditional Certificate Order approving Petitioners' Project. On December 20, 2018, Supreme Court, Niagara County, issued a Decision and Order denying Petitioner's request for summary judgment on its preemption claim, upon finding the state permits at issue are required by FERC's Certificate Order. Supreme Court also found that FERC's public convenience and necessity determination requires Petitioner to obtain the state permits. On January 18, 2019, Petitioner filed a Notice of Appeal of the Decision and Order to the Appellate Division, Fourth Department. On February 4, 2019, Petitioner requested a stay of the proceeding from the trial court in order to explore settlement, including solutions to DEC's objections to the Project regarding the method for crossing eight sensitive streams identified by DEC. On April 23, 2019, Supreme Court ordered the parties to discuss settlement on May 7, 2019.

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PRELIMINARY STATEMENT

In February 2017, the Federal Energy Regulatory Commission ("FERC") issued to National Fuel a Certificate of Public Convenience and Necessity pursuant to section 7 of the Natural Gas Act, 15 U.S.C. § 717f(h). *National Fuel Gas Supply Corporation et al.*, Order Granting Abandonment and Issuing Certificates, 158 FERC ¶ 61,145 (2017), 2017 FERC LEXIS 129, (February 3, 2017), stay denied 160 FERC ¶ 61,043, 2017 FERC LEXIS 1059 (August 31, 2017) ("Certificate Order"). *See* 15 U.S.C. § 717f(c)(1)(A) (requiring such certificate for interstate pipeline projects).

The FERC certificate is conditioned on National Fuel certifying that all environmental conditions in Appendix B of FERC's Certificate Order have been met, (R.145), and "all federally delegated state permits" have been obtained, (R.116), including a Water Quality Certification under Section 401 of the federal Clean Water Act ("CWA"). In New York, CWA § 401 certifications are determined by the New York State Department of Environmental Conservation ("DEC"). *See* Pet'r Br., 11-12.

In March 2017, National Fuel "filed a vesting petition before it even knew

whether it could actually build the underlying pipeline project," (R. 371.n.2), since the CWA § 401 determination was pending before DEC. On April 7, 2017 DEC denied the requested federal Water Quality Certification. R.228-240. As an affirmative defense, Respondents JOSEPH A. SCHUECKLER and THERESA F. SCHUECKLER assert that as a result of the failure of this important environmental condition, the company's FERC certificate cannot "satisfy the requirements for an exemption under EDPL 206", (R.183 (¶10)), as FERC's finding that the project would be in the public interest is conditioned on National Fuel obtaining CWA § 401 certification. *See* 158 FERC ¶ 61,145, at P 10. The Appellate Division majority agreed, holding that under the circumstances the FERC certificate is not effective and therefore fails to qualify National Fuel for the EDPL 206 exemption. *See* R.371-372 (Appellate Division decision).

The Schuecklers are landowners in Cuba, New York, who reside on and own more than 100 acres along the route proposed for National Fuel's proposed Northern Access 2016 pipeline project. *See* R. 59 (parcel map). These properties are the subject of the above-captioned eminent domain proceeding.

The Schuecklers' land, as all lands along the proposed pipeline route, would be subjected to "clearing a 75-foot wide ROW [right of way]", (R.232), even

though most of the route, including on the Schuecklers' land, would be "co-located with existing pipeline and powerline right-of-way". *Compare* Pet'r Br., 19. The new right of way Petitioner seeks over the Schuecklers' land would clearcut through an entirely forested area. R.208.

In the vesting proceeding, National Fuel did not demonstrate it has a public project. *See* R.372 ("Petitioner obviously did not conduct a hearing under EDPL 203 or make findings pursuant to EDPL 204."). Instead, the company contended it is authorized to construct the pipeline pursuant to the federal Natural Gas Act. R. 46 (Verif. Pet. ¶2). *See* 15 U.S.C. § 717f(h). The company also contends that its pipeline project has a "[p]ublic use, benefit or purpose" based on FERC's approval. R. 47 (Verif. Pet. ¶6). Having a deemed public purpose, according to the company, obviates the need to demonstrate a public purpose and authorizes an immediate taking of an easement from the Schuecklers, pursuant to Article 2 of New York's Eminent Domain Procedure Law. R. 47-48 (Verif. Pet. ¶6 ¶¶9-10). *See* EDPL § 207(C)(4).

Under CWA § 401, DEC must approve the project's crossing several streams and wetlands. Section 401 of the Clean Water Act requires applicants for federal approvals whose project may affect water quality to obtain a "water quality

certification" from the state agency to which Section 401 approvals have been delegated, here, DEC. *See* 33 U.S.C. § 1341(a)(1). *Cf. also* R. 109, at n.136 (FERC noting that its review "is not intended to replace the Clean Water Act [or] air permitting process", both of which are delegated by the U.S. Environmental Protection Agency to DEC); R. 219, text and note at n.15 (National Fuel's concurrence).

As a result of DEC's April 7, 2017 action, it is unlikely the project alignment as proposed will ever be approved. Among eight stream crossings that raise the greatest concerns for DEC, two are near the Schuecklers' property, Haskell Creek and Dodge Creek. R.233 (Table 1). In its April 7 decision, DEC invited National Fuel to reapply with a modified project. R.240. However, the company has not reapplied.

FERC has said conditional Certificate Orders like the one it issued for National Fuel's project are "incipient authorizations" awaiting satisfaction of the Order's conditions. FERC's approval is found in a "Certificate Order" only part of which was provided with the Petition. R. 69-163. Another part crucial for understanding the posture of this case, "Appendix B – Environmental Conditions", accompanies the published decision. Certificate Order, 158 FERC ¶ 61,145, at

61,949-61,954.

FERC's Certificate Order finds that National Fuel's project will serve a public purpose, warranting a "certificate of public convenience and necessity", (*cf.* EDPL § 206(A)), if *inter alia* NYSDEC determines water quality would be adequately protected. Accordingly, prior to authorizing National Fuel to commence construction of any part of the project, the FERC Order requires the company to certify to FERC that it has obtained a NYSDEC water quality certification. "Prior to receiving written authorization from the Director of OEP [FERC's Office of Energy Projects] to commence construction of any Project facilities, National Fuel shall file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof)." Certificate Order, 158 FERC ¶ 61,145, 61,952 at P 10. However, as a result of DEC's action, National Fuel cannot certify to FERC that FERC's conditions have been met, and has not done so.

Because an important condition informing FERC's public interest finding has failed, the project fails the public purpose test under both the Natural Gas Act and New York's Eminent Domain Procedure Law. *See* EDPL § 402(B)(6). Accordingly, National Fuel does not qualify for an exemption from the hearing

and findings procedure of New York's Eminent Domain Procedure Law. *See* EDPL § 206(A).

Under the circumstances, this Court should dismiss the Petition upon a finding that Petitioner lacks standing since without a project to advance, the Schuecklers' holding out can inflict no delay or other harm on the company's proposal. DEC's review of Petitioner's CWA § 401 application has concluded without prejudice to a modified project proposal. However, the project proposal identified in the Petition has failed. Accordingly, were the Petition granted, National Fuel would either condemn rights that are not necessary for the project, or it will take rights for a different project neither DEC nor FERC have reviewed. The Appellate Division's resolution of this dispute fully protects Petitioner's ability to modify its proposal by allowing the company to refile a vesting petition if conditions change. R.371.n.2.

QUESTIONS PRESENTED

1. Is a natural gas pipeline company qualified for an exemption under EDPL 206 (A) where a FERC certificate of public convenience is issued "subject to" a particular condition, and that condition fails?

Answer: No. The Appellate Division correctly determined that under those circumstances the company must affirmatively demonstrate the project's public purpose, since "[w]ithout a qualifying federal permit under EDPL 206 (A), petitioner is not entitled to bypass the standard hearing and findings procedure of EDPL article 2." R.373.

2. May a natural gas pipeline company's legal entitlement to initiate condemnation proceedings be divorced from its legal entitlement to the "public use, benefit, or purpose" for which the condemner's land is needed?

Answer: No. The Appellate Division correctly determined that the company's entitlement to initiate condemnation proceedings is tied to a public project, since "only a viable public project can force respondents to surrender their rights in their land". R.373-374.

POINT I

Neither the Natural Gas Act nor FERC confers the power to exercise eminent domain; only a court may do so.

To seek eminent domain under the Natural Gas Act, National Fuel must demonstrate three elements: that it holds a certificate conferring the rights that it seeks to condemn, that it was unable to reach agreement with the landowner on compensation, and that the value of compensation exceeds $3000. 15 U.S.C. § 717f(h). The only element at issue in this case is the first, the scope of the rights conferred under National Fuel's FERC certificate.

The Natural Gas Act does not authorize FERC to confer the power to exercise eminent domain on FERC certificate holders. Rather, FERC may authorize certificate holders to "acquire [private property] by the exercise of the right of eminent domain in the district court . . . or in the state courts", and then only if that proceeding conforms "with the practice and procedure . . . in the courts of the State where the property is situated." 15 U.S.C. § 717f(h). *See also* R.368.n.1. Accordingly, FERC has held that "the Commission itself does not confer eminent domain powers". *Transcontinental Gas Pipe Line Co., LLC*, Order

on Rehearing, 161 FERC ¶ 61,250, at P 31 (2017).

Neither the Natural Gas Act nor New York law authorize immediate possession or "quick-take" of a condemner's land by a FERC certificate holder. Condemnation in federal court is governed by FRCP Rule 71.1 (formerly Rule71A), which "does not include any provisions governing the exercise of immediate possession", but "a gas company with condemnation power under the NGA may apply under Rule 65(a) for a preliminary injunction awarding immediate possession." *E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 824 (4th Cir. 2004). In that circumstance, "[t]he gas company must, of course, establish that it is entitled to equitable relief." *Id.*

New York's eminent domain procedures result in the same outcome. As the Appellate Division noted, "EDPL 206 (A), in short, protects the condemner from duplicative public purpose inquiries; it does not eliminate the condemner's obligation to show a public purpose in the first place." R.368-369.

Thus, contrary to Petitioner, (Pet'r Br., 52), issuance of a FERC certificate triggers the right to utilize federal or New York procedures that govern the exercise of eminent domain. It does not confer the power to exercise eminent domain.

Where an objection is properly interposed by the condemnee, New York requires a court to determine whether a project for which the power of eminent domain is sought is in the public interest. It is therefore a prerequisite for the actual exercise of eminent domain that such power be conferred by a court. *Contra* Pet'r Br., 56 (citing R.258 and n.49 thereto, including *Transcontinental Gas Pipe Line Co.*, 161 FERC ¶ 61,250, at PP 30-34).

Federal district courts reviewing condemnation proceedings involving FERC certificates, (*see* FRCP Rule 71.1, formerly Rule 71A), note that the court's role "is circumscribed by statute." *Columbia Gas Transmission, LLC v. 76 Acres More or Less*, 2014 U.S. Dist. LEXIS 87709, *9 (D. Md. June 27, 2014) (citing 15 U.S.C. § 717r(a) (other citations and quotation marks omitted), *reconsideration denied*, 2014 U.S. Dist. LEXIS 132366 (D. Md., Sept. 22, 2014), *affirmed in part, vacated in part, and remanded on other gnds., sub.nom.*, 701 Fed. Appx. 221, 2017 U.S. App. LEXIS 12547 (4th Cir. 2017). "The district court's role is simply to evaluate the scope of the certificate and to order condemnation of property as authorized in the certificate." *Id.* Specifically, takings of property are limited to "enforcement of the FERC order". *Williams Natural Gas Co. v. City Oklahoma City*, 890 F.2d 255, 265 (10th Cir. 1989).

In evaluating a private party's claim of a substantive entitlement to eminent domain under the Natural Gas Act, the scope of a certificate of public convenience and necessity issued by FERC is to be construed narrowly against the party exercising the power. "This is so because the exercise of the power of eminent domain is in derogation of property rights and may be subject to abuse." *Tennessee Gas Pipeline Co. v. 104 Acres of Land*, 749 F.Supp. 427, 433 (D.R.I. 1990). When a condemnation action is filed pursuant to the Natural Gas Act, landowners may challenge the scope of the FERC certificate. *Steckman Ridge GP, LLC v. An Exclusive Natural Gas Storage Easement Beneath 11.078 Acres, More or Less, in Monroe Township, Bedford County, Commonwealth of Pennsylvania*, 2008 U.S. Dist. LEXIS 71302, *12 (W.D. Pa. 2008). Thus, courts closely scrutinize FERC certificates to evaluate whether the land and rights that the pipeline company seeks to take are within the scope of the certificate. *Tennessee Gas Pipeline Co.*, 749 F. Supp. at 433.

A condemnee, following an adverse decision by an EDPL Article 4 trial court, may challenge the condemnor's argument that is exempt from the EDPL Article 2 notice and public purpose demonstration requirements on appeal, as the Schuecklers did. *County of Monroe v. Morgan*, 83 A.D.2d 777 (4th Dep't 1981).

The *Morgan* court noted that EDPL § 207(C) provides that "a determination that an acquisition is exempt from compliance with this article" can be made only by the Appellate Division. *Id. See also City of Buffalo Urban Renewal Agency v. Moreton*, 100 A.D. 2d 20, 26.n.4 (4th Dep't 1984) ("As a practical matter, the only way the issue [of entitlement to an exemption from the hearing procedures of EDPL article 2] can come before us is by appeal since presenting the question in a separate EDPL 207 review proceeding in the Appellate Division where there have been no hearings or determinations under EDPL article 2 would be impossible.") (citations omitted).

Here, where FERC considered the factors for determining whether the public interest will be served by the proposed acquisition consistent with EDPL § 204(B) and conditioned its affirmative determination on DEC's judgment that the project will adequately protect water quality, when DEC refuses to so conclude, the project sponsor is not entitled to an exemption from the requirement to demonstrate the public purpose or benefit of the project pursuant to EDPL § 206(A). *See Matter of Eagle Creek Land Resources, LLC v. Woodstone Lake Development, LLC*, 108 A.D. 3d 71, 77-78 (3d Dep't 2013).

POINT II

FERC's certificate is conditional, and under the circumstances fails to establish National Fuel's project serves a public purpose.

As a private business entity, National Fuel's substantive entitlement to eminent domain is based solely on FERC's conclusion that the project serves a public purpose if conditions in that agency's Certificate Order are satisfied. R. 144, at ¶198. *See* R. 48 (Verif. Pet. ¶10). FERC has said "the Commission's public convenience and necessity finding is equivalent to a 'public use' determination". *Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250, at P 33. However, there are several conditions that must be met before FERC will authorize National Fuel to commence construction on any part of its project.

FERC issues both unconditional and conditional certificates. *See* 15 U.S.C. § 717f(e) (authorizing FERC to issue conditional certificates). Unconditional certificates authorize construction, conditional certificates do not. According to FERC, a "conditioned certificate" is "an incipient authorization without force or effect." *Ruby Pipeline*, Order Denying Rehearing, 133 FERC ¶61,015, P 18 (2010) (*citing Crown Landing LLC*, 117 FERC ¶ 61,209, P 21.n.27 (2006) ("Conditional Commission orders have been described in the context of constitutional standing

analysis as 'without binding effect.'") (citations omitted)). *See also Delaware Department of Natural Resources and Environmental Control v. FERC*, 558 F.3d 575, 577 (D.C. Cir. 2009) ("*final* approval by the Commission is subject to the condition that documentation of concurrence by the state of Delaware evidencing the consistency of the project with the state's Coastal Management Program be submitted by the company 'prior to construction.' The order contains a parallel condition requiring pre-construction submission of an air quality analysis specifically demonstrating conformity with applicable state implementation plans under the CAA [federal Clean Air Act].") (emphasis in original). *See also id.*, 558 F.3d at 579 ("FERC's order–as it stands now–cannot possibly authorize Crown Landing's project absent the approval of Delaware").

In its offer to compensate the Schuecklers for an easement, National Fuel incorrectly asserts that it (through its affiliate Empire Pipeline) received "FERC's approval to construct and operate the Northern Access 2016 Project." R. 209. In its Petition, National Fuel incorrectly asserts that a FERC Certificate for its project "is in full force and effect", and therefore New York's procedures under EDPL Article 2 do not apply:

> National Fuel is exempt from the requirements of Article 2 of the New York Eminent Domain Procedure Law

> ("EDPL") because National Fuel previously applied to the Federal Energy Regulatory Commission ("FERC") for a Certificate of Public Convenience and Necessity for the Project, in accordance with the requirements of the Natural Gas Act, and was granted such a certificate on February 3, 2017 (the "FERC Certificate").
>
> . . . The FERC Certificate covers the activity at issue here, is in full force and effect, and is incorporated by reference.

R. 47-48 (Verif. Pet., ¶¶9, 13). However, by its terms, FERC's Certificate Order is not in full force and effect until the conditions stated in the Order are satisfied, and until National Fuel so certifies to FERC. *See* R. 69 ("the Commission will grant the requested certificate authorizations, subject to conditions described below."). In addition, Appendix B of the FERC Order includes 27 detailed "environmental conditions" that must be satisfied before FERC will issue approval to commence construction. 158 FERC ¶ 61,145.

The Natural Gas Act states that a FERC certificate is not "in force" until such time as, by its terms, the certificate authorizes construction, acquisition of facilities, and operation of the project:

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or

> acquire or operate any such facilities or extensions thereof, *unless there is in force* with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission *authorizing such acts or operations*.

15 U.S.C. § 717f(c)(1)(A) (emphases added). However, the Certificate Order in this case does not authorize construction, and FERC has not issued any such authorization.

Conditions contained in a FERC Certificate Order are not an afterthought nor are they included for decorative purpose. To the contrary, these conditions are integral to the Commission's statutorily-required finding that a project serves the present or future public convenience. Most Certificate Order Appendix B environmental conditions are preceded by, in bold font: "**Prior to construction, National Fuel shall** . . ." or similar language. *See* 158 FERC at ¶¶ 61,950-61,954, at PP 3-6, 9, 10, 13-15, 18-24, 26). FERC's Certificate Order only authorizes the project "as described and conditioned herein." R. 144, at P 198. *Compare* R. 47 (Verif. Pet. ¶9).

On April 7, 2017, NYSDEC issued to National Fuel a "Notice of Denial" of a federally delegated water quality certification, a state stream disturbance permit, and a state freshwater wetlands disturbance permit. R. 228-240. The first of these

three approvals (a certification that water quality would be protected pursuant to Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341(a)(1)), are among the conditions set forth in the FERC Certificate Order. 158 FERC at 61,952, P 10. *Cf.* R. 145, at P 198(C)(3).

If the FERC certificate is ineffective under the circumstances, the Court is unable to rely on "the issuance of the FERC Certificate" to "satisfy the requirements for a exemption under New York EDPL § 206." R. 48 (Verif. Pet. ¶10). If the FERC Certificate Order finds that "factors bearing on the public interest" require compliance with "the environmental and other conditions in this order", (R. 78-79, at P 32), and the project as proposed does not comply with those conditions, the project cannot be said to serve a public purpose or provide a public benefit. *See* EDPL §§ 204(B)(1), 207(C)(4).

POINT III

Failure of the Clean Water Act § 401 certification makes National Fuel's FERC certificate ineffective.

The Clean Water Act requires every applicant for a federal permit authorizing any action that "may result in any discharge into the navigable waters" of the United States to submit to the permitting agency (here, FERC) a certification from the appropriate state or interstate agency (here, DEC) "that any such discharge will comply" with the Act. 33 U.S.C. § 1341(a)(1). "No license or permit shall be granted until the [water quality] certification required by this section has been obtained or has been waived." *Id. See PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 707 (1994) ("§ 401 of the Act requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters").

Section 401 does not prohibit all "license[s] or permit[s]" issued without state certification, only those that allow the licensee or permittee "to conduct any activity . . . which may result in any discharge into the navigable waters." 33 U.S.C. § 1341(a)(1). However, as DEC's April 7, 2017 decision shows, National Fuel's project entails an "expansive scope and significant impacts to New York's

environmental and natural resources," (R. 229), by among other things "introducing turbidity and sedimentation" into the numerous streams crossed by the project. R. 234. As stated in DEC's denial letter, the agency requires several proposed stream and wetland disturbances to be avoided by utilizing "horizontal directional drilling" or "conventional boring" sufficiently below the stream bed or wetland to avoid any streambed disturbance or degradation of stream water quality. R. 232. National Fuel has said such trenchless pipeline installation methods in 184 such instances is not financially feasible. *Id.* DEC concluded that National Fuel's proposed crossing methods would violate State water quality standards. R. 233.

Among those 184 stream crossings are "eight priority streams" for which NYSDEC insists on trenchless crossing methods, including Dodge Creek and Haskell Creek, trout streams located approximately two miles from the Schuecklers' land to the west and east, respectively. R. 233. A new application, if submitted, will therefore need to realign the pipeline route to avoid those disturbances. In that case, the rights sought for eminent domain before the Court may not be necessary for the project as ultimately proposed.

Because National Fuel declined to employ trenchless crossing methods for even the high priority streams DEC identified, DEC denied a § 401 certification, effectively blocking the Project and rendering FERC's certificate ineffective. A FERC conditional certificate preserves the State's "power to block the project" under Clean Water Act Section 401(a). *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006). Accordingly, "without that [401] certification, FERC lacks authority to issue a license". *Id.*, 460 F.3d at 68. "Section 401 . . . was meant to 'continu[e] the authority of the State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.'" *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 380 (2006) (quoting S. Rep. No. 92-414 (1971), as reprinted in 1972 U.S.C.C.A.N. 3668, 3735 (regarding 33 U.S.C. § 1341(a)(1))).

FERC has affirmed these principles in a case like the one at bar. *See Constitution Pipeline Company*, Order on Petition for Declaratory Order, 162 FERC ¶ 61,014 (2018). In the *Constitution Pipeline* matter, DEC denied a Section 401 water quality certification after FERC issued a conditional certificate of public convenience and necessity, and after Constitution withdrew and resubmitted its application to DEC, at DEC's request. FERC denied Constitution's request to

declare DEC effectively waived its authority to deny the Section 401 certification because the agency took much longer than the maximum one year period for doing so. *See* 33 U.S.C. § 1341(a)(1). The period is calculated from the time the application is submitted, (162 FERC ¶ 61,014, P 23), and less than one year elapsed from Constitution's resubmission to DEC. *Id.*, at P 18. Noting that Constitution is "an NGA section 7(e) certificate-holder", (*id.*, at P 12), but also that the company's Certificate Order "is conditioned, in part, on Constitution obtaining all 'applicable authorizations required under federal law (or evidence of waiver thereof)'", (*id.*, at P 2.n.6), FERC held that "section 401 does not infringe on the state's authority to fashion procedural regulations they deem appropriate or, if necessary, to deny applications for failure to meet such regulations." *Id.*,at P 16.

> A [Section 401] certifying agency remains free to deny the request for certification with or without prejudice within one year if the certifying agency determines that an applicant fails to fully comply with the state's filing requirements or fails to provide timely and adequate information necessary to support granting a water quality certification.

Id., at P 17. Accordingly, DEC properly blocked Constitution's natural gas pipeline project based on Constitution's failure to satisfy DEC's federally delegated water quality regulations. *Cf. id.*, at P 4. The "content" of Constitution's

application submitted to NYSDEC "is not material to our legal analysis." *Id.*, at P 23.

In all material respects the circumstances in *Constitution Pipeline* parallel the facts at bar. As a result of NYSDEC's April 7 action denying a Section 401 certification for National Fuel, the Project's FERC certificate is now ineffective.

POINT IV

National Fuel relies on cases involving pending FERC conditions but these cases do not address the circumstance where certificate conditions fail.

National Fuel points to 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. However, these cases do not involve the actual denial of a federal approval required by FERC, and thus the failure of a substantive condition to an otherwise effective FERC certificate.

In *Columbia Gas Transmission LLC v. 370.393 Acres*, 2014 U.S. Dist. LEXIS 144055 (D. Md. October 9, 2014), litigants opposed the exercise of eminent domain by pointing to the pipeline's failure to comply with conditions,

but the decisions of other agencies as to those conditions was pending, no final decisions denying these required non-FERC approvals had been made. The Court ruled the challenge was appropriately addressed by FERC through its enforcement powers and not relevant to a determination of whether eminent domain could go forward.

In *Tennessee Gas Pipeline Co.*, 749 F. Supp. at 433, the Court found that a FERC condition requiring agency approval of an applicant's mitigation plans could not operate as a "shield" against use of eminent domain "based on the possibility that approval will not be granted".

In *Transcontinental Gas Pipe Line Company, LLC v. Permanent Easement for 2.59 Acres*, 2017 U.S. Dist. LEXIS 43087, *7-8 (M.D.Pa. 2017), a challenge to a FERC-certificated pipeline's exercise of eminent domain was rejected because the landowner collaterally attacked the FERC certificate's finding of public convenience and necessity, which the Court held must be treated as conclusive. Here, however, FERC's finding of public convenience and necessity assumes that National Fuel's project qualifies for and actually obtains a Clean Water Act water quality certification. Thus, the Schuecklers rely on the findings of FERC's Certificate Order: to the extent the FERC Order requires DEC to certify water

quality would be protected in order serve the public purpose, DEC's finding to the contrary means the public interest would not be served. Accordingly, National Fuel is not exempt from the burden of demonstrating it's project's public purpose. *See* EDPL § 206(A).

POINT V

FERC's recent waiver order is neither binding nor does it have any immediate effect.

The dissenting opinion below relies on an order issued by FERC on August 6, 2018, concluding *inter alia* that DEC waived its water quality certification authority under section 401 of the Clean Water Act. R.375. *See* R.261-271. Subsequent to the Appellate Division's decision and order below, FERC denied a request for rehearing of the waiver order from DEC. *Nat'l Fuel Gas Supply Corp. et al.*, 167 FERC ¶ 61,007 (2019).

Petitioner's leading argument before this Court advocates for the dissenting opinion and asserts further that FERC's waiver order "was a change in controlling law", (Pet'r Br., 39), or "changed the federal law governing National Fuel's pipeline project". *Id.*, 41. Accordingly, National Fuel argues that FERC's waiver

order is "binding" and "took effect immediately". Pet'r Br., 28-43 *passim*. However, federal courts have consistently held that FERC lacks the authority to make this determination, because the Clean Water Act delegates that authority exclusively to the federal Environmental Protection Agency, subject to judicial review. *See Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) ("FERC's interpretation of § 401, or any other provision of the CWA, receives no judicial deference under the [Chevron] doctrine . . . because the Commission is not Congressionally authorized to administer the CWA."); *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (FERC's "interpretation of Section 401 is entitled to no deference by the court, because the Environmental Protection Agency, and not the Commission, is charged with administering the Clean Water Act"); *AES Sparrows Pt. LNG v. Wilson*, 589 F.3d 721, 730 (4th Cir. 2009) ("AES's reliance on FERC's regulation interpreting § 401(a)(1)'s one-year waiver period is misplaced given that FERC is not charged in any manner with administering the Clean Water Act.") (citing *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 297 (D.C. Cir. 2003)). Accordingly, "judicial notice . . . of developments that post-date the lower court's decision", (Pet'r Br., 39) (citation omitted), do not resolve the questions presented here.

The precise question addressed in the waiver order (whether DEC waived its authority in this regard) has been brought by Petitioner to the Second Circuit Court of Appeals. On April 21, 2017, National Fuel filed a petition with the Second Circuit challenging DEC's jurisdiction to deny it a § 401 water quality certification on the basis that the agency waived its authority to do so by taking more than one year from the time the company applied, despite an agreement it made with DEC to deem the application submitted later so as to avoid that result. On February 5, 2019, the Second Circuit issued a summary order vacating DEC's denial, and remanding the matter to DEC for a more complete elaboration of its reasons. *Nat'l Fuel Gas Supply Corp.*, 2019 U.S. App. LEXIS 3519. The summary order concludes that "although the Department was not required to adopt FERC's water quality findings, . . . the Department failed to address evidence in the record that supported those findings." *Id.*, at *6-7 (citing *Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79 (2d Cir. 2006) ("*Islander East I*").

The Second Circuit's summary order does not find DEC waived its authority to deny a § 401 water quality certification. In addition, it remains speculative whether the Second Circuit will find DEC's final reasoning supports the denial.

It appears the Second Circuit is following the same path it did in the Islander East Pipeline Co. matter. As it has done in National Fuel's case, (2019 U.S. App. LEXIS 3519), the Second Circuit initially vacated Connecticut Department of Environmental Protection's denial of a § 401 water quality certification to Islander East as arbitrary and capricious and remanded the matter back to the agency for further review. *Islander East I*, 482 F.3d. Upon completing its review, the agency again denied certification. *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 143 (2nd Cir. 2008) ("*Islander East II*"). This time, the Second Circuit found the denial was supported "with reasoned explanations tied to record evidence" and denied the pipeline company's petition for review. *Id.*

The Second Circuit found, as it has in National Fuel's case, that the state environmental agency in the Islander East matter initially "failed both to cite record evidence reasonably supporting its finding of permanent harm [to the environment] . . . , and to address contrary evidence on the point". *Id.*, 525 F.3d at 149. *Compare Nat'l Fuel Gas Supply Corp.*, 2019 U.S. App. LEXIS 3519, at *7 (DEC "failed to address evidence in the record that supported [it's] findings . . . [and] should have addressed such evidence in the record in the Denial Letter") (citing *Islander East I*, 482 F.3d at 88). Accordingly, should DEC on remand

adequately set forth its reasons for the denial, *Islander East II* should control. In *Islander East II* the Second Circuit held that the challenged denial of a § 401 water quality certification is subject to a "deferential standard of review of the record" and, finding "rational support for the choice made by the agency in the exercise of its discretion" the second time around, the court was constrained to deny Islander East's petition for review. *Islander East II*, 525 F.3d at 152.

POINT VI

Because New York has blocked the project, National Fuel lacks standing.

The U.S. Supreme Court has held that "a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" *Lexmark Intn'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (quoting *Allen v. Wright*, 468 U.S. 737 (1984)). Similarly, this Court has held that standing "requir[es] that the litigant have something truly at stake in a genuine controversy." *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 812 (2003), *cert. denied* 540 U.S. 1017 (2003). This is so even though, "[i]n contrast to our approach [in New York], standing in federal

courts rests on both constitutional (see US Const art III, § 2, [1]) and prudential grounds." *Id.*, at n.6.

"Whether derived from the Federal Constitution or the common law, the core requirement [for standing is] that a court can act only when the rights of the party requesting relief are affected . . ." *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 772 (1991). In New York, "existence of an injury in fact" replaces the federal "case or controversy" requirement for standing, but both are governed by "our policy not to render advisory opinions". 77 N.Y.2d at 773. Thus, "the interest or injury asserted [must] fall within the zone of interests protected by the statute invoked" and "at both State and Federal levels, that has evolved into the crucial test for standing in the administrative context". 77 N.Y.2d at 775

This Court has also advised that in New York courts, "the requirement that a petitioner's injury fall within the concerns the Legislature sought to advance or protect by the statute assures that groups whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes." 77 N.Y.2d at 774. Accordingly, this Court should be reluctant to consider academic

questions that may be designed to obtain a favorable decision for purposes other than the case at bar.

National Fuel claims an interest in the Schuecklers' land under the Natural Gas Act, (R. 46 (Verif. Pet., ¶2)), and New York's EDPL, (R. 48 (Verif. Pet., ¶10)), but these statutes confer on the company a legal interest only in a project approved by FERC. As the court below concluded, the company's failure to obtain DEC approval to cross streams and wetlands has removed even a contingent interest in that project. R.372 (citing *Islander East I*, 482 F.3d 79, 91). National Fuel could reapply for DEC's approval, but in that case it is likely the company would need to modify the project alignment as proposed, principally by avoiding nearby Dodge Creek and Haskell Creek, among the eight streams DEC insists require horizontal directional drilling. R. 233. Since the company has taken the position with DEC that such drilling under the streams is not feasible, (R. 232), even if National Fuel reapplied and won DEC's approval, the new application would need to modify the proposed project, and under the modified proposal may not need to cross the Schuecklers' land. These uncertainties have removed from National Fuel any substantive legal entitlement to the project FERC approved.

Recently, a federal district court found that, because DEC had denied a CWA § 401 water quality certification, as has occurred here, a pipeline company holding a conditional FERC certificate of public necessity and convenience lacks standing to seek relief in other matters related to its pipeline project. *Constitution Pipeline Company, LLC*, 2017 U.S. Dist. LEXIS 205902 (N.D.N.Y. 2017). Constitution sought a declaration that state permits not federally delegated to New York could not be required by DEC, as any requirement that state permits be obtained is preempted by the federal Natural Gas Act. DEC denied a § 401 water quality certification for Constitution's pipeline project and, as National Fuel has in the case at bar, the company brought a parallel challenge to the denial of the water quality certification in the Second Circuit Court of Appeals, which was pending. *Id.*, 2017 U.S.Dist. LEXIS 205902, *2.

The Court declined to reach the merits of case because, in its Certificate Order FERC wrote, "[c]onsistent with the language of section 401 of the Clean Water Act, the 2014 [FERC Certificate] Order ensures that until NYSDEC issues the WQC [water quality certification], Constitution may not begin an activity, *i.e.*, pipeline construction, which may result in a discharge into jurisdictional waterbodies." *Id.*, at *12-13. Accordingly, the Court concluded that the pipeline

company could not meet the federal test for standing. Specifically, Constitution could not suffer "actual injury" "because the pipeline project cannot go forward without the CWA 401 WQC that NYSDEC has denied." *Id.*, at *22. Thus, "a finding of injury to [the company] arising from NYSDEC's inaction [in determining state permits] would be based on a speculative chain of possibilities that may never occur." *Id.* Moreover, if (as here) the pipeline company "then submits a new or modified CWA 401 WQC application to NYSDEC, the nature and effect of the ensuing state proceedings cannot be foreseen." *Id.*, at *23. "Accordingly, the Court holds that it lacks subject-matter jurisdiction, because [the pipeline company] has not pleaded an injury in fact and thus lacks standing to assert the claims in the amended complaint." *Id.*, at *26.

Similar circumstances are presented here. To overcome DEC's denial of a Clean Water Act Section 401 water quality certification, the Second Circuit Court of Appeals must conclude that DEC acted improperly when denying National Fuel's water quality certification, or National Fuel must submit a new application that addresses DEC's concerns. *See* DEC's denial letter, at R. 240. Until then, the Schuecklers' holding out, refusing to agree voluntarily to compensation for an

easement, cannot result in actual injury to National Fuel because regardless of the Schuecklers, National Fuel's project as proposed cannot be advanced.

Since a federal case has reached the same conclusion with respect to standing of a FERC-certificated pipeline project under similar circumstances, this Court may decline to deviate from that result. *See Sylcox v. Novello*, 1 A.D. 3d 688 (3d Dep't 2003) (federal Medicaid statute) (citations omitted).

Since it is hypothetical that National Fuel's project, if ever approved, will in fact cross the Schuecklers' property, this case is also moot. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). "A decision on the merits of a moot case or issue would be an impermissible advisory opinion." *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam). *See also Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) ("We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us."); *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehabilitative Servs.*, 225 F.3d 1208, 1217 (11th Cir. 2000) ("When events subsequent to the commencement of a lawsuit create a situation in which the court can no longer give the plaintiff meaningful relief, the case is moot and must be

dismissed."). The jurisdiction of New York courts "extends only to live controversies. We are thus prohibited from giving advisory opinions or ruling on 'academic, hypothetical, moot, or otherwise abstract questions'. Accordingly, where changed circumstances prevent us 'from rendering a decision which would effectually determine an actual controversy between the parties involved,' we will dismiss the appeal or reverse the lower court order and direct that court to dismiss the action." *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 810-811 (2003), *cert. denied* 540 U.S. 1017 (2003) (citations omitted).

Because it is speculative whether National Fuel' pipeline project can be advanced without the modifications DEC demands, and the project as modified may never cross the Schuecklers' land, this case should be dismissed as moot.

CONCLUSION

FERC authorized eminent domain for the Northern Access 2016 project as proposed in National Fuel's application for a FERC certificate if the proposal meets with the approval of other agencies, including DEC. As a result of subsequent action by DEC, the project as proposed cannot be built. If a modified version of the project is proposed, it must comport with DEC's stated concerns,

(*see* R. 231-240), and the modified project will likely be different from the pipeline project FERC considered. In that case, the rights sought for eminent domain before this Court will not be necessary.

No court has determined DEC acted unlawfully. *Compare* Pet'r Br., 54-55. The Second Circuit appears to have found National Fuel's § 401 waiver claim to be without merit. *Nat'l Fuel Gas Supply Corp.*, 2019 U.S. App. LEXIS 3519.

Under the circumstances, National Fuel is unable to point to an effective certificate of public convenience and necessity, authorizing the Court to grant the relief requested. EDPL § 206(A). Without an effective certificate of public convenience and necessity from FERC, National Fuel has failed to articulate how or in what manner the condemnation of the Schueckler's land fosters any benefit to the public. EDPL § 204(B). Because the conditions under which FERC concluded it could issue a certificate of public convenience and necessity can no longer be met, National Fuel's project cannot be said to serve a public purpose. Because its project is blocked, there is no logical way the Schuecklers can inflict harm on the company.

For the reasons stated above, this Court should dismiss National Fuel's Petition, without prejudice to demonstrate in the future that its requested taking would be for a public purpose.

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Humphrey, New York

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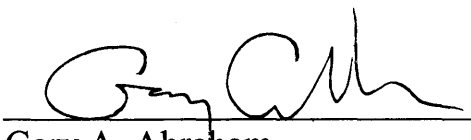
By: 
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