UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CONSTITUTION PIPELINE COMPANY, LLC,

Plaintiff,

-v- **1:16-CV-568 (NAM/DJS)**

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

Defendants.

DELAWARE RIVERKEEPER NETWORK, and MAYA VAN ROSSUM,

Proposed Intervenors.

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Hon. Norman A. Mordue, Senior U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

INTRODUCTION

This lawsuit arises from the efforts of Constitution Pipeline Company, LLC ("Constitution") to obtain the necessary approvals to construct and operate an interstate natural gas pipeline and associated facilities ("pipeline project") originating in Pennsylvania and crossing approximately 100 miles of New York State. On December 2, 2014, Constitution obtained from the Federal Energy Regulatory Commission ("FERC") the Certificate of Public Convenience and Necessity ("FERC Certificate Order") required for such a project by the Natural Gas Act ("NGA"), 15 U.S.C. § 717f(c)(1)(A). The FERC Certificate Order conditioned the commencement of construction upon one or more approvals by defendant New York State Department of Environmental Conservation ("NYSDEC"), in particular a water quality certification ("WQC") required by section 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341.

On August 22, 2013, Constitution submitted a Joint Application to NYSDEC seeking a WQC under section 401 of the CWA ("CWA 401 WQC"), as well as certain permits. In April 2014, Constitution submitted to NYSDEC an application entitled "State Pollution Discharge Elimination System General Permit for Stormwater Discharges from Construction Activity" ("SPDES permit"). On April 22, 2016, NYSDEC issued a letter decision ("Denial Letter") denying the Joint Application insofar as it sought a CWA 401 WQC. NYSDEC did not rule on the permits sought in the Joint Application or on the SPDES permit.

Pursuant to the exclusive jurisdiction provision of the NGA, 15 U.S.C. § 717r(d)(1), Constitution petitioned the Second Circuit for review of the CWA 401 WQC denial. *Constitution Pipeline Company, LLC v. Seggos* (2d Cir. Case No. 16-1568). That petition remains pending before the Second Circuit.

The action presently before this Court stems from NYSDEC's statements in its April 22, 2016 Denial Letter that the "other permits sought by Constitution in the Joint Application remain pending" before NYSDEC, and that Constitution "is obligated to obtain coverage from NYSDEC" under the SPDES permit. In its amended complaint (Dkt. No. 12), Constitution contends primarily that these permit requirements are state law requirements that are preempted by the NGA. Constitution seeks judgment declaring the following: that the permits are preempted; that Constitution is not required to obtain them in order to proceed with the pipeline project; and that Constitution is exempt from or is eligible for coverage under the SPDES permit. Constitution also seeks an injunction prohibiting NYSDEC and two officials thereof, sued in their official capacities, from enforcing compliance with the permit requirements.

Presently pending before the Court is defendants' motion to dismiss Constitution's amended complaint for lack of subject-matter jurisdiction (Dkt. No. 26). *See* Fed. R. Civ. P. 12(b)(1). Also pending before this Court are a discovery motion by Constitution (Dkt. No. 44) and a motion to intervene and for leave to move to dismiss by proposed intervenors Delaware Riverkeeper Network and Maya van Rossum (Dkt. Nos. 29, 31).

STATUTORY BACKGROUND

The NGA, 15 U.S.C. §§ 717-717z, "comprehensively regulates the transportation and sale of natural gas in interstate commerce." *Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 143 (2d Cir. 2008) ("*Islander East*"). The NGA requires any party seeking to construct, extend, acquire, or operate a facility for the transportation or sale of natural gas in interstate commerce to secure a "certificate of public convenience and necessity" from FERC. 15 U.S.C. § 717f(c)(1)(A). FERC must issue such a certificate if it finds the applicant "is able and willing" to comply with the federal regulatory scheme and the proposed project "is or will be required by the present or future public convenience and necessity." *Id.*

§ 717f(e). FERC may attach to the issuance of the certificate "such reasonable terms and conditions as the public convenience and necessity may require." *Id.*

The National Environmental Policy Act ("NEPA") requires all federal agencies to prepare, for every major federal action significantly affecting the quality of the human environment, a detailed statement by the responsible official regarding the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, and related information. 42 U.S.C. § 4332(C). The NGA requires FERC to "ensure that the proposed project complies with all requirements of federal law, including, but not limited to, those established by the Clean Water Act, 33 U.S.C. §§ 1251-1387." *Islander East*, 525 F.3d at 143. Under the NGA, FERC is designated as lead agency for purposes of complying with NEPA and coordinating all applicable federal authorizations. *See* 15 U.S.C. § 717n(b)(1).

Courts consistently interpret the NGA to preempt state regulatory authority within the scope of FERC's jurisdiction. *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *National Fuel Gas Supply Corp. v. Public Serv. Comm'n of the State of N.Y.*, 894 F.2d 571 (2d Cir. 1990). The NGA expressly provides, however, that it does not affect the rights of states under three federal regulatory statutes, one of which is the CWA. 15 U.S.C. § 717b(d)(3).[1]

Under section 401 of the CWA, "[a]ny applicant for a Federal license or permit to conduct any activity, including construction and operation of facilities, which may result in any discharge into the navigable waters shall provide the licensing or permitting agency with a certification from the State"

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[1] The NGA, 15 U.S.C. § 717b(d), provides:

> Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under –
>
> (1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);
>
> (2) the Clean Air Act (42 U.S.C. 7401 et seq.); or
>
> (3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

The Federal Water Pollution Control Act is commonly known as the Clean Water Act. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. Environmental Prot. Agency*, 836 F.3d 492, 501 (2d Cir. 2017).

indicating that any discharge will comply with specified provisions of the CWA. 33 U.S.C. § 1341(a)(1).[2] Further, any certification under CWA 401 shall set forth limitations and requirements necessary to assure that the applicant will comply with specified CWA standards "and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of" section 401. *Id*. § 1341(d). If the state denies certification, no federal license for the construction or operation of facilities which may result in any discharge into the navigable waters shall be granted. *Id.* § 1341(a)(1).

Section 402 of the CWA, "National pollutant discharge elimination system," requires a permit for the discharge of pollutants into a waterbody. *Id*. § 1342. Under CWA 402(b), a state has the authority to administer its own state permitting program under state law upon approval by the United States Environmental Protection Agency ("EPA"). *Id*. § 1342(b). Where EPA has approved a state's permitting laws, the state has primary permitting authority under CWA 402. *Id.* § 1342(c). The parties herein note that NYSDEC administers the state's CWA 402 discharge permitting program pursuant to ECL Article 17.

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[2] Specifically, CWA 401(a)(1) includes the following:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. § 1341(a)(1). Sections 1311 through 1317 concern standards and enforcement regarding water pollution prevention and control, and state involvement therein. *Id*. §§ 1311-1317.

Section 401(d) provides in full:

> Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

Id. § 1341(d).

With respect to the CWA, the Second Circuit explains:

> While the NGA generally preempts local permit and licensing requirements, the Clean Water [Act is] ... notable in effecting a federal-state partnership to ensure water quality ... around the country, so that state standards approved by the federal government become the federal standard for that state. Consistent with this scheme, the [Clean Water Act] require[s] applicants for federal permits to provide federal licensing agencies such as the FERC with certifications from affected states confirming compliance with local standards.

Islander East, 525 F.3d at 143-44 (case citations and footnote omitted). Thus, the NGA does not preempt state authorizations required under the CWA; rather, such state authorizations become federal requirements. *See id.*

FACTUAL BACKGROUND

On June 13, 2013, Constitution applied to FERC under the NGA for a FERC Certificate Order authorizing the pipeline project. On August 22, 2013, Constitution submitted to NYSDEC and the United States Army Corps of Engineers ("USACE") the Joint Application seeking federal permits; permits under New York State Environmental Conservation Law ("ECL") Article 15, Title 5, "Protection of Waters" and "Stream Disturbance," and Article 24, "Freshwater Wetlands" (collectively, "ECL Arts. 15 and 24 permits"); and a CWA 401 WQC. In April 2014, Constitution submitted to NYSDEC a document entitled "State Pollution Discharge Elimination System General Permit for Stormwater Discharges from Construction Activity; Stormwater Pollution Prevention Plan" ("SPDES permit"), pursuant to ECL Article 17, Title 8.

On October 24, 2014, in its role as lead agency under NEPA, 42 U.S.C. § 4332(C), FERC issued a 450-page Final Environmental Impact Statement ("FEIS") regarding the project. The FEIS concluded that any adverse environmental impacts that would result from the pipeline project "would be reduced to less than significant levels with the implementation of Constitution's ... proposed mitigation and the additional measures recommended by staff in the [FEIS]."

On December 2, 2014, FERC issued the FERC Certificate Order for the project, finding that the Project is in the "public convenience and necessity." 15 U.S.C. § 717f(c). In the introductory portion of the FERC Certificate Order, FERC states:

> [A]s as set forth in the environmental discussion below, we agree with the conclusion in the Environmental Impact Statement (EIS) that, if constructed and operated in accordance with applicable laws and regulations, the projects will result in some adverse environmental impacts, but that these impacts will be reduced to less-than-significant levels with the implementation of Constitution's ... proposed mitigation and staff's recommendations[.]

The "Conclusion" section of the FERC Certificate Order includes the following:

> 1. We have reviewed the information and analysis contained in the final EIS regarding potential environmental effects of the Constitution Pipeline ... Project[]. Based on our consideration of this information and the discussion above, we agree with the conclusions presented in the final EIS and find that the projects, if constructed and operated as described in the final EIS, are environmentally acceptable actions. We are accepting the environmental recommendations in the final EIS and are including them as conditions in the appendix to this order.
> 2. The Commission orders:
>
> > (A) A certificate of public convenience and necessity is issued authorizing Constitution to construct and operate the Constitution Pipeline Project, as described in this order[.]
> > ***
> > (E) The certificate authority issued in Ordering Paragraph[] (A) ... shall be conditioned on the following:
> > ***
> >
> > > (3) Applicant['s] compliance with the environmental conditions listed in the appendix to this order.

The Appendix to the FERC Certificate Order, headed "Environmental Conditions," includes the following:

> 8. Prior to receiving written authorization from the Director of OEP [Office of Energy Projects] to commence construction of their respective project facilities, the Applicants shall file documentation that they have received all applicable authorizations required under federal law (or evidence of waiver thereof).

Neither Constitution nor defendants sought rehearing of the FERC Certificate Order.

A number of opponents of the pipeline project requested rehearing of the FERC Certificate Order, raising, *inter alia*, challenges to the adequacy of FERC's environmental analysis. Neither Constitution nor defendants requested rehearing. On January 28, 2016, FERC issued the Rehearing Order upholding the FERC Certificate Order and denying the rehearing applications. In its Rehearing Order, FERC rejected the argument that it should not have approved the project before Constitution obtained the CWA 401 WQC from NYSDEC. In this respect, FERC wrote:

> Consistent with the language of section 401of the Clean Water Act, the 2014 [FERC Certificate] Order ensures that until NYSDEC issues the WQC, Constitution may not begin an activity, i.e., pipeline construction, which may result in a discharge into jurisdictional waterbodies. Consequently, there can be no adverse impact on New York State jurisdictional waters until the Commission receives confirmation that NYSDEC has completed its review of the project under the Clean Water Act and issued the requisite permits.

With respect to the CWA 402 national pollutant discharge permit, the Rehearing Order stated:

> The final EIS explains that Constitution would seek National Pollutant Discharge Elimination System permits as part of its project. These permits would be reviewed by ... the New York State Department of Environmental Conservation (NYSDEC).

Neither Constitution nor defendants sought judicial review of the Rehearing Order.

On April 22, 2016, NYSDEC issued a letter ("Denial Letter") denying Constitution's application for a CWA 401 WQC. In footnote 3, the Denial Letter stated: "The other permits sought by Constitution in the Joint Application remain pending before the Department and are not the subject of this action." On page 2, the Denial Letter stated: "Additionally, Constitution is obligated to obtain coverage from NYSDEC under the SPDES Stormwater General Permit for Construction Activities ... and prepare a Stormwater Pollution Prevention Plan... prior to Project construction."

Constitution challenges the Denial Letter in two proceedings. On May 16, 2016, Constitution filed a petition with the Second Circuit seeking review of NYSDEC's denial of the CWA 401 WQC.[3] *Constitution Pipeline Company, LLC v. Seggos* (2d Cir. Case No. 16-1568). In that petition, Constitution argues that NYSDEC waived the requirement of a CWA 401 WQC by not acting within the CWA's one-year time frame and that the denial was arbitrary, capricious and unsupported by the record.

In the instant action, also filed on May 16, 2016, Constitution challenges the statements in the Denial Letter that other permits remain pending and that Constitution is required to obtain coverage under the SPDES permit. In the amended complaint (Dkt. No. 12), Constitution seeks a declaration that it is not

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[3] The NGA establishes "original and exclusive jurisdiction" in the United States Courts of Appeals over orders or actions of a "State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval ... required under federal law, other than the Coastal Zone Management Act of 1972." 15 U.S.C. § 717r(d)(1).

required to obtain the ECL Arts. 15 and 24 permits, which, according to footnote 3 of NYSDEC's Denial Letter, "remain pending." Constitution argues that these requirements are based solely on state law and are thus preempted by the NGA. Constitution also seeks a declaration that it is exempt from the SPDES permit requirement or is otherwise not required to obtain it.

Presently pending before the Court is NYSDEC's motion (Dkt. No. 26) to dismiss Constitution's amended complaint (Dkt. No. 12), primarily on the ground of lack of subject-matter jurisdiction. Also pending before this Court are a discovery motion by Constitution (Dkt. No. 44) and a motion to intervene and for leave to move to dismiss by Maya K. van Rossum and the Delaware Riverkeeper Network (Dkt. Nos. 29, 31).

As set forth below, the Court holds that Constitution lacks standing. Accordingly, the Court dismisses this action for subject-matter jurisdiction and does not reach the other issues.

AMENDED COMPLAINT

The first amended complaint (Dkt. No. 12) asserts federal question jurisdiction under 28 U.S.C. § 1331, based on the NGA and the CWA. Essentially, Constitution seeks declaratory relief from NYSDEC's position, asserted in its April 22, 2016 Denial Letter, that Constitution is required to obtain from NYSDEC the permits it sought in its Joint Application as well as the SPDES permit. Constitution asserts that NYSDEC has "improperly reserved for Defendants the 'right' to later act on various New York State Permits which are preempted by Second Circuit law ... and exempted under the CWA."

The first cause of action seeks a declaration that NYSDEC's permitting requirements related to freshwater wetlands, water withdrawal, excavation and fill in navigable waters, and stream disturbance are preempted by the NGA. These are the ECL Arts. 15 and 24 permits that Constitution sought, along with a CWA 401 WQC, in the Joint Application. Footnote 3 of the Denial Letter states NYSDEC's position that these permit applications "remain pending." Constitution avers that it included the permit applications in its Joint Application only because NYSDEC repeatedly advised that it would not process the CWA 401 WQC application without them; that Constitution applied for the permits in compliance with FERC's policy of encouraging interstate pipeline companies to cooperate with state agencies; and that it did so

"[w]ithout prejudice to its position that the State Permits were preempted by the NGA." In this respect, Constitution points to a letter it submitted to NYSDEC with the Joint Application in which it asserted "an express reservation of rights that the NGA preempts New York permitting and procedural requirements." Constitution states that, before issuing the FERC Certificate Order, FERC reviewed reports submitted by Constitution that "comprehensively addressed the issues that NYSDEC attempts to raise through its state regulations and permitting scheme," and argues that by requiring the permits, NYSDEC "is attempting to regulate the same issues directly and exclusively regulated by FERC." Constitution contends: "The State Permits are preempted by federal law, and Defendants' ongoing failure to recognize this creates an actionable case or controversy." Constitution requests a declaration that the ECL Arts. 15 and 24 permitting requirements are preempted by the NGA.

Constitution's second cause of action challenges the statement on page 2 of NYSDEC's Denial Letter that Constitution is required to apply to NYSDEC for coverage under the SPDES permit and to prepare a stormwater pollution prevention plan. Constitution argues that such a permit is exempted under section 402(*l*)(2) of the CWA, 33 U.S.C. § 1342(*l*)(2); that, since the SPDES permit is exempted under federal law, any requirement that Constitution obtain the permit is necessarily based on state law and is thus preempted; and, in the alternative, that Constitution has complied with the requirements and is eligible for coverage under the SPDES permit. In this cause of action, Constitution seeks a declaration as follows:

> that Constitution is exempt from NYSDEC's SPDES General Permit requirement, as the permit is not required under Section 402 of the CWA, or in the alternative that NYSDEC's requirement that Constitution obtain coverage under the SPDES permit be preempted as a requirement based on state law, or in the alternative, and to the extent Constitution is not exempt from NYSDEC's SPDES General Permit requirement or that the requirement is not preempted, Constitution is eligible for coverage under the SPDES General Permit.

In the "Wherefore" clause of the amended complaint, Constitution seeks judgment as follows:

> (a) declaring that that the State Permits are preempted by federal law;
> (b) declaring that Constitution is not required to obtain the State Permits in order to proceed with construction of the Interstate Project;
> (c) enjoining Defendants from seeking to enforce compliance with State Permit requirements;
> (d) declaring that Constitution is exempt from NYSDEC's State Pollutant Discharge Elimination System (SPDES) General Permit pursuant to Section

> 402(*l*)(2) of the Clean Water Act, 33 U.S.C. § 1342(*l*)(2); or in the alternative, to the extent Constitution is not exempt from NYSDEC's SPDES General Permit requirement or that the requirement is not preempted, Constitution is eligible for coverage under the SPDES General Permit;
> (e) maintaining jurisdiction over this action to address any future actions by Defendants inconsistent with the Court's orders; and
> (f) awarding damages, attorneys' fees, costs, and such further relief as the Court deems appropriate and just.

DISCUSSION

Defendants move to dismiss the amended complaint on various grounds, one of which is that Constitution lacks standing and that therefore the Court lacks subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Article III of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const., Art. III, § 2. The doctrine of standing gives meaning to these constitutional limits by "identify[ing] those disputes which are appropriately resolved through the judicial process." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). With respect to standing, the Supreme Court has stated:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61 (citations, internal quotation marks, and alterations omitted). "The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements." *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1547 (2016).

When a court can decide a Rule 12(b)(1) motion solely on the allegations of the complaint and the undisputed documents attached, incorporated, and integral thereto, the plaintiff has no evidentiary burden. *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016). In such a case, the court's task is to determine whether the pleading and documents "allege facts that affirmatively and plausibly suggest that [the plaintiff] has standing to sue." *Id.*; *accord Selevan v. New York Thruway Auth.*, 584 F.3d 82, 88 (2d

Cir. 2009) (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)). "[T]he plaintiff must clearly allege facts demonstrating each element." *Spokeo*, 136 S.Ct. at 1547 (internal quotation marks and alteration omitted). The court must construe the complaint liberally, accepting all factual allegations as true, and drawing all reasonable inferences in the plaintiff's favor. *Selevan*, 584 F.3d at 88.

The first element for Article III standing, an injury in fact, "need not be actualized." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008). "A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." *Id.* As the Second Circuit recently explained:

> In order to suffice for Article III standing, an injury in fact must not only be concrete and particularized, it must also be "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548 (internal quotation marks and citation omitted). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is *certainly* impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotation marks and citation omitted; emphasis in original). The Supreme Court has therefore "repeatedly reiterated that threatened injury must be clearly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient." *Id*. (internal quotation marks and citations omitted; emphasis in original). A "speculative chain of possibilities does not establish that [the] injury [alleged] is certainly impending[.]" *Id*. at 1150.

Ross v. AXA Equitable Life Ins. Co., 2017 WL 730266, at *3 (2d Cir. Feb. 23, 2017).

The second element requires that the injury "be fairly traceable to the challenged action of the defendant[.]" *Lujan*, 504 U.S. at 560 (internal quotation marks and alterations omitted). This "traceability" requirement means that "the plaintiff must demonstrate a causal nexus between the defendant's conduct and the injury." *Chevron Corp. v. Donziger*, 833 F.3d 74, 121 (2d Cir. 2016). The third element – redressabililty – requires that it be that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted).

In the instant case, the Court decides defendants' Rule 12(b)(1) motion solely on the allegations of the amended complaint and the documents integral thereto, none of which are disputed. After careful consideration, and construing the allegations and documents most favorably to Constitution, the Court

finds that Constitution has not alleged facts that affirmatively and plausibly suggest that it has standing to sue. Specifically, Constitution has not plausibly pleaded injury in fact, that is, it has not pleaded either actual injury or a threatened injury that is "certainly impending." *Ross*, 2017 WL 730266, at *3. Rather, as discussed below, Constitution merely alleges possible future injury.

NYSDEC has not denied the permits or refused to issue them. It simply has not yet acted to grant or deny them. The fact that NYSDEC has not yet acted on the permits does not inflict actual injury on Constitution, because the pipeline project cannot go forward without the CWA 401 WQC that NYSDEC has denied. Nor does NYSDEC's inaction on the permits threaten imminent injury to Constitution. To the contrary, a finding of injury to Constitution arising from NYSDEC's inaction would be based on a speculative chain of possibilities that may never occur.

Whether harm may ensue from the fact that NYSDEC has not yet acted on the permits depends in part on the outcome of Constitution's pending petition before the Second Circuit challenging NYSDEC's denial of the CWA 401 WQC. *See Constitution Pipeline Company, LLC v. Seggos* (2d Cir. Case No. 16-1568). In its petition, Constitution requests "a remand to NYSDEC with instructions requiring NYSDEC to notify USACE that NYSDEC has waived CWA 401 certification requirements or a remand requiring NYSDEC to issue a CWA 401 WQC consistent with the certification prepared and ready for final signature in July/August 2015." If the Second Circuit grants the relief requested and remands with directions to NYSDEC to issue the CWA 401 WQC without further state proceedings, any harm arising from the fact that NYSDEC has not yet acted on the permits will be obviated if NYSDEC then promptly grants the permits. If the Second Circuit remands for additional proceedings, the effect of such proceedings on the currently-pending permit applications cannot be foreseen. For example, the Second Circuit ruling could result in revisions in the pipeline project such that revisions in the CWA 401 WQC and permit applications would also be needed. In such a case, NYSDEC's inaction on the currently-pending applications would have no impact.

On the other hand, if the Second Circuit denies relief to Constitution, the absence of the permits can cause no harm, because the pipeline project cannot go forward without the CWA 401 WQC. If

Constitution then submits a new or modified CWA 401 WQC application to NYSDEC, the nature and effect of the ensuing state proceedings cannot be foreseen. For example, since Constitution combined the present ECL Arts. 15 and 24 permit applications with the CWA 401 WQC application in the Joint Application, the submission of a new or modified CWA 401 WQC application would presumably necessitate the submission of new or modified permit applications. Alternatively, Constitution might decline to seek the permits on the ground that they are preempted by the NGA or are otherwise not required. In these scenarios, the fact that NYSDEC has not acted on the present permit applications would cause no actual or imminent injury.

Further, it is unclear what would be the outcome if NYSDEC eventually denies, refuses to act upon, or delays in acting on the permit applications, either after a Second Circuit decision granting relief to Constitution or after further proceedings if the Second Circuit denies relief. If, as a result of NYSDEC's denial, refusal to act, or delay in acting on the permit applications, Constitution is denied permission to begin construction, or some necessary federal approval is denied or withheld, Constitution would almost certainly have standing to seek appropriate relief. *See, e.g., Weavers Cove Energy, LLC v. Rhode Is. Coastal Res. Mgmt. Council* ("*Weavers Cove*"), 589 F.3d 458, 467-68 (1st Cir. 2009). On the present undisputed record, however, the amended complaint does not allege an actual or imminent injury, but rather a "purely hypothetical case in which the projected harm may ultimately fail to occur." *Baur v. Veneman*, 352 F.3d 625, 632 (2d Cir. 2003) (citing *Lujan*, 504 U.S. at 564-65, n.2).

Weavers Cove, cited by Constitution in support of its contention that it has standing, is inapposite. 589 F.3d at 467-68. In *Weavers Cove*, the plaintiff, a sponsor of a natural gas facility, sought judicial relief from a state agency's explicit refusal to take action for years on certain of the plaintiff's applications. The state agency's refusal to act stymied the plaintiff's efforts to satisfy a condition for FERC approval for the project and prevented FERC and other federal agencies from exercising their authority. The *Weavers Cove* court held that the state agency's refusal to act had a "determinative or coercive effect" on third parties – *i.e.*, the federal agencies – causing the plaintiff to sustain "a concrete and particularized injury in fact" supporting standing. *Id*. at 467-68. In contrast, in the instant case, as

discussed above, NYSDEC's position in the Denial Letter that the ECL Arts. 15 and 24 permit applications remain pending and the SPDES permit is required, has had no effect on Constitution or any other entity, and may never have any effect. For the same reason, the conclusion by the *Weavers Cove* court that the state agency's subjection of the plaintiff in that case to "a preempted state law" caused the plaintiff to suffer "concrete injury" is inapplicable herein, because any such potential injury to Constitution is not actual or imminent, but rather conjectural and hypothetical.

Accordingly, the Court holds that it lacks subject-matter jurisdiction, because Constitution has not pleaded an injury in fact and thus lacks standing to assert the claims in the amended complaint. The case must be dismissed without prejudice under Fed. R. Civ. P. 12(b)(1). The Court does not reach any other issue raised in these motions, and nothing in this Memorandum-Decision and Order is intended to suggest any view the Court might hold regarding any other issue. Because it lacks subject-matter jurisdiction, the Court does not address Constitution's discovery motion or the motions to intervene and for leave to move to dismiss by the proposed intervenors.

CONCLUSION

It is therefore

ORDERED that defendants' motion (Dkt. No. 26) to dismiss the amended complaint for lack of subject-matter jurisdiction is granted, and the case is dismissed without prejudice; and it is further

ORDERED that plaintiff's discovery motion (Dkt. No. 44) is denied without prejudice; and it is further

ORDERED that the motions to intervene and for leave to move to dismiss by proposed intervenors Delaware Riverkeeper Network and Maya van Rossum (Dkt. Nos. 29, 31) are denied without prejudice.

IT IS SO ORDERED.

Date: March 16, 2017
Syracuse, New York

Norman A. Mordue
Senior U.S. District Judge