IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO, *EX REL.* MICHAEL DEWINE OHIO ATTORNEY GENERAL Plaintiff, v. ROVER PIPELINE, LLC, *et al.*, Defendants.	Case Number: 2017cv02216 JUDGE KRISTIN G. FARMER **MOTION TO DISMISS OF DEFENDANTS ROVER PIPELINE LLC AND MEARS GROUP, INC.**

Now comes Defendants, Rover Pipeline LLC and Mears Group, Inc., through counsel, and hereby move this Court, pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure, to dismiss Plaintiff's Third Amended Complaint for failing to state a claim upon which relief can be granted. The reasons for this Motion are more fully stated in the Memorandum in Support, which is attached hereto and incorporated herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing Motion to Dismiss was served on all counsel of record on this 10th day of September, 2018 via U.S. mail and e-mail.

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STATE OF OHIO, *EX REL.* MICHAEL DEWINE OHIO ATTORNEY GENERAL Plaintiff, v. ROVER PIPELINE, LLC, *et al.*, Defendants.	Case Number: 2017cv02216 JUDGE KRISTIN G. FARMER **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OF DEFENDANTS ROVER PIPELINE LLC AND MEARS GROUP, INC.**

DEFENDANTS ROVER PIPELINE LLC'S AND MEARS GROUP, INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulatory Materials

Other Authorities

INTRODUCTION

The Court should dismiss the Third Amended Complaint for failure to state a claim upon which relief can be granted. Plaintiff, the State of Ohio, challenges the manner of construction for the now-completed Rover Pipeline, a natural gas pipeline that spans four States. Specifically, the State seeks penalties and injunctive relief for alleged state-law violations stemming from discharges of drilling fluid and other materials. Those discharges are inevitable and foreseeable, which is why the parties planned for them in this construction project, just as they do in similar projects. And jurisdiction over the Pipeline's construction—including the likelihood of discharges such as those at issue here—is vested by federal law in the Federal Energy Regulatory Commission ("FERC" or "the Commission"). Federal law allows States to play a limited role in the oversight of the construction of interstate natural gas pipelines, but Ohio waived its opportunity to take part here for two independent reasons.

First, the Clean Water Act granted Ohio a full year to act on Rover Pipeline LLC's ("Rover's") request for a certification that the pipeline would comply with Ohio's water-quality standards. That one-year window was the State's chance to (i) specify whatever conditions would be needed for the construction to comply with its water-quality standards, and (ii) list those conditions in the State's Water Quality Certification. Because Ohio failed to do these things within the federally imposed one-year deadline, the power to impose conditions and enforce environmental requirements on construction of the Rover Pipeline reverted fully to FERC. Ohio is not allowed to circumvent this waiver by waiting until construction is underway to invoke its water quality standards and other state-law requirements in a civil lawsuit.

Second, despite Ohio EPA's role as a state agency that actively cooperated with FERC in setting environmental requirements and conditions for construction of this pipeline under the Natural Gas Act, the State did not ask FERC to include, in FERC's certificate approving the

pipeline, the various conditions that are at issue in Counts 1, 3, 4 and 5. Because Ohio failed to take this action when it was required to do so—*i.e.*, when FERC was preparing Rover's certificate of public convenience and necessity under the Natural Gas Act—the State's effort to enforce those conditions after the fact is preempted by federal law. This is so regardless of whether, as noted in the previous paragraph, Ohio waived its authority to impose conditions on the construction of the pipeline by disregarding the Clean Water Act's one-year time limit for granting or denying a Water Quality Certification request.

Ohio's two separate failures did not leave construction of the pipeline unsupervised. Far from it. FERC's publicly available docket for this project makes abundantly clear that the Commission took seriously the responsibilities that Ohio waived. FERC closely and actively monitored Rover's compliance with environmental conditions that FERC imposed only after it had completed its painstaking review and analysis of the pipeline's potential environmental impacts. And FERC gave the State a voice in the process despite Ohio's waivers. Not only did Ohio have ample opportunity to participate in the assessment and mitigation of environmental impacts, FERC even paused construction at Ohio's urging to address the very environmental concerns that Ohio asserts in its Third Amended Complaint. There is no regulatory gap for state law to fill through this lawsuit, despite Ohio's suggestion to the contrary.

Rover has also worked cooperatively with Ohio directly. This is evidenced by the company's extensive work preparing and proposing drafts of nearly a dozen construction-related plans to address various environmental issues—plans that Ohio *requested and approved*, and that Rover then voluntarily implemented, all in an effort to further protect waters in Ohio.

This pipeline's construction is now complete. All along the way it was built in accordance with comprehensive environmental conditions backed by the force of federal law. Among other

things, FERC—the agency supervising those conditions—has substantial civil-penalty enforcement authority. Rather than dispute any of these points, Ohio instead insists that it too can assert jurisdiction with its own set of overlapping environmental conditions and requirements. But Ohio simply does not have that jurisdiction. After Ohio's waivers, the law placed that jurisdiction with FERC instead. The Third Amended Complaint should therefore be dismissed.

BACKGROUND

Ohio seeks fines from, and injunctive relief against, defendants for alleged violations of the State's environmental laws during construction of an interstate natural gas pipeline. Two federal statutes circumscribe the State's power to bring an action in this context: the Natural Gas Act (as amended in 2005) and the Clean Water Act. Those statutes and other relevant background are set forth below.

1. Rover Applied To The Federal Energy Regulatory Commission Pursuant To FERC's Exclusive Authority, Under The Natural Gas Act, To Regulate The Construction And Operation Of Interstate Natural Gas Pipelines.

The process for building the Rover Pipeline officially began more than four years ago, on June 27, 2014, when FERC staff approved Rover's use of the Commission's pre-filing process for review of the proposed project. Ex. B, *In re Rover Pipeline LLC*, 158 FERC ¶ 61,109, at ¶ 151 (2017) (FERC Certificate).[1] Half a year later, on February 20, 2015, Rover filed its application

[1] All exhibits to this motion are identical to those filed in May 2018 in support of Rover's and Mears Group's Motion to Dismiss the Second Amended Complaint. This Court's July 17, 2018 Order permits the use of those exhibits for this Motion without the need to file them a second time. The FERC Certificate is included as Exhibit B. It is also available through Westlaw (at 2017 WL 465966) and on the FERC Docket under docket number CP15-93 (as "issuance" 20170202-3075). FERC Docket materials are publicly available on FERC's website, in the "eLibrary" under "Documents & Filings," at https://www.ferc.gov/docs-filing/elibrary.asp. Each docket entry (usually identified as a "submittal" or an "issuance") begins with the date of filing or docketing in the format YYYYMMDD. For example, the issuance just mentioned (20170202-3075) was docketed on February 2, 2017.

with FERC for authorization to construct and operate the pipeline in four States: Ohio, Michigan, West Virginia, and Pennsylvania.[2]

Rover's application was made—and FERC was authorized to act upon it—pursuant to Section 7 of the Natural Gas Act (or "NGA"), 15 U.S.C. 717f, a statute giving FERC "exclusive jurisdiction" over interstate facilities such as Rover. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01, 306, 108 S.Ct. 1145, 99 L.Ed.2d. 316 (1988) ("The NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale," including "authority over the rates and facilities of natural gas companies[.]"); *see also Del. Riverkeeper Network v. Sec'y Penn. Dep't of Envtl. Prot.*, 833 F.3d 360, 367 (3d Cir.2016) ("Section 7 of the Natural Gas Act grants FERC the power to authorize the construction and operation of interstate transportation facilities."). In giving FERC plenary authority over *natural gas* pipelines, Congress has put FERC and that type of pipeline in a category of their own. *See, e.g.*, Brandon J. Murrill, Cong. Res. Serv., Pipeline Transportation of Natural Gas and Crude Oil: Federal and State Regulatory Authority 7-8 (2016), https://fas.org/sgp/crs/misc/R44432.pdf (noting the "contrast" between "siting review of proposed interstate natural gas pipelines under the NGA" and the absence of a similar federal law governing oil pipelines).

When FERC authorizes construction of a natural gas pipeline through a "certificate of public convenience and necessity" under Section 7 of the NGA, it can (and routinely does) include specific conditions. 15 U.S.C. 717f(e) (authorizing FERC to "attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require") (referred to here as the "FERC Certificate").

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[2] Ex. A, Section 7(c) Application, *Rover Pipeline LLC*, FERC Docket CP15-93, submittal 20150220-5241.

For example, FERC requires the applicant to submit information about all of the project's potential environmental impacts. 18 C.F.R. 157.14(a)(6-a). FERC also consults with other agencies, both federal and state, about these possible environmental impacts so it can devise conditions that will avoid or minimize adverse impacts to the extent practicable. And FERC includes in its Order granting a Certificate the requirement that the project proponent obtain all legally required permits from other agencies. *See, e.g., Berkshire Envtl. Action Team Inc. v. Tenn. Gas Pipeline Co.,* 851 F.3d 105, 107-08 (1st Cir.2017).

As described further below, FERC followed its established process here, taking a "hard look" at potential environmental impacts pursuant to the National Environmental Policy Act. *See* Ex. B (FERC Certificate) ¶ 277 ("Under NEPA, we are required to take a 'hard look' at the environmental impacts of the proposed project and we have done so."). FERC also ordered close monitoring of the construction from start to finish to help ensure compliance with the FERC Certificate's 45 environmental conditions. *See, e.g., id.* at Appendix B, ¶ 7 (requiring Rover to employ at least one environmental inspector per construction spread responsible for, among other things, "documenting compliance with the environmental conditions of the order"); *id.* at Appendix B, ¶ 9 (separately requiring Rover to document compliance).

One of those 45 specific environmental conditions, in particular, broadly implemented FERC's plenary jurisdiction over construction of this pipeline. It gave FERC's Office of Energy Projects "authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation" including "modification of conditions of the order" and "design and implementation of any additional measures deemed necessary (including stop-work authority) to ensure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact

resulting from construction and operation" of the pipeline. Ex. B at Appendix B, ¶ 2. At Ohio's urging, FERC used that stop-work authority in May 2017 to halt construction of the pipeline until Rover established, to the satisfaction of FERC, that construction could continue to proceed in an environmentally sound manner. *See, e.g.*, Ex. C, FERC Docket CP15-93, issuance 20170510-3009. FERC also has sizeable civil penalty authority for violations of its rules and orders. *See* 15 U.S.C. 717t-1(a) (up to $1,000,000 per violation per day).

In 2005, Congress removed any doubt that FERC has the lead role in cases like this and, moreover, that States must act in a timely manner if they wish to participate by applying their environmental laws to a FERC project. The 2005 Act designated the Commission as "the lead agency for the purposes of coordinating all applicable Federal authorizations" for natural gas pipelines, "and for the purposes of complying with the National Environmental Policy Act of 1969." 15 U.S.C. 717n(b)(1) (added by Section 313(a) of the Energy Policy Act of 2005). Among the "Federal authorizations" for which FERC takes the lead role are "any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law with respect to an application for * * * a certificate of public convenience and necessity under section 717f[.]" *Id.* at 717n(a)(2). Because state (and other federal) agencies may play a role in this approval process, *see, e.g., id.* at 717b(d)(3) (generally preserving state law authority under the Clean Water Act),[3] the 2005 Act directs "[e]ach Federal and State agency considering an aspect of an application for Federal authorization" to "cooperate with the Commission and comply with the deadlines established by the Commission." *Id.* at 717n(b)(2).[4] The FERC Certificate here

[3] Natural Gas Act Section 717b(d)(3) refers to the Clean Water Act by its original name: the Federal Water Pollution Control Act.

[4] As part of Congress's effort to keep tardy state agencies from interfering with the progress of FERC-approved projects, the 2005 Act even added a special mechanism for expedited judicial

expressly warns that while "[t]he Commission 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 "unreasonably delay the construction or operation of facilities approved by this Commission." Ex. B (FERC Certificate) ¶ 280. The need for state agencies to comply with all relevant deadlines and laws is a central feature of this litigation.

2. The Clean Water Act Gives States A Role In FERC's Approval Process, But It Is A Role That The State Can Waive.

As just noted, the Clean Water Act contains some of the "Federal authorizations" for which FERC exercises a lead coordinating role under the NGA. *See also, e.g., Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 84 (2d Cir.2006) (In reviewing a Section 7 application to build a natural gas pipeline, FERC "must ensure that the project complies with the requirements of all relevant federal laws, including * * * the Clean Water Act.") (internal citations omitted). The Clean Water Act established a comprehensive, cooperative federalism scheme of water pollution control. Generally speaking, it first prohibits all discharges into waters of the United States without a permit. Then it divides authority among the United States Army Corps of Engineers, the United States Environmental Protection Agency, and the various States to authorize (or "permit") certain discharges under specified conditions.

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review of "agency delay." 15 U.S.C. 717r(d)(2) & (5). That amendment to the NGA gives the United States Court of Appeals for the District of Columbia "original and exclusive jurisdiction" of "any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law" for "a facility subject to" Section 7 of the NGA (such as the pipeline at issue here). *Id.* at 717r(d)(2). As explained below, the D.C. Circuit has held it unnecessary to seek review under this provision when a state agency has failed to comply with the one-year time limit under Section 401 of the Clean Water Act, because, as discussed further below, Section 401 provides that such a failure *automatically* waives the need to obtain certification that a project will comply with state water quality standards. *See Millennium Pipeline Co., LLC v. Seggos*, 860 F.3d 696, 701 (D.C.Cir.2017).

As noted above, in fulfilling FERC's designation "as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969," 15 U.S.C. 717n(b)(1), the Commission coordinates with the relevant permitting authorities (including state agencies) to ensure that a proposed project obtains all necessary permits, including under the Clean Water Act.

Three sections of the Clean Water Act are important here: Sections 303, 401, and 402.

Section 303 "requires each State, subject to federal approval, to institute comprehensive standards establishing water quality goals for all intrastate waters[.]" *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994). Generally, States promulgate water-quality standards that are then subject to review and approval by the EPA. 33 U.S.C. 1313. Ohio alleges that its standards fall within this framework. Third Amended Complaint ("TAC") ¶ 38.

Section 401 of the Clean Water Act requires projects "which may result in any discharge into the navigable waters" of the United States to receive "a certification from the State in which the discharge originates or will originate * * * that any such discharge will comply with the applicable provisions of" *inter alia* "Section 303"—the provision governing state water-quality standards. *See* 33 U.S.C. 1341(a)(1). When "certification from the State" is requested under Section 401, the State has three options: deny it, grant it, or waive its power by neither granting nor denying within the time allotted by the Act (*i.e.*, no more than a year after the State receives the certification request).

The first option, a denial of certification, can be fatal to a project unless undone through judicial review: "No license or permit shall be granted if certification has been denied by the State[.]" 33 U.S.C. 1341(a)(1). If the State instead grants certification (option two), it may

condition that grant on the project's compliance with various "limitations" or "any other appropriate requirement of State law." *Id.* at 1341(d). In fact, Section 401(d) expressly provides that this certification document is the State's opportunity to impose state-law-based conditions on the project: "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* * * *, *and with any other appropriate requirement of State law set forth in such certification*" (emphases added). It is important that these state-law restrictions be "set forth in such certification" because that is the way in which each limitation "shall become a condition on any Federal license or permit subject to the provisions of [Section 401]." *Id.*

This case concerns the third option—a State's failure to act timely on a Water Quality Certification request—and the consequences that flow from that failure. Section 401 contains a strictly enforced time limit of no greater than one year for the State to act on such a request. "If the State * * * fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived[.]" 33 U.S.C. 1341(a)(1). When the State, through its delay, waives its ability to impose a certification requirement, a State certification is no longer needed for the project to go forward. *Id.* ("No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.") Congress had good reason for imposing this consequence when a State fails to grant or deny certification within a year of receiving the certification request. "[T]he purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by

failing to issue a timely water quality certification under Section 401." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir.2011).

Section 402 of the Clean Water Act authorizes EPA to regulate the discharge of pollutants into navigable waters under the National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. 1342(a). EPA has, in turn, delegated its permitting authority to States, such as Ohio, that meet EPA's requirements. *Id.* at 1342(b); *see also* 40 C.F.R. 123.1(a); R.C. 6111.03(J)(1). Section 402 regulates pollutants discharged from "point sources" (such as a factory pipe that drains into a waterway), 33 U.S.C. 1342(f), as well as certain "stormwater discharges," *id.* at 1342(p). The latter occur when byproducts of industrial activity, including dirt (dredged or fill material) loosened due to ground-disturbing construction activities, are carried by runoff from rainfall or melting snow. 40 C.F.R. 122.26.[5]

3. Rover Received All Necessary Regulatory Approvals Before Starting Construction.

As noted above, the environmental review process for the Rover Pipeline began in 2014. That process included FERC's issuance of a Notice of Intent to Prepare an Environmental Impact Statement (or "EIS") on November 4, 2014. Ex. B (FERC Certificate) ¶ 151. The November 2014 Notice was followed by ten public scoping meetings, at locations near the pipeline route, to receive public comment on environmental and other issues. *Id.* FERC fully considered potential

[5] Another provision rounds out the division of permitting authority. Section 404 of the Clean Water Act authorizes the Army Corps of Engineers to issue permits "for the discharge of dredged or fill material." 33 U.S.C. 1344(a). This is an exception to EPA's broad authority, found in Section 402, to "issue a permit for the discharge of any pollutant." *See id.* at 1342(a)(1) (EPA has that authority "[e]xcept as provided in sections [318 and 404]"); *see also Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 274, 129 S.Ct. 2458, 174 L.Ed.2d 193 (2009) ("if the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402"). The EPA, however, retains the authority to (1) draft guidelines for the Corps to follow when determining whether to issue a permit pursuant to Section 404 and (2) veto a permit issued by the Corps. 33 U.S.C. 1344(b)-(c); *see also Coeur Alaska* at 274.

environmental impacts and summarized its work in the EIS that it published in the Federal Register in July 2016. *Id.* ¶ 157. As part of conducting this comprehensive assessment of environmental issues, FERC also oversaw the development of plans to mitigate or eliminate altogether potential impacts. FERC did so in coordination with other resource agencies, including Ohio EPA, which accepted FERC's designation as a "cooperating agency" that "assist[ed] in the preparation" of the EIS. Ex. D, FERC Docket CP15-93, submittal 20160729-4001 (EIS) at 1-6.

The EIS, which Ohio helped prepare, evaluated the project's possible impacts on a full range of resources, including the many waterbodies that the pipeline route traverses. To minimize potential environmental effects in those locations, Rover proposed using Horizontal Directional Drilling (or "HDD") to install the pipe beneath 45 waterbody crossings. Ex. B (FERC Certificate) ¶ 177. Rather than digging an open trench into which the pipeline is lowered and then covered with the disturbed soil, the newer HDD method involves tunneling beneath the surface from one side of a waterbody to the other. The digging starts at an angle to the surface going deeper into the ground as it approaches the edge of the waterbody. The tunnel's path is planned so that it can level off and run safely beneath the waterbody before angling back up to the surface on the other side. The construction of this path—roughly the profile of the inside of a bathtub—starts with a small-diameter pilot hole from one side of the waterbody to the other. The diameter of the hole gradually expands with multiple passes of drilling equipment back and forth until the tunnel is large enough to insert sections of the pipeline and pull them though from one end to the other.

Because of the recognized likelihood that drilling fluids will leak out at unplanned times during the HDD construction process (a phenomenon known in the industry as "inadvertent returns," "inadvertent releases," or "IRs"), Rover submitted an HDD Contingency Plan to FERC describing procedures Rover would follow when an inadvertent return occurred. The Plan was

published on the FERC docket. Ex. E, FERC Docket CP15-93, submittal 20150422-5306. It also became a condition of the FERC Certificate. Ex. B (FERC Certificate) at Appendix B, ¶¶ 1, 6. FERC's EIS, prepared in tandem with Ohio EPA, explicitly endorsed Rover's use of HDD crossing methods as a way to minimize the environmental impact. In so doing, the EIS also explained how and why inadvertent releases would likely occur during construction:

> Throughout the drilling process, a slurry of naturally occurring, non-toxic bentonite clay and water would be pressurized and pumped through the drilling head to lubricate the drill bit, remove drill cuttings, and hold the hole open. This slurry, referred to as "drilling mud" or "drilling fluid," has the potential to be inadvertently released to the surface. The pipeline route would be monitored and the circulation of drilling mud would be observed throughout the HDD operation for indications of an inadvertent drilling mud release. If a release is observed or suspected, Rover would immediately implement corrective actions. The corrective actions that Rover would implement if it uses the HDD method, including the steps it would take to clean up and dispose of a release, are outlined in its HDD Plan[.]

Ex. D (EIS) at 2-31 to 2-32.[6]

On November 10, 2015, as part of the process of obtaining its FERC Certificate under Section 7, Rover submitted an application to Ohio EPA for the Water Quality Certification governed by Section 401 of the Clean Water Act. Ex. D (EIS) at 1-16. Rover's certification request stated, among other things, that it planned to utilize HDD techniques "to install the pipelines under sensitive streams and wetlands." *See* Ex. F (Mitigation Plan) at 3.[7]

On September 22, 2016, more than 10 months after Rover submitted its certification request, Ohio EPA held its public information session and hearing on the application. Ohio EPA

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[6] An HDD drill will often encounter pre-existing cracks, voids, or weaker geological formations in the highly variable geology beneath the surface. When highly pressurized drilling mud reaches one of these features, the mud follows a path of least resistance. Sometimes that path takes the mud to the surface, resulting in an inadvertent release (or return). *See* Ex. D (EIS) at 4-130.

[7] Rover's Mitigation Plan is also publically available on the Ohio EPA website by clicking the link for "Rover Item 7" at http://web.epa.state.oh.us/dsw/401Applications/SBP/Rover/.

then waited until February 24, 2017 to act on the request with either a grant or denial. This was 15 months and 14 days after Rover submitted the application. (Ohio EPA claims it did not "receive" the application until November 16, 2015—six days after Rover submitted it. *State of Ohio ex rel. DeWine v. Rover Pipeline, LLC*, No. 5:17-cv-2566 (N.D. Ohio Dec. 29, 2017), D.E. 13-1 ¶ 7 (Kallipolitis Decl.). Even accepting Ohio's assertion that it did not receive the application until that later date, it still took more than 15 months for Ohio EPA to act on Rover's request.)

Ohio EPA's February 24, 2017 decision purported to grant a certification that the proposed construction of the Rover Pipeline would comply with the applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act. *See* Ex. G, FERC Docket CP15-93, submittal 20170224-5178; Ex. H (Ohio EPA decision).[8] The purported certification document also set forth, starting at page 62, terms and conditions for the project, such as the need to promptly report to Ohio EPA "inadvertent spills" and "unpermitted impacts to surface water resources." *See* Ex. H (Ohio EPA decision). By the document's own terms, then, the State certified that the project would comply with Ohio water quality standards despite the likelihood of discharges from inadvertent returns.

Meanwhile, FERC had already issued the Certificate required under Section 7, which (as previously noted) was subject to dozens of environmental conditions. Ex. B (FERC Certificate) at Appendix B. In approving the use of HDD to install the pipeline beneath certain waterbodies, FERC accepted, and worked to minimize, the risk of inadvertent returns:

> [U]se of the HDD crossing method to cross designated waterbodies and implementation of the mitigation measures outlined in Rover's *Construction Mitigation Plans* and other project-specific plans will avoid or adequately minimize impacts on surface water resources to the extent practicable.

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[8] The February 24, 2017 decision is also publicly available on the Ohio EPA website, at http://epa.ohio.gov/Portals/47/citizen/response/Rover%20Pipeline%20401%20WQC%20154852.pdf.

Id. ¶ 184. In March 2017, after receiving confirmation that Rover met the necessary conditions, FERC staff authorized pipeline construction. Ex. I, FERC Docket CP15-93, issuance 20170303-3000. FERC Staff would not have authorized construction to commence unless Rover had received all necessary state and federal permits and authorizations. *See* Ex. D (EIS) at 1-13.

4. FERC Closely Oversaw The Rover Pipeline's Construction And Repeatedly Responded To Ohio's Concerns.

With the FERC Certificate and staff authorization in hand, construction of the Rover Pipeline began in March 2017. Ex. S, FERC Docket CP15-93, submittal 20170314-5132. Early in the process, Rover "discovered and reported to Ohio EPA" and FERC a number of inadvertent returns of drilling fluids, in the form of bentonite slurry, into streams, wetlands, ponds, and ditches. *See, e.g.*, TAC Attachment 3 (EPA Director's Final Findings), ¶¶ 15, 19, 21, 27, 29, 31, 33, 35 (each paragraph summarizing an "inadvertent return" that Rover "discovered and reported to Ohio EPA" while "conducting horizontal directional drilling activities" on a particular date). This case concerns these inadvertent releases, as well as certain stormwater and other discharges that occurred during construction. *See, e.g.*, TAC ¶¶ 68 (stormwater), 70 (stormwater), 101-23 (drilling fluids), 142-44 (effluent limits).

The drilling fluid (or mud) releases were as small as 10 gallons. TAC ¶ 121. The Complaint substantially overstates the sizes of the various releases, but even accepting those incorrect numbers—as the Court must at this stage of the case—the median release that the State alleges in TAC ¶¶ 98-123 was 500 gallons, and the two highest releases occurred very early in the construction process. TAC ¶¶ 103 (alleging second release was several million gallons on April 13) & 104 (alleging 50,000 gallons the following day). By contrast, during the most recent six-month period covered by the Complaint—from September 2017 through March 2018—the great majority of releases (10 out of 13) were between only 10 and 500 gallons. *Id.* at ¶¶ 111-23.

As noted above, FERC acted, consistent with its role as the lead agency with exclusive authority over this pipeline, to halt construction temporarily at Ohio EPA's request due to the concerns underlying this lawsuit. For example, in a May 5, 2017 letter to FERC, Ohio EPA's Director cited "numerous inadvertent returns of bentonite slurry at a number of locations throughout the State of Ohio" and a "fail[ure] to adequately control storm water runoff from pipeline construction activities"; claimed that each "contributed to violations of Ohio's water quality standards" (citing R.C. 6111.04); and "ask[ed] FERC to review the matter and to take appropriate action in the most expeditious manner to ensure that Rover is held responsible for the violations and is conducting its ongoing drilling operations to ensure protection of human health and the environment." Ex. J, FERC Docket CP15-93, submittal 20170516-0027 (Ohio EPA May 5, 2017 letter to FERC).

FERC responded to Ohio EPA's concerns, ordering Rover not to proceed at any new HDD drilling sites until it implemented various protective measures and then obtained authorization from Commission staff. Ex. C, FERC Docket CP15-93, issuance 20170510-3009. These new measures included paying for an independent third-party contractor to (i) determine whether Rover followed its Horizontal Directional Drill Contingency Plan, and (ii) "develop a plan detailing the measures that Rover can put into place to ensure that the same level of impacts do[es] not occur on the remaining HDDs during project construction." *Id.* at 2-3 (also doubling the number of environmental inspectors per construction "spread" and vesting Commission staff with "complete control over the scope, content, and quality of the [independent third-party] contractor's work").

Throughout this process of intense FERC oversight, Rover worked continuously and extensively with the Commission to remediate impacts and otherwise address both FERC's and Ohio EPA's concerns. In August 2017, for example, Rover documented for FERC the various

HDD protocols it was implementing based on recommendations from the independent third-party contractor. Ex. K, FERC Docket CP15-93, submittal 20170804-5084 (recommended measures include designing a greater depth for the HDD path, using a tool for better monitoring of relevant pressure during HDD operations, employing a drilling fluid engineer or specialist to assist in drilling improvements, adding third-party inspectors, and revising HDD plans "to reflect modifications requested by the Ohio Environmental Protection Agency").

Later that month, FERC acknowledged Rover's progress. Ex. L, FERC Docket CP15-93, issuance 20170831-3070 (adding FERC approval of a wetland restoration plan and a well monitoring program that "have also been approved by the Ohio EPA"). A week later, Rover submitted proof of additional progress, backed up by 400 pages of documentation that it was implementing FERC's Measures Required For Implementation of Remaining Horizontal Direction Drills ("HDDs"). Ex. M, FERC Docket CP15-93, submittal 20170912-5072 (Rover Sept. 6, 2017 letter to FERC).

Even though Rover worked conscientiously with FERC to address issues such as inadvertent returns of drilling fluid and stormwater discharges, Ohio EPA demanded more: It wanted Rover to agree that Ohio EPA could (i) duplicate FERC's power to impose additional environmental conditions on the project and (ii) collect substantial fines for alleged violations of conditions. *See, e.g.*, Ex. J (Ohio EPA May 5, 2017 letter to FERC). Rover consistently agreed to work *voluntarily* with Ohio EPA to develop plans for protecting the environment, but Rover would not (and will not) agree that Ohio EPA can add to the conditions required by FERC, because the State lacks that power.

Ohio's effort in this regard is also documented in the FERC docket. Included with the May 5 letter mentioned above, for example, are Ohio EPA's "Final Findings and Orders," which the

State said it intended to impose on Rover as "effectively a settlement agreement between the parties" that would include a substantial fine on Rover. *Id.* at 1. It was Rover's refusal to buckle to this demand that prompted Ohio EPA to urge FERC to take actions against the pipeline. *Id.* at 2.

Then, on September 7, 2017, Ohio EPA wrote to FERC accusing Rover of "systemic and unprecedented noncompliance and an unwillingness to responsibly agree to a consensual order." Ex. N, FERC Docket CP15-93, submittal 20170908-5153 (Ohio EPA Sept. 7, 2017 letter to FERC). This time Ohio EPA asked for FERC's help in getting Rover to acquiesce in the State's demand for jurisdiction over how the pipeline is built. That letter urged that "FERC not approve" Rover's then-recent request to restart HDD operations in Ohio "until Rover resolves all noncompliance matters in Ohio[.]" *Id.* at 2. This included a demand that Rover (i) fully implement 10 plans that Ohio EPA required under its Unilateral Orders and (ii) submit for coverage under Ohio's construction stormwater permit. *Id.* Nowhere in Ohio EPA's September 7 letter did it mention that Rover *already* had voluntarily submitted—and Ohio EPA *already* had approved—all 10 plans demanded in the July Unilateral Orders, including plans for drilling fluid release prevention, drilling fluid removal, wetland restoration, and stormwater pollution prevention. In fact, the State itself acknowledged as much in a letter to Rover the very next day. Ex. O, FERC Docket CP15-93, submittal 20170908-5153 (Ohio EPA Sept. 8, 2017 letter to Rover). As Rover explained in opposing Ohio EPA's effort to use FERC approvals as leverage in the jurisdictional dispute between Rover and the State, the only substantive request in Ohio's Unilateral Orders to which Rover did not acquiesce was an NPDES permit that Rover and Ohio EPA had previously agreed it was unnecessary for Rover to obtain. Ex. P, FERC Docket CP15-93, submittal 20170911-5112.

FERC issued an authorization on September 18, 2017, granting Rover's request to resume certain HDD activities. Notably, the authorization did not require Rover to comply with Ohio EPA's new NPDES permitting demands. Ex. Q, FERC Docket CP15-93, issuance 20170918-3075 (FERC Sept. 18, 2017 Authorization) (finding sufficient safeguards in place).[9] Thus, Ohio EPA failed in enlisting FERC's help to coerce a settlement from Rover.

5. Unable To Persuade FERC Of The Need For New Conditions, Ohio Sought To Impose Them Through The Filing Of This Lawsuit.

Ohio EPA originally filed its complaint on November 3, 2017. The current version contains seven counts against six defendants. Count 1 alleges that defendants caused inadvertent returns of drilling fluid between April 8, 2017 and March 12, 2018 without obtaining a point-source NPDES permit from the State. TAC ¶¶ 98-124 (citing R.C. 6111.04(A)(1); Ohio Adm.Code 3745-33-02(A)). Count 2 alleges that beginning on May 12, 2017 Rover failed to obtain coverage that Ohio EPA had ordered a week earlier under Ohio EPA's Construction Storm Water Permit or Industrial Storm Water Permit. TAC ¶¶ 125-29 (citing R.C. 6111.04(A)(1); Ohio Adm.Code 3745-38-02(A) & 04(C)(1)(c)(iii)). Count 3 alleges that the drilling fluid discharges identified in Count 1 and certain stormwater discharges violated Ohio's general water-quality standards. TAC ¶¶ 130-33 (citing Ohio Adm.Code 3745-1-04(A)-(C)). Count 4 alleges that some of the same drilling fluid and stormwater discharges violated Ohio's wetland water-quality standards. TAC ¶¶ 134-38 (citing Ohio Adm.Code 3745-1-51(A)-(B)).

Count 5 alleges that Rover's decision not to obtain coverage under the stormwater permit that is the subject of Count 2 was a violation of the Ohio EPA Director's Orders to obtain such

[9] FERC also did not require Rover to comply with Ohio EPA's permitting demands at any time since the September 18 authorization. Instead, when FERC temporarily ordered Rover to cease another limited portion of the pipeline construction, it allowed work to resume after Rover provided certain information. *See* Ex. R, FERC Docket CP15-93, issuance 20180124-3036.

coverage by July 14, 2017. TAC ¶¶ 139-41 (citing R.C. 6111.03 & 6111.07). Count 6 alleges that between July 29, 2017 and January 23, 2018 Rover exceeded various effluent limits for total-suspended-solids, oil-and-grease, and total residual chlorine under Rover's Hydrostatic Permits, and further that Rover failed to properly report certain discharge information or violations, monitor for all parameters, or properly sample parameters. TAC ¶¶ 142-49 (citing R.C. 6111.07). Finally, Count 7 alleges that Rover engaged in activity requiring a Water Quality Certification between the date a certification purportedly issued (February 24, 2017) and the date Rover paid fees that Ohio claims were needed to make the certification "effective." TAC ¶¶ 150-54 (citing R.C. 6111.07(A); Ohio Adm.Code 3745-32-02(B)-(C)).

Although construction is complete, Ohio continues to seek injunctive relief, including permanently enjoining defendants from discharging any pollutant except in compliance with Ohio law; enjoining Rover to submit to Ohio EPA a notice of intent to seek coverage under Ohio permits, obtain the coverage, and comply with the permits; and enjoining Rover to comply with the same 10 Ohio EPA plans (including plans governing inadvertent returns of drilling fluid and stormwater pollution prevention) that Rover previously prepared, submitted to Ohio EPA, and obtained Ohio's approval to use. Ohio also seeks civil penalties of $10,000 for each day of each violation.

6. Defendants Removed The Lawsuit To Federal Court And That Court Remanded.

Rover and Pretec (the only defendants originally named) removed the case to federal court. Ohio successfully moved for a remand. The district court agreed with defendants that "[t]he matter necessarily raises a federal issue," but believed that resolving it in federal court, rather than plaintiff's forum of choice, would disrupt a federal balance Congress struck in the Clean Water Act. *State of Ohio ex rel. DeWine v. Rover Pipeline, LLC*, No. 5:17-cv-2566 (N.D. Ohio Jan. 26, 2018), D.E. 27 at 1-2 (identifying the test for removal) & 3-4 (noting that the Clean Water Act tasked state courts with litigating challenges to state permitting decisions). Although the district

court recognized that the Natural Gas Act also plays a role in this case, it reasoned that it will be "invoked solely through the defenses that Rover and Pretec are likely to pursue" and that "the litigation will focus on the Clean Water Act." *Id.* at 4. In short, nothing in the court's ruling is inconsistent with the grounds for dismissal urged here.

LEGAL STANDARD

This Court should dismiss the State's Third Amended Complaint in full because it "fail[s] to state a claim upon which relief can be granted." Civ.R. 12(B)(6). While a trial court must "presume that all factual allegations of the complaint are true," it may only make "reasonable inferences in favor of the non-moving party." *Walker v. Toledo*, 143 Ohio St.3d 420, 2014-Ohio-5461, 39 N.E.3d 474, ¶ 4. Federal law, including orders issued by and documents filed with FERC, which are cited herein, support the dismissal of each of the State's claims. This Court can, and should, consider these materials in granting Rover its requested relief. *See* Civ.R. 44.1(A)(3). Rover and Mears also hereby adopt in full the arguments in Pretec's Motion to Dismiss as alternative grounds for dismissal.

ARGUMENT

I. The State Waived Its Authority To Require The Water Quality Certification That Forms The Basis For Count 7.

As noted earlier, Section 401 of the Clean Water Act requires "[a]ny applicant for a Federal license or permit to conduct any activity * * * which may result in any discharge in the navigable waters" to obtain a Water Quality Certification "from the State in which the discharge originates or will originate." 33 U.S.C. 1341(a)(1). But if the State "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request" the certification requirement "shall be waived." *Id.* In which case, the permitted activity may go forward without a Section 401 Water Quality Certification. *See Millennium*

Pipeline at 700 ("[I]f the Department has unlawfully delayed * * * it can no longer prevent the construction of Millennium's pipeline."); *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 456 (2d Cir.2018) (by failing to act on the request within a year "the Department waived its authority under Section 401").

Importantly, the one-year time limit begins to run once the State receives a request, *not* when the State says the request is sufficient. The Second Circuit, for example, has rejected the view that the clock starts "only once" the State "deems an application 'complete,'" because "the plain language of Section 401 outlines a bright-line rule regarding the beginning of review": it starts with the state's "receipt" of the certification request. *N.Y. State Dep't of Envtl. Conservation* at 455. This also has long been FERC's interpretation of the plain text of the statute. "The Commission has consistently found that the one-year waiver period begins when the certifying agency receives the request for water quality certification." *In re FFP Missouri 15, LLC*, 162 FERC ¶ 61,237, at P 11 (2018); *In re Millennium Pipeline Co., LLC*, 161 FERC ¶ 61,186, at P 38 (2018) ("section 401(a)(1) of the CWA is unambiguous"). The Ninth Circuit has also found FERC's interpretation "fully consistent with the letter and intent" of the Clean Water Act. *California v. FERC*, 966 F.2d 1541, 1554 (9th Cir.1992) (reviewing an interpretive rule, applicable to hydroelectric projects, that "simply applied the one-year limitation set forth in the CWA").[10] Reading Section 401 as written "does not leave a state water quality certifying agency without remedy because it can deny an incomplete application." *Millennium*, 161 FERC ¶ 61,186, at P 39; *see also id.* at P 42 ("Denying an incomplete application does not prevent the state from working

[10] The D.C. Circuit agrees too that the text of Section 401(a) is free from ambiguity. *North Carolina v. FERC*, 112 F.3d 1175, 1183 (D.C. Cir.1997) (concluding, in a case addressing a related aspect of the waiver provision, that "the congressional intent underlying Section 401(a)(1) of the CWA is clear and unambiguous").

with an applicant; a denial can be issued without prejudice to an applicant's refiling in accordance with the state agency's requirements."); *N.Y. State Dep't of Envtl. Conservation* at 455 (State's "concerns are misplaced," because "[i]f a state deems an application incomplete, it can simply deny the application without prejudice—which would constitute 'acting' on the request under the language of Section 401").

Here, in Count 7, the State claims that Rover engaged in activity requiring a Section 401 Water Quality Certification without having a certification that was effective. TAC ¶¶ 150-54. In particular, the State alleges that although it "journalized" its grant of a Section 401 Water Quality Certification on February 24, 2017, Rover "failed to pay all fees" for the certification "until May 15, 2017," and thus, the State insists, between those two dates the company engaged in activity without having a required certification. TAC ¶¶ 152-53.

The fatal flaw in this argument is that in November 2016—months before the violation alleged in Count 7—the State had already waived its authority to require a Section 401 Water Quality Certification. As the State has admitted in this litigation, it received Rover's request for a certification no later than November 16, *2015*. Kallipolitis Decl. ¶ 7. By the plain terms of Section 401, the State had until no later than November 16, 2016 to act on Rover's request or else it would waive its authority under the statute. Yet the State did not purport to act by "issu[ing]" a Section 401 certification until February 24, *2017*. *Id.* ¶ 8. By then, the State's "decision to grant or deny [had] no legal significance." *Millennium Pipeline* at 701. Because the State had already waived its Section 401 authority, any certification was legally unnecessary. Hence Rover cannot be liable for lacking a certification when it engaged in activity on any of the dates alleged in Count 7.

That remains true even though the State asserts that it requested, and Rover submitted, a "revised" application on February 23, 2017, after a period of consultation "to address any

insufficiencies, omissions, and modifications" to the request. Kallipolitis Decl. ¶¶ 8-9. As noted above, the one-year period "commences when" the State "receives a request" for a Section 401 certification, even if the requesting party submits "further information" later in the process. *N.Y. State Dep't of Envtl. Conservation* at 453, 455. In *N.Y. State Dep't of Envtl. Conservation*, the State advised the requesting party that it needed more information to process the request, and the requesting party provided that information months after the request was first received. *Id.* at 453. There, as here, the one-year period began to run from the initial request just the same. *Id.* at 455-56. The State did not *act* on Rover's initial request within that one-year period (for example, by "deny[ing] the application without prejudice")—the one thing it needed to do to avoid waiver under Section 401. *Id.* at 456; *see also* 33 U.S.C. 1341(a)(1) (waiver when State "fails or refuses to act"). Nor did Rover voluntarily withdraw and resubmit its application *within* the one-year period, as might start the clock anew. *See Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014, at P 23 (2018) ("By withdrawing its applications before a year had passed" and submitting "new applications," the applicant gave the State "new deadlines"). Rover's "revised" application—which does not even rise to the level of the withdrawal and resubmission addressed in *Constitution Pipeline*—came outside the one-year period and thus after Ohio's waiver had already taken effect.[11]

[11] In *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721 (4th Cir.2009), the Fourth Circuit accepted Maryland's argument that the one-year waiver period did not begin to run in that case until FERC and the Corps issued a "joint public notice to advertise," which stated, among other things, that "[t]he Corps hereby requests that [Maryland] and [Pennsylvania] review the proposed discharges for compliance with the applicable water quality standards" and further noted that "[t]he Section 401 certifying agencies have a statutory limit of one year in which to make their decisions." *Id.* at 725 & 728-29. The court deferred to a Corps regulation that purported to start the one-year clock when a Corps employee "verif[ies] that the certifying agency has received a valid request for certification," and then it interpreted the joint notice as providing the referenced verification. 589 F.3d at 729 (quoting 33 C.F.R. § 325.2(b)(1)(ii)). That poorly reasoned decision is at odds

Thus, because the State waived its authority to require a Section 401 Water Quality Certification, its claim that Rover engaged in activities requiring a certification without one should be dismissed.

II. The State Also Waived Its Authority With Respect To The Remaining Counts.

The State also waived its authority to impose penalties or enjoin behavior based on conduct alleged in Counts 1 through 6. In these other Counts, the State alleges that Rover caused discharges without NPDES permits required by the Clean Water Act and in violation of state water-quality standards authorized pursuant to that Act. The State also alleges that Rover violated the terms of a hydrostatic permit that FERC required the company to obtain.

The problem for the State is that the purpose of a Section 401 certification is to give it the opportunity to affirm (or deny) that any discharge in connection with a project "will comply with the applicable provisions" of numerous sections of the Clean Water Act—including Section 303 of the Clean Water Act, which authorizes States to promulgate water-quality standards. 33 U.S.C. 1341(a)(1); *see also id.* at 1313. That certification, if the State chooses to issue it, also "shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that" the applicant "will comply with" not only with numerous sections of the

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with the Second, Ninth, and D.C. Circuit decisions cited above. Nor, by even its own reasoning, does the Fourth Circuit ruling apply to the facts here. As FERC recently explained, *AES Sparrows* "is distinguishable" in a case where "the Corps' interpretation of the CWA is not at issue" because the applicant "did not require an individual 404 permit and instead fell under a nationwide general permit." *Millennium*, 161 FERC ¶ 61,186, at P 31 (2018); *id.* (calling *Millennium* "[u]nlike" *AES Sparrows* in that "no comparable Corps notice was issued" in *Millennium*). Rover, too, proceeded under a nationwide general permit—the same one applicable in *Millennium*—thus making the Corps' regulation governing notice for individual permits inapplicable. *See* Request for Notice to Proceed with Construction, *Rover Pipeline LLC*, FERC Docket CP15-93, submittal 20170221-5030, at 3-119.

Clean Water Act, but also "any other appropriate requirement of State law set forth in such certification." *Id.* at 1341(d).

Which is to say that Section 401(a) gives the State the opportunity to "confirm that," with or without specified conditions, the proposed activity will "comply with the Act, state water quality standards, and other requirements of state law." *N.Y. State Dep't of Envtl. Conservation* at 453; *see also Del. Riverkeeper* at 368 (the certificate "confirms that a given [activity] will comply with federal discharge limitations and state water quality standards"). And, where needed, Section 401(d) broadly "authorizes the State to place restrictions on the activity as a whole"—for example, by placing additional conditions on construction—to "ensure that the project complies" with the relevant provisions of the Clean Water Act, along with any other appropriate requirements of State law. *PUD No. 1 of Jefferson Cty.* at 712; *id.* at 711 (Section 401(d) "expands the State's authority to impose conditions on the certification of a [federal] project," thus "allow[ing] the State to impose 'other limitations' on the project in general to assure compliance with various provisions of the Clean Water Act and with 'any other appropriate requirement of State law'") (emphasis added); *Alcoa Power* at 971 (a State may "issue[] a certification contingent on the applicant's satisfaction of various conditions" and "[t]hese conditions may be based on requirements for monitoring or performance standards under the Clean Water Act, or 'any other appropriate requirement of State law'") (quoting Section 401).

Although States may therefore place conditions on a project, by the plain terms and structure of Section 401 the State must do so within Section 401's one-year deadline for a Water Quality Certification, making it *before* federal authorization is granted to the project. As the statute puts it, these restrictions "shall [be] set forth" in the State's certification. 33 U.S.C. 1341(d). And when the State exercises this authority, "[t]he limitations included in the certification become a

condition on any federal license," such as a FERC Certificate. *PUD No. 1 of Jefferson Cty.* at 708. When it comes to authorizations for the construction of natural gas pipelines, the process is structured to ensure exactly that. FERC is "the lead agency for the purposes of coordinating all applicable Federal authorizations," and any state agency "considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission." 15 U.S.C. 717n(b).

When a State fails to act on a request for a Section 401 Water Quality Certification within one year it waives the authority encompassed under that section "with respect to such Federal application." 33 U.S.C. 1341(a). That is, "[o]nce the Clean Water Act's requirements have been waived, the Act falls out of the equation." *Millennium Pipeline* at 700. Thus, the State waives its authority to impose whatever conditions it deemed necessary for compliance with any other appropriate state laws—for those restrictions must be set forth in a valid Section 401 Water Quality Certification issued within the one-year deadline. Otherwise, States could undermine the one-year deadline by seeking to halt activity, already approved as a matter of federal law, based on the failure to comply with a condition that the State did not specify was necessary. *Del. Riverkeeper* at 376. "In the context of an interstate natural gas facility," this outcome is avoided by a State's refusal or failure to act within the one-year deadline. *Id.* "In effect such a refusal would"—and, here, it did—"return the state's delegated authority to enforce Section 401 of the Clean Water Act to FERC with respect to the project," *id.*, because the Commission otherwise has authority over construction of natural gas pipelines, including by imposing environmental conditions in the FERC Certificate, 15 U.S.C. 717f(e). Thus, when a state "waives" its authority under Section 401, "the Commission may include certification conditions," including those recommended by the State, in

its Certificate if consistent with the Natural Gas Act. *FFP Missouri 15, LLC*, 162 FERC ¶ 61,237, at P 15 (2018).

Here, in Counts 1 through 6, the State seeks to assert authority that it already waived as a consequence of its failure to act on Rover's request for a Section 401 Water Quality Certification until more than a year had passed. For in all of these claims the State asserts that Rover caused discharges without allegedly required NPDES permits and otherwise contravened what the State considers to be appropriate requirements of State law within the meaning of Section 401. Counts 1 and 2 allege that Rover caused certain discharges without first obtaining NPDES point-source and stormwater permits. TAC ¶¶ 98-124, 125-29. Count 5 alleges that Rover violated an order issued by the Director of the Ohio EPA, TAC ¶¶ 139-41, but because the order was based on Rover's failure to "obtain coverage" under an NPDES stormwater permit this Count is of a piece with Counts 1 and 2. TAC ¶ 140. Counts 3 and 4 both allege that Rover violated the State's water-quality standards (general standards in Count 3, wetland standards in Count 4) through alleged discharges that were foreseeable and expected under the project. TAC ¶¶ 130-33, 134-38. And Count 6 similarly alleges violations of a State law hydrostatic permit that FERC required Rover to obtain.[12] All of these claims fall within the State's putative authority to require permits and ensure compliance with "appropriate State law requirements"—authority the State waived when it failed to act under Section 401.

The State thus ceded its authority over these discharges back to FERC. *Del. Riverkeeper* at 376. The Commission, in turn, has sufficient authority to address them. As explained earlier,

[12] A hydrostatic permit covers the discharge of water that a pipeline company places into the pipe, during the construction phase, for safety testing. The water is pressurized to ensure that the pipe can operate at or above the levels of pressure required in accordance with the FERC Certificate. After the testing, the water is discharged. *See* Ex. D (EIS) at 4-81 to 4-82.

in discharging its responsibility to grant a Certificate of Public Convenience and Necessity before construction of a natural gas pipeline may commence, FERC conducts an extensive environmental analysis under NEPA. 15 U.S.C. 717n(b)(1). FERC then has "the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." *Id.* at 717f(e). The Commission has broad powers to enforce these conditions, including the power to halt construction, *id.* at 717o; to obtain injunctive relief, *id.* at 717s(a); and to seek civil penalties, *id.* at 717t-1.

FERC has exercised this authority over the precise conduct that forms the basis of the State's claims—including implementation of measures at the State's request. In the EIS for the pipeline, FERC explained that there was a risk of inadvertent releases of drilling fluid, but that "[t]he pipeline route would be monitored and * * * observed throughout the HDD operation for indications of an inadvertent release," and that pursuant to Rover's HDD plan the company "would immediately implement corrective actions" in the event of a release. Ex. D (EIS) at 2-31.

Then in the FERC Certificate, FERC concluded that Rover's construction and mitigation plans (among others) "will avoid or adequately minimize impacts on surface water." Ex. B (FERC Certificate) ¶ 184. FERC also included an entire appendix of 45 environmental conditions "[a]s recommended" in the EIS. *Id.* at Appendix B. For example, Rover was required to employ an environmental inspector responsible "for monitoring and ensuring compliance with all mitigation measures required by the order and other grants, permits, certificates, or other authorizing documents." *Id.* ¶ 7. The company also needed to document that "it has received all applicable authorizations required under federal law." *Id.* ¶ 9. As explained above, FERC also retained authority to impose new conditions and halt construction based on violations of the Certificate or other concerns about environmental issues.

Indeed, FERC used its authority in the FERC Certificate to respond directly to the State's concerns about inadvertent releases of drilling fluid. When the State wrote to FERC in May 2017 about inadvertent releases of bentonite slurry and stormwater runoff that allegedly "contributed to violations of Ohio's water quality standards," *see* Ex. J (Ohio EPA May 5, 2017 letter to FERC), the Commission ordered Rover to cease HDD drilling until it implemented various protective measures and received the go-ahead from FERC staff to continue drilling, Ex. C, FERC Docket CP15-93, issuance 20170510-3009.[13] On other occasions, however, FERC has determined that the project can proceed without imposing all of the State's requested conditions. For example, in September 2017, the State urged FERC to require Rover to obtain a stormwater NPDES permit before the Commission allowed the company to restart HDD drilling. Ex. N (Ohio EPA Sept. 7, 2017 letter to FERC). The Commission allowed Rover to restart HDD drilling without requiring it to obtain an NPDES permit. Ex. Q (FERC Sept. 18, 2017 Authorization).

FERC therefore possesses, and has comprehensively exercised, the authority that the State ceded to the Commission as a consequence of its waiver. That division of authority mirrors the regulatory structure established by both the Clean Water Act and the Natural Gas Act (as amended in 2005). Once the State waived its authority to set conditions for compliance with water-quality requirements, FERC filled in to regulate the occurrence of inadvertent discharges, stormwater discharges, and discharges of water from hydrostatic testing resulting from the authorized construction of the Rover Pipeline. Ohio has failed to state a claim on which relief can be granted.

[13] In addition to being able to seek action by FERC on matters within the scope of either the Section 401 Certification that Rover requested or the Certificate that FERC granted, the State also retains its authority pursuant to other state laws, including authority to seek compliance with applicable water-quality requirements. 33 U.S.C. 1341(b). For example, the State could assert authority over discharges that were not contemplated during the FERC Certificate process.

III. Even Without A Waiver Under Section 401 Of The Clean Water Act, The State Waived Its Authority With Respect To Counts 1, 3, 4, And 5 Under The Natural Gas Act.

As just explained, the State ceded to FERC the authority to enforce environmental conditions on the Rover Pipeline by failing to act within one year on Rover's request for a Water Quality Certification that would set forth such conditions. But even if the State had met Section 401's one-year deadline, its failure to avail itself of the FERC certification process to invoke the need for conditions needed to comply with relevant State water-quality requirements precludes the State from enforcing those supposed permit requirements and State provisions now.

State regulation is preempted insofar as it would "'conflict with federal regulation, or would delay the construction and operation of facilities approved by' FERC." *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C.Cir.2013); *see also Schneidewind* at 310 (state law that "affects the ability of FERC to regulate comprehensively" is preempted) (alterations and citation omitted).

Here, the Natural Gas Act (as amended by the Energy Policy Act of 2005) assigns FERC as the "lead agency for the purposes of coordinating all applicable Federal authorizations," and directs the Commission to "establish a schedule" to "ensure expeditious completion of all such proceedings." 15 U.S.C. 717n(b)-(c). The States are required to "cooperate with the Commission," *id.* at 717n(b)(2), and their failure to do so is "considered inconsistent with Federal Law," *id.* 717r(d)(2). The import of these provisions is that any foreseeable need to invoke conditions, and any other foreseeable inconsistency between the proposed project and State law, must be raised during the FERC-led process to obtain a Certificate of Public Necessity and Convenience. Otherwise, the State could seek to impose new permit requirements or raise newly asserted inconsistencies between the project and state pollution laws after that certificate has been granted and construction is already underway. Interjecting new state-mandated requirements and

conditions after the grant of a FERC Certificate would delay construction and operation and obstruct FERC's comprehensive regulatory authority, which the Commission has *already* exercised to approve the project at issue.

Several of Ohio's claims violate this requirement to set forth all applicable conditions in the FERC Certificate. Inadvertent releases of drilling fluid such as those that back the State's claims are the reality of HDD drilling, and thus FERC recognized in the EIS that "[i]nadvertent releases of drilling fluids could occur within a waterbody and result in impacts on water quality and aquatic organisms." Ex. D (EIS) at 5-8. The EIS also notes that hydrostatic testing of the pipeline to ensure it was safely constructed would result in discharge of test water. *Id.* at ES-6. In view of these environmental consequences, the EIS repeatedly notes that "Rover would be required to obtain applicable permits," *id.* at ES-13, and that construction would proceed "in accordance with federal, state, and local permits," *id.* at 2-29.

The EIS thus put the State on notice that *any* permit or relevant provision of State law related to water quality had to be timely asserted through the FERC-led process for obtaining a certificate of convenience and public necessity. Which is to say the State cannot wait to assert those putative permit requirements and State laws in a later lawsuit. In its complaint, however, the State seeks to enforce a number of permit requirements that the State—a cooperating agency in the EIS process—did not have FERC include in issuing the FERC Certificate. For example, the State alleges that Rover engaged in discharges without a point-source NPDES permit (Count 1) and without an industrial stormwater permit (Count 5), yet neither permit is required in the FERC Certificate (nor are the relevant terms of either permit required by some other name). Counts 3 and 4 likewise assert violations of State water-quality standards from discharges with no mention by the State to FERC, before FERC issued its Certificate, that foreseeable activities during

construction of the pipeline might exceed the limitations in those standards.[14] Hence the State has waived its authority to assert these claims here.

Of course, that does not leave the State without remedies. It can appeal to FERC to take action against Rover. Indeed, the State has done exactly that here. As noted earlier, the State urged FERC to require Rover to obtain a stormwater NPDES permit before allowing the company to resume HDD drilling. Ex. N (Ohio EPA Sept. 7, 2017 letter to FERC). In a proper exercise of its regulatory authority, FERC allowed Rover to resume drilling without requiring that permit. Ex. Q (FERC Sept. 18, 2017 Authorization). This exchange between Ohio and FERC illustrates how the regulatory structure is supposed to work, and stands in visible contrast to the State's attempt to subvert that structure through its suit here.

CONCLUSION

For the reasons stated above and in Pretec's Motion, the Court should dismiss the Third Amended Complaint with prejudice for failing to state a claim upon which relief can be granted.

[14] The EIS includes a table of the permits that apply to this project. The only items listed for Ohio are the Section 401 Water Quality Certification (which the State waived, as explained above), isolated wetland permits, an NPDES *construction* stormwater permit, and a hydrostatic test water discharge permit. Ex. D (EIS) at 1-16 to 1-17.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing Memorandum in Support of Motion to Dismiss was served on all counsel of record on this 10th day of September, 2018 via U.S. mail and e-mail.

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