In the United States Court of Appeals for the Second Circuit

Nos. 17-3503, 17-3770 (not consolidated)

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al*.,
Respondents.

ON PETITION FOR A WRIT OF PROHIBITION AND PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

OPPOSITION OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION TO PETITION FOR A WRIT OF PROHIBITION AND TO EMERGENCY MOTION FOR STAY

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Crounse Exh.	Exhibits to the Declaration of Sita Crounse in Support of Petitioner's Motion for a Stay
Millennium	Millennium Pipeline Co., LLC
Motion	The Department's November 17, 2017 Emergency Motion for Stay
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INTRODUCTION

In its October 30 Petition for A Writ of Prohibition (Petition) and its November 17 Emergency Motion for Stay (Motion), the New York State Department of Environmental Conservation (Department) asks this Court to stay construction by the Millennium Pipeline Company (Millennium) of its Valley Lateral project (Project), which the Federal Energy Regulatory Commission (Commission) has found to be in the public interest. As the Department acknowledges that its Petition is now moot,[1] this Response addresses the arguments in the Motion requesting that construction be stayed pending appellate review of *Millennium Pipeline Company, L.L.C.*, 160 FERC ¶ 61,065 (Sept. 15, 2017) (Waiver Order) (Exhibit A to the Declaration of Sita Crounse in Support of Petitioner's Emergency Motion for a Stay (Crounse Exh.)), *reh'g denied*, 161 FERC ¶ 61,186 (Nov. 15, 2017) (Waiver Rehearing Order) (Crounse Exh. B).

In the Waiver Orders, the Commission found that the Department waived its authority under Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), with regard to the Project. Section 401 provides that a state waives its authority if it does not "act on a request for certification" within one year "after receipt of such request." Here, the Department received Millennium's 1200-page application for

[1] *See* Petitioner's November 16 Response to Emergency Motion to Dismiss or Deny Petition for Writ of Prohibition at 3 ("the Department's Emergency Petition has been overtaken by events").

water quality certification on November 23, 2015, but did not deny the application until August 30, 2017, well outside the one-year limitation.

The Department has failed to demonstrate the extraordinary circumstances required for this Court to stay pipeline construction. The Department is not likely to succeed on its claim that it can toll the statutory one-year limitation period until it deems a request for certification to be "complete," Motion at 18, when the plain language of the statute confers no such authority. Nor can the Department demonstrate actual or imminent irreparable injury from environmental harm it speculates "could" occur during appellate review, *see* Motion at 15, when, as a result of an extensive environmental review of the Project in which the Department participated, the Commission has imposed mandatory mitigation measures to protect against any significant environmental damage.

To the contrary, this Court and others consistently have declined to halt Commission-authorized pipeline construction prior to judicial review on the merits based upon purported environmental injury. In the past six years, courts have denied all 16 emergency requests to interfere with the effectiveness of Commission natural gas certificate orders, including three filed in this Court:

- *Catskill Mountainkeeper v. FERC*, No. 16-345 (2d Cir. Feb. 24, 2016) (denying stay of pipeline construction);
- *In re Stop the Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015) (denying petition for mandamus); and

- *Coalition for Responsible Growth & Res. Conservation v. FERC*, No. 12-566 (2d Cir. Feb. 28, 2012) (denying stay of tree clearing for pipeline construction). [2]

The Department has presented no legitimate reason why this Court should reach any different decision here.

BACKGROUND

I. THE COMMISSION'S CERTIFICATE ORDERS

This case concerns the Commission's authorization for Millennium to construct the Project, based on the Commission's finding that Project is consistent with the "public convenience and necessity" under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c). *See Millennium Pipeline Co. L.L.C.*, 157 FERC ¶ 61,096 P 1 (Nov. 9, 2016) (Certificate Order) (Crounse Exh. F), *on reh'g*, 161 FERC ¶ 61,194 (Nov. 16, 2017) (Certificate Rehearing Order) (Crounse Exh. N). The

[2] The other thirteen cases denying stays of (or otherwise interfering with) FERC natural gas infrastructure orders are: *Allegheny Defense Project v. FERC*, No. 17-1098 (D.C. Cir. Nov. 8, 2017); *Adorers of the Blood of Christ v. FERC*, 5:17-cv-3163 (E.D. Pa. Sept. 28, 2017), *on appeal*, No. 17-3163 (3d Cir. Oct. 13, 2017); *Sierra Club v. FERC*, No. 16-1329 (D.C. Cir. Nov. 17, 2016); *City of Boston v. FERC*, No. 16-1081 (D.C. Cir. Oct. 28, 2016); *In re Clean Air Council*, No. 15-2940 (3d Cir. Dec. 8, 2015); *Town of Dedham v. FERC*, 2015 WL 4274884, No. 1:15-cv-12352 (D. Mass. July 15, 2015); *EarthReports, Inc. v. FERC*, No. 15-1127 (D.C. Cir. June 12, 2015); *In re Del. Riverkeeper Network*, No. 15-1052 (D.C. Cir. Mar. 19, 2015); *Minisink Residents for Envt'l Pres. and Safety v. FERC*, No. 12-1481 (D.C. Cir. Mar. 5, 2013); *Feighner v. FERC*, No. 13-1016 (D.C. Cir. Feb. 9, 2013); *Del. Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013); *In re Minisink Residents for Envt'l Pres. and Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012); and *Summit Lake Paiute Indian Tribe and Defenders of Wildlife v. FERC*, Nos. 10-1389 & 10-1407 (D.C. Cir. Jan. 28, 2011 & Feb. 22, 2011).

Project is composed of 7.8 miles of pipeline and related facilities in Orange County, New York, designed to deliver natural gas to a new natural gas-fueled generator, the Valley Energy Center.

In granting the certificate, the Commission balanced the public benefits of the Project against the potential adverse consequences. *See* Certificate Rehearing Order P 19, Crounse Exh. N. The Commission found a strong need for the Project because the Project's capacity was fully subscribed by the developer of the Valley Energy Center, CVP Valley LLC. *Id*. The Commission further found that the benefits of serving this demand outweighed the minimal adverse consequences, which largely would be mitigated by the extensive environmental and operating conditions required in the Certificate Order. *Id*. Those conditions included the requirement that Millennium document that it had received all required federal authorizations or "evidence of waiver thereof," including a water quality certification under the Clean Water Act. Certificate Order at App. B, Environmental Condition 9, Crounse Exh. F. The Commission determined that the Project, constructed and operated in accordance with these conditions, would not significantly affect the quality of the human environment. *Id*. P 133.

In the Certificate Rehearing Order, the Commission denied timely-filed requests for rehearing of the Certificate Order filed by other parties, and dismissed

the Department's late-filed request for rehearing as jurisdictionally barred. *See* Certificate Rehearing Order PP 1, 10-14, Crounse Exh. N.

II. THE DEPARTMENT'S WATER QUALITY CERTIFICATION PROCEEDING

Because the Project would traverse several streams in southern New York, Millennium was required to apply to the Department for a Water Quality Certificate under the Clean Water Act. *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 698 (D.C. Cir. 2017). Under the certificate conditions, Millennium could commence Project construction only if the Department either granted certification or waived the certification requirement by failing to act within one year of a "'request for certification.'" *Id*. (quoting 33 U.S.C. § 1341(a)(1)).

The Department received Millennium's 1200-page application for a Water Quality Certificate on November 23, 2015. *See* Crounse Exh. H at 1. On December 7, 2015, the Department issued a Notice deeming Millennium's application incomplete pending issuance of the Commission's Environmental Assessment. *Id*. Following the May 9, 2016 issuance of the Environmental Assessment, the Department issued a Second Notice of Incomplete Application, raising additional issues. *Id*. On August 16 and 31, 2016, Millennium provided a response and a supplemental response to the second Notice. *Id*. at 2. In a November 18, 2016 letter -- while acknowledging that Millennium had fully responded to the second Notice of Incomplete Application -- the Department stated

that it would "continue its review of the Application, as supplemented, to determine if a valid request for a [Water Quality Certificate] had been submitted." *Id*. "Regardless of any such determination," the Department stated that it had, "at a minimum, until August 30, 2017 to either approve or deny the application." *Id*.

Millennium then petitioned the D.C. Circuit to compel the Department to act on the certification application. *Millennium Pipeline Co*., 860 F.3d at 699. On June 23, 2017, the D.C. Circuit dismissed the petition, finding that Millennium was not aggrieved by the Department's delay because any unlawful delay would trigger the waiver provisions of the Clean Water Act and permit construction to go forward without state certification. *Id*. at 700. Millennium's remedy for the delay was to present evidence of waiver to the Commission. *Id*. at 701.

Accordingly, on July 21, 2017, Millennium requested that the Commission issue a Notice to Proceed with construction. *See* Crounse Exh. K at 1. On August 30, 2017, the Department denied Millennium's water certification application. Crounse Exh. I. On September 15, 2017, the Commission found that the Department's delay constituted waiver of the Department's authority under the Clean Water Act, Crounse Exh. A, and on October 27, 2017, the Commission issued the Notice to Proceed with Construction. Crounse Exh. K. On November 15, 2017, the Commission denied the Department's request for rehearing of that waiver determination. Waiver Rehearing Order P 3, Crounse Exh. B.

ARGUMENT

In its Motion, the Department has failed to justify staying pipeline construction pending appellate review. An injunction is an extraordinary remedy never awarded as a right. *Munaf v. Geren*, 553 U.S. 674, 691 (2008); *UBS Fin. Serv. v. W. Va. Univ. Hosps., Inc*., 660 F.3d 643 (2d Cir. 2011); *Thapa v. Gonzales*, 460 F.3d 323 (2d Cir. 2006). When considering whether to grant such extraordinary relief, the Court balances four factors: "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *In re World Trade Ctr. Disaster Site Litig. v. City of New York*, 503 F.3d 167, 170 (2d Cir. 2007).

The Commission's reasonable application of governing statutory language makes success on the merits unlikely. Given the numerous mandatory mitigation measures, the Department's alleged environmental harms are neither substantial nor irreparable. Last, the significant public interest in the new gas supply and the detriment to parties in need of such supply weigh strongly against a stay.

I. THE DEPARTMENT HAS NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS.

The Department has not demonstrated likelihood of success on its claim that its own determination of whether a "request for certification" is "complete"

permits it to toll the one-year limitation under section 401 of the Clean Water Act. The Department must make a "strong showing" that it is likely to succeed on the merits. *In re World Trade Ctr.*, 503 F.3d at 170; *see also No Spray Coal., Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001) (rigorous likelihood of success on the merits standard applicable to agency action taken in the public interest pursuant to statutory scheme). Absent such a showing, this Court has denied injunctive relief, even in the presence of irreparable injury. *See, e.g., N.Y. City Envtl. Justice All. v. Giuliani*, 214 F.3d 65, 68 (2d Cir. 2000).

The Clean Water Act provides that "'[i]f the State, interstate agency, or Administrator, as the case may be, 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 with respect to such Federal application." 33 U.S.C. § 1341(a)(1). Here, the Department received Millennium's 1200-page certification application on November 23, 2015, but did not deny the application until August 30, 2017. Waiver Order PP 5 & n.5, 10 & n.13, Crounse Exh. A. In the Department's view, the one-year decision period did not commence until the Department received what it deemed to be a "complete" application. Motion at 18.

As the Commission determined, however, under the plain meaning of the statutory phrase "receipt of such request," the one-year period began the day the

Department received Millennium's certificate application, November 23, 2015, rather than when the Department deemed that application to be complete. Waiver Order P 13, Crounse Exh. A; Waiver Rehearing Order P 38, Crounse Exh. B. Receipt ordinarily refers to taking possession or delivery, *see United States v. Ramos*, 685 F.3d 120, 131 (2d Cir. 2012), and request means to ask, petition or entreat. *Mallard v. U.S. Dist. Ct. for the S.D. of Iowa*, 490 U.S. 296, 301 (1989). *See* Waiver Order P 13, Crounse Exh. A; Waiver Rehearing Order P 38, Crounse Exh. B. *See generally, e.g., Greenery Rehab. Grp., Inc. v. Hammon*, 150 F.3d 226, 231 (2d Cir. 1998) ("If the statutory terms are unambiguous, our review generally ends and the statute is construed according to the plain meaning of its words.").

Other courts have found the same waiver language unambiguous. In 1987, the Commission revised its hydropower licensing regulations to provide that the one-year period commences when the certifying agency receives a written request for certification, rather than when that agency finds the application acceptable for processing. Waiver Order P 16, Crounse Exh. A (citing 18 C.F.R. § 4.34(b)(5)(iii)).[3] The Ninth Circuit held that the new regulation was "fully

[3] There is no comparable regulation for Natural Gas Act certificate proceedings but the Commission has held in natural gas cases that the one-year period begins on the day the certifying agency receives a certification application. Waiver Order P 15, Crounse Exh. A. *See Georgia Strait Crossing Pipeline LP*, 107 FERC ¶ 61,065 P 7, *on reh'g*, 108 FERC ¶ 61,053 (2004); *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245 PP 61-63 (2009). Further, the Commission has formally clarified that the term "receipt" as used in its regulation governing

consistent with the letter and the intent of [section] 401(a)(1) of the [Clean Water Act]." *State of Cal. ex rel. State Water Resources Control Bd. v. FERC*, 966 F.2d 1541, 1554 (9th Cir. 1992). *See* Waiver Order P 16 & n.31, Crounse Exh. A; Waiver Rehearing Order P 39 & n.86, Crounse Exh. B (citing *State of Cal.*).

Similarly, the D.C. Circuit has recognized that, "[i]n imposing a one-year time limit on States to 'act,' Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request. This is clear from the plain text." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). *See also id*. at 966 (for certification application filed on May 8, 2008, the one-year period expired on May 7, 2009, notwithstanding intervening public hearing and hearing officer report). *See also, e.g., Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73, 80 (1st Cir. 1993) (finding that "[t]he Clean Water Act required [the state] to provide its certificate, or announce a decision not to certify, within a reasonable time not to exceed one year after the application").

In contrast, the Department's interpretation requires adding the term "complete" to the statutory language. *See, e.g., Alcoa*, 643 F.3d at 974 (rejecting

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notification of an agency's receipt of a request for a federal authorization required for a natural gas infrastructure project, 18 C.F.R. § 385.2013(a), means the day that a request for a federal authorization is submitted to an agency, not the day an agency takes official notice that a complete application has been received. Waiver Rehearing Order P 41 n.89, Crounse Exh. B (citing FERC regulations).

statutory interpretation of section 401 of the Clean Water Act that "would require adding terms to the statute that Congress has not included"); *Prudential S.S. Corp. v. U.S.*, 220 F.2d 655, 657 (2d Cir. 1955) ("As the words of the section are plain, we are not at liberty to add or alter them to effect a purpose which does not appear on its face or from its legislative history"). For example, in the Clean Air Act, 42 U.S.C. § 7661b(c), Congress required that the relevant permitting authority approve or disapprove "a completed application" within "18 months after the date of receipt thereof." *See, e.g., Tenn. Gas Pipeline Co., LLC v. Paul*, 692 Fed. Appx. 3, 4-5 (D.C. Cir. 2017) (addressing what constitutes a "completed application" under the Clean Air Act). No similar modifier in section 401 of the Clean Water Act requires a "complete" request for certification.

The Department points to *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721 (4th Cir. 2009), Motion at 20, but that case concerned a request for a water quality certification in connection with an Army Corps of Engineers dredge and fill permit under section 404 of the Clean Water Act, 33 U.S.C. § 1344. The court in *AES* found that a request for certification must be "valid" to commence the one-year limitation period, based upon a Corps regulation providing that, in determining whether waiver has occurred, the district engineer "will verify that the certifying agency has received a valid request for certification." *See* 589 F.3d at 729 (quoting 33 C.F.R. 325.2(b)(1)(ii)). Here, in contrast, Millennium was not

required to obtain a dredge and fill permit, and the referenced regulation of the Corps of Engineers is inapplicable. *See* Waiver Order P 15 n.25, Crounse Exh. A; Waiver Rehearing Order P 31, Crounse Exh. B. Indeed, the Corps has confirmed by letter that it takes no position on the statutory construction issue presented here, and that it will "'abide by whatever final determination the Federal Courts make in this case.'" Waiver Rehearing Order P 31 & n.54, Crounse Exh. B (quoting Corps October 16, 2017 letter).

Further, although the Department claims deference for its statutory interpretation, Motion at 18, citing *AES*, 589 F.3d at 730; *Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 297 (D.C. Cir. 2003), those citations stand for the proposition that the Environmental Protection Agency administers the Clean Water Act and receives deference for its interpretation, not the Department. *See also, e.g.*, *Alcoa*, 643 F.3d at 972 (the Commission receives no deference for interpreting the Clean Water Act, which is administered by the Environmental Protection Agency). Rather, as this Court recognized in *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989), this Court reviews *de novo* a state's interpretation of a federal statute that is not approved by a federal agency. Waiver Rehearing Order P 27, Crounse Exh. B. *See also, e.g.*, *Perry v. Dowling*, 95 F.3d 231, 236 (2d Cir. 1996) ("When the federal-statute interpretation is that of a state agency and 'no federal agency is involved,' deference is not appropriate.") (quoting *Turner*, 869 F.2d at

141). At the same time, courts have held that the Commission is required to make certain inquiries under section 401 (*see City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (Commission must confirm state compliance with section 401 notice requirements); *Keating v. FERC*, 927 F.2d 616, 625 (D.C. Cir. 1991) (Commission must determine effectiveness of state revocation of certification)), such that the Commission's interpretation here may warrant some enhanced degree of consideration by the court. *See* Waiver Rehearing Order P 32, Crounse Exh. B.

The Commission's interpretation is, moreover, consistent with Congressional intent. Waiver Order P 16, Crounse Exh. A; Waiver Rehearing Order P 40, Crounse Exh. B. *See McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (in determining the meaning of a statute, the Court looks "'not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy'") (quoting *Crandon v. U.S.*, 494 U.S. 152, 158 (1990)). As the D.C. Circuit has recognized, "the Conference Report on Section 401 states that the time limitation was meant to ensure that 'sheer inactivity by the State . . . will not frustrate the Federal application.'" *Alcoa*, 643 F.3d at 972 (quoting H.R. Rep. 91-940 at 56 (1970), reprinted in 1970 U.S.C.C.A.N. 2691, 2741). "Such frustration would occur if the State's inaction, or incomplete action, were to cause the federal agency to delay its licensing proceeding." *Id*. The Department's interpretation would permit a state agency to request supplemental information over an indefinite

period of time, "holding both the applicant and the Commission proceeding in limbo." Waiver Rehearing Order P 40, Crounse Exh. B. *See also, e.g.*, *Millennium Pipeline*, 860 F.3d at 698 ("To prevent state agencies from indefinitely delaying issuance of a federal permit, Congress gave States only one year to act on a 'request for certification' under the Clean Water Act."). This Court has recognized that, even if the statute is ambiguous, the Court can "look to legislative history as a means of determining Congressional intent." *Freier v. Westinghouse Elec. Corp*., 303 F.3d 176, 197 (2d Cir. 2002).

Nor is the Department prejudiced by the Commission's interpretation. Waiver Rehearing Order P 42, Crounse Exh. B. The Commission's interpretation of section 401 does not permit applicants to force an agency into a premature decision by delaying submission of supplemental materials. *See* Motion at 19. States remain free to fashion procedural regulations they deem appropriate and to deny applications for failure to meet such regulations. Waiver Rehearing Order PP 41-42, Crounse Exh. B. Denying an incomplete application does not prevent the state from working with an applicant, *see* Motion at 23; a denial can be issued without prejudice to an applicant's refiling in accordance with the state's requirements. Waiver Rehearing Order P 42, Crounse Exh. B. Rather, the Commission has found that using the receipt date as the triggering date for the one-year period is in the public interest, providing all parties certainty regarding the

one-year limitation period, and avoiding undue delay associated with open-ended certification deadlines. Waiver Rehearing Order P 41, Crounse Exh. B.

II. THE ALLEGED HARM IS NEITHER SUBSTANTIAL NOR IRREPARABLE

The Department must demonstrate "an injury that is neither remote nor speculative, but actual and imminent." *Rodriguez v. DeBuono,* 175 F.3d 227, 234 (2d Cir. 1999) (quoting *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995)). "Irreparable harm is 'the single most important prerequisite for the issuance of a preliminary injunction.'" *Id*. at 233-34 (quoting *Bell & Howell: Mamiya Co. v. Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir. 1983)).

Where, as here, an environmental harm is alleged, this Court has held that "broader injunctive relief is appropriate, of course, where substantial danger to the environment . . . is established." *Town of Huntington v. Marsh*, 884 F.2d 648, 653 (2d Cir. 1989) (vacating injunction for plaintiff's failure to establish actual or threatened injury). Thus, the Department bears the burden to establish that Project construction will substantially endanger the environment. *See id.* at 654. As evidenced by the Environmental Assessment, Crounse Exh. D, Millennium's Project, as conditioned by the Certificate Order, poses no such threat.

The alleged injury – harm to the water quality of streams and wetlands that construction "could cause" (Motion at 15) – is speculative and unsupported by the record. To the contrary, based on the analysis in the Environmental Assessment,

the Commission determined that the Valley Lateral Project, if constructed and operated in accordance with the conditions imposed in the Certificate Order, would not significantly affect the quality of the human environment. Waiver Rehearing Order P 19, Crounse Exh. B (citing Certificate Order P 133, Crounse Exh. F). The Project pipeline route and construction procedures were modified to avoid or minimize impacts on sensitive resources and reduce engineering concerns. Certificate Order P 48, Crounse Exh. F. The Project crosses four different creeks or their tributaries – none of which is designated as a "High Quality" or "Exceptional Value" waterbody – for a total of 12 crossings. Environmental Assessment at 39 and Appendix D-1, Crounse Exh. D (no rivers or other major waterbodies are crossed). To minimize impacts on the affected creeks, Millennium is using the horizontal directional drilling method at 8 of the 12 waterbody crossings. Environmental Assessment at Appendix D-1, Crounse Exh. D; Certificate Rehearing Order P 57 & n.86, Crounse Exh. F. The Project will cross a total of 1.9 acres of wetlands, and most impacts to wetlands will be avoided by using conventional bore or horizontal directional drilling methods. Environmental Assessment at 45-46, Crounse Exh. D.

The Commission found that the mandatory mitigation measures would minimize impacts related to water discharge and waterbody and wetland crossings, and would minimize or prevent accidental spills and leaks, during construction and

operation of the Project. *See, e.g.*, Certificate Order PP 70-80, Crounse Exh. F; Environmental Assessment at 40-44 (waterbodies), 45-48 (wetlands), Crounse Exh. D. Further, Millennium must comply, *inter alia*, with: Wetland and Waterbody Mitigation Procedures to avoid, reduce, or minimize disturbances on wetlands and waterbodies during and following pipeline construction, and to minimize erosion and enhance vegetation; Spill Prevention and Response Procedures to mitigate any incidental spills of contaminants; and Environmental Construction Standards which set pipeline construction techniques and incorporate the best management practices from the Commission and the New York State Department of Agriculture and Markets. Certificate Order at PP 68, 71, 72, 74, 78, 80, Environmental Condition 1, Crounse Exh. F. The Commission concluded that, with the mitigation measures, the Project will not have adverse, long-term impacts on surface water and wetland resources. *Id*. PP 74, 79.

While the Department speculates about potential harm from an inadvertent release of drilling fluid, *see* Crounse Declaration PP 5, 6, an inadvertent release is not "actual or imminent" and the chance of such a release is minimized by mandatory horizontal directional drilling contingency plan measures. Environmental Assessment at 42, 46, Crounse Exh. D. Further, the impacts from an inadvertent release, should one occur, would be temporary (*id*. at 46), and the clean-up plan would be developed in consultation with the Department. *Id*. at 42.

The Department complains that its environmental review has been circumvented (Motion at 17), but the Department's participation in the Commission's environmental review resulted in significant Project modifications. Waiver Rehearing Order P 20, Crounse Exh. B; Certificate Order P 48, Crounse Exh. F. For example, in response to Department comments, Millennium modified crossing methods for Department-regulated forested wetlands and streams, and revised its Environmental Construction Standards for stream bank stabilization. Waiver Rehearing Order P 20, Crounse Exh. B; Certificate Order P 48, Crounse Exh. F.

The Department's concern about ensuring that unanticipated adverse environmental impacts are reported, remedied, and monitored (Motion at 16) is also unavailing. Millennium is required to assign a trained environmental inspector for each construction spread and at least one inspector to monitor horizontal directional drilling activities, and to be present where additional temporary workspace is within 50 feet of a waterbody. Waiver Rehearing Order P 20, Crounse Exh. B; Certificate Order P 71 and App. B Environmental Condition 3 (requiring trained environmental inspectors), Condition 6 (requiring implementation plan specifying procedures if noncompliance occurs), and Condition 7 (requiring one environmental inspector per spread), Crounse Exh. F; *see also* Environmental Assessment at 42, Crounse Exh. D. Furthermore,

Commission staff will conduct routine compliance inspections of the project throughout construction and restoration. Waiver Rehearing Order P 20, Crounse Exh. B; Certificate Order P 71, Crounse Exh. F.

Thus, the Department's allegations of what "could" happen during construction of the Project (Motion at 15) ignore the mitigation measures designed to minimize, if not eliminate altogether, environmental impacts on water resources and wetlands. The Commission carefully addressed each of these concerns, and many others, in its Environmental Assessment and concluded that, as mitigated, none of the impacts would be significant. Any injury remaining after mitigation is outweighed by the Project's public benefits.

III. A STAY WILL SUBSTANTIALLY INJURE OTHER PARTIES

The Court must also consider whether a stay would have a serious adverse effect on other interested persons. *In re World Trade Ctr.*, 503 F.3d at 170. As the Commission found, the Project is required by the public convenience and necessity, and commencement of construction is necessary to allow Millennium to provide natural gas transportation service to the Valley Energy Center, which has an anticipated February 2018 in-service date. Waiver Rehearing Order P 22, Crounse Exh. B.

Even a short stay could result in a significant delay to the Project and harm to the CPV Valley Energy Center. *See* November 15, 2017 Millennium Pipeline

Co., L.L.C. Emergency Motion to Dismiss or Deny Petition for Writ of Prohibition at 4-5; CPV Valley, LLC Answer in Opposition to New York State Department of Environmental Conservation Motion for Reopening and Stay, Docket No. CP16-17-001 (Sept. 15, 2017) (September 15 Answer) at 15-19 (detailing the harm to itself and New York wholesale and retail electric customers from delay in construction of the Project). Absent the Project, CPV Valley will be forced to generate electricity using fuel oil instead of cheaper and cleaner-burning natural gas. *See* CPV Valley September 15 Answer at 16. Courts have recognized a substantial interest in continuing with approved construction activities in light of the costly nature of interruptions. *See, e.g., 3883 Connecticut LLC v. Dist. of Columbia*, 336 F.3d 1068, 1074 (D.C. Cir. 2003) ("the permit holder has a substantial interest in the continued effect of the permit and in proceeding with a project without delay"); *Tri County Indus. v. Dist. of Columbia*, 104 F.3d 455, 461 (D.C. Cir. 1997) ("The property interest here – the entitlement to continue construction without unfair interference – is substantial; any interruption in construction is likely to be very costly").

IV. THE PUBLIC INTEREST DOES NOT FAVOR A STAY

The public interest is a crucial factor in litigation involving the administration of regulatory statutes designed to promote the public interest. *Ofosu v. McElroy*, 98 F.3d 694, 701-702 (2d Cir. 1996). In *Ofosu*, this Court

stated that, in considering whether to stay agency orders, courts give significant weight to the public interest served by the proper operation of the regulatory scheme. *Id.* at 702 (citations omitted); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction"). The Natural Gas Act charges the Commission with regulating the interstate transportation and wholesale sale of natural gas in the public interest. *See, e.g.*, *Islander East Pipeline Co. v. McCarthy*, 525 F.3d 141, 143 (2d Cir. 2008). Because the Commission is the presumptive guardian of the public interest in this area, its views indicate the direction of the public interest for purposes of deciding a request for stay pending appeal. *See CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 142 (2d Cir. 1977).

Here, the Commission found that the project is required by the public convenience and necessity, and commencement of construction will allow Millennium to provide natural gas transportation service to the Valley Energy Center, a new natural-gas fueled generator. Once the generator enters the market using natural gas, New York ratepayers will "receive the benefits of lower cost and cleaner energy, and increased generation to meet energy demands within the state [of New York]." *See* CPV Valley September 15 Answer at 18; *see also* Waiver

Rehearing Order P 21 & n.31, Crounse Exh. B. A stay would, at the least, significantly delay the public benefits of this Project.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Prohibition should be dismissed as moot or denied, and the Motion for Stay should be denied.

Respectfully submitted,

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November 20, 2017

CERTIFICATE OF COMPLIANCE

I certify that this document, produced using a computer, complies with the 5200-word type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5147 words, excepting sections excluded from the length limitations by Fed. R. App. P. 32(f).[4]

I further certify that this brief 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 brief has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

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[4] This document is not a handwritten or typewritten response to a motion that is subject to the 20-page limitation of Fed. R. App. P. 27(d)(2)(B), but if that provision were deemed to apply, on November 17, 2017, Petitioner filed a motion requesting *inter alia* that responsive pleadings to Petitioner's Emergency Motion for Stay be permitted to exceed the 20-page limitation as long as the filings do not exceed 5200 words.

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and Circuit Rule 25.1(h), I hereby certify that I have, this 20th day of November 2017, filed the foregoing via the Court's CM/ECF System and served it upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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