In the United States Court of Appeals for the District of Columbia Circuit

No. 13-1015

DELAWARE RIVERKEEPER NETWORK, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

RESPONDENT'S OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING REVIEW

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JANUARY 30, 2013

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GLOSSARY

Certificate Order	*Tennessee Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61,161 (May 29, 2012)
Commission or FERC	Federal Energy Regulatory Commission
EA	Environmental Assessment for the Northeast Upgrade Project, issued November 21, 2011
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act
Pipeline	Tennessee Gas Pipeline Company, L.L.C., sponsor of the Northeast Upgrade Project
Project	Tennessee Gas Pipeline Company's Northeast Upgrade Project, comprised of (i) 40.5 miles of 30-inch diameter pipeline looping from Bradford County, Pennsylvania, across the Delaware River into New Jersey, (ii) modifications of four existing compressor stations including the addition of approximately 22,310 horsepower of compression at two stations, and (iii) upgrades at one meter station
Rehearing Order	*Tennessee Gas Pipeline Co., L.L.C.*, 142 FERC ¶ 61,025 (January 11, 2013)
Riverkeeper	Petitioners, Delaware Riverkeeper Network, New Jersey Highlands Coalition, and Sierra Club, New Jersey Chapter

INTRODUCTION

Delaware Riverkeeper Network, New Jersey Highlands Coalition, and Sierra Club, New Jersey Chapter (collectively "Riverkeeper") have returned to this Court asking, once again, for the extraordinary remedy of indefinitely delaying the construction of a natural gas pipeline certificated by the Federal Energy Regulatory Commission ("Commission" or "FERC"). Yet, nothing has changed in the two weeks since this Court denied the same stay request supported by the same facts.

Riverkeeper's request is premised on its assertion of extraordinary facts. But there is nothing extraordinary here. All the Commission has done here – as it must do in all project siting cases – is to determine, after weighing findings such as the need for the project and its environmental effects, whether the project is required by the public convenience and necessity. In weighing appropriate considerations, and striking a balance that mitigates, through extensive environmental conditions, environmental effects, the Commission has carried out its statutory responsibility under the Natural Gas Act to promote the public interest.

Riverkeeper seeks to upset that balance. Its primary claim in support of its request for extraordinary relief is its belief that the Commission was required to conduct an unnecessarily expansive, global environmental review of this Project with three other independent pipeline projects. Again, there is nothing extraordinary here. The Commission correctly declined to develop a programmatic

environmental impact statement for unconnected natural gas projects. Moreover, the specific injuries claimed by Riverkeeper are inadequate to justify such an intrusion. They are assertions of general environmental harms that are either wholly speculative or effectively mitigated by conditions imposed by the agency (including after-the-fact monitoring, reporting, and enforcement) or commitments made by the project applicant.

Riverkeeper does not present any legitimate reason why the Court should reach a different decision here than it did in this case two weeks ago, as well as in other recent natural gas pipeline construction cases. *See In re Del. Riverkeeper Network*, No. 13-1004 (D.C. Cir. Jan. 17, 2013) (denying Riverkeeper's January 9, 2013 stay request); *see also supra* at pp. 5-6 (describing other recent pipeline stay denials).

BACKGROUND

This case concerns a proposal by Tennessee Gas Pipeline Company, L.L.C. ("Pipeline") to upgrade a portion of its existing "300 Line System," a natural gas pipeline system constructed in the 1950s in northeastern United States. This proposal, the Northeast Upgrade Project, comprises 40.3 miles of pipeline looping,[1] 84 percent of which will be collocated with the Pipeline's existing 300

[1] A pipeline "loop" is a segment of pipe installed adjacent to an existing pipeline and connected to it at both ends. A loop allows more gas to be moved through the natural gas pipeline system. Environmental Assessment for the

Line, and improvements to four existing compressor stations and one meter station (the "Project"). *See Tenn. Gas Pipeline Co., L.L.C.*, 142 FERC ¶ 61,025, at P 2 (Jan. 11, 2013) ("Rehearing Order"); *see also* EA at 1-8 (separately submitted). The Project is divided into five loop segments – Loop 317, 319, 321, 323, and 325. Pipeline intentionally routed 6.4 miles (16 percent) of the looping (entirely on Loop 323) outside of the Pipeline's existing right-of-way to circumvent a national park. EA at 1-8; Rehearing Order P 2; *see also* EA at 3-4 (original 300 Line predated the national park's designation). The Project will enable transport of an additional 636,000 dekatherms per day on the Pipeline's existing 300 Line to meet customer demand in the Northeast. *See Tenn. Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61,161, at P 8, 15 (May 29, 2012) ("Certificate Order") (Project capacity fully subscribed under two long-term contracts).

In agency proceedings extending over a year, and resulting in the detailed 200-page (excluding appendices) EA, the Commission thoroughly examined the environmental impacts of the Project. Certificate Order PP 39-201. Ultimately, the Commission determined that the Project, upon the Pipeline's satisfaction of numerous environmental conditions and mitigation measures, is consistent with the

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Northeast Upgrade Project at 1-8, n.5, FERC Docket No. CP11-161-000 (Nov. 21, 2011) ("EA") (separately submitted).

public convenience and necessity under section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e). *Id.* PP 201, 203.

ARGUMENT

Riverkeeper has not justified the extraordinary remedy of a stay. *See Munaf v. Geren*, 553 U.S. 674, 691 (2008) (stay pending appeal "is an extraordinary and drastic remedy; it is never awarded as of right"). The four factors the court considers are identical whether the request for stay is filed under the All Writs Act (e.g., Riverkeeper's January 9 request) or as a motion (e.g., Riverkeeper's current request). *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985).

Specifically, Riverkeeper must establish: (1) a strong showing that it is likely to prevail on the merits of its appeal; (2) that, without such relief, it will be irreparably injured; (3) a lack of substantial harm to other interested parties; and (4) that the public interest favors a stay. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). "The courts must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, paying particular regard to the public consequences." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 9 (2008).

Applying that balance, this Court and another circuit court recently declined to grant a stay in pipeline cases with greater project impacts (and alleged harm) than here. Recently, this Court denied an emergency request for stay of tree

clearing and construction of a natural gas compressor station located 650 to 2500 feet from residential homes. *In re Minisink Residents for Pres. of the Env't & Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012) (holding petitioner failed to demonstrate either irreparable injury or likelihood of success on the merits, even where the challenged FERC order was accompanied by two dissents).

In 2012, the Second Circuit refused to halt construction of a 39-mile greenfield natural gas pipeline which required the clearing of hundreds of acres of trees (including 200,000 mature trees from undisturbed forest interiors) and numerous water crossings on public park land to create a new utility pipeline corridor. *Coal. for Responsible Growth & Res. Conservation v. FERC*, No. 12-566 (2d Cir. Feb. 28, 2012) (denying emergency motion for stay pending review of petitioners' multiple claims of National Environmental Policy Act violations); *Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 Fed. Appx. 472 (2d Cir. June 12, 2012) (denying petition for review on the merits). In contrast, the Project here entails only 6.4 miles of greenfield pipeline and will permanently convert 80 acres of forested land. *See* EA at 1-8, 2-36.

In 2011, this Court twice rejected motions to stay construction of a 40-mile segment of a 675-mile natural gas pipeline that crosses (1) an important ecosystem directly impacting the habitat for two sensitive species, as well as (2) land considered by a Native American tribe to be a traditional cultural property that is

sacred for worship and contains unmarked graves. *Summit Lake Paiute Tribe v. FERC*, Nos. 10-1389 & 10-1407 (D.C. Cir. Jan. 28, 2011 & Feb. 22, 2011).

In this case, the balance of the equities, again, weighs in favor of denying the requested stay. The Commission recognizes the important environmental values Riverkeeper advances – values it thoroughly considered in evaluating the Project. At the urging of Riverkeeper and others, including other responsible agencies, and consistent with the Commission's statutory duties, the Certificate Order adopted numerous conditions which act to prevent and mitigate any significant environmental impacts of the Project. Moreover, Riverkeeper has not made the requisite strong showing that it is likely to succeed on the merits of its claims that the Commission violated the National Environmental Policy Act ("NEPA"). Finally, the interests of the public in ensuring adequate supplies of natural gas and of the Pipeline in developing the Project, as conditioned by the Commission, support denying the requested stay.

I. Riverkeeper Fails To Show A Likelihood Of Success On The Merits

Riverkeeper has not demonstrated a likelihood of success on the merits on appeal, one of the four factors necessary to obtain a stay. *See Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (explaining that "*Winter* at least . . . suggest[s] if not . . . hold[s] 'that a likelihood of success is an independent, free-standing requirement'") (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288,

1292 (D.C. Cir. 2009) (Kavanaugh, J., concurring) and referencing *Winter*, 555 U.S. at 22).

Riverkeeper repeats the three alleged NEPA violations that were the basis of its unsuccessful January 9th stay petition: unlawful segmentation; failure to consider cumulative effects of other projects; and reliance on underdeveloped mitigation measures to be imposed by other agencies. Motion at 9. In the context of a NEPA claim, this Court and other courts have suggested that a higher standard, requiring a clear violation of NEPA procedures, applies. *See Cuomo v. NRC*, 772 F.2d 972, 976 (D.C. Cir. 1985) ("The NEPA violation in this case has not been clearly established . . . as should be done in order to justify injunctive relief."); *see also*, *e.g.*, *Huntington v. Marsh*, 884 F.2d 648, 653 (2d Cir. 1989) (requiring a violation of NEPA and "substantial danger" to the environment); *accord Sierra Club v. Hennessy*, 695 F.2d 643, 648 (2d Cir. 1982) ("[a] violation of NEPA does not necessarily require a reflexive resort to the drastic remedy of an injunction").

Actions of administrative agencies taken pursuant to NEPA are entitled to a high degree of deference. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377-78 (1989). "Under NEPA, the court's role is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Nat'l Comm. for the New River*,

Inc. v. FERC, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (denying appeal of FERC pipeline certificate decision).

A. Programmatic Environmental Review Is Not Required

Riverkeeper focuses its stay request on the Commission's decision to decline to conduct a programmatic environmental impact statement ("EIS") covering the Project and three other upgrades on the 300 Line System. Motion at 9-15 (alleging FERC improperly segmented its NEPA analysis). Contrary to Riverkeeper's contention that the Project and three other upgrades of the 300 Line System (the 300 Line project, Northeast Supply Diversification project, and MPP project (together, the "upgrade projects")) are, collectively, a single major federal project,[2] each is a stand-alone project designed to serve distinct customers.

Although agencies may not evade their responsibilities under NEPA by artificially dividing a major federal action into smaller components, this rule against segmentation does not apply in every situation. *Taxpayers Watchdog, Inc.*

[2] Riverkeeper bases its claim that the upgrades comprise a single project on two reports of its expert, Accufacts, on gas flow velocities. Motion at 12; Exs. 8 & 9. The January 22, 2013 Accufacts Report (Ex. 9) was not submitted to FERC and is outside the administrative record. The June report's (Ex. 8) findings regarding gas velocities are contradicted by record evidence and are based on unsupported assumptions. *See* Certificate Order P 86 (FERC's engineering review found Project will not increase gas velocities above safety design standards in the existing or proposed pipelines); Rehearing Order P 43 (affirming that design of each upgrade project is appropriate to meet the specified contractual demand); *see also id.* (noting that Accufacts report provided no engineering support or cites to any scientific papers).

v. Stanley, 819 F.2d 294, 298 (D.C. Cir. 1987) (finding independent utility in four-mile section of mass transit project originally planned as 18.6 miles). When evaluating a segmentation claim, courts consider whether the proposed segment (1) has logical termini, (2) has substantial independent utility, (3) does not foreclose the opportunity to consider alternatives, and (4) does not irretrievably commit federal funds for closely related projects. *Id.* (citations omitted). However, this Court has focused more on the "independent utility" factor, stating that "the proper question is whether one project will serve a significant purpose even if a second related project is not built." *Coal. on Sensible Transp. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987) (finding independent utility of a highway widening project from interchange upgrade projects along the same highway).

An interstate natural gas transportation system such as the 300 Line System is much like a highway network. As the Court recognized, "it is inherent in the very concept of a highway network that each segment will facilitate movement in many others; [but] if such mutual benefits compelled [under NEPA] aggregation, no project could be said to enjoy independent utility." *Id.* The Pipeline's upgrade projects each have independent utility as they each were designed to provide a contracted-for volume of gas to specific (and different) customers within distinct timeframes. Certificate Order P 92; *see also Nat'l Comm.*, 373 F.3d at 1329 (finding FERC did not unlawfully segment a large pipeline project, noting that the

practical reality is such projects involve considerable time and effort to develop, with segments of the project proceeding at different speeds). Here, the Commission reasonably determined each of the Pipeline's upgrade projects is a stand-alone project. *Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n*, 677 F.2d 883, 891 (D.C. Cir. 1981) (arbitrary and capricious standard applies to segmentation of environmental review).

Moreover, the fact that two of the upgrade projects are completed and in-service is further evidence that they operate independent of the new Project. *See* Rehearing Order PP 5, 39 (300 Line project placed into service on November 1, 2012, prior to the issuance of the Project EA; Northeast Supply project placed into service in 2012). Because an EA is a forward-looking instrument, even new construction that solely finishes off work already done does not trigger an obligatory EIS evaluating program-wide effects. *Nat'l Wildlife Fed'n*, 677 F.2d at 889 (programmatic EIS not required for ongoing, mostly completed, highway project).

The Commission was not required to consider the MPP project because it was first proposed after the EA issued. *See* Rehearing Order PP 44-45; *see also O'Reilly v. U.S. Army Corps of Engrs.*, 477 F.3d 225, 237 (5th Cir. 2007) (courts in evaluating a segmentation argument are concerned with projects that have reached the proposal stage, not actions that are merely contemplated); *accord Weinberger*

v. Catholic Action of Haw., 454 U.S. 139, 146 (1981) (mere contemplation of an action is not a sufficient basis for requiring the preparation of an EIS). Nevertheless, the Commission found no support in the record that the Project is dependent upon construction of the MPP project. Rehearing Order P 42.

Finally, developing an EA for the Project instead of a programmatic EIS of all of the upgrade projects did not "irretrievably commit" the Commission to any course of action because the Project does not depend on any of the others to operate or provide the projects' respective benefits to shippers. Further, the Commission has an independent obligation, under the Natural Gas Act, to examine individual applications to construct gas facilities and determine whether each project will be in the public interest.

The NEPA process "involves an almost endless series of judgment calls," including decisions regarding a project's relation to other activities. *Coal. on Sensible Transp.*, 826 F.2d at 66. These "line-drawing decisions" are vested in the agency, not the courts. *Id.*

B. FERC's Cumulative Impacts Analysis Satisfies NEPA

Riverkeeper next makes the separate but related claim (Motion at 15), that the Commission failed to analyze the cumulative impacts of the Pipeline's other three upgrade projects. The contents of the EA contradict this claim. The Court will not disturb the Commission's cumulative impacts analysis "absent a showing

of arbitrary action." *Kleppe v. Sierra Club*, 427 U.S. 390, 412-14 (1976). As demonstrated below, there is nothing arbitrary about the Commission's cumulative impacts analysis of the Project.

A cumulative impact is "the incremental impact of the action [at issue] when added to other past, present, and reasonably foreseeable future actions . . . ." 40 C.F.R. § 1508.7. As required, the EA's cumulative impacts section identifies FERC-jurisdictional natural gas pipeline projects that would potentially cause a cumulative impact when considered with the Project. EA at 2-121; *see also* EA at 2-123 to -124 (list of projects evaluated for potential cumulative impacts). The Northeast Supply project was excluded from the cumulative impacts analysis because it was too distant (over 25 miles) from the Project to be relevant. EA at 2-127 (finding projects located over 25 miles away would not significantly contribute to the cumulative impacts in the Project area). The MPP project was excluded because it was unknown at the time the EA issued.[3] Rehearing Order P 86 (MPP project application filed after the EA issued); *see also Natural Res. Defense Council v. Callaway*, 524 F.2d 79, 90 (2d Cir. 1975) (unknown or speculative projects need not be considered).

[3] Nevertheless, the Commission found that, because the MPP project would be collocated in an existing pipeline right-of-way, it would not result in significant cumulative impacts if added to the effects of the other projects in the Project area. Rehearing Order P 86.

The Commission then took the requisite hard look at the cumulative impacts of recently completed, ongoing, and planned projects in the Project area, including the 300 Line project. *See* EA at 2-128 to -134 (seven-page discussion of cumulative effects on soils, water/wetlands, vegetation and wildlife, land use, recreation, special interest areas, visual resources, socioeconomics, air quality and noise, and climate change). *See also* Certificate Order P 195 (noting that most of the 300 Line project's construction impacts were temporary in nature and will be separated by time and distance from the impacts of the Project)

C. Finding Of No Significant Impact Is Supported By The Record

Riverkeeper's allegation (Motion at 16), that the Commission erroneously concluded that the Project has no significant environmental impacts, is belied by the record. NEPA requires that agencies prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). To determine if an action has a "significant" impact, an agency initially performs an environmental assessment, which leads to either a finding of no significant impact or (if there will be significant effect) preparation of a full EIS. *Id.*

Consistent with NEPA procedures, Commission staff prepared a thorough, 200-page EA for the Project that addresses the effects of the Project and describes required mitigation measures, including site-specific measures for each special

interest area as determined by the managing agency or permitting authority. Based on that EA, the Commission determined the Project would not have a significant impact on the environment. *See* Certificate Order P 133; Rehearing Order P 64. *See also Cabinet Mountain Wilderness v. Peterson*, 685 F.2d 678, 682-83 (D.C. Cir. 1982) (a mitigated finding of no significant impact has long been appropriate under this Court's precedent).

Contrary to Riverkeeper's claim (Motion at 16), the Commission reasonably relied on mitigation measures yet to be developed by relevant state agencies. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989) (NEPA does not require a completed mitigation plan prior to making a finding of no significant impact). As other circuits have explained, even "underdeveloped" mitigation measures are adequate where they are mandatory, enforceable, and subject to review by other agencies to ensure their efficacy. *See Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 735 (9th Cir. 2001) (citing *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1121 (9th Cir. 2000) (upholding issuance of permit "before all the details of the mitigation plan had been finalized")); *see also LaFlamme v. FERC*, 945 F.2d 1124, 1130 (9th Cir. 1991) (FERC did not err in permitting post-order monitoring and studies of environmental impacts). Here, the Project mitigation measures are mandatory and enforceable. Certificate Order, Ordering Paragraph E.

Moreover, as the Commission explained, it routinely relies on other agencies to conduct certain studies where the particular agency has expertise and responsibility over the particular subject matter. Rehearing Order P 66 (noting that all such studies are subject to FERC's review and approval). *See also Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1555 (2d Cir. 1992) (requirement that licensee consult with local agencies to develop measures to mitigate adverse project impact is a rational basis for finding of no significant impact).

Where, as here, the Commission identified and detailed Project impacts, imposed enforceable mitigation measures (whether drafted or to be developed), and required future monitoring to ensure their success, the Commission's finding of no significant impact is entirely consistent with reasoned decisionmaking. *See Town of Cave Creek v. FAA*, 325 F.3d 320, 327 (D.C. Cir. 2003) (agency's finding of no significant impact may be overturned only if it was arbitrary, capricious or an abuse of discretion).

II. The Alleged Harm Is Not Certain, Substantial, Or Irreparable

A claim of irreparable injury absent a stay must be "both certain and great; it must be actual and not theoretical." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). An applicant for a stay cannot rely on unsupported assertions to meet this stringent standard, but must instead "justify the court's exercise of such an extraordinary remedy." *Cuomo*, 772 F.2d at 978. Where an environmental

harm is alleged, "broader injunctive relief is appropriate, of course, where substantial danger to the environment, in addition to a violation of [NEPA] procedural requirements, is established." *Huntington*, 884 F.2d at 653 (vacating an injunction for plaintiff's failure to establish some actual or threatened injury even though agency conceded a NEPA violation).

Riverkeeper bears the burden to establish some actual or threatened injury; specifically, that tree clearing and Project construction will substantially endanger the environment. *Id.* at 654. As evidenced by the extensive EA, the Project, as conditioned by the Certificate Order, poses no such threat. The alleged injury, that tree clearing and Project construction will (i) cause the project area to "possibly remain poorly vegetated . . . due to soil compaction" (Motion at 3) and (ii) "result in long-term damage to streams, wetlands, and forest areas" (Motion at 18), is unsupported by the underlying record. Rather, the record shows that construction of the Project, subject to the required mitigation measures, will not significantly impact sensitive ecological resources. Moreover, the EA includes numerous mitigation measures that eliminate or reduce potential impacts on soils, streams, wetlands, and forests. EA at 2-8 (soil mitigation), 2-13 to -32 (stream and wetland mitigation), 2-36 to -37 (forest mitigation). Based on the analysis in the EA, which includes and references best management practices, mitigation, and the required restoration measures that Pipeline has adopted, the Commission concluded that the

Pipeline's proposal to construct 40 miles of mostly collocated pipeline would have limited adverse impacts on the environment. Certificate Order P 139; Rehearing Order PP 67-68.

Riverkeeper attempts to bolster its argument regarding irreparable harm through declarations from its members (Motion at 17, Exs. 11-14). But, the declarations merely assert generalized harm to the individual's recreational and aesthetic interests without identifying how, why, or where construction of the Project causes that harm. *See Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (nonspecific claims of "the destruction and loss of wildlife" constitute an insufficient injury to warrant a preliminary injunction). Riverkeeper's claims are neither certain nor substantial. Contrary to Riverkeeper's assertions, "forested land makes up only a small portion of the [P]roject area," with insignificant permanent impacts. Certificate Order P 135. Moreover, the majority of the tree clearing results from the widening of Pipeline's existing right-of-way rather than a new greenfield pipeline through forested land. *Id.*; *see also id.* P 139 (concluding that forest fragmentation will be minimal because the Project primarily expands the width of the existing right-of-way).

In addition, the EA studied each recreational and special interest area that would be crossed by or within a quarter-mile of the Project, and imposes mitigation measures to minimize construction and operational impacts on such

areas. *Id.* P 45 (noting Pipeline also committed to continued consultation with agencies for site-specific areas regarding the need for additional mitigation measures); *see also id.* P 115; EA at 2-68 to -70 (discussing mitigation measures to minimize potential interruptions to hikers and trail users during construction and to restore the trail crossing locations after construction).

Even if the Court finds an irreparable injury, that finding must be balanced against the other stay factors. *See Nken v. Holder*, 556 U.S. 418, 427 (2009) (stay "is not a matter of right, even if irreparable injury might otherwise result"). Here, a thorough environmental analysis of the Project was conducted in full compliance with NEPA. Any injury remaining after mitigation is outweighed by the public benefits of enhanced natural gas transportation options that would be reduced, if not eliminated altogether as Project economics change, by a stay.

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." *Va. Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Here, a stay would likely render impossible the intended November 2013 in-service date. *See* Certificate Order P 65; EA at 1-2. This Court has recognized a substantial interest in continuing with approved construction activities in light of the costly nature of interruptions. *See 3883 Connecticut LLC v. District 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").

The Pipeline detailed the serious financial losses it faces by even a short, two to four week delay of its construction schedule. *See* Pipeline's Answer to Motion Requesting Stay of Construction at 9-10, FERC Docket No. CP11-161-000 (filed Dec. 14, 2012). Halting construction of the pipeline at this point also would seriously jeopardize the in-service date for the Project, to the detriment of Pipeline, Project shippers, and natural gas customers in the Northeast. *See id.* at 8-11 (noting that, because tree clearing is prohibited from April until mid-October to protect threatened and endangered species, a short delay in construction at this time would ultimately result in a significant delay in the Project's in-service date).

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." *Va. Petroleum Jobbers*, 259 F.2d at 925. The Natural Gas Act charges FERC with regulating the interstate transportation and wholesale sale of natural gas in the public interest. *See, e.g.*, *Columbia Gas Transmission Corp. v. FERC*, 750 F.3d 105, 112 (D.C. Cir. 1984). Because FERC is the "presumptive[] guardian of the public interest," its views "indicate[] the direction of the public interest" for purposes of deciding a request for stay pending appeal. *N. Atl. Westbound Freight*

Ass'n v. Fed. Mar. Comm'n, 397 F.2d 683, 685 (D.C. Cir. 1968).

Here, the public interest would not be served by a stay of construction. In issuing the certificate of public convenience and necessity for the Project, the Commission found a strong showing of need for this Project. *See* Certificate Order P 17. The Project will provide substantial benefits to both gas producers and end-users by providing additional capacity to move natural gas produced in the area near Tennessee's pipeline to high-demand Northeast markets. *See id.* P 15. Moreover, the Commission found the Project would have a beneficial long-term socioeconomic effect in the Project area. EA at 2-87 & 2-88 (citing increased jobs and tax revenues). A stay would, at the least, significantly delay the benefits of this project.

CONCLUSION

For the foregoing reasons, Riverkeeper's motion for a stay should be denied.

Respectfully submitted,

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January 30, 2013

Delaware Riverkeeper Network, et al. v. FERC **Docket No. CP11-161**
D.C. Cir. No. 13-1015

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the Court's Administrative Order Regarding Electronic Case Filing, and the Court's January 25, 2013 order in this case, I hereby certify that I have, this 30th day of January, 2013, filed the foregoing with the Court via the Court's CM/ECF system, with the paper copies hand-delivered to the Court by 4:00 p.m. as required by the Court, and served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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