

# 17-1164

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IN THE  
**United States Court of Appeals  
for the Second Circuit**

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NATIONAL FUEL GAS SUPPLY CORPORATION and EMPIRE PIPELINE, INC.,  
*Petitioners,*

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION;  
BASIL SEGGOS, COMMISSIONER, NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION; JOHN FERGUSON, CHIEF PERMIT  
ADMINISTRATOR, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION,

*Respondents.*

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On Petition for Review from the  
New York State Department of Environmental Conservation

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**BRIEF OF *AMICI CURIAE* AMERICAN PETROLEUM INSTITUTE,  
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, NATURAL GAS  
SUPPLY ASSOCIATION, AMERICAN GAS ASSOCIATION, CHAMBER OF  
COMMERCE OF THE UNITED STATES OF AMERICA, AND BUSINESS  
COUNCIL OF NEW YORK STATE, INC. SUPPORTING PETITIONERS AND  
VACATUR**

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## **CORPORATE DISCLOSURE STATEMENT**

**American Petroleum Institute (API)** is a nationwide, not-for-profit association representing companies engaged in all aspects of the oil-and-gas industry. API has no parent companies, and no publicly held company has a 10% or greater ownership interest in API.

**Natural Gas Supply Association (NGSA)** represents integrated and independent companies that produce and market natural gas in the United States. NGSA has no corporate parents and no publicly held company owns a 10% or greater interest in NGSA.

**Interstate Natural Gas Association of America (INGAA)** is an incorporated, not-for-profit trade association representing virtually all of the interstate natural gas transmission pipeline companies operating in the United States. INGAA has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock. Most INGAA member companies are corporations with publicly traded stock.

**American Gas Association (AGA)** is a nonprofit, nonstock association. AGA does not have any parent companies, and no publicly held company has a 10% or greater ownership interest in AGA. AGA does not issue stock.

**The Chamber of Commerce of the United States of America** is the world's largest business federation. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

**The Business Council of New York State, Inc.** is the leading business organization in New York State, representing the interests of large and small firms throughout the State. The Business Council has no parent companies, and no publicly held company has a 10% or greater ownership interest in the Business Council.

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**BRIEF OF *AMICI CURIAE* AMERICAN PETROLEUM INSTITUTE,  
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, NATURAL  
GAS SUPPLY ASSOCIATION, AMERICAN GAS ASSOCIATION,  
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,  
AND BUSINESS COUNCIL OF NEW YORK STATE, INC. SUPPORTING  
PETITIONERS AND VACATUR**

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**INTEREST OF *AMICI CURIAE***

The American Petroleum Institute, Interstate Natural Gas Association of America, Natural Gas Supply Association, American Gas Association, the Chamber of Commerce of the United States of America, and Business Council of New York State, Inc., respectfully submit this brief *amici curiae* supporting Petitioners and vacatur.<sup>1</sup>

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<sup>1</sup> No party's counsel authored any part of this brief, nor have any parties or their counsel contributed money that was intended to fund the preparation or submission of this brief. No person other than *amici*, their members, and their counsel contributed any money that was intended to fund the preparation or submission of

The American Petroleum Institute is the only national trade association that represents all aspects of America's oil-and-natural-gas industry. Its 650 corporate members, from the largest major oil companies to the smallest of independents, come from all segments of the industry. They are producers, refiners, suppliers, marketers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry.

The Interstate Natural Gas Association of America represents the interstate natural-gas-pipeline industry in North America, including virtually all of the interstate pipelines operating in the United States. Its members transport over 95% of the Nation's natural gas through a network of over 200,000 miles of pipelines.

The Natural Gas Supply Association is a trade association that represents integrated and independent companies that produce and market natural gas. Established in 1965, it encourages the use of natural gas within a balanced national energy policy, and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. customers. Members account for approximately 30% of the domestic natural gas production and are shippers on interstate pipelines.

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this brief. Respondents have declined to consent to this brief, but do not oppose its filing.

The American Gas Association (AGA), founded in 1918, represents more than 200 state regulated or municipal natural gas distribution companies. AGA members serve 95% of the 72 million natural gas customers, representing more than 160 million people, in the United States. These customers daily rely on AGA members to provide safe, reliable, and affordable natural gas service as a basic life necessity or for business purposes. AGA and its members are committed to continuing to improve the high level of safety and reliability throughout the natural gas industry, including interstate transmission. Numerous AGA programs and activities focus on the safe and efficient delivery of natural gas to customers.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members before the Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the Nation's business community. The Chamber supports a rational "all of the above" energy policy that ensures Americans have adequate supplies of affordable, domestically produced fuel and power.

The Business Council of New York State is the leading business organization in New York State, representing the interests of large and small firms throughout the state. The Business Council supports the economic benefits from natural-gas infrastructure and plentiful, affordable natural-gas supplies in New York.

*Amici* have a vital interest in this case. As some of the largest producers, transporters, and users of natural gas in the country, many of *amici*'s members are affected by the New York State Department of Environmental Conservation's decision under review, which denied a certification necessary for the construction of an important interstate pipeline. Further, *amici* are troubled by the broader impacts of certification denials like this one on the development of much-needed natural-gas infrastructure. Global natural-gas demand, driven by manufacturing and power generation, is poised to increase by 40% over the next decade, and U.S. supply is expected to increase by 48% over the same period. This enormous growth in shale gas requires new or expanded pipeline capacity. *Amici* thus have a strong interest in ensuring that responsible agencies carry out Congress's policy of promoting the efficient approval of natural-gas pipelines.

## **INTRODUCTION**

The New York State Department of Environmental Conservation (the Department) decision under review upsets the careful federal-state balance struck

by Congress in the Natural Gas Act’s process for approving natural-gas pipeline projects. State water quality certification denials, if not properly scrutinized, could stymie much-needed natural-gas infrastructure growth, potentially depriving consumers, States, and the country of significant economic and environmental benefits. Although individual States play a limited role in the pipeline-approval process by virtue of Section 401 of the Clean Water Act, Congress gave the Federal Energy Regulatory Commission (the Commission or FERC) the principal authority to determine whether a proposed pipeline, including its environmental impacts, is consistent with the “public convenience and necessity.” Allowing individual States to veto FERC-approved projects for reasons that the Commission has already considered and rejected upsets that balance. Unfounded state vetoes also deprive other affected States and the Nation of vitally important infrastructure projects, which benefit both the local and national economies and the environment.

## **ARGUMENT**

### **I. FEDERAL LAW PLACES PRIMARY RESPONSIBILITY FOR EVALUATING THE ENVIRONMENTAL IMPACTS OF A PIPELINE PROJECT WITH FERC, NOT THE DEPARTMENT.**

In the Natural Gas Act and the National Environmental Policy Act (NEPA), Congress gave FERC the lead in evaluating a interstate pipeline’s environmental impacts. The Commission faithfully carried out that role in this case, finding that

the potential impacts of National Fuel’s project—including those raised by the Department—were unfounded or could be mitigated.

**A. The NEPA Process Is Designed To Rigorously Assess The Environmental Impact Of Federal Agency Actions.**

NEPA declares the federal government’s policy “to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C.

§ 4331(a). Thus, the Act makes “the quality of the environment a concern of every federal agency.” *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1088 (D.C. Cir. 1973); *see* 40 C.F.R. § 1501.4.

To that end, NEPA requires federal agencies to prepare “a detailed statement” on “the environmental impact of” any “major Federal action[] significantly affecting the quality of the human environment,” known as an environmental impact statement. 42 U.S.C. § 4332(2)(C)(i). Agencies typically begin the NEPA process by preparing an environmental assessment, which must “provide sufficient evidence and analysis for determining whether” the project will have a “significant impact.” 40 C.F.R. § 1508.9(a). If so, the agency must prepare an environmental impact statement. If not, as here, the environmental assessment’s thorough environmental review ensures the agency’s NEPA compliance. *See id.*

NEPA’s “‘action-forcing’ procedures” ensure “that agencies take a ‘hard look’ at environmental consequences,” and “provide for broad dissemination of relevant environmental information.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Aggrieved parties can challenge the adequacy of an agency’s NEPA review by seeking judicial review of the final agency determination. *E.g.*, *Robertson*, 490 U.S. at 345-346. A decision not to prepare an environmental impact statement is subject to judicial review as well. *E.g.*, *Coalition for Responsible Growth & Res. Conservation v. FERC*, 485 F. App’x 472, 474 (2d Cir. 2012). And on judicial review, the courts carefully examine an agency’s NEPA compliance to ensure that its “duty . . . to consider environmental factors [is not] shunted aside in the bureaucratic shuffle.” *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Okla.*, 426 U.S. 776, 787 (1976); *see Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng’rs*, 524 F.3d 938, 947 (9th Cir. 2008) (courts apply “a strict reading of NEPA’s procedural requirements”). NEPA ensures that environmental effects are thoroughly and rigorously considered—at the federal level.

**B. The Natural Gas Act Makes FERC, Not The Department, The Primary Evaluator Of A Project’s Overall Benefits And Impacts.**

1. Under the Natural Gas Act, “a natural gas company 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.” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 302 (1988); *see* 15 U.S.C. § 717f(c). FERC, in turn, considers a project’s environmental impacts as part of its overall public-interest analysis in deciding whether to grant a certificate. *E.g.*, *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1322-25 (D.C. Cir. 2015). The Commission’s consideration of these factors is guided by its Certificate Policy Statement, which describes FERC’s practice 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) (*Certificate Policy*), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

The Natural Gas Act also makes FERC “the lead agency . . . for the purposes of complying with” NEPA. 15 U.S.C. § 717n(b)(1). In that role, the Commission carefully accounts for the environmental impacts, alternatives, and potential mitigation measures described in an environmental assessment. For example, the Commission may consider a pipeline project’s impact on wetlands and aquatic resources, wildlife, air quality, and noise. *E.g.*, *Corpus Christi Liquefaction, LLC Cheniere Corpus Christi Pipeline, L.P.*, 149 FERC ¶ 61,283, 62,907–908 (2014). The Commission may also consider the safety and reliability of the project, its

cumulative environmental effects, and whether it has a disproportionate impact on people of a certain race, ethnicity, or socioeconomic status. *Id.* at 62,909. FERC’s analysis of these and other factors is based on the environmental assessment, any public comments received, and input from stakeholders. *See id.* at 62,906-907. And at the end of its comprehensive process, FERC may deny approval or condition approval on the adoption of alternatives or mitigation measures. *E.g., id.* at 62,912 (imposing 104 different environmental conditions of approval). A party who is dissatisfied with FERC’s environmental analysis can seek rehearing. 15 U.S.C. § 717r(a); *e.g., Corpus Christi Liquefaction, LLC Cheniere Corpus Christi Pipeline, L.P.*, 151 FERC ¶ 61,098, 61,651 (2015). And if rehearing is denied, an aggrieved party can seek judicial review. 15 U.S.C. § 717r(a); *e.g., Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967-968 (D.C. Cir. 2000).

2. The Commission’s process for approving National Fuel’s project illustrates its exhaustive consideration of a pipeline’s environmental impacts. FERC’s pre-filing environmental review began in July 2014—nine months before National Fuel’s application was formally submitted. *National Fuel Gas Supply Corp.*, 158 FERC ¶ 61145, at \*14 (2017). Commission staff issued a notice of intent to prepare an environmental assessment, which was published in the *Federal Register* and “mailed to interested parties including federal, state, and local officials; agency representatives; environmental and public interest groups; Native

American tribes; local libraries and newspapers; and affected property owners.”

*Id.* The notice described the project and announced two public scoping meetings to be held in New York. *See National Fuel Gas Supply Corporation Empire Pipeline, Inc.; Notice of Intent To Prepare an Environmental Assessment for the Planned Northern Access 2016 Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings*, 79 Fed. Reg. 64,379 (Oct. 29, 2014). And during the pre-filing process, National Fuel adopted several modifications and alternatives to “address stakeholder concerns and/or avoid or minimize environmental impacts.” *National Fuel*, 158 FERC ¶ 61145, at \*15.

After National Fuel filed its application, the Commission issued a supplemental notice of intent, seeking comments on particular details of the project and announcing an additional scoping meeting. *Id.* The Commission repeated this process a third time in late 2015, after National Fuel made changes to its proposal in response to public input, including relocating a compressor station. *Id.* FERC received and reviewed 170 written comments in response to the supplemental notice of intent alone. *Id.*

FERC issued its final, 199-page—not including the appendixes—environmental assessment in July 2016. *Id.* at \*16, \*20. The environmental assessment addressed the modifications made by National Fuel during the pre-filing process and a wide range of other issues, including “geology, soils, water

resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, socioeconomics, air quality, noise, safety, cumulative impacts, and alternatives.” *Id.* at \*15.

The environmental assessment was mailed to interested parties and notice was again published in the *Federal Register*, opening yet another comment period. *Id.* at \*16; National Fuel Gas Supply Corporation, Empire Pipeline, Inc.; Notice of Availability of the Environmental Assessment for the Proposed Northern Access 2016 Project, 81 Fed. Reg. 51,873 (Aug. 5, 2016). Commenters included the Environmental Protection Agency, the Town of Pendleton, several nongovernmental organizations, some individuals, and the Department itself. *National Fuel*, 158 FERC ¶ 61145, at \*16. National Fuel made even more modifications to its proposal in response to the environmental assessment, all of which the Commission approved. *Id.*

In February 2017, the Commission issued a certificate of public convenience and necessity for National Fuel’s project, concluding that the project was in the public convenience and necessity and “not expected to have significant impacts on environmental resources.” *Id.* at \*1, \*15-\*16, \*47. In doing so, it relied on “the information and analysis in the [environmental assessment]” and in the certificate order itself, which responded to comments and addressed the purpose and need for the project, potential alternatives, water resources and wetlands, biological

resources, socioeconomics and visual resources, noise, air quality, historic and archaeological resources, greenhouse gases, indirect impacts of natural gas production, and the cumulative impacts of the project, among other topics. *Id.* at \*16-\*47. The Commission also responded in detail to the Department’s various comments, mentioning it by name 23 times. *Id.*

Based on its thorough environmental analysis and deep-dive consideration of all substantive comments, FERC concluded “that if constructed and operated in accordance with National Fuel’s and Empire’s application and supplements, and in compliance with the environmental conditions . . . of this order, our approval of this proposal will not . . . significantly affect[] the quality of the human environment.” *Id.* at \*47. The Commission imposed 27 separate conditions of approval, including construction procedures, additional environmental surveys, and other mitigation measures. *Id.* at \*49-\*56. And with those conditions in place, FERC found that “[t]he Project will provide benefits to all sectors of the natural gas market,” and that, “based on the benefits that [the Project] will provide; the lack of adverse effects on existing customers . . . and the minimal adverse effects on landowners or communities . . . the public convenience and necessity require approval and certification of the project.” *Id.* at \*7.

The Department did not seek rehearing of the Commission’s approval. *See* 15 U.S.C. § 717r(a).

## II. THE COURT SHOULD CAREFULLY SCRUTINIZE CERTIFICATION DENIALS UNDER SECTION 401 OF THE CLEAN WATER ACT THAT CONFLICT WITH FERC'S APPROVAL OF THE PROJECT.

The Commission's environmental review reflects scrupulous adherence to NEPA's procedural requirements, close consultation with state, local, and other stakeholders, and a careful balancing of environmental concerns against other relevant factors—so much so that the Department chose not to contest it. The Department should not be allowed to collaterally attack it now, through the back door of a Section 401 denial.<sup>2</sup>

A State's exercise of Section 401 certification authority "is not a sovereign state right." *Islander E. Pipeline Co. v. Connecticut Dep't of Env'tl. Prot.*, 482 F.3d 79, 93 (2d Cir. 2006). Rather, "Congress has the authority to regulate discharges into navigable waters under the Commerce Clause, and the State, in this case, exercises only such authority as has been delegated by Congress." *Id.* Moreover, Congress made the Commission the key decision maker regarding interstate pipeline projects, including their environmental impacts. *See* 15 U.S.C. § 717n(b)(1). The Clean Water Act's separate Section 401 procedure, although

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<sup>2</sup> For all the reasons National Fuel explains (Br. 37-73), the Department's denial was arbitrary and capricious regardless of how closely the Court scrutinizes it. Nevertheless, the Court should make clear it will give more exacting scrutiny to decisions that second-guess the Commission's reasoned judgment on the same topics.

applicable to pipeline projects, was not intended to displace the Commission’s judgment as to the public convenience and necessity; after all, the Commission’s decision already contemplates a broad range of environmental considerations. *See supra* pp. 5-12.

A State’s use of its limited Section 401 authority to override the Commission’s judgment thus would upset the balance Congress struck in the Natural Gas and Clean Water Acts. Indeed, the Commission has often noted—including in this case—that, while it “encourages cooperation between interstate pipelines and local authorities . . . this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by the Commission.” *National Fuel*, 158 FERC ¶ 61,145, at \*47.

The Supreme Court has similarly cautioned that giving States an unfettered “veto power” over projects subject to federal approval would “subordinate to the control of the State the ‘comprehensive’ planning which [federal law] provides shall depend upon the judgment of” the Commission. *First Iowa Hydro-Elec. Coop. v. Federal Power Comm’n*, 328 U.S. 152, 164 (1946); *see also California v. FERC*, 495 U.S. 490, 506 (1990) (State efforts to impose stricter environmental requirements “interfere with the Commission’s comprehensive planning authority”) (citation omitted). The same is true here. Although the States properly

play a role in the pipeline approval process under Section 401, they should not be permitted to exercise their authority to reach into areas outside water quality and in a manner that disrupts the Commission's "comprehensive planning authority" under the Natural Gas Act. *California*, 495 U.S. at 506.

Thus, where a state agency denies a Section 401 certification for a FERC-approved project after the Commission has considered and addressed the project's environmental impacts and the agency's comments on those impacts, the Court should carefully scrutinize the decision to ensure that the State's denial rests on water-quality related grounds. *See American Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) ("Section 401(d), reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another."). "More aggressive review under the arbitrary and capricious standard may be appropriate in any number of circumstances," including where the "the nature of [the] problem under agency consideration" or problems in the agency process call for "heightened . . . scrutiny." *Office of Comm'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1425 n.23 (D.C. Cir. 1983); *cf. Smathers v. Multi-Tool, Inc./Multi-Plastics, Inc. Emp. Health & Welfare Plan*, 298 F.3d 191, 199 (3d Cir. 2002) (applying "more penetrating review" to decisions potentially affected by conflict of interest).

A more searching review in cases like this one is also consistent with the Energy Policy Act of 2005, which increased the courts of appeals' authority to police state "order[s] or actions" that "would prevent the construction" of a natural-gas pipeline. 15 U.S.C. § 717r(d)(3); *see Islander E. Pipeline Co.*, 482 F.3d at 94. And it is especially important for the courts to ensure that States do not interfere with the Commission's approval decisions because the Commission itself has no authority to reject a State's Section 401 denial. *See American Rivers*, 129 F.3d at 102.

A higher degree of scrutiny is particularly appropriate where, as here, the state agency participated fully in FERC's environmental review process. The Department repeatedly raised before FERC the very same concerns that it raised again with National Fuel during the drawn-out Section 401 application process, including its objection to the project's route—a matter over which States have no authority. *National Fuel Br.* 14-16, 66-67. As the New York Court of Appeals has explained, nothing in Section 401 or its legislative history "empower[s] [the Department] to deny certification on the basis of broader environmental provisions of New York law or regulation"; thus, allowing the Department "to usurp the authority that Congress reserved for FERC . . . over issues beyond water quality standards . . . is not justified." *Niagara Mohawk Power Corp. v. State Dep't of Env'tl. Conservation*, 624 N.E.2d 146, 150-51 (N.Y. 1993). Congress "maintained

essentially preemptive Federal control by restricting State certification” to the specific grounds enumerated in Section 401. *Id.* at 151.

A State therefore should not be permitted to use Section 401 to reconsider environmental issues beyond the narrow scope of the State’s authority to ensure compliance with water-quality standards. When a State steps outside the narrow boundaries of its Section 401 authority and considers issues beyond water quality, it is no longer exercising its federally delegated powers; it is instead engaging in the sort of “concurrent” environmental review this Court has condemned. *National Fuel Gas Supply Corp. v. Public Serv. Comm’n*, 894 F.2d 571, 579 (2d Cir. 1990) (“Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review.”).

### **III. ALLOWING STATES TO VETO FERC-APPROVED PROJECTS UNDER SECTION 401 WOULD DEPRIVE THE COUNTRY OF THE BENEFITS OF NATURAL-GAS PIPELINE PROJECTS.**

Natural-gas infrastructure projects like National Fuel’s offer significant benefits. The Commission considers these benefits during the pipeline approval process. Allowing the Department to override FERC’s judgment therefore not only undermines the Commission’s authority, it also threatens to impose significant harm on the Nation’s energy infrastructure.

1. To begin with, natural-gas infrastructure development offers important economic benefits, including economic activity related to the

development, operation, and maintenance of infrastructure projects and the many benefits of lower natural-gas prices. Recent economic developments—including abundant supply, low natural-gas commodity prices, and uncertainty in the global economy—underscore the need for additional natural-gas infrastructure. One recent study estimates that capital expenditures on midstream oil-and-gas infrastructure—which includes natural-gas gathering, transport, and storage—will range from \$471 billion to \$621 billion over the next 21 years, with roughly \$267 billion to \$352 billion of that going to natural-gas infrastructure. See INGAA Foundation, *North American Midstream Infrastructure Through 2035: Leaning into the Headwinds* 8-9 (Apr. 12, 2016) (*Headwinds*).<sup>3</sup> Moreover, 264,000 to 329,000 miles of natural-gas gathering and transmission pipeline are projected to be built during the same 21-year period. *Id.* at 10.

Studies like this “clearly demonstrate that much new infrastructure is needed,” with even less optimistic economic projections “requir[ing] significant infrastructure development.” *Id.* at 11. Even now, there are “bottlenecks in some parts of the U.S. where there is insufficient transmission pipeline capacity to move the [natural gas] to market.” IHS Economics, *The Economic Benefits of Natural Gas Pipeline Development on the Manufacturing Sector* 4 (May 2016) (*Economic*

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<sup>3</sup> Available at <https://goo.gl/svwnB8>.

*Benefits*).<sup>4</sup> New York itself has recognized the need for more natural-gas infrastructure development, including “the need to improve the capacity to transport [natural] gas into New York.” 2015 N.Y. State Energy Plan, Vol. 2, Sources, at 87.<sup>5</sup>

Investment in natural-gas infrastructure pays off. Projected infrastructure development over the next two decades could add \$1.50 to \$1.89 trillion to the U.S. Gross Domestic Product and employ 828,000 to 1,047,000 people annually. American Petroleum Institute, *U.S. Oil and Gas Infrastructure Development Through 2035*, at 2 (Apr. 2017).<sup>6</sup> In fact, New York is among the top ten States in total employment from pipeline investment. *Headwinds, supra*, at 12. But these benefits are not limited to companies and States directly involved in pipeline operations. “[T]here are many indirect and induced benefits that occur in many other industries, and a substantial number of service sector jobs are created as a result,” such that “[a]ll sectors and regions of North America benefit from infrastructure development.” *Id.*; see also *Economic Benefits, supra*, at 4 (“[M]any firms across a diverse set of industry sectors are beneficiaries of tens of billions of dollars in capital expenditures and operating and maintenance . . . expenditures.”).

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<sup>4</sup> Available at <https://goo.gl/s9kyRX>.

<sup>5</sup> Available at <http://energyplan.ny.gov/Plans/2015>.

<sup>6</sup> Available at <https://goo.gl/KAABuK>.

These benefits include the lower natural-gas prices that can result from increased capacity. Natural gas has a variety of uses, including electricity generation and residential, commercial, and industrial consumption. *Economic Benefits, supra*, 5-6; see also *Order Approving Electric And Gas Rate Plans*, No. 15-E-0283, 2016 WL 3386590, at \*39 (N.Y. Pub. Serv. Comm’n June 15, 2016) (*PSC Order*) (“[T]he expansion of natural gas service will bring more affordable heat to New York homes and businesses.”). In all of these areas, “lower natural gas prices will result in benefits to consumer purchasing power and confidence, higher profits among businesses, and improvements in cost-competitiveness for domestic manufacturers relative to their international competitors.” *Economic Benefits, supra*, at 4; see *PSC Order*, 2016 WL 3386590, at \*39 (noting that low-cost gas can attract businesses).

Lower natural-gas prices can also lead to lower electricity prices and reduce costs in “energy-intensive industries such as chemicals, metals, food, and refining.” *Economic Benefits, supra*, at 4, 34–37. Likewise, “[m]any industries use [natural gas] as a fuel or a feedstock for production,” *id.* at 5, and cheap and plentiful natural gas is a boon to the growth or resurgence of manufacturing across the country, see *id.* at 21. In 2015 alone, “economic benefits from increased domestic shale gas production and the accompanying lower [natural-gas] prices

include[d] contributions of \$190 billion to real gross domestic product (GDP), 1.4 million additional jobs, and \$156 billion to real disposable income.” *Id.* at 4.

2. Natural-gas projects offer significant environmental benefits, as well. “Burning natural gas for energy results in fewer emissions of nearly all types of air pollutants and carbon dioxide . . . than coal or refined petroleum.” U.S. Energy Information Administration, *Natural Gas Explained: Natural Gas and the Environment*.<sup>7</sup>

From 2011 to 2016, natural gas’s generation share increased from 24.7% to nearly 34%. U.S. Energy Information Administration, *Natural Gas Expected to Surpass Coal in Mix of Fuel Used for U.S. Power Generation in 2016* (Mar. 16, 2016).<sup>8</sup> And 2016 marked the third consecutive year global carbon-dioxide emissions remained flat, despite a growing global economy. International Energy Agency, *IEA Finds CO2 Emissions Flat for Third Straight Year Even as Global Economy Grew in 2016* (March 17, 2017).<sup>9</sup>

The United States was primarily responsible for that achievement, with U.S. carbon-dioxide emissions falling 3%, even as the economy grew by 1.6%, the biggest drop of any country. *Id.* The U.S.’s decrease was “driven by a surge in

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<sup>7</sup> Available at <https://goo.gl/RNueKB>.

<sup>8</sup> Available at <https://goo.gl/bAzdPr>.

<sup>9</sup> Available at <https://goo.gl/MVha5Z>.

shale gas supplies.” *Id.* But these benefits will continue only if natural-gas infrastructure keeps pace with increased demand. *See Economic Benefits, supra*, at 20 (“New pipeline and processing infrastructure expansion will be a key to connecting new supply sources with new and growing sources of demand.”); *see also* North Am. Elec. Reliability Corp., *Potential Reliability Impacts of EPA’s Clean Power Plan*, at viii (May 2016).

3. These national and international benefits show that the harms of allowing the Department to deny FERC-approved pipeline projects go far beyond New York. Congress knew that when it enacted the Natural Gas Act, which is why it appointed the Commission to “make choices in the interests of energy consumers *nationally*.” *National Fuel*, 894 F.2d at 579 (emphasis added). Any other approach would allow “agencies with only local constituencies . . . [to] delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need.” *Id.*

The State of New York may have its own parochial reasons for rejecting the economic and environmental bounty of natural-gas and related infrastructure, preferring that pipelines be routed through some other State’s backyard. Other state governments may feel similarly. But natural-gas facilities “must be built somewhere.” *Minisink Residents for Env’tl. Preservation & Safety v. FERC*, 762 F.3d 97, 100 (D.C. Cir. 2014). And “[d]ecades ago, Congress decided to vest the

Federal Energy Regulatory Commission with responsibility for overseeing the construction and expansion of interstate natural gas facilities.” *Id.* The Department should not be permitted to supplant the Congress’s and FERC’s considered judgment.

## CONCLUSION

For the foregoing reasons, the petition for review should be granted.

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Date: July 7, 2017.

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## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on July 7, 2017. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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