

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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MILLENNIUM PIPELINE COMPANY, L.L.C.,

*Plaintiff,*

-against-

BASIL SEGGOS, in his official capacity as  
Commissioner of the New York State Department  
of Environmental Conservation

and

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION,

*Defendants.*

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**COMPLAINT**

**Case No.** 1:17-CV-1197 (MAD/CFH)

Plaintiff Millennium Pipeline Company, L.L.C. (Millennium) brings this Complaint against Defendants New York State Department of Environmental Conservation (NYSDEC) and Basil Seggos, in his official capacity as Commissioner of the NYSDEC, and alleges the following:

**PRELIMINARY STATEMENT**

1. This action requires the application of a single, settled legal principle: any state regulation that conflicts or interferes with the authority of the Federal Energy Regulatory Commission (FERC) to regulate the transportation of natural gas is preempted by federal law.

2. Under the Natural Gas Act, Congress vested FERC with responsibility for approving the siting and construction of all natural gas pipelines operating in interstate commerce. 15 U.S.C. § 717f.

3. Millennium owns and operates an existing FERC certificated interstate natural gas pipeline system in southern New York. To help meet growing energy demands and improve

reliability of electric service in New York, Millennium plans to construct the Valley Lateral Project, 7.8 miles of new natural-gas pipeline and associated facilities in Orange County, New York. The Valley Lateral Project will serve a new electric power plant, which has already been approved by New York authorities and is nearing completion.

4. Millennium sought and obtained FERC's authorization to build the Valley Lateral Project under the Natural Gas Act. *Millennium Pipeline Company, L.L.C.*, 157 FERC ¶ 61,096 (2016).

5. The Natural Gas Act preempts state regulation if it interferes with FERC's regulatory authority over the transportation of natural gas. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988). Thus, for example, a state law or regulation is preempted if it concerns a matter considered by FERC within the exercise of its authority, such as an environmental issue, or if it would delay or block the construction or operation of facilities approved by FERC. *See, e.g., Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n*, 894 F.2d 571, 579 (2d Cir. 1990).

6. The Natural Gas Act expressly permits states to retain their authority to exercise delegated powers under certain federal statutes. *See* 15 U.S.C. § 717b(d). Any other state environmental laws or permitting requirements, including state permits required under New York Environmental Conservation Law (ECL) Articles 15 (Protection of Waters) and 24 (Freshwater Wetlands), are preempted to the extent they conflict with FERC orders or would delay or interfere with construction of a FERC-authorized pipeline.

7. Nonetheless, Defendants purported to deny permits to Millennium under both ECL Article 15 and ECL Article 24, threatening to delay or even block entirely Millennium's construction of a pipeline that FERC has expressly approved.

8. Millennium seeks a declaratory judgment and injunctive relief confirming that the Natural Gas Act, and FERC's exercise of its powers thereunder, preempt any state ECL permitting requirements that would delay or prevent construction of the Valley Lateral Project approved by FERC, including the two permit applications recently denied by NYSDEC.

### **PARTIES**

9. Plaintiff Millennium is a natural gas transportation company that owns and operates an interstate natural gas pipeline system extending across southern New York. Millennium is a Delaware limited liability company that maintains its principal office at One Blue Hill Plaza, Pearl River, New York 10965.

10. Defendant NYSDEC is the state agency charged with administering New York's environmental laws. Its central office is located at 625 Broadway, Albany, New York 12233.

11. Defendant Basil Seggos is the Commissioner of the NYSDEC. Upon information and belief, Defendant Seggos maintains an office at the NYSDEC, 625 Broadway, Albany, New York 12233.

### **JURISDICTION AND VENUE**

12. Because this action arises under the Constitution and laws of the United States, this Court has jurisdiction under 28 U.S.C. § 1331. Specifically, this action arises under, among other provisions, Article VI of the United States Constitution; the Natural Gas Act, 15 U.S.C. § 717 *et seq.*; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202.

13. Venue is proper under 28 U.S.C. § 1391(b)(1) and (b)(3) because Defendant NYSDEC is a state agency located within this district and Defendant Seggos, who is sued in his official capacity only, works within this district. Venue is also proper under 28 U.S.C.

§ 1391(b)(2) because a substantial part of the events giving rise to Millennium's claims occurred in the Northern District of New York.

14. Millennium has standing to bring this action. The Defendants have caused Millennium an actual and concrete injury by purporting to deny Millennium the disputed state-law permits and prohibiting Millennium from proceeding with construction of the Valley Lateral Project. This injury is redressable through the relief requested herein: (i) a declaratory judgment that Defendants are preempted from using the state laws in question to delay or block the Valley Lateral Project; and (ii) injunctive relief prohibiting the enforcement of those state laws against Millennium to the extent that they would delay or interfere with construction or operation of the Valley Lateral Project pipeline approved by FERC.

15. This action is ripe for adjudication. Defendants have denied Millennium's application for the relevant state-law permits and have asserted that Millennium is presently barred from constructing the Valley Lateral Project pipeline as a result.

## **STATEMENT OF THE CASE**

### **Relevant Statutes and Procedures**

#### **A. The Natural Gas Act**

16. In 1938, Congress enacted the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, to provide for federal regulation of the transportation and sale of natural gas in interstate commerce. In the opening provision of the Act, Congress "declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary to the public interest." 15 U.S.C. § 717. The Natural Gas Act preempts state regulation that interferes with or frustrates FERC's broad

regulatory authority. *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988); *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n*, 894 F.2d 571, 579 (2d Cir. 1990).

17. The Natural Gas Act confers upon FERC “exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale.” *Schneidewind*, 485 U.S. at 300. Among other things, the Act gave FERC the exclusive authority to approve the siting of interstate natural gas facilities, including pipelines and storage facilities. 15 U.S.C. § 717f. The statute contemplates that FERC will exercise that power by approving certificates of public convenience and necessity, which are required before regulated entities may construct natural gas facilities and pipelines. *See* 15 U.S.C. §§ 717f(c), (e).

18. When reviewing an application for a certificate of public convenience and necessity, FERC performs an environmental analysis under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4231 *et seq.* The Commission will prepare either an environmental assessment or an environmental impact statement depending on the scope of the project.

19. The Natural Gas Act authorizes FERC to include in the certificate of public convenience and necessity conditions that the successful applicant must adhere to when implementing the proposed project, including conditions designed to safeguard the environment. *See* 15 U.S.C. § 717f(e).

#### **B. Section 401 of the Clean Water Act**

20. The Natural Gas Act expressly carves out from preemptive effect the states’ responsibility for administering three specific federal environmental statutes: the Clean Water Act (33 U.S.C. § 1251 *et seq.*), which is relevant here; the Coastal Zone Management Act of 1972 (16 U.S.C. § 1451 *et seq.*); and the Clean Air Act (42 U.S.C. § 7401 *et seq.*). *See* 15 U.S.C. § 717b(d) (“Except as specifically provided in this chapter, nothing in this chapter affects the

rights of States under [the Coastal Zone Management Act, the Clean Air Act, and the Clean Water Act].”).

21. Section 401 of the Clean Water Act requires applicants seeking federal permits that may result in “any discharge into the navigable waters” to obtain “a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions” of the Clean Water Act. 33 U.S.C. § 1341(a)(1). New York exercises its authority to issue Section 401 certifications through NYSDEC.

22. A state must act on an application for a Section 401 certification within one year of receipt; otherwise, the state will be deemed to have waived its authority to deny the application. 33 U.S.C. § 1341(a)(1).

### **C. Additional New York State Permitting Requirements**

23. In addition to the Clean Water Act Section 401 certification, which is expressly contemplated by the Natural Gas Act, the ECL also purports to require at least two additional state law permits in connection with construction of a natural gas pipeline: a Stream Disturbance permit and a Freshwater Wetlands permit.

24. Before issuing a Stream Disturbance permit, the ECL directs the NYSDEC to “ascertain the probable effect on the health, safety and welfare of the people of the state, and the effect on the natural resources of the state.” N.Y.E.C.L. § 15-0501(3)(a).

25. In evaluating a Freshwater Wetlands permit, the NYSDEC must “consider the effect of the proposed activity with reference to the public health and welfare, fishing, flood, hurricane and storm dangers, and protection or enhancement of the several functions of the freshwater wetlands.” N.Y.E.C.L. § 24-0705(1).

26. The NYSDEC has a unified Joint Application Form that covers both the Clean Water Act Section 401 certification and the various state law permits governed by the ECL, including the Stream Disturbance and Freshwater Wetlands permits.

27. Unlike the Section 401 certification, the state ECL permits are not expressly carved out from preemptive effect by the Natural Gas Act. 15 U.S.C. § 717b(d).

**Millennium's Valley Lateral Project**

28. The Valley Energy Center, owned by CPV Valley, LLC, is an electric power generation facility under construction in the Town of Wawayanda in Orange County. When completed, the Valley Energy Center will generate enough electricity to power more than 650,000 homes and help reduce New York electricity costs by more than \$400 million per year.

29. Several years ago, Millennium contracted with CPV Valley, LLC to build the Valley Lateral Project, a 7.8 mile long pipeline and associated facilities designed to connect the CPV Valley Energy Center to Millennium's existing main natural gas line in Orange County, New York. Upon completion, the Valley Lateral Project will provide 127,200 dekatherms per day of incremental natural gas transportation service, and is expected to reduce greenhouse gas emissions by nearly half a million tons per year. The Valley Lateral Project is expected to create up to 500 construction jobs and 24 permanent jobs. Twenty-three permanent employees currently work at the Valley Energy Center.

30. The Valley Lateral Project will transport natural gas received from points outside of New York. As a result, it will operate in interstate commerce.

**A. FERC and NYSDEC Application Process**

31. In November 2015, Millennium applied to FERC for a certificate of public convenience and necessity for the Valley Lateral Project. Ex. 1. NYSDEC intervened in the FERC proceeding.

32. As a matter of policy, FERC encourages companies to cooperate voluntarily with local regulators to the extent feasible. Ex. 5 at 49, ¶ 134. And many local regulators in turn cooperate with FERC. *See Maritimes & Ne. Pipeline, L.L.C.*, 81 FERC ¶ 61,166, 61,730 (1997). However, FERC has made clear that “this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.” *Id.* ¶ 61,729; *see also* Ex. 5 at 49, ¶ 134.

33. In that spirit, Millennium submitted a Joint Application to NYSDEC for a Section 401 certification, a Stream Disturbance permit, and a Freshwater Wetlands permit. Ex. 2.

34. In December 2015, NYSDEC sent Millennium a notice that in NYSDEC’s view, Millennium’s Joint Application was incomplete pending FERC’s Environmental Assessment under NEPA.

35. Between December 2015 and January 2016, NYSDEC filed two sets of comments with FERC in connection with Millennium’s application. Ex. 3. In these filings, NYSDEC specifically identified for resolution the effect of the proposed pipeline on streams and freshwater wetlands. *Id.* at 2-3, 7-9.

36. In May 2016, FERC issued its environmental assessment for the Valley Lateral Project. Ex. 4. The environmental assessment addressed a comprehensive range of environmental issues, including geology and soils; groundwater, surface water, and wetlands; vegetation, wildlife, and aquatic resources; threatened and endangered species; land use,



recreation, and visual resources; socioeconomics; cultural resources; air quality and noise; reliability and safety; cumulative impacts; and project alternatives. The environmental assessment concluded that “approval of the [Valley Lateral Project] would not constitute a major federal action significantly affecting the quality of the human environment.” Ex. 4 at 125.

37. In June 2016, NYSDEC filed additional comments with FERC responding to the Environmental Assessment, in which it again discussed wetlands and stream protections.

38. Also in June 2016, NYSDEC issued a second notice to Millennium, now requesting additional information regarding potential impacts on three protected species and seeking minor clarifications of previously-submitted data. Millennium provided the requested information.

39. In November 2016, FERC issued a certificate of public convenience and necessity approving the construction of the Valley Lateral Project (the November 2016 Certificate). Ex. 5.

40. The November 2016 Certificate stated: “A certificate of public convenience and necessity is issued authorizing Millennium to construct and operate the Valley Lateral Project, as described and conditioned herein, and as more fully described in the application.” *Id.* at 49.

41. One of those conditions was that Millennium file documentation that it had received all authorizations required under federal law, including certification under Section 401 of the Clean Water Act, before commencing construction. *Id.* at 56.

42. None of FERC’s conditions required Millennium to obtain a New York State Stream Disturbance or Freshwater Wetlands permit before beginning construction. *See id.* at 53-58.

## **B. Litigation Over The Section 401 Certification**

43. Six days after FERC approved the Valley Lateral Project, Millennium wrote to NYSDEC requesting that it expeditiously issue its Section 401 certification, which had been pending before NYSDEC since November 2015. NYSDEC responded that, in its view, it had until August 2017 to issue a decision, based on its previous requests for additional information.

44. Millennium then petitioned for review of NYSDEC's refusal to act on the application in the United States Court of Appeals for the District of Columbia Circuit, seeking a declaration that NYSDEC had waived its right to certify the Valley Lateral Project or to compel NYSDEC to render a decision on the Section 401 certification. In June 2017, the D.C. Circuit held that Millennium's proper course of action was to seek a declaration from FERC that NYSDEC had in fact waived its authority under Section 401. *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 701 (D.C. Cir. 2017). As the Court explained, even if NYSDEC had failed to act within a reasonable time, Millennium was not injured by this failure because FERC would consider NYSDEC to have waived its Section 401 authority as a result of such delay. *Id.*

45. In July 2017, following the D.C. Circuit's suggestion, Millennium asked FERC to declare that NYSDEC had waived its Section 401 authority by failing to act within the required one-year period.

46. On September 15, 2017, FERC issued an order declaring that the NYSDEC had waived its authority to deny Millennium a certification under Section 401 of the Clean Water Act by failing to act on Millennium's application within one year, as required by statute. Ex. 6.

## **C. Ongoing Dispute Over the State ECL Permits and FERC's Declaratory Order**

47. In late August 2017, NYSDEC presented FERC with a motion to reopen the Millennium certificate proceedings and stay the November 2016 Certificate. Ex. 7. On that

same day, NYSDEC purported to deny Millennium's Joint Application for the Section 401 certification, the state Stream Disturbance permit, and the state Freshwater Wetlands permit. Ex. 8.

48. The NYSDEC denial letter expressly stated: "The Department reminds Millennium that, during the pendency of FERC's review of the Department's Request, commencement of any and all activities related to the construction of the Project are currently prohibited." *Id.* at 2.

49. FERC has approved Millennium's application to construct the Valley Lateral Project, subject only to the conditions expressly contained in the November 2016 Certificate. The FERC order discussed water resources, including wetlands. None of the environmental conditions requires Millennium to obtain a state Stream Disturbance or Freshwater Wetlands permit. But NYSDEC purportedly denied both permits, threatening to delay or even block entirely Millennium's construction of a pipeline that FERC has expressly approved. *Id.* at 2.

50. NYSDEC's actions conflict with the Natural Gas Act and FERC's exercise of authority thereunder, including but not limited to FERC's issuance of the November 2016 Certificate authorizing construction of the pipeline.

51. The November 2016 Certificate specifically provided that "[a]ny state or local permits issued" with respect to the Valley Lateral Project "must be consistent with the conditions of this certificate." Ex. 5 at 49, ¶ 134.

52. The November 2016 Certificate also explained that state and local agencies are not authorized to "prohibit or unreasonably delay the construction or operation of facilities approved by" FERC. *Id.* To the contrary, FERC noted that state and local regulation would be

preempted “to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission.” *Id.* at 49 n.200.

53. FERC is correct. By attempting to block construction of a pipeline that FERC has expressly authorized, Defendants’ conduct regulates in a preempted field and stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. It therefore is preempted under both field and conflict preemption principles.

#### **D. Need for Expedited Relief**

54. Prompt declaratory and injunctive relief is necessary and appropriate to prevent any attempted disruption of construction activities pursuant to state regulatory actions which have been preempted by federal law. Millennium therefore respectfully requests a decision in this case before January 31, 2018.

### **COUNT I**

55. Millennium realleges, reasserts and incorporates by reference each of the allegations contained in paragraphs 1 through 54 above, as though fully set forth herein.

56. The Supremacy Clause of the United States Constitution provides that federal law “shall be the supreme law of the land . . . anything in the Constitution or laws of any State to the contrary notwithstanding.” U.S. Const., art. VI, cl. 2.

57. When Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, any state law in that field is preempted. In addition, when state law conflicts with federal law such that the state law is an obstacle to the achievement of federal objectives, the state law is preempted to the extent of the conflict.

58. The Natural Gas Act grants FERC the exclusive authority to approve the siting for

and authorize the construction of natural gas pipelines operating in interstate commerce. FERC has specifically approved Millennium's Valley Lateral Project pipeline after considering and addressing the effects of the Valley Lateral Project on the environment, including streams and freshwater wetlands.

59. NYSDEC's purported "denial" of the two state permits regulates in a preempted field and delays and interferes with construction of the Valley Lateral Project pipeline, frustrating the achievement of the objectives of Congress and FERC. It therefore is preempted under both field and conflict preemption principles.

60. In passing the Natural Gas Act, "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594 (2015) (internal quotation omitted). And under the rubric of field preemption, the Second Circuit has squarely held that states are preempted from enforcing environmental regulations that go beyond the environmental restrictions imposed by FERC. *See Nat'l Fuel Gas Supply Corp.*, 894 F.2d 571, 579 (2d Cir. 1990).

61. Defendants' conduct also frustrates the achievement of the objectives of Congress and FERC. One of the main objectives of the Natural Gas Act was to vest FERC with exclusive authority to approve the siting for natural gas pipelines. FERC has expressly approved the Valley Lateral Project in its present location. And yet NYSDEC has purported to use state environmental laws to prohibit construction of the pipeline in its current location under the conditions approved by FERC. It would frustrate Congress's objectives if states were allowed to block (or even delay unreasonably) pipelines that had been approved by FERC as necessary and in the public interest.

62. Defendants' conduct also frustrates Congressional objectives for other reasons as well. FERC actually considered the exact same environmental concerns reflected in the ECL permit denials, and came to the exact *opposite* conclusion from the NYSDEC. Defendants' permit denials also impose additional delay and hassle on a FERC-approved project. And by purporting to justify the permit denials based on the assertion that FERC's environmental assessment was deficient, NYSDEC's denial letter appears to reflect an attempt to short-circuit the procedure that Congress has established for intervenors to challenge a FERC certificate. *See* 15 U.S.C. § 717r.

63. For all of the foregoing reasons, NYSDEC is preempted from taking any action in connection with the state law permitting requirements under the ECL that would delay or interfere with construction or operation of the Valley Lateral Project pipeline approved by FERC.

64. Millennium will be irreparably harmed unless Defendants' conduct is enjoined. Absent an injunction, Millennium would be deprived of its federal right to install the pipeline without further delay.

65. The public interest and balance of the equities favor injunctive relief. Courts routinely enter injunctions upon a finding that federal law preempts state law. *See, e.g., Aircraft Owners v. Cuomo*, 06-CV-1468, 2017 WL 9626973, at \*3 (N.D.N.Y. Dec. 27, 2007); *Metro. Taxicab Bd. of Trade v. City of New York*, 633 F. Supp. 2d 83, 106 (S.D.N.Y. 2009), *aff'd*, 615 F.3d 152 (2d Cir. 2010). In addition, the public greatly benefits from uniform regulation in the area of natural gas transportation. Indeed, Congress has recognized that “[f]ederal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary to the public interest.” 15 U.S.C. § 717.

66. In contrast, NYSDEC will not be harmed if prevented from enforcing unconstitutional restrictions on Millennium's construction and operation of the Valley Lateral Project.

67. Millennium has no adequate remedy at law based on the unique nature of the harm.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully prays for the following relief:

A. A declaration pursuant to 28 U.S.C. § 2201 that Defendants are preempted from applying any state permitting requirements in a manner that would delay or interfere with construction or operation of the Valley Lateral Project pipeline approved by FERC;

B. Preliminary and permanent injunctive relief enjoining Defendants from enforcing any state permitting requirements in a manner that would delay or interfere with construction or operation of the Valley Lateral Project pipeline approved by FERC;

C. An order awarding Millennium its costs, expenses, and attorneys' fees; and

D. Such other and further relief as the Court deems just and proper.

Dated: October 27, 2017

By: /s/ Robert M. Rosenthal  
ROBERT M. ROSENTHAL  
Bar Roll No.: 510013  
Greenberg Traurig, LLP  
54 State Street  
Albany, NY 12207  
(518) 689-1426  
rosenthalrm@gtlaw.com

CATHERINE E. STETSON\*  
SUSAN COOK\*  
SEAN MAROTTA\*  
Hogan Lovells US LLP  
555 13th Street N.W.  
Washington, D.C. 20004  
(202) 637-5600  
cate.stetson@hoganlovells.com

*\*Motion to appear pro hac vice  
forthcoming.*

*Attorneys for Plaintiff Millennium Pipeline  
Company, L.L.C.*