

requires. Once construction and other land disturbing activities commence, sensitive and ecologically important resources in which DRN has significant interests will be harmed. Indeed, the construction conducted under the Commission's Certificate will irreparably harm DRN unless it is stayed. The irreparable environmental harm facing DRN will be permanent and cannot be remedied by any amount of monetary compensation.

In stark contrast, any harm to Millennium caused by staying construction will merely be temporary. Thus, the balance of the harms weighs in favor of granting the stay pending rehearing. The public interest also weighs in favor of granting a stay. Because DRN seeks to compel compliance with NEPA, a federal law designed by Congress to protect the environment, and because a stay would in fact prevent permanent environmental damage, the granting of this stay serves the public interest. DRN are also likely to succeed on the merits, as demonstrated in its Rehearing Request. Furthermore, DRN objects to the Commission's unlawful use of tolling orders to indefinitely prevent aggrieved parties, such as DRN, from bringing their challenge in federal circuit court.

I. BACKGROUND

On July 29, 2016, Millennium Pipeline Company, L.L.C. ("Millennium") filed an application under section 7(c) of the Natural Gas Act (NGA)¹ and Part 157 of the Commission's regulations for authorization to construct and operate the Project, located in Orange, Sullivan, Delaware, and Rockland Counties, New York. The project is designed to provide up to 223,000 dekatherms per day (Dth/d) of firm transportation service. Millennium, a Delaware limited liability company, is a natural gas company, as defined by section 2(6) of the NGA, engaged in the transportation of natural gas in interstate commerce and subject to the Commission's jurisdiction. Millennium operates an approximately 240-mile-long interstate natural gas pipeline

system extending across southern New York from an interconnection with National Fuel Gas Supply Corporation in Independence, New York, to an interconnection with Algonquin Gas Transmission, LLC (Algonquin) in Ramapo, New York. Millennium proposes to construct and operate its Eastern System Upgrade to provide 223,000 Dth/d of incremental firm transportation service from its existing compressor station in Corning, New York, to the existing interconnection with Algonquin in Ramapo, New York. To provide the incremental service, Millennium proposes to construct and operate a number of pipeline facilities, including but not limited to: an approximately 7.8-mile-long, 30- and 36-inch-diameter pipeline loop in Orange County, New York (Huguenot Loop); a new compressor station in Sullivan County, New York (Highland Compressor Station), with one 22,400 horsepower Solar Titan 130E gas-fired turbine compressor unit; and a new 22,400 horsepower Solar Titan gas-fired turbine compressor unit at the existing Hancock Compressor Station in Delaware County, New York. In addition to the the Algonquin delivery point the proposed project will also supply gas to the proposed CPV Valley Energy Center.

The Commission issued the Environmental Assessment (“EA”) for the Project on March 31, 2017, in which Commission staff recommended that the “Order contain a finding of no significant impact” (“FONSI”) for the Project. During the public comment period for the Environmental Assessment, a number of interested parties, including individuals, federal and state agencies, and organizations submitted comments on the proposed Project. On May 1, 2017 DRN submitted substantive comments on the Environmental Assessment.

On November 28, 2017, the Commission ordered that a Certificate be issued to Millennium for approval of the Project. The Order agreed with the staff recommendation, memorialized in the Environmental Assessment, that the Project would not constitute a major federal action

significantly affecting the quality of the human environment, and therefore, that an EIS was not required. The Order also granted DRN's timely motion to intervene in the proceedings. *See* Order at Appendix A. For the reasons set forth below, DRN now seek a rehearing and rescission of the Commission's decision to grant the Certificate without first preparing an EIS, and otherwise appropriately fulfilling the requirements of NEPA.

II. ARGUMENT

The Interest of Justice Require that the Commencement of Construction is Stayed Pending Rehearing and Judicial Review.

Pursuant to the Administrative Procedure Act, the Commission has the authority to stay its actions when "justice so requires." 5 U.S.C. § 705 (2006). In assessing a request for a stay, the Commission will consider: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether the stay is in the public interest. *See Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,020, at 15 (Jan. 12, 2011). Additionally, courts also take into account availability of a legal remedy to address the harm done, and likelihood of success on the merits. *Virginia Petroleum Jobbers. v. FERC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Here, justice requires the granting of DRN's request for a stay of the Order – without it, DRN will be left without an adequate remedy at law to address their injuries, and the public will permanently lose significant environmental resources, while Millennium would experience a construction delay, at most.

A.) A Stay is Necessary to Avoid Irreparable Injury

The purpose of a stay is to preserve the *status quo* pending the Commission's review of its decision. *See, e.g., Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1978) ("By maintaining the *Status quo* [sic], while additional environmental studies are performed, or additional alternatives are considered, an injunction ensures that there will be at least a possibility that the agency will

change its plans in ways of benefit to the environment. It is this possibility that courts should seek to preserve.”) (internal quotations omitted). The Commission should not prejudge the outcome of DRN’s Request for Rehearing by allowing construction to proceed before the issues raised in that motion are fully resolved.

Absent a stay pending review of the Commission’s Order on rehearing, DRN and its members will suffer irreparable injury. Under the standard for injunctive relief – which the Commission has applied to its assessment of requests for administrative stays – in order to qualify as irreparable an injury must be “both certain and great,” “actual and not theoretical,” not “something merely feared as liable to occur at some indefinite time.” *Wisconsin Gas Co. v. Fed. Energy Regulatory Comm’n*, 758 F.2d 669, 674 (D.C. Cir. 1985). Here, there is no doubt that construction of the Project will cause irreparable injury to DRN.

Harm to the environment is almost always irreparable because such harm, “by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

Millennium has proposed to build a linear pipeline that will slice through a pristine natural landscape, traversing the highly erodible steep slopes, intact forests, and Special Protection water bodies. Construction activities will involve the disturbance of over a hundred acres of land, impact wetlands, and cross waterbodies.

If construction is permitted to commence, members of DRN who live in the immediate vicinity of the proposed Project route will suffer irreparable harm, including the irretrievable loss of pristine forest lands, wetlands, and streams in and around which they live, work, and recreate, the permanent alteration of the unique character of their rural community, and the devaluation of their property.

As the D.C. Circuit has emphasized, “[t]he NEPA duty is more than a technicality; it is an extremely important statutory requirement to serve the public and the agency *before* major federal actions occur. . . . If plaintiffs succeed on the merits, then the lack of an adequate environmental consideration looms as a serious, immediate, and irreparable injury.” *Found. On Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985) (emphasis in original); *see also* 40 C.F.R. § 1501.2 (“Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.”). Accordingly, the “procedural harm” caused by the Commission’s failure to undertake adequate NEPA analysis supports a grant of a stay. *See Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 222 (D.D.C. 2003) (finding that, where plaintiffs had demonstrated concrete injury, the procedural harm arising from a NEPA violation bolstered the case for a preliminary injunction). When a showing of potential environmental injury is combined with a procedural violation of NEPA, “courts have not hesitated to find a likelihood of irreparable injury.” *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24 (D.D.C. 2009); *see, e.g., Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (noting that the combination of concrete environmental injuries and injury by violation of NEPA led to court’s finding of irreparable harm).

B.) The Balance of Equities Favors the Granting of a Stay

Millennium will not be significantly harmed by a stay of the Order and Certificate. Any short-term delay to Millennium’s construction schedule that would result from the grant of a stay would not outweigh the permanent environmental damages that will occur absent a stay. *See Citizen’s Alert Regarding the Env’t v. U.S. Dep’t. of Justice*, 1995 WL 748246, *11 (D.D.C. Apr. 15, 1995) (finding that potential loss of revenue, jobs, and monetary investment that would be

caused by project delay did not outweigh “permanent destruction of environmental values that, once lost, may never again be replicated”). The costs of doing business and of complying with the law cannot fairly be characterized as harm and certainly do not trump the costs that will be borne by DRN and the public if construction goes forward absent the completion of the legally-mandated environmental review.

C.) A Stay is in the Public Interest

The public interest weighs heavily in favor of preventing irreparable harm to the environment. Granting DRN’s request for a stay will preserve existing environmental conditions pending review of the adequacy of a lead agency’s review of the environmental impacts of a major federal action, thus promoting the goals of NEPA. In enacting NEPA and demanding compliance “to the fullest extent possible,” Congress has underscored the public interest in fully vetting environmental consequences of federal actions.

For the people living in the Delaware River watershed the stakes are high. The proposed Project will cut through public lands, impact numerous wetlands, and water bodies. The Project will result in miles of wooded mountains and pastoral landscapes being replaced with expanded pipeline right of way, access roads, and other industrial machinery, to the detriment of local businesses, residents, and the public as a whole. The public interest weighs heavily in favor of preventing irreparable harm to the environment.

D.) DRN is Likely to Succeed on the Merits

DRN is likely to succeed in their claims on the merits as specified in the Rehearing Request. DRN’s Rehearing Request demonstrates that the Commission violated NEPA by granting the Certificate for construction of the Project without properly applying the NEPA regulations in evaluating the significance of the Project’s impacts. Moreover, the Commission

violated NEPA by unlawfully segmenting consideration of the Project's impacts from other interdependent and inter-related projects. Finally, the Commission was required by its own regulations and past precedent to undertake a full EIS on the segmented projects. For these reasons, the Commission's decision to rely on an EA and FONSI and its failure to prepare an EIS was arbitrary and capricious, in violation of applicable statutory and regulatory requirements, and not supported by substantial evidence.

DRN's Rehearing Request demonstrates that the Commission erred in a number of ways, which include:¹

1. *The Commission erred in unlawfully segmenting consideration of the Project's environmental impacts from those of inter-related projects on Millennium's integrated pipeline system.*
2. *The Commission erred because the Eastern System Upgrade Project Overbuilds Capacity in Conflict with the Commission's Policy Statement.*
3. *The Commission erred because the Commission's Truncated Cumulative Impacts Review Render The Environmental Assessment Unlawful.*
4. *The Commission erred because it failed to appropriately consider impacts to Streams, Endangered Species that are Water Dependent, Class A, B, and C Waterbodies, and wetlands.*
5. *The Commission erred because it failed to appropriately consider induced natural gas development.*
6. *The Commission erred because it failed to consider and account for the ways in which the proposed Project's harms outweigh its benefits.*

¹ DRN incorporates by reference the arguments regarding the merits of DRN's claims as provided in DRN's Request for Rehearing.

7. *The Commission erred because it failed to account for the extent to which Project construction and operation will emit air pollutants and fails to present a comprehensive analysis of the direct, indirect, and cumulative effects of the Project on climate change.*

8. *The Commission erred because it failed to take a “hard look” at alternatives to the proposed Project.*

III. CONCLUSION

For all the reasons set forth above, DRN’s request that the Commission grant a stay pending review of the Order on rehearing and prohibiting Millennium from commencing any construction or land disturbing activities until the Commission completes its review of the Order on rehearing.

Dated: November 30, 2017

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