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Millennium Secures Approval to Construct
Request for Injunction Filed

Sullivan County, NY – December 19, 2017 the Federal Energy Regulatory Commission granted a notice to proceed for beginning construction of the Millennium Eastern System Upgrade Pipeline Project (Millennium ESU). The Delaware Riverkeeper Network immediately filed for an injunction to prevent construction. The request for injunction was filed for review with the United States Court of Appeals for the Second Circuit.

The Delaware Riverkeeper Network has two outstanding challenges against the project:

1. December 1, the organization filed a petition for review with the United States Court of Appeals for the Second Circuit regarding the New York State Department of Environmental Conservation's decision granting Millennium Pipeline Company's (Millennium) application for a State Pollutant Discharge Elimination System General Permit for the Eastern System Upgrade (ESU) Project.
2. November 30 the organization filed a rehearing request with the Federal Energy Regulatory Commission asking for reconsideration of their November 28 issuance of a Certificate of Public Convenience and Necessity to the Project. The rehearing request was accompanied by a motion for a stay of any construction activity and any other land disturbance conducted under the Certificate, pending review of the Order on rehearing.

"The holidays are upon us and both Millennium and FERC decide now is the right time to rob people of their rights so another pipeline company can make bigger profits on the backs of the rest of us. FERC has given approval to advance construction of the Millennium ESU pipeline while impacted communities are placed in legal limbo by the agency's failure to respond to our November 30 rehearing request, and before the court has had an opportunity to even consider, let alone decide upon, our December 1 challenge to state approval of the project. Not only does advancing the project through construction deny people our ability to challenge the project in the courts before irreparable harm is inflicted on communities and the environment, but it will invade the peace and sanctity of the communities and homes that lie in the wake of its destruction. And once again, it is the people who

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must stand up to defend their rights against this massive federal agency that is totally in the pockets of the pipeline industry – there is no one to help us, not even the state of New York who has also rolled over for this project," said Maya van Rossum, the Delaware Riverkeeper and leader of the Delaware Riverkeeper Network.

This newest set of legal challenges add to the other legal battles that embroil Millennium – including a legal challenge by the state against FERC approval of the Valley Lateral Project and strong opposition to the CPV power plant.

To view the entire filing, visit http://bit.ly/millenniumfiling.

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Delaware Riverkeeper Network (DRN) is a nonprofit membership organization working throughout the four states of the Delaware River Watershed including Pennsylvania, New Jersey, Delaware and New York. DRN provides effective environmental advocacy, volunteer monitoring programs, stream restoration projects, public education, and legal enforcement of environmental protection laws.

No. 17-3895

ORAL ARGUMENT NOT YET SCHEDULED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DELAWARE RIVERKEEPER NETWORK; MAYA VAN ROSSUM, the Delaware Riverkeeper,

Petitioners,

v.

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

Respondents,

MILLENNIUM PIPELINE COMPANY, L.L.C.,

Intervenor.

EMERGENCY MOTION OF PETITIONERS FOR A STAY OF FINAL AGENCY ACTION OF THE NEW YORK DEPARTMENT OF ENVIRONMETNAL CONSERVATION UNDER RULE 18

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Dated: December 20, 2017

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INTRODUCTION

Petitioners Delaware Riverkeeper Network, and the Delaware Riverkeeper (collectively "DRN" or Petitioners), seek an emergency stay of the August 30, 2017, New York Department of Environmental Conservation's ("NYSDEC" or Respondents) issuance of coverage under the State Pollution Elimination System general permit ("SPDES") for Millennium Pipeline Company L.L.C.'s ("Millennium") proposed Eastern System Upgrade pipeline project ("Project"). *See* Acknowledgement of Notice of Intent, Ex. D. All construction activity was authorized to begin on December 19, 2017, by the Federal Energy Regulatory Commission ("Commission"). *See* Notice to Proceed Granting Construction Activity, Ex. A. Millennium states that it intends to begin construction on December 20, 2017. *See* Implementation Plan, at 8, Ex. B.

On July 29, 2016, Millennium filed a request to the Commission for a Certificate of Public Convenience and Necessity authorizing the Project. *See* Certificate Order, 161 FERC ¶ 61,229, at ¶ 1, Ex. C. Under the Natural Gas Act, the Commission is the lead federal agency responsible for authorizing applications to construct and operate interstate natural gas pipeline facilities. *See* 15 U.S.C. §717f. The Commission required Millennium to obtain a SPDES from the NYSDEC prior to construction activity beginning. *See* Certificate Order, 161 FERC ¶ 61,229, at Appendix B, Condition 9, Ex. C. The Commission's notice to

proceed with construction is also specifically predicated on Millennium having obtained all "federal authorizations." *See* Letter Order Granting Construction Activity, at 1, Ex. 1. On August 30, 2017, the NYSDEC authorized coverage for the Project under the SPDES permit for the Project. *See* Acknowledgment of Notice of Intent, Ex. D.

Petitioners here challenge the issuance of coverage for the Project under the SPDES general permit by the NYSDEC as arbitrary, capricious, or otherwise not in accordance with law. The proposed Project involves the construction of approximately 8 miles of pipeline loop[1] along Millennium's existing pipeline system, as well as the construction of a new compressor station and additional compressor units at other existing compressor stations. *See* Certificate Order, at ¶ 4, Ex. C. Construction of the Project would impact 209.2 acres of land, which includes roughly 25 acres of mature forested land. *See* Environmental Assessment, at 13, 71, Ex. E. The Project will cross seven subwatersheds, fourteen streams, and withdrawal and discharge over 2.5 million gallons of water for hydrostatic testing. The withdrawal and discharge of hydrostatic testing waters can "contribute to a change in the water quality of receiving waters" and also can "result in erosion of upland areas or stream banks and increased sedimentation or turbidity." *Id.*, at 58, 64. Portions of pipeline facilities would also cross or otherwise impact numerous

[1] Pipeline "loops" are new pipelines sited alongside and adjacent to one or more pre-existing pipelines.

other public and private resources, including: one state park, three county parks or recreation areas, one municipal park, two preserves, two private land trusts, a New York state scenic byway, two recreation hiking trails, a sportsman's club, and multiple Bald Eagle nests. *Id*., at 99. Additionally, the New York Natural Heritage Program identified three significant natural communities that occur in the Project area that may be impacted. *Id*., at 73. As explained in more detail below, the construction activity for the Project will inflict significant and irreparable harm on the resources identified above, and irreparable harm on Petitioners, their members, and the public.

The NYSDEC unlawfully provided authorization under the SPDES general permit for Millennium's Project without complying with several key provisions of the Clean Water Act which demand various and robust opportunities for public participation prior to authorization. NYSDEC's failure to comply with these clear provisions of the Clean Water Act have prevented Petitioners from obtaining adequate notice of authorization of Millennium's Project, and also obstructed Petitioners from all meaningful public participation opportunities.

Furthermore, because any appeal of an authorization pursuant to a Federal Energy Regulatory Commission jurisdictional project must be heard in the first instance by the Second Circuit, *see* 15 U.S.C. § 717r(d)(1), and the Second Circuit is limited in its review to the record developed before the agency, Petitioners have

also been prevented from developing a record upon which it could mount a substantive challenge to the authorization under the permit.

RELIEF REQUESTED

Petitioners request a temporary stay during the pendency of this Court's consideration of this Emergency Motion for Stay, and for this Emergency Motion for Stay of permit authorization to be granted.

JURISDICTION AND STANDING

This Court has jurisdiction to hear this case pursuant to 15 U.S.C. § 717r(d)(1), of the Natural Gas Act ("NGA"). *See* 15 U.S.C. § 717r(d)(1). Section 717r(d)(1) provides that:

> [t]he United States Court of Appeals for the circuit in which a facility subject to . . . section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action 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.

Id.

Pursuant to Section 19(d) of the Natural Gas Act, 15 U.S.C. § 717r(d)(1), and Federal Rule of Appellate Procedure 15(a), DRN submitted a Petition for Review in the United States Court of Appeals for the Second Circuit for review of the NYSDEC's decision granting Millennium's request for State Pollutant Discharge Elimination System general permits (permit identification numbers

NYR11C669, NYR11C670, NYR11C671, NYR11C672) in connection with the Project. *See* Acknowledgement of Notice of Intent, Ex. D.

The Federal Water Pollution Control Act Amendments of 1972 (Pub. L. 92–500, 86 U.S. Stat. 816–904, codified as amended at 33 U.S.C. §§ 1251–1388), known as the Clean Water Act ("CWA"), governs discharges of pollutants from "point sources" (i.e., "any discernible, confined and discrete conveyance" [33 USC § 1362(14)]) into the waters of the United States. These discharges are prohibited except as authorized by a National Pollutant Discharge Elimination System ("NPDES") permit issued by the Administrator of the United States Environmental Protection Agency ("EPA"). "Generally speaking," the statute envisaged NPDES permits that "place[d] limits on the type and quantity of pollutants that can be released into the Nation's waters." *South Fla. Water Management Dist. v. Miccosukee Tribe,* 541 U.S. 95, 102 (2004).

Although the federal government plays a role in water pollution control under the CWA, states, such as New York, continue their own water pollution control regulations as long as they are at least as stringent as federal law demands. *See* 33 U.S.C. § 1370. Importantly, states are authorized to administer the NPDES permit program for discharges into navigable waters within their borders. *See* 33 USC § 1342(b). Here, the EPA has delegated authority to NYSDEC to issue SPDES permits to fulfill the requirements of the CWA's NPDES program.

Because the issuance of the authorization pursuant to the SPDES general permit is an "action" by a "state administrative agency" acting "pursuant to Federal law" to issue "permit[s]," Petitioners meet the standard articulated in Section 717r(d)(1). *See also Tennessee Gas Pipeline Company LLC v. Delaware Riverkeeper Network*, 921 F.Supp.2d 381, 387-88 (M.D. Pa. 2013); *Delaware Riverkeeper Network, et al. v. Secretary Department of Environmental Protection, et al.*, 833 F.3d 360, 370-374 (3d Cir. 2015).

Petitioners are a non-profit organization representing members who reside, work, and recreate in the areas that will be affected by the Project. *See* Petitioners' Affs., Exs. F-J. Millennium's construction and operational activities will cause Petitioners' members concrete, particularized, and imminent harm, which this Court can redress by granting a stay. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Petitioners therefore have standing to assert this claim.

STANDARD OF REVIEW

A party "seeking a preliminary injunction must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winters v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). These four factors are present here. Agency action under the NGA is reviewed pursuant to the Administrative Procedure Act, 5 U.S.C.

§§ 701-706, whereby courts hold unlawful and set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

ARGUMENT

I. Petitioners Demonstrate a High Likelihood of Success of the Merits

a. The NYSDEC's Authorization Of The Project Pursuant To Its SPDES General Permit Is Arbitrary, Unreasonable, And Contrary To The Requirements Of The Clean Water Act

NYSDEC violated statutory public participation requirements of the Clean Water Act by failing to provide an opportunity for public comment and an opportunity to request a public hearing on the SPDES Notice of Intent prior to NYSDEC's authorization of coverage under the SPDES general permit. *See, e.g.*, 33 U.S.C. § 1342(a)(1); 33 U.S.C. § 1342(j).

Congress explicitly sought to encourage public participation in the development and implementation of the nation's water pollution control measures, and required that the EPA and the states provide for, encourage, and assist with "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the [EPA] or any State." 33 USC § 1251(e). A strength of the NPDES permit system is the opportunity it provides for citizen participation throughout the permit issuance process. *See also Costle v. Pacific Legal Found.*, 445 U.S. 198, 216 (1980) (citing

the "general policy of encouraging public participation is applicable to the administration of the NPDES permit program"). Public participation is thus an essential element of the NPDES program: "[t]he public must have a genuine opportunity to speak on the issue of protection of its waters." *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 177 (D.C. Cir. 1988) (quoting text available in S. Rep. No. 92-414, p. 72 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668).

It is well-established that for meaningful public participation, the public must be provided adequate notice to be able to evaluate a request for a government authorization or permit. *See, e.g., Ohio Valley Envtl. Coalition v. U.S. Army Corps of Engineers*, 674 F.Supp.2d 783, 800-02 (S.D. W.Va. 2010) (noting that "[c]ompletion and public notice are inextricably linked" and rejecting public notice and comment process undertaken on incomplete request); *Cook Inletkeeper v. EPA*, 2010 WL 4127976, at * 2 (9th Cir., Oct. 21, 2010) (state administrative agency conceded that their finding "was flawed because of a lack of meaningful opportunity for public comment" on a Clean Water Act authorization). The notice of a request is directly tied to the commencement of public notice, to offer meaningful feedback the public needs a full picture of the project and its effects. *See Ohio Valley Envtl. Coalition*, 674 F.Supp.2d. at 802 (finding that federal agency "unreasonably found the applications were complete and issued public

notices that plainly did not contain sufficient information to allow for meaningful public comment").

The CWA specifically requires that the public be afforded certain public participation opportunities on all discharge permits, such as the SPDES permit. The intended transparency of process, and engagement with the public, is reflected in two separate public participation requirements of the CWA for this type of permit. First, is a requirement that requests for coverage under NPDES and SPDES permits be made public. *See* 33 U.S.C. § 1342(j). Specifically, the CWA requires that "[a] copy of each permit application and each permit issued under [section 402] shall be available to the public." *Id.* The court in *Environmental Defense Center v. U.S. E.P.A.*, concluded that "clear Congressional intent requires that NOIs be subject to the Clean Water Act's public availability and public hearings requirements." *Environmental Defense Center, Inc. v. U.S. E.P.A.*, 344 F.3d 832, 856 (9th Cir. 2003) (concluding that NOIs are "the functional equivalents" of permit applications) (hereinafter referred to as "*EDC*"). The EPA's description in its stormwater regulations also concludes that a permit "application" is inclusive of "a notice of intent for coverage under a general permit." 40 CFR 122.34(d)(1). This Circuit's decision in *Waterkeeper Alliance* also supports this interpretation. *See Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486 (2d Cir. 2005). In *Waterkeeper Alliance*, this Court invalidated portions

of the EPA's 2003 regulations governing NPDES permitting for concentrated animal feeding operations, finding that the "permitting scheme . . . violates the Clean Water Act's public participation requirements and is otherwise arbitrary and capricious under the Administrative Procedure Act." *Id*., at 503 (citing violations of the public participation requirements of 33 U.S.C. § 1342(a)(1) and 33 U.S.C. § 1342(j)); *but see Texas Ind. Producers & Royalty Owners Assn. v. Environmental Protection Agency*, 410 F.3d 964 (7th Cir. 2005).

Second, the CWA requires that the EPA, or a state, may only issue a NPDES permit – or here a SPDES permit – "**after** opportunity for public hearing." *See* 33 U.S.C. § 1342(a)(1) (emphasis added); *see also* 33 U.S.C. § 1342(b)(3) (for a state to serve as permitting authority, state law must provide adequate authority to ensure that the public receive notice of each application for a permit and an opportunity for a public hearing before a ruling on each such application).[2]

In response to the *EDC* case the EPA issued guidance that directs states to comply with the court's decision by providing opportunities for public

[2] New York state law also mandates public participation with respect to SPDES coverage, and requires "[p]ublic notice of a complete application for a SPDES permit" (ECL 17–0805(1)(a)), which shall include "a statement that written comments or requests for a public hearing on the permit application ... may be filed by a time and at a place specified" (ECL 17–0805(1)(a)(ix)). The public comment shall last "not less than thirty days following the date of the public notice ... during which time interested persons may submit their written views with respect to the application and the priority ranking of the permit" (ECL 17–0805(1)(b)).

participation and hearings on NOIs. *See* Memorandum from James A. Hanlon, Director, Environmental Protection Agency, Office of Wastewater Management, *Implementing the Partial Remand of Stormwater Phase II Regulations Regarding Notices of Intent & General Permitting for Phase II MS4s*, (April 16, 2004), available at: https://www3.epa.gov/npdes/pubs/hanlonphase2apr14signed.pdf. Although the EPA guidance is not binding on this Court, judicial deference to EPA's interpretation is "particularly appropriate" under a cooperative federalism statute, such as the Clean Water Act. *Rodriguez v. Perales*, 86 N.Y.2d 361, 367 (1995); *see also Brown v. Wing*, 93 N.Y.2d 517, 524 (1999) (noting that, where a state agency administers a federal statute, it would be appropriate to defer to that agency's interpretation where it comports with that of the responsible federal agency).

The concept of providing a fair and full opportunity for public participation in NPDES permitting is clearly enshrined in the implementing regulations for the NPDES program. For example, the EPA specifically identifies the policy justifications for providing public availability and an opportunity for a hearing:

> [t]he NPDES permitting process includes the public as a valuable stakeholder and ensures that the public is included and information is made publicly available . . . Citizen suit enforcement has assisted in focusing attention on adverse water quality impacts on a localized, public priority basis. Citizens frequently rely on the NPDES permitting process and the availability of NOIs to track program implementation and help them enforce regulatory requirements.

64 Fed. Reg. at 68739-68740. Because substantive pollution control requirements are implicated by the NOI, and not in the boilerplate of the general permit itself, it is the NOIs, and not just the general permits, which must be made available to allow citizens to "track program implementation and . . . enforce regulatory requirements." *Id*.

Here, on June 19, 2017, Millennium submitted its Notice of Intent ("NOI") for coverage under the SPDES general permit. *See* Notice of Intent Request, Eastern System Upgrade, Ex. L. However, NYSDEC provided no public notice that an NOI had been submitted, no public notice that the NOI was complete, no public notice or opportunity for the receipt of public comment related to the NOI, no public notice when authorization was provided, and no opportunity for a public hearing. As such, the public and DRN were completely shut-out of the permitting process for the NOI. There was simply no way for DRN or the public to determine whether or not the Project met the substantive criteria for qualifying under the general SPDES permit.

Had DRN been provided the opportunity to comment on the NOI, it would have raised a host of issues. *See* Silldorff Aff., at ¶¶6-14, Ex. K; *see also* van Rossum Aff., at ¶¶22, Ex. F. For example, there is a heightened anti-degradation standard in this region of New York, and the regulations require "no measureable change to water quality" as required by the Delaware River Basin Commission.

Silldorff Aff., at ¶12. However, the NOI included no anti-degradation analysis, and "the New York State general permit for stormwater is not an approved component of the Administrative Agreement between New York State and the Delaware River Basin Commission." *Id*. DRN was also prevented from evaluating impacts to "such resources as protected streams (whether they are class AA or AA-S), historic properties, and state-regulated wetlands." *Id*., at ¶13. Indeed, based on these concerns and others it is possible that Millennium's Project would not have even qualified for a SPDES general permit, and instead Millennium should have been required to obtain an individual SPDES permit. *Id*. at ¶10-11. These are only a few of the many potential substantive issues DRN could have raised had it been provided the opportunity.

As described above, DRN was materially harmed by the lack of public notice because it was robbed of its opportunity to review the NOI, submit expert reports and comments, and therefore preserve a record for appeal. Indeed, the van Rossum declaration makes clear that "DRN did not become aware of the SPDES NOI until after it had been issued by NYSDEC," and therefore "DRN was prevented from meaningfully engaging in the permitting process for a significant part of the Clean Water Act's program." van Rossum Aff., at ¶22, Ex. F. While the purpose of public notice is to "invite public comment prior to the final decision," *Lake Erie Alliance for Protection of Coastal Corridor v. U.S. Army Corps of*

Engineers, 526 F.Supp. 1063, 1079 (W.D. Pa. 1981), that simply did not, and could not, occur here.

Concluding that no public participation is necessary for the SPDES permit would insulate the NYSDEC from the public, or other aggrieved parties, developing a record that contradicts the contents and conclusions presented in an NOI because those parties would never be provided with an opportunity to present their objections. Such a violation of the purpose and intent of the public participation requirements of the Clean Water Act simply does not withstand scrutiny. Under NYSDEC's implementation of the SPDES program, a landowner who has a stream running through his/her back yard would have no notice or opportunity to engage with NYSDEC regarding the SPDES permit prior to NYSDEC's authorization of a potential withdrawal from or a discharge to that landowner's stream. Such a regulatory regime is manifestly unjust, and does not comport with the public participation requirements of the Clean Water Act.

This problem is compounded by the fact that 15 U.S.C. § 717r(d)(1) requires that the circuit courts rely exclusively on the record as established at NYSDEC to determine whether the NYSDEC's authorization pursuant to the SPDES general permit was lawful. *See* 15 U.S.C. § 717r(d)(1). However, DRN could not have developed such a record because DRN was never made aware of a complete SPDES permit NOI, and thus DRN was not able to provide substantive comments

to NYSDEC. As such, DRN was prevented from developing a record for a substantive challenge to the SPDES permit.

In a case pending before the Third Circuit Court of Appeals, the court was highly critical at oral argument of a similar NPDES permitting scheme as implemented by the Pennsylvania Department of Environmental Protection ("Department"). *See Delaware Riverkeeper Network, et al. v. Pennsylvania Department of Environmental Protection, et al.*, Third Circuit Court of Appeals, Docket No. 16-2211, Oral Argument (November 7, 2017). There, the court criticized the Department's position that the Department could issue a NPDES permit without any public notice or opportunity for comment. Specifically, the court stated:

> How can the action of the department be viewed as something other than arbitrary and capricious when it is contingent upon the filing or issuance of a [NPDES] permit as to which the department itself acknowledges there is no opportunity to be heard, there is no notice and no opportunity to be heard because the NPDES permit is issued in final form without any notice?

Transcript of Oral Argument, *Delaware Riverkeeper Network, et al. v. Secretary of the Pennsylvania Department of Environmental Protection, et al.*, at 34, Ex. M; *see also id.*, at 35-45 (where the court further presses this line of questioning regarding the failure of the Department to provide public participation and notice for the NPDES permit). The same problem exists here, but worse. In Pennsylvania the

Department at least provided public notice of the final issuance of coverage under the NPDES general permit, here NYSDEC provided no such notice.

In the context of a Commission-jurisdictional pipeline project an emergency motion for stay is appropriate where "various important and required procedures" of the Clean Water Act were "ignored" by the state permitting agency. *See City of Green v. Ohio Environmental Protection Agency, et al.*, Sixth Circuit Court of Appeals, Docket No. 17-4016, Slip-op: Order and Opinion Granting Emergency Motion for Stay (November 22, 2017), at 2-3, Ex. N. In *City of Green*, the Sixth Circuit found that the Ohio Environmental Protection Agency likely failed to follow mandated procedures and methodology for evaluating wetlands, and that this procedural error was sufficient to grant a stay of the agency's Clean Water Act approval of the pipeline project. *Id.*, at 4. Here, DRN could not even challenge whether proper methodologies were used, cited, or relied upon by NYSDEC and the applicant because DRN never had the opportunity to do so. As such, the likelihood of success on merits for DRN's case for a stay is, if anything, significantly stronger than what was presented and affirmed in *City of Green*.

In failing to provide the citizen protections of a public available permit and a public hearing on the requested discharge, NYSDEC failed to adhere to the plain language of the Clean Water Act. Accordingly, NYSDEC's decision to authorize coverage pursuant to the SPDES general permit was arbitrary, capricious, or

otherwise not in accordance with law. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987) (courts must reject administrative constructions of law inconsistent with clear congressional intent).

II. Petitioners Will Suffer Irreparable Harm in the Absence of a Stay

Construction of the Project will require clearing vegetation (*i.e.*, trees and shrubs), grading the right-of-way ("ROW"), constructing or improving access roads, stripping topsoil and subsoils, excavating a trench, installing the pipeline, replacing topsoil and subsoil, and restoration of the pipeline ROW. *See* van Rossum Aff., ¶ 9-11, Ex. F. Blasting might be necessary in some areas where bedrock is encountered.

These construction activities cause permanent environmental damage. For example, clearing woody vegetation can destabilize stream banks causing erosion and turbid discharges into the waterbody and increasing water temperatures. *Id.* ¶¶ 9, 18, 21. Both of these conditions can adversely impact native aquatic life. *Id.* Although some of the Project's water-quality impacts could be mitigated by using "trenchless" techniques, to drill under waterbodies and wetlands, rather than excavating through them, even trenchless techniques pose risk to water quality, because drilling fluids could inadvertently be released into wetlands and waterbodies. *Id.*, at ¶19.

Irreparable harm to Petitioners' aesthetic and recreational interests will result from long-term harm to streams, wetlands, and forest. *See, e.g.*, Wood Aff., at ¶¶6-12, Ex. H; Billard Aff., at ¶6-10, Ex. J; Metts Aff., at ¶¶5-11, Ex. G; Robinson Aff., at ¶¶4-8, Ex. I. The harm to woody vegetation, including mature trees, is particularly significant because tree replanting requires decades before saplings can replace the environmental services provided by cleared trees. As such, there is no legal remedy for these harms.

The Supreme Court has recognized that environmental 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); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 25 (D. D.C. 2001) ("[E]nvironmental and aesthetic injuries are irreparable"). It is well established that the clearing of trees alone constitutes irreparable harm. *See, e.g., Concerned Citizens of Chappaqua v. U.S. Department of Transportation*, 579 F.Supp.2d 427, 432 (S.D.N.Y. 2008) (the felling of only sixty-one trees warranted a preliminary injunction); *Lichterman v. Pickwick Pines Marina, Inc.*, 2007 WL 4287586, at *6 (N.D. Miss. Dec. 6, 2007) (finding that clearing trees in a shoreline buffer zone constituted irreparable harm to residents with views of the shore); *Saunders v. Wash. Metro. Area Transit Auth.*, 359 F.Supp. 457, 462 (D. D.C. 1973) (enjoining construction because "[p]laintiffs

would suffer irreparable harm in the removal of trees from their neighborhood"); *Merritt Parkway Conservancy v. Mineta*, 424 F.Supp.2d 396, 425 (D. Conn. 2006) (holding the "felling of mature trees" together with other effects to aesthetic and historic features to be irreparable harm).

Additionally, the irreparable harm requirement is satisfied when, as here, the proposed Project will likely irreparably harm Plaintiffs' interests in using, recreating in, and conserving the project area. *See AWR v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011); *see also* Wood Aff., at ¶¶6-12, Ex. H; Billard Aff., at ¶6-10, Ex. J; Metts Aff., at ¶¶5-11, Ex. G; Robinson Aff., at ¶¶4-8, Ex. I. Ultimately, irreparable harm relates to harm to the **petitioner** and the **petitioner's interests** in the case, and is not limited to a showing of harm to the subject of the law being enforced. *See City of Green*, Slip-op., at 3, Ex. N (stating that "[t]he second stay factor—**irreparable harm to Green**—also weighs in Green's favor") (emphasis added). Importantly, there is no zone of interests test for irreparable harm. As explained by the Supreme Court, "[a] plaintiff seeking a preliminary injunction must establish that . . . **he is likely to suffer irreparable harm** in the absence of preliminary relief." *Winters*, 555 U.S. 21-22 ("applicant must demonstrate that in the absence of a preliminary injunction, the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered").

Based on this standard, courts have repeatedly held that petitioners can rely on a showing of irreparable harm to their recreational or aesthetic interest in mature trees or other natural resources, regardless of the subject of the law being enforced. For example, there are several cases involving logging, where the court looked to the plaintiff's interests in the forest even though the legal claim had nothing to do with forests or trees. *See, e.g., Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1135 (9th Cir. 2011); *League of Wilderness Defenders* v. *Connaughton*, 752 F.3d 755 (9th Cir. 2014); *Alliance for the Wild Rockies v Christensen*, 663 Fed. Appx. 515 (9th Cir. 2016).

Here, the proposed construction activity includes mechanized tree clearing, trenching, grading, stormwater and water discharge impacts, and irreversible deforestation. For example, by the specific design of the Project mature trees will forever cease to exist and never be permitted to regrow, or if they are permitted to regrow will not reach a comparable level of maturity in Petitioners' lifetimes. Petitioners and their members have clearly explained how their recreational and aesthetic interests in the forests, streams, wildlife habitat, and other waterways will be irreparably harmed by construction and operation of the Project. *See generally* Petitioners' Affs., Exs. F-J.

Furthermore, the rising number of pipeline incidents resulting in property damage, including environmental harm, and bodily injury or death, is well

documented. In 2017, through November 1, 2017, there have been at least 430 pipeline incidents resulting in 26 injuries, 3 fatalities, and $90,858,266 in damages. *See* U.S. Dep't of Transportation, Pipeline and Hazardous Materials Safety Administration, Pipeline Incident 20 Year Trend data (Oct. 3, 2017).

III. A Stay Will Not Cause the NYSDEC or Millennium Substantial Injury

Although Millennium may allege that delay to its construction schedule may result in economic harm, any such harm should be weighed in light of the fact that Millennium is ultimately responsible for that delay; Millennium chose to design and submit a proposed pipeline project that clearly violated the express provisions of the CWA. Whatever economic harm might befall Millennium as a result of this delay is temporary and far outweighed by the potential irreparable harm to the State's environment. *See Citizen's Alert Regarding the Environment v. United States Department of Justice*, 1995 WL 748246 at *11 (D. DC. Dec. 8, 2995) (potential loss of revenue, jobs, and investment caused by delay did not outweigh "permanent destruction of environmental values that, once lost, may never again be replicated").

Furthermore, the Sixth Circuit has held that the type of harm to a pipeline company resulting from the grant of an emergency motion for stay is "minimized because . . . this order directs the clerk of the court to expedite the appeal." *City of*

Green, Slip-op., at 4, Ex. N. DRN has no objection to an expedited schedule for this appeal.

IV. A Stay Pending Review is in the Public Interest

In cases involving preservation of the environment, the balance of harms generally favors a grant of injunctive relief. *See Amoco Prod. Co.*, 480 U.S. at 545 ("If such injury is sufficiently likely…the balance of harms will usually favor the issuance of an injunction to protect the environment"). There also is no question that the public has an interest in having the mandates of the federal Clean Water Act be carried out accurately and completely. Here, the clearing of mature trees, trenching through wetlands and streams, the concomitant loss of the ecological services those resources provide, and the impacts of withdrawing, using, and discharging over 2.5 million gallons of water is a significant environmental harm, and therefore a harm to the public interest in protecting natural resources.

The costs of complying with the Clean Water Act cannot fairly be characterized as harm, particularly when those costs are the self-inflicted. S*ee Cronin v. U.S. Dep't of Agriculture*, 919 F.F2d 439, 445 (7th Cir. 1990) (The felling of trees that will not grow back in plaintiff's lifetime outweighs "the time value of the profit component of [the anticipated] revenue[s]" of the project).

CONCLUSION

Petitioners request a temporary stay during the pendency of this Court's consideration of this Emergency Motion for Stay, and for this Emergency Motion for Stay to be granted. Petitioners have no objection to an expedited schedule for resolution of the Emergency Motion for Stay.

Respectfully submitted this 20th day of December 2017,

/s/ Aaron Stemplewicz

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CERTIFICATE OF COMPLIANCE

The undersigned attorney, Aaron Stemplewicz, hereby certifies:

1. This document complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2). According to the word processing system used in this office, this document, exclusive of the sections excluded by Fed. R. App. P. 32(f), contains 5,167 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface in 14-point Time New Roman font.

Dated: December 20, 2017

/s/ Aaron Stemplewicz

Aaron Stemplewicz
Counsel for: *Petitioners Delaware Riverkeeper Network and the Delaware Riverkeeper*

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2017, the foregoing Emergency Motion, Addendum, and Affirmation have been served via the Court's CM/ECF system, via email upon Respondents and Intervenor in this matter:

Dated: December 20, 2017

/s/ Aaron Stemplewicz

Aaron Stemplewicz
Counsel for: *Petitioners Delaware Riverkeeper Network and the Delaware Riverkeeper*

No. 17-3895

ORAL ARGUMENT NOT YET SCHEDULED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DELAWARE RIVERKEEPER NETWORK; MAYA VAN ROSSUM, the Delaware Riverkeeper,

Petitioners,

v.

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

Respondents,

MILLENNIUM PIPELINE COMPANY, L.L.C.,

Intervenor.

ADDENDUM

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Dated: December 20, 2017

Counsel for: *Delaware Riverkeeper Network and the Delaware Riverkeeper*