

ORAL ARGUMENT NOT YET SCHEDULED

Case No. _____
FERC Docket No. CP16-17

**United States Court of Appeals
for the Second Circuit**

IN RE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, AND MILLENNIUM PIPELINE COMPANY,
LLC,

Respondents.

PETITION FOR EXTRAORDINARY WRIT TO THE FEDERAL ENERGY
REGULATORY COMMISSION

EMERGENCY PETITION FOR A WRIT OF PROHIBITION

LISA M. BURIANEK
*Deputy Bureau Chief
Environmental Protection Bureau*
BRIAN LUSIGNAN
Assistant Attorney General

ERIC T. SCHNEIDERMAN
*Attorney General of the
State of New York*
BARBARA D. UNDERWOOD
Solicitor General
ANDREW D. BING
Deputy Solicitor General
FREDERICK A. BRODIE
Assistant Solicitor General
Attorney for Respondents
Albany, New York 12224-0341
(518) 776-2399

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Petitioner New York State Department of Environmental Conservation (the Department) hereby petitions this Court pursuant to the All Writs Act, 28 U.S.C. § 1651, the Natural Gas Act, 15 U.S.C. § 717r, Federal Rule of Appellate Procedure 21(c), and Circuit Rule 21.1, for a writ of prohibition to the Federal Energy Regulatory Commission (FERC) temporarily staying the effectiveness of the “Notice to Proceed with Construction,” issued by FERC on October 27, 2017 (Exhibit A).¹ Although FERC has pending before it the Department’s motion for rehearing and stay of FERC’s ruling, FERC has nonetheless issued the Notice to Proceed authorizing Respondent Millennium Pipeline Company, LLC to construct a natural gas pipeline (the project) in the State of New York without first obtaining a certification from the Department that the project will comply with state water quality standards under Clean Water Act section 401, 33 U.S.C. § 1341. The Department also asks this Court to stay the effectiveness of the Notice to Proceed on an interim basis while it considers the merits of this Emergency Petition on an expedited briefing schedule. *See, e.g.,* Per

¹ An addendum containing relevant exhibits, including relevant portions of the FERC record, is attached to this Petition.

Curiam Order, *In re: Delaware Riverkeeper Network*, D.C. Cir. Case No. 15-1052 (March 11, 2015) (Exhibit W).

The Department seeks a narrow writ of prohibition to preserve this Court's prospective jurisdiction over FERC's September 15, 2017 "Declaratory Order Finding Waiver Under Section 401 of the Clean Water Act" ("Waiver Order"), which held that the Department waived its authority to issue or deny a section 401 certification (Exhibit B). Under the Natural Gas Act, the Waiver Order is not reviewable by this Court until FERC acts on the Department's motion for rehearing, which was filed October 13, 2017, and remains pending. *See* 15 U.S.C. § 717r(a), (b). Despite repeated requests from the Department to stay the effectiveness of the Waiver Order or to delay authorizing construction until FERC acts on the rehearing request and judicial review is available, *see* Exhibits Q,R,T,U, FERC's Notice to Proceed authorizes Millennium to begin construction of the project immediately. Without a writ of prohibition, Millennium will construct the project before FERC acts on the Department's rehearing request or this Court has an opportunity, as appropriate, to review the merits of FERC's Waiver

Order, inflicting irreparable environmental harm and undermining the State of New York's sovereign duty to prevent or mitigate the discharge of pollutants into state waterways.

This Petition is properly before this Court because Millennium has its principal place of business in New York, and FERC's Waiver Order will therefore be reviewable here. *See* 15 U.S.C. § 717r(b). Millennium has already commenced a related proceeding regarding the project in this Court. *See* Petition for Review, Docket No. 17-3465. Although Millennium previously commenced a proceeding seeking preemptive relief from the District of Columbia Circuit under a separate judicial review provision of the Natural Gas Act that places venue exclusively in the D.C. Circuit, 15 U.S.C. § 717r(d)(2), that Court declined to reach the merits of the case. *See Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 701 (D.C. Cir. 2017). Because review of FERC's Waiver Order will ultimately lie before this Court under 15 U.S.C. § 717r(b), a writ of prohibition to preserve its future jurisdiction is appropriate.

RELIEF REQUESTED

The Department asks that this Court issue a Writ of Prohibition to FERC, staying the effectiveness of the October 27, 2017 “Notice to Proceed with Construction” until seven (7) days after FERC acts on the Department’s October 13, 2017 request for rehearing of FERC’s September 15, 2017 Waiver Order. The Department also asks that this Court stay the Notice to Proceed while it considers the merits of the Petition.

ISSUE PRESENTED

Whether a writ of prohibition from this Court is necessary and appropriate to preserve its prospective jurisdiction by staying the effectiveness of the FERC Notice to Proceed authorizing Millennium to construct a natural gas pipeline in the State of New York without receiving a Clean Water Act section 401 certification, when the Department’s objections have not been acted upon by FERC and are not yet subject to judicial review by this Court.

STATEMENT OF FACTS

A. The Proposed Pipeline

The project consists of a new 7.8-mile, 16-inch diameter natural gas pipeline (the project) connecting Millennium's existing pipeline system to an electric-power generator currently under construction in the Town of Wawayanda, New York. Exhibit C, Joint Application, at 2-1. The proposed pipeline would cross 12 waterbodies, while access roads would cross 5 additional waterbodies. Exhibit E, FERC Environmental Assessment (EA) at 39. Roughly two acres of wetlands would also be impacted by the Project. *Id.* at 45. Construction of the pipeline and access roads could have short- and long-term negative effects on the water quality of those streams and wetlands. *Id.* at 41-42, 46.

The water-quality impacts of the Project would be mitigated by using "trenchless" techniques to drill under, rather than dig through, certain waterbodies and wetlands. But even trenchless techniques pose some risk to water quality, because drilling fluids could inadvertently be released into the waterbodies. *Id.* at 41-42, 46.

B. Millennium's Application to FERC and the Department

Millennium applied to FERC for a Certificate of Public Convenience and Necessity authorizing the project in November 2015. Shortly thereafter, Millennium submitted a Joint Application to the Department seeking a Clean Water Act section 401 certification, as well as related permits required for the project. Exhibit C, Joint Application (received November 23, 2015).

On December 7, 2015, the Department sent a Notice of Incomplete Application to Millennium. Exhibit D. The notice stated that Millennium's Joint Application would be deemed incomplete until FERC issued "an Environmental Assessment or Draft Environmental Impact Statement" of the project. *Id.* at 1. The Department's administrative review of the Joint Application continued while FERC completed the environmental assessment; the Department identified site-specific issues and areas in which additional information was required.

FERC issued its environmental assessment of the project on May 9, 2016. Exhibit E. After reviewing the environmental assessment, the

Department sent Millennium a second Notice of Incomplete Application which raised concerns relating to potential water quality impacts, including details relating to the trenchless crossing techniques and right-of-way maintenance, impacts to freshwater wetland adjacent areas, further evaluation of horizontal directional drilling² crossing techniques at one stream crossing, and technical details relating to excavation required by the project. Exhibit F, Second Notice of Incomplete Application at 4-5. The Department also sought additional information on impacts to Indiana bats and bog turtles, both of which are endangered species under New York State law. *Id.* at 2-4. Millennium responded to the Department's Second Notice of Incomplete Application in August 2016. Exhibit G, Response to 2d Notice of Incomplete Application (Aug. 16, 2016); Exhibit H, Supp. Response to 2d Notice of Incomplete Application (Aug. 31, 2016)). The Department

² Horizontal directional drilling, sometimes referred to in the Record as HDD, is a method of drilling under streams, wetlands, or other surface features without using trenched excavation, a more disruptive technique which requires diverting the flow of the stream while digging a trench through it. See Exhibit E, Environmental Assessment at 16-18.

concluded that Millennium's Joint Application was complete as of August 31, 2016. Exhibit N, Notice of Complete Application.

FERC issued a conditional Certificate of Public Convenience and Necessity for the Project on November 9, 2016. Exhibit I (Conditional Certificate). To minimize the Project's impacts to state water quality – and to comply with the requirements of the Clean Water Act – FERC directed Millennium to obtain a Clean Water Act section 401 certification from the Department before commencing construction and to “comply with mitigation requirements and conditions contained” in the Conditional Certificate. *Id.* at 45, 56.

On November 15, 2016, Millennium submitted a letter, an accompanying affidavit from one of its employees, and 16 supporting exhibits, arguing that the Department should grant a Section 401 certification for the Project “without delay.” Exhibit J, Letter to Department (Nov. 15, 2016) (attachments omitted).

In response, the Department informed Millennium that the Department was “continu[ing] its review” of the Joint Application. Exhibit K, Corrected Berkman Letter (Nov. 18, 2016). The Department

observed that Clean Water Act section 401(a)(1) afforded it up to one year after the submission of a complete application to grant, condition, or deny the section 401 certification. *Id.* at 2 & n.1. The Department explained that its time to act under Clean Water Act section 401 “must necessarily be triggered by completeness” because section 401(a)(1) required it to establish procedures for public notice, which in turn were triggered by the submission of a complete application. *Id.* at 2 n.1. “[O]therwise,” the Department noted, “applicants could frustrate the State’s mandate to make [a section 401 certification] determination by completing an application 364 days after submitting an incomplete and deficient application.” *Id.*

C. Millennium’s Petition to the D.C. Circuit

Impatient to begin construction of the Project, Millennium sued the Department under 15 U.S.C. § 717r(d)(2) in the U.S. Court of Appeals for the D.C. Circuit, arguing, among other things, that the Department’s review of the section 401 certification had taken too long, and therefore had been “waived.” *See* Petitioner’s Brief, D.C. Cir. Docket No. 16-1415, ECF No. 1649407.

The D.C. Circuit dismissed the Petition for Review because Millennium lacked standing; the Court observed that “Millennium can go directly to FERC and present evidence of the Department’s waiver.” *Millennium Pipeline Co.*, 860 F.3d at 701. Millennium accordingly asked FERC for permission to start construction on the grounds that the Department had waived its section 401 review authority. Exhibit O, Request for Notice to Proceed with Construction (July 21, 2017).

D. The Department Denies Millennium’s Application

On August 30, 2017 – less than one year after receiving a complete section 401 application – the Department conditionally denied Millennium’s section 401 certification, on the grounds that intervening D.C. Circuit case law had rendered FERC’s environmental assessment incomplete. Exhibit P, Notice of Decision. Specifically, the Department concluded that *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir 2017), required FERC to evaluate the potential environmental impacts of greenhouse gas emissions from the Project, including greenhouse gas emissions from the gas-fired power plant to be supplied by the pipeline. Exhibit P at 2. The Department also moved FERC to reopen the record

and complete the required environmental review, and to stay the effectiveness of the Conditional Certificate while the motion for reopening and any appeal thereof was pending. *See* Exhibit Q, Motion for Reopening at 2. The requested stay would have suspended construction of the pipeline until the legal concerns raised by the Department had been satisfied.

E. FERC Allows Pipeline Construction

On September 15, 2017, FERC issued a Declaratory Order finding that the Department had, “by failing to act within the one-year timeframe required by the [Clean Water Act], waived its authority to issue or deny a water quality certification.” Exhibit B, Waiver Order (160 FERC ¶ 61,065). Although FERC – unlike the Department – is not charged in any manner with administering the Clean Water Act, *see Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 297 (D.C. Cir. 2003), it rejected the Department’s interpretation of section 401 as requiring a “complete” application to trigger the one-year review deadline. *Id.* ¶¶12-18. FERC declined to follow a Fourth Circuit decision holding that section 401 is ambiguous and concluded that “the plain meaning of

‘after receipt of the request’ is the day the agency receives a certification application.” *Id.* ¶¶13, 15 n.25; see *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 729 (4th Cir. 2009) (concluding that section 401 “is ambiguous on the issue” of “whether an invalid as opposed to only a valid water quality certification will trigger § 401(a)(1)’s one-year waiver period”). FERC declined to rule on the Department’s request to reopen the environmental review of the project in light of the D.C. Circuit’s intervening decision in *Sierra Club*, 867 F.3d 1357, but noted that it would be “addressed by the Commission in a separate order.” *Id.* ¶10 n.13.

The Department timely sought rehearing and a stay of the Waiver Order. Exhibit R, Request for Rehearing and Stay (Oct. 13, 2017). The Department reiterated that a complete application was necessary to have meaningful public comment and to prevent applicants from gaming the application process. The Department also noted that its interpretation of section 401 was consistent with regulations issued by the U.S. Army Corps of Engineers (Army Corps) – a federal agency that, unlike FERC, is responsible for administering the Clean Water Act. *Id.*

at 4-6. The Department also noted that FERC, in contrast to its position that section 401's "plain language" dictated the result, read additional words into the statute by interpreting "request" to mean "written certification application." *Id.* at 6. Accordingly, the Department asked FERC to grant rehearing of its Waiver Order and, "to prevent any potential irreparable environmental harm to the State of New York, grant a stay of the [Waiver Order] pending any and all appeals thereof." *Id.* at 7. The Department's rehearing request remains pending before FERC.

Millennium renewed its request for a Notice to Proceed on October 20, 2017. Exhibit S. The Department again objected and asked that FERC not issue a Notice to Proceed until it acted on the Department's request for rehearing of the Waiver Order and judicial review could be obtained. Exhibit T.

Notwithstanding the Department's repeated requests that FERC not authorize construction until the rehearing request could be acted upon and judicial review obtained, on October 27, 2017, FERC issued the "Notice to Proceed with Construction," authorizing Millennium to

begin construction without receiving a Clean Water Act section 401 certification from the Department. *See* Exhibit A. The Department promptly moved FERC to stay the Notice to Proceed. Exhibit U. FERC has not acted upon the Department's motion.

To preserve the status quo until judicial review of FERC's Waiver Order is available, the Department now brings this emergency petition for a writ of prohibition to stay the effectiveness of the Notice to Proceed until FERC acts on the Department's motion for rehearing of the Waiver Order. The Department also asks that this Court stay the Notice to Proceed while it considers the merits of the Petition.

LEGAL STANDARDS

A. Natural Gas Act and Clean Water Act

The Natural Gas Act governs FERC's regulation and approval of the interstate transportation and sale of natural gas. 15 U.S.C. § 717-717z. FERC has authority to issue a "certificate of public convenience and necessity" for construction and operation of a natural gas project. 15 U.S.C. § 717f(e). That certificate, however, is not the only authorization required: applicants must also obtain all other authorizations required by federal law. *See* 15 U.S.C. §§ 717n(a), (c).

The Natural Gas Act expressly provides that “nothing in this Act affects the rights of States” under the Clean Water Act. See 15 U.S.C. § 717b(d)(3). Accordingly, one necessary authorization is a state certification under section 401 of the Clean Water Act that the proposed project will comply with the Clean Water Act, state water quality standards, and other appropriate requirements of state law. 33 U.S.C. § 1341(a)(1), (d); see *Constitution Pipeline Co. v. New York State Department of Environmental Conservation*, 868 F.3d 87, 100-102 (2d Cir. 2017).

A party seeking judicial review of a FERC order under the Natural Gas Act must first petition FERC for rehearing of the order. 15 U.S.C. § 717r(a). “[A]fter the order of [FERC] upon the application for rehearing,” a party has sixty (60) days to file a petition for review. *Id.* § 717r(b). Judicial review of a FERC order may be obtained in the circuit court “wherein the natural-gas company to which the order relates is located or has its principal place of business.” *Id.* Neither the filing with FERC of an application for rehearing nor the filing with the Court of

Appeals of a petition for review stays the effectiveness of the order being reviewed. *Id.* § 717r(c).

B. All Writs Act

The All Writs Act provides federal courts with authority to “issue all writs necessary or appropriate in aid of their respective jurisdictions.” 28 U.S.C. § 1651(a). Although the All Writs Act is not an independent basis for jurisdiction, it “empowers a federal court to issue writs of mandamus necessary to protect its prospective jurisdiction.” *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) (*TRAC*). Accordingly, this Court can issue writs to preserve its potential jurisdiction “[o]nce there has been a proceeding of *some* kind instituted before an agency or court that might lead to an appeal.” *In re Tennant*, 359 F.3d 523, 529 (D.C. Cir. 2004). There are three conditions for issuing a writ: (1) the petitioner must have “no other adequate means to attain the relief he desires”; (2) the petitioner must “show that his right to the issuance of the writ is clear and indisputable”; and (3) the Court must “be satisfied that the writ is appropriate under the circumstances.” *In re Kellogg Brown & Root, Inc.*,

745 F.3d 754, 760 (D.C. Cir. 2014), *cert. denied* 135 S.Ct. 1163 (2015) (internal quotation marks and citations omitted).

JURISDICTION

This Court has jurisdiction over the Department's Petition for a Writ of Prohibition. The United States Courts of Appeals have exclusive jurisdiction over challenges to FERC decisions under the Natural Gas Act. *See* 15 U.S.C. § 717r(b); *Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010) ("Exclusive means exclusive, and the Natural Gas Act nowhere permits an aggrieved party otherwise to pursue collateral review of a FERC [decision] in state court or federal district court."). Because Millennium has its principal place of business in New York,³ the Second Circuit is an appropriate venue for a proceeding challenging the Waiver Order. 15 U.S.C. § 717r(b). Judicial review of the Waiver Order may not be sought until "after" FERC has acted on the Department's rehearing request. 15 U.S.C. § 717r(a), (b); *see Moreau v. FERC*, 982 F.3d 556, 564 (D.C. Cir. 1993). However, the All

³ *See, e.g.*, Exhibit X, Millennium Pipeline Co., LLC., "Contact Us," available at <http://www.millenniumpipeline.com/contact-us/> (printed October 27, 2017) ("Millennium Pipeline is a New York-based interstate gas pipeline serving the Northeast.")

Writs Act authorizes this Court to issue writs necessary to preserve its prospective jurisdiction. *See TRAC*, 750 F.2d at 76-77. The Department has already sought rehearing of the Waiver Order. If FERC adheres to its prior decision, the Department will petition for review in this Court. *Cf. In re Tennant*, 359 F.3d at 529-531 (resort to All Writs Act unavailable where party has not commenced any administrative proceeding). FERC has not acted on the Department's multiple stay requests. This Court may therefore issue a writ of prohibition to preserve its prospective jurisdiction over the Waiver Order, while the Department's rehearing request is pending before FERC. *See Town of Dedham v. FERC*, Case No. 15-12352-GAO, 2015 WL 4274884, at *2 (D. Mass. July 15, 2015) (noting that party seeking to stay a FERC order before a rehearing motion has been acted on should apply to the Circuit Court under the All Writs Act).

ARGUMENT

The Department Is Entitled to a Writ of Prohibition Under the All Writs Act

A writ of prohibition staying the Notice to Proceed and preventing Millennium from commencing construction of the Project is necessary to preserve this Court's prospective jurisdiction over the Waiver Order.

A. The Department Has No Other Adequate Avenue to Prevent Construction Until FERC Acts on the Rehearing Request

The Department has no other adequate avenue to prevent construction of the project at this time. Judicial review of FERC's Waiver Order is not available until FERC acts on the Department's rehearing request. *See* 15 U.S.C. § 717r(b); *Tennessee Gas Pipeline Co. v. FERC*, 9 F.3d 980, 981 (D.C. Cir. 1993) (the Court lacks jurisdiction over a review proceeding filed while the request for FERC's reconsideration is pending). Although the Department timely sought rehearing and has asked FERC to stay the Waiver Order until judicial review can be sought, *see* Exhibit D, FERC has not acted on the rehearing request or stayed the Waiver Order. *See* 15 U.S.C. § 717r(c); 18 C.F.R. § 385.713(e) (rehearing request does not stay effectiveness of

order unless ordered by FERC). Unless this Court grants a writ of prohibition, Millennium can and will commence construction immediately. *See* Exhibit Y, Chris McKenna, “Federal official pushes ahead pipeline project,” *Times Herald Record* (Oct. 27, 2017) (Millennium spokeswoman said construction would begin “in early November”). Millennium could complete construction of the Project in less than six months. *Id.*; Exhibit L, Work Schedule. Many of the irreversible environmental impacts from tree-clearing and excavation could occur much sooner. *See* Exhibit M, Army Corps Permit Special Conditions (authorizing tree-clearing to begin November 1). Construction could be substantially completed – and irreparable environmental harm inflicted – before FERC has the opportunity to act on the Department’s rehearing request and before this Court has an opportunity to review the Waiver Order. Completion (or substantial completion) of the Project could deprive this Court of jurisdiction over the Department’s objections by mooting those objections before this Court reviews them. *See Sierra Club v. U.S. Army Corps of Engineers*, 277 Fed.App’x 170, 172-173 (3d Cir. 2008) (plaintiffs’ environmental

challenge to sports complex rendered moot by its construction because “the wetlands Plaintiffs enjoyed at the beginning of this litigation are now gone and cannot be restored”); *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 893-894 (8th Cir. 2004) (request for injunctive and declaratory relief preventing construction of highway rendered moot by completion of highway); *but see Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 43 (D.C. Cir. 2015) (construction of natural gas pipeline did not render NEPA challenge moot where pipeline could effectuate “partial remedy” by closing pipeline). In fact, removing the pipeline in the event the Waiver Order is reversed would cause further environmental damage. *See Exhibit V, Gaidasz Aff.*, ¶ 10.⁴ Accordingly, the Department must resort to the All Writs Act as a stopgap measure to preserve this Court’s prospective jurisdiction. *See Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985) (Scalia, J.) (where FERC order was not yet subject to judicial review, requirement of All

⁴ In support of its claim of irreparable harm, the Department has submitted an affidavit of the Project Manager for the Valley Lateral Project. *See Exhibit V, Gaidasz Affidavit* (Oct. 30, 2017).

Writs Act that party have no adequate statutory remedy was “arguably satisfied”).

B. The Department Has an Indisputable Right to the Narrow Writ of Prohibition to Stay the Notice to Proceed Until Judicial Review of the Waiver Order is Available

At the most basic level, the Department simply asks this Court to maintain the status quo while the Department’s request for rehearing is pending before FERC. The relief requested is akin to a request for a preliminary injunction that would be available in connection with a proceeding seeking judicial review of the Waiver Order. A preliminary injunction is not available, however, because FERC has not acted on the Department’s rehearing request. *See Reynolds Metals Co.*, 777 F.2d at 762-763 (traditional standards for preliminary relief apply where a party seeks to stay a FERC order under All Writs Act). 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.

1. The Department Will Suffer Irreparable Harm Without a Writ of Prohibition

Construction and operation of the Project, including access roads, without a section 401 certification could cause irreparable harm to the water quality of streams and wetlands in the vicinity of the Project. See Exhibit V, Gaidasz Aff., ¶¶8-10. 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 (at least 12 inches wider than the pipe and deep enough to allow at least three feet of soil cover over the top of the pipe), installing the pipeline, replacing topsoil and subsoil, and restoration of the pipeline ROW. Exhibit V, Gaidasz Aff., ¶6. Blasting might be necessary in some areas where bedrock is encountered. *Id.*

These construction activities could cause permanent environmental damage. For example, clearing woody vegetation could destabilize stream banks causing erosion and turbid discharges into the waterbody and increasing water temperatures. *Id.* ¶8. 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.*; *see also* Exhibit E, EA at 41-42, 46. The Department's oversight of pipeline construction helps to avoid or mitigate environmental impacts by requiring that unanticipated adverse environmental impacts, such as the inadvertent release of drilling fluids, are reported and remedied and streams are monitored to ensure proper restoration of stream bed and banks. Exhibit V, Gaidasz Aff. ¶8.

By issuing a Notice to Proceed to Millennium based on the Waiver Order, FERC has authorized Millennium to construct the Project without being subject to the conditions contained in a section 401 certification which could minimize impacts to state water quality. *Id.* ¶9. These conditions would include the prohibition of in-stream blasting, specific hydrostatic testing best management practices,

horizontal directional drilling protective measures and requirements for post-construction monitoring and adaptive management to ensure proper restoration of wetlands and waterbodies. *Id.* ¶9. Without those conditions, the detrimental effects they seek to prevent or mitigate could occur. *Id.* ¶10.

In addition to the physical environmental harms that may occur if a writ of prohibition is denied, the State will suffer injury to its sovereign interests under the cooperative federalism model established by the Clean Water Act. In issuing the Notice to Proceed without requiring Millennium to obtain a section 401 certification, FERC has overridden the State's primary role as regulator of water pollution within its borders. *See S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 380 (2006); *Constitution Pipeline Co.*, 868 F.3d at 100-101. Essentially, FERC has allowed Millennium to circumvent the Department's environmental review and oversight. Without a writ of prohibition, the Department will suffer this injury without recourse to judicial review. *See Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) (finding irreparable harm where agency action risked

depriving state of “sovereign interests and public policies . . . without first having a full and fair opportunity to be heard on the merits”).

2. The Department Is Likely to Prevail on the Merits

FERC’s Waiver Order is not likely to be upheld by this Court, once judicial review becomes available. The central issue framed by the Waiver Order is whether the statutory requirement that a state agency act within one year of the “receipt” of a “request” for section 401 certification requires a complete application, or whether an incomplete submission to the Department starts the waiver period running. In the Waiver Order, FERC overrode the Department’s conclusion that a complete application was required. However, the Department – not FERC – is delegated authority under the Clean Water Act to implement and interpret section 401. *See AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 730 (4th Cir. 2009); *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 297 (D.C. Cir. 2003).

The reasons for the Department’s interpretation of section 401 as requiring a complete application are set forth in a November 2016 letter to Millennium. *See Exhibit K. First*, for the Department to comply with

section 401's public notice requirements, "the time to act must necessarily be triggered by completeness." *Id.* at 2 n.1. Section 401 requires the Department to establish public notice procedures for section 401 applications. 33 U.S.C. § 1341(a)(1). A state agency's failure to provide public notice on an application may result in the federal licensing agency's rejection of a section 401 certification. *See City of Tacoma v. Fed. Energy Reg. Comm'n*, 460 F.3d 53, 67-68 (D.C. Cir. 2006).

If the Department were required to act within one year of receiving an *incomplete* application for a section 401 certification, it could be forced to act on an application before the public notice and comment process has concluded or, in some cases, before that process has even commenced.⁵ FERC could then reject the certification for

⁵ For the public to have a meaningful opportunity to comment on a project, the public must be able to evaluate a complete application. *See, e.g., Ohio Valley Environmental 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 application). Accordingly, the Department's regulations for public notice and comment on permit applications are triggered "[i]mmediately upon determining that an application is complete." N.Y. ECL § 70-0109(2)(a);

failing to comply with section 401's public notice requirements. *See City of Tacoma*, 460 F.3d at 67-68.

Second, a complete application is necessary to commence the waiver period because otherwise, "applicants could frustrate the State's mandate to make [section 401] determination[s] by completing an application 364 days after submitting an incomplete and deficient application." Exhibit K at 2 n.1. Under FERC's interpretation of Section 401, in contrast, the waiver period would commence upon an agency's receipt of *any* request for a section 401 certification, however lacking in substance. The applicant could then force an agency into a premature decision by delaying its submission of supplemental materials or by submitting materials just before the one-year waiver period expires. Indeed, in this case, Millennium submitted a letter and affidavit demanding that the section 401 certification be granted, along with more than 200 pages of exhibits, a mere eight days before the one-year

accord N.Y.C.R.R. tit. 6, § 621.7(a) (major project); *id.* 621.7(f) (minor project). After public notice, the Department must take time to receive, review and respond, as appropriate, to public comments, *id.* § 621.8(a), 621.10(e), and ultimately must decide whether the application should be granted or denied, *id.* § 621.10(a).

anniversary of its initial application submittal. Tying the waiver period to the receipt of a complete application avoids such a result, by allowing the Department time to assess and respond to submissions in a meaningful way.

FERC's interpretation of section 401 ignores the Department's reasoning and rejects relevant caselaw. In *AES Sparrows Point*, the Fourth Circuit concluded that section 401 "is ambiguous on the issue" of "whether an invalid as opposed to only a valid request for a water quality certification will trigger § 401(a)(1)'s one-year waiver period." 589 F.3d at 729. FERC ignored this precedent, holding that "the plain meaning of 'after receipt of the request' is the day the agency receives a certification application." Exhibit B, Waiver Order, ¶¶13, 15 n.25. By ignoring court precedent holding that section 401 is ambiguous, FERC avoided the issue of whether the Department, as the agency tasked with implementing section 401, may reasonably interpret the ambiguous language as requiring a complete application.

FERC's interpretation of section 401 is also internally inconsistent. By interpreting "request" to mean "written certification

application,” 33 U.S.C. § 1341(a), FERC added language to the statute. FERC’s interpretation of the Clean Water Act conflicts with the construction of section 401 adopted by the Army Corps – a federal agency that, unlike FERC, is responsible for administering the Clean Water Act. *See AES Sparrows Point*, 589 F.3d at 729-30. Under 33 C.F.R. § 325.2(b)(1)(ii), “[i]n determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a valid request for certification.” When promulgating this regulation, the Army Corps noted that generally “valid requests for certification must be made in accordance with State laws[.]” *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41,206, 41,211 (Nov. 13, 1986). The Fourth Circuit has held that the Army Corps’ interpretation is entitled to deference and “is permissible in light of the statutory text and is reasonable.” *AES Sparrows*, 589 F.3d at 729. Likewise, the Department’s requirement that a complete application be submitted to commence the waiver period is a permissible and reasonable interpretation of section 401.

FERC offers the Department little consolation by claiming that the Department could have denied Millennium's application as incomplete. Exhibit B, Waiver Order, ¶18. Simply denying incomplete applications would unnecessarily limit the options available to both the Department and applicants when an application requires additional information. In many cases, applicants are responsive to the Department's requests and are willing to submit additional information necessary to the Department's review. Requiring the Department to nonetheless deny an application as incomplete would be inefficient and would prevent the Department and applicants from working cooperatively to ensure that a section 401 application includes all necessary information for the Department to issue a decision on the merits.

3. The Balance of the Equities Favors a Writ of Prohibition

The writ of prohibition will temporarily delay construction of the project until FERC can consider the Department's request for rehearing of the Waiver Order, triggering the availability of judicial review of that order. In the event FERC denies the rehearing request, judicial review

by this Court will remain available to the Department. 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 and sovereignty. *See Kansas v. United States*, 249 F.3d at 1228 (threatened harm to state sovereignty outweighed delay in economic benefits from construction of casino).

4. A Writ of Prohibition Is in the Public Interest

A short delay in the construction of the Project to allow for full administrative and judicial review of the Waiver Order will preserve the environment and the sovereign interests of the State of New York. There is no evidence that the project is immediately necessary to meet New York's power needs or that power from other sources will be unavailable. Accordingly, a writ of prohibition is in the public interest.

C. The Writ Is Appropriate Under the Circumstances

Finally, a writ of prohibition is appropriate under the circumstances. Without a writ from this Court, Millennium will construct the Project without waiting for FERC to rule on the Department's rehearing request or for this Court to determine whether FERC's interpretation of the Clean Water Act is correct. The potential

irreparable environmental harm from the Project will be inflicted, and the State of New York will be stripped of its authority to protect the quality of its state water bodies, without any judicial review.

Issuance of a writ of prohibition, on the other hand, will merely maintain the status quo until FERC can act on the Department's rehearing request, triggering this Court's jurisdiction. At that point, if FERC has not addressed the legal errors in the Waiver Order, the Department can file a petition for review of the Waiver Order and seek to stay its effectiveness.

Once FERC acts on the Department's rehearing request, this Court will have jurisdiction to review the Waiver Order and a writ of prohibition will no longer be necessary. However, the Department is requesting that the writ extend seven days after FERC acts on the rehearing request to give the Department time to evaluate its course of action and, if appropriate, file a petition for review and seek a stay from this Court. In these unusual and specific circumstances, a writ of prohibition is necessary and appropriate.

CONCLUSION

For the reasons described above, this Court should issue a writ of prohibition to FERC staying the effectiveness of the Notice to Proceed until seven days after FERC acts on the Department's request for rehearing of the Waiver Order. Additionally, this Court should stay the Notice to Proceed while it considers the merits of this Emergency Petition on an expedited basis.

Dated: October 30, 2017
Albany, New York

BARBARA D. UNDERWOOD
Solicitor General
ANDREW D. BING
Deputy Solicitor General
FREDERICK A. BRODIE
Assistant Solicitor General
LISA M. BURIANEK
Deputy Bureau Chief
BRIAN LUSIGNAN
*Assistant Attorney General
of Counsel*

Respectfully submitted,

ERIC T. SCHNEIDERMAN
*Attorney General of the
State of New York*
Attorney for Respondents

By: /s/ Brian Lusignan
BRIAN LUSIGNAN
Assistant Attorney General
NYS Department of Law
The Capitol
Albany, New York 12224
(518) 776-2399

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/s/ Brian Lusignan
BRIAN LUSIGNAN
Assistant Attorney General
The Capitol
Albany, New York 12224
(518) 776-2399