# No. 17-3503, -3770

IN THE
## United States Court of Appeals for the Second Circuit

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner.

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petitions for Review and Writ of Prohibition to the Federal Energy Regulatory Commission

**MILLENNIUM PIPELINE CO., L.L.C.'S OPPOSITION TO PETITIONER'S MOTION TO STAY AND PETITION FOR A WRIT OF PROHIBITION**

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## INTRODUCTION

In November 2015, Millennium Pipeline Co., L.L.C. applied to the Federal Energy Regulatory Commission (FERC) for a certificate of public convenience and necessity for the Valley Lateral Project. The Project is a 7.8-mile natural-gas pipeline and associated facilities that will connect Millennium's main line to CPV Valley, LLC's Valley Energy Center power plant. Millennium also separately applied to the New York State Department of Environmental Conservation for authorization of the Valley Lateral Project under Section 401 of the Clean Water Act. The Department received Millennium's request on November 23, 2015; under Section 401, the Department had up to one year "after receipt of [Millennium's] request" to approve, deny, or condition the application or else waive its power to certify the Project. 33 U.S.C. § 1341(a)(1).

FERC approved the Valley Lateral Project, concluding after an exhaustive environmental assessment that the Project, if built in accordance with the Commission's detailed mitigation measures, would not significantly impact the environment. But the Department dragged its feet on Millennium's separate Section 401 certification request. So Millennium, at the suggestion of the D.C. Circuit, sought relief from FERC on the ground that the Department had waived its right to act on the Valley Lateral Project.

FERC agreed. It concluded the Department had waived its Section 401 authority and allowed Millennium to commence construction. The Commission's reasoning was straightforward: Section 401 requires a state agency to make a decision no later than one year after it receives an application. The Department did not meet that statutory deadline. The Department had therefore waived its Section 401 powers.

The Department now seeks a stay of construction pending judicial review. But the Department meets none of the usual prerequisites for a stay. First, the Department is wrong on the merits. The Department argues that the one-year Section 401 clock does not begin to run until it declares an application "complete." But the word "complete" appears nowhere in Section 401. The Department is unlikely to succeed on its atextual approach to the statute.

Second, the Department cannot show it will suffer irreparable harm if the Project is not enjoined. The Department does not point to any environmental harm that is likely to occur—its motion and supporting declaration are riddled with mights and maybes. Moreover, FERC found that the Project will not harm the environment if built in accordance with the Commission's exacting mitigation requirements, and the Department cites no contrary evidence.

Third, the balance of harms tilts squarely in favor of Millennium, CPV, and the public. If the Project construction is stayed, it may be delayed for months or

more due to the environmental restrictions on construction, possibly forcing CPV out of business and certainly costing CPV tens of millions of dollars. And a stay will hurt New Yorkers, who will pay higher wholesale electric rates without the Valley Energy Center and have to rely on older, less-efficient, and less-environmentally-friendly generators for electricity. The Department's stay motion should be denied.

Just as importantly, the Department's motion should be denied on or before December 6. An unoccupied eagle's nest has recently been discovered in the Project area, and Millennium must complete work near it before December 31 in order to avoid harming the eagles' habitat. The latest Millennium can begin construction and still meet that December 31 deadline is December 7. The Court should therefore promptly deny the Department's motion and dissolve its administrative stay so that the Department does not obtain the practical equivalent of a stay through judicial inaction.

## BACKGROUND

**Millennium's Valley Lateral Project.** The Valley Energy Center, owned by CPV, is an electric power generation facility under construction in the Town of Wawayanda in Orange County, New York. Crounse Decl. Ex. F, at PP 3-4. New York State authorities have approved the Valley Energy Center; it is expected to be completed by February or March 2018. Nugent Decl. ¶ 17. Indeed, the

Department approved the Valley Energy Center's air-quality permits knowing that its primary fuel source would be natural gas delivered by the Valley Lateral Project. *See id.* ¶ 13. The Valley Energy Center will help reduce wholesale electricity costs by more than $700 million a year, and is expected to reduce greenhouse-gas emissions by nearly half-a-million tons a year. *Id.* ¶¶ 24-25.

Millennium contracted with CPV to build the Valley Lateral Project, a 7.8-mile-long pipeline and associated facilities that will connect the Valley Energy Center to Millennium's existing main interstate natural-gas pipeline in Orange County. Opp. Ex. 1, at 5. The Project will create up to 500 construction jobs and 24 permanent jobs. *Id.* at 7.

In November 2015, Millennium applied to FERC for a certificate of public convenience and necessity for the Project. *See generally id.* The next week, Millennium submitted a joint application to the Department for authorization for the Project under Section 401 of the Clean Water Act. Crounse Decl. Ex. C. The Department received the application on November 23. Crounse Decl. Ex. A, at P 5. Under Section 401, "[i]f the State . . . fails or refuses to act on a request for certification, within a reasonable time (which *shall not exceed one year*) after receipt of such request, the certification requirements of this subsection shall be waived." 33 U.S.C. § 1341(a) (emphasis added). In other words, if a State waits

longer than a year "after receipt of [a] request" to act on a Section 401 certification, the State waives its authority to act on the request. *See id.*

The next month, the Department notified Millennium that in its view, the application was "incomplete," not because of anything Millennium had included or failed to include, but because FERC had not yet completed its assessment under the National Environmental Policy Act (NEPA). Crounse Decl. ¶ 9. But the Department's regulations do not require a NEPA assessment to be included with a project sponsor's application. *See* 6 N.Y.C.R.R. §§ 621.3, 621.4. Still, for the next five months, Millennium heard nothing from the Department about its application.

Meanwhile, the Department intervened in the FERC proceeding and submitted two sets of comments. Opp. Ex. 2. The Department's comments addressed the potential impact of construction on, among other things, streams, wetlands, and endangered wildlife—specifically, bog turtles and two species of bat. *Id.* at 2-4, 8-10. The Department did not raise any concerns about greenhouse-gas emissions. *See generally id.*

In May 2016, FERC issued its environmental assessment, which addressed each issue raised by the Department along with a raft of others. *See generally* Crounse Decl. Ex. D. The Commission found that as long as Millennium adhered to the recommended procedures, "Millennium would minimize and mitigate impacts on surface waters and these impacts would not be significant." *Id.* at 42.

As for wetlands, FERC extensively catalogued the methods that Millennium will use to minimize the impact to wetlands during construction and operation of the Valley Lateral Project. *Id.* at 45-48. Many of those methods are the same as those the Department suggests it would have imposed. With those measures in place, the Commission determined that "wetlands impacts associated with the construction and operation of the [Valley Lateral] Project would not be significant and would be in compliance with applicable permit conditions." *Id.* at 48.

About a month after FERC issued the environmental assessment, the Department issued Millennium a *second* notice of incomplete application. Crounse Decl. ¶ 11. This time, the Department sought yet more information about water resources, among other things. *Id*. Millennium promptly provided it. *Id.* ¶ 12.

The Department also submitted comments on FERC's environmental assessment. Opp. Ex. 3. In particular, the Department said it wanted to conduct testing at various stream crossings to determine if blasting would be necessary. *Id.* at 2. The Department also acknowledged that the environmental assessment had addressed the Project's impact on wetlands, but noted that it nevertheless planned to conduct an additional analysis of the areas *adjacent to* wetlands. *Id.* at 3. As before, the Department's comments said nothing about greenhouse gases. *See generally id.*

In November 2016, FERC issued a certificate authorizing construction of the Valley Lateral Project. Crounse Decl. Ex. F. In the certificate, FERC responded to the Department's comments. *See id.* PP 20, 48, 69, 72, 76, 86, 94-95, 98-99, 116, 118. FERC also included seven pages' worth of environmental conditions that Millennium must comply with before, during, and after construction, including those Millennium agreed to in response to the Department's comments. *Id.* at 53-58. The conditions require Millennium to take the mitigation steps described in the application and certificate, and subject Millennium to regular oversight throughout construction. *Id.* at 53-55. They also require Millennium to submit a Clean Water Act Section 401 certification, or proof that the State has waived its authority to issue one. *See id.* P 72.

**The Department's Continued Delays.** Shortly after FERC approved the Project, Millennium requested that the Department expeditiously issue its Section 401 certification, which had now been pending before the Department for just under a year. Crounse Decl. Ex. G. The Department responded that at that time—fully three months after Millennium had responded to the last request for information—it *still* had not determined whether Millennium had successfully submitted a complete Section 401 request. Crounse Decl. Ex. H, at 2. In the Department's view, it had "at a minimum . . . until August 30, 2017," but perhaps even longer, "to either approve or deny" Millennium's application. *Id.*

Millennium petitioned for review in the D.C. Circuit of the Department's refusal to act on the application. *See* 15 U.S.C. § 717r(d)(2) (supplying jurisdiction in that court over a state agency's failure to act on a pipeline's permit application). The court of appeals dismissed Millennium's petition for lack of standing, but held that Millennium could obtain an order from FERC that the Department had waived its Section 401 authority, highlighting the Department's oral-argument concession that a FERC certificate "would [be] all the authority [Millennium] needs to begin construction." *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 701 (D.C. Cir. 2017). Following the D.C. Circuit's suggestion, Millennium asked FERC to declare that the Department had waived its Section 401 authority by failing to act within the required one-year period. *See* Crounse Decl. Ex. A, at P 1.

FERC did so, declaring that the Department, "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." *Id.* FERC relied on Section 401's plain language, which states that the deadline runs one year "*after receipt of such request*." *Id.* P 13 (quoting 33 U.S.C. § 1341(a)(1)). FERC noted that the ordinary dictionary meaning of "receipt" is "the act or process of receiving." *Id.* "Giving effect to th[is] plain text," FERC determined that the relevant date is "the day the agency receives a certification application"—in Millennium's case, November 23, 2015—"as opposed to when the agency considers the application to be complete."

*Id.* FERC further found that even if there were some ambiguity in Section 401, its interpretation was consistent with Congress' intent "that sheer inactivity by the State . . . will not frustrate the federal application." *Id.* P 14 (quoting H.R. Conf. Rep. 91-940 (1980)).

The Department sought rehearing and a stay before the Commission. Crounse Decl. Ex. J. The Department also purported to "deem[ ] denied" Millennium's Section 401 application, not on water quality-related grounds, but because FERC's greenhouse-gas analysis for the Project was allegedly inadequate. Crounse Decl. Ex. I.

While rehearing was pending, FERC issued a notice giving Millennium the green light to start construction. Crounse Decl. Ex. K. The notice to proceed confirmed that Millennium has "all federal authorizations necessary" and concluded that no further environmental analysis was required. *See id.* at 1-2. Almost immediately after FERC issued the notice to proceed, the Department again sought a stay from the Commission, *see* Crounse Decl. Ex. M, and petitioned in this Court for a writ of prohibition. The Court entered an administrative stay pending the disposition of the Department's petition.

FERC denied rehearing and a stay. Crounse Decl. Ex. B. The Commission first rejected the Department's stay request. *Id.* PP 18-22. It held that the Department had not alleged any irreparable harms that were imminent or likely to

occur, and that a stay would not be in the public interest because the Valley Lateral Project is necessary to fuel the (already-approved) Valley Energy Center. *Id.* PP 17-22. The Commission then reaffirmed its waiver finding, holding that Section 401's one-year clock unambiguously begins to run upon an agency's receipt of an application and that FERC could construe any ambiguity in favor of the one-year period beginning at receipt of an application. *Id.* PP 27-43.

**Millennium's Narrow Construction Window.** Millennium faces an extraordinarily challenging construction window because of the Department's delays. An unoccupied eagle's nest was recently discovered within the Project area, and work near it must be complete by December 31, 2017, in order to avoid disturbing the eagle's habitat. Zimmer Decl. ¶ 4. To complete work by December 31, Millennium must begin construction by December 7. *Id.* ¶ 6. Otherwise, Millennium may have to attempt to obtain an "incidental take" permit for the bald eagle—a process that can take months—that will allow Millennium to disturb the nest during construction. *See id.* ¶ 7. If Millennium cannot meet that December 31 deadline, construction will be delayed until November 2018. The delay will cost CPV $73 million and New York ratepayers hundreds of millions more in higher wholesale electricity costs. Nugent Decl. ¶¶ 24-25. Indeed, a construction delay until November 2018 would create an event of default under CPV's loans and CPV could be pushed into bankruptcy by its lenders. *Id.* ¶ 23.

## ARGUMENT

### I. THE DEPARTMENT HAS NOT JUSTIFIED THE EXTRAORDINARY REMEDY OF A STAY.

A stay "is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as of right." *Nken v. Holder*, 556 U.S. 418, 438 (2009). The Department must demonstrate that (1) it is likely to prevail on the merits; (2) it will likely suffer irreparable harm if a stay is withheld; (3) no other party will suffer substantial harm if a stay is granted; and (4) the public interest favors a stay. *Winters v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).[1]

The Department cannot meet any of these prerequisites.

#### A. FERC Correctly Held That The Clean Water Act's One-Year Time Limit Ran, Resulting In Waiver.

FERC correctly held that the Department's Section 401(a)'s time period to approve, condition, or deny Millennium's Clean Water Act authorization expired on November 23, 2016, one year after the Department received Millennium's application. Crounse Decl. Ex. A, at P 17. Under the plain language of Section 401, Millennium must submit a "request for certification" to the Department and the Department must act "within a reasonable period of time (which shall not exceed one year) after receipt of such request." 33 U.S.C. § 1341(a)(1). The

[1] Before FERC denied rehearing, the Department also petitioned this Court for a writ of prohibition. As the Department now agrees (Dkt. 53 at 3), prohibition is no longer necessary or appropriate.

Department indisputably received Millennium's Section 401 request for the Valley Lateral Project in November 2015. Crounse Decl. Ex. A, at P 5. FERC thus correctly concluded that the Department waived certification when it did not act on the application within one year. *Id.* at PP 11-18; Crounse Decl. Ex. B, at PP 27-43.

The Department ignores the plain language of Section 401, offering a variety of reasons why (in its view) requiring a "complete" application to start the clock makes for better policy. *See* Mot. 18-20. But "the starting point for interpreting a statute is the language of the statute of itself." *United States v. Piervinanzi*, 23 F.3d 670, 677 (2d Cir. 1994) (citation omitted). As FERC noted, the plain-meaning, dictionary-definition of "receipt" is "the act or process of receiving." Pet. Ex. B, at P 13 (citing *Merriam-Webster*); *see also Succo v. First Reliance Standard Life Ins. Co.*, 16 F. App'x 53, 55 (2d Cir. 2001) ("A non-legal dictionary can supply the everyday, common meaning" of a word). Thus, in Section 401, "the plain meaning of 'after receipt of the request' is the day the agency received a certification application, as opposed to when the agency considers the application to be complete." Crounse Decl. Ex. A, at P 13. And when the language of a statute is unambiguous, the "judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

The Department asserts that Millennium must submit a "*complete* request for certification" to the Department, such that the one-year period does not begin to run until the Department deems an application complete. But the word "complete" appears nowhere in the statute. And this Court "cannot add to the statute what congress did not provide." *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993); *see also Dean v. United States*, 556 U.S. 568, 572 (2009) (courts "ordinarily resist reading words . . . into a statute that do not appear on its face") (citation omitted).

The Department tries to wedge the qualifier "complete" into Section 401(a)(1) by arguing that a clock that starts on receipt of a supposedly incomplete request would lead to absurd results. Mot. 18-20. As FERC explained, however, the Department has a ready remedy if it "concludes that a certification application does not meet [Clean Water Act] requirements." Crounse Decl. Ex. A, at P 18. "[I]t can deny the application." *Id.*; *see also* Crounse Decl. Ex. B, at PP 40, 42.

Out of textual answers, the Department invokes deference. Mot. 21-22. But whether the Department or FERC is entitled to *Chevron* deference ultimately makes no difference: There is no ambiguity in Section 401(a)(1) to resolve. *See Lawrence Memorial Hosp. v. Burwell*, 812 F.3d 257, 267 (2d Cir. 2016) (declining to defer to an agency's interpretation because "we find the statutory language to be

plain and unambiguous"). The Department contends that Section 401(a)(1) is ambiguous because it does not expressly disclaim the possibility that only a complete application triggers the one-year(-at-the-outside) waiver period. Mot. 20. But courts have explained before that a statute is not ambiguous "any time [it] does not expressly *negate* the existence of a claimed administrative power." *Railway Labor Execs.' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

Moreover, as FERC explained, courts do not defer to state-agency interpretations of federal statutes. *See* Crounse Decl. Ex. B, at P 27. And although FERC may not generally administer the Clean Water Act, the Environmental Protection Agency's Section 401 regulations vest the licensing authority—here, FERC—with the responsibility to determine when waiver has occurred. 40 C.F.R. § 121.16(b). That properly places interpretation of Section 401's one-year trigger with FERC, not the Department.

In arguing the contrary, the Department points (Mot. 20-21) to *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721 (4th Cir. 2009). But the Commission explained at length why *AES Sparrows Point* was distinguishable. *See* Crounse Decl. Ex. B, at PP 28-33. The Department offers no response, save to disagree. *See* Mot. 18-24. And to the extent *AES Sparrows* is relevant, the Fourth Circuit's ambiguity finding is unpersuasive. The Fourth Circuit panel's *Chevron*

step-one analysis, in full, was this: "Indeed, the statute is ambiguous on the issue." 589 F.3d at 729. That bare conclusion does not withstand application of the "traditional tools of statutory construction" that this Court applies to determine whether a statute, in context, is ambiguous. *Bell v. Reno*, 218 F.3d 86, 90 (2d Cir. 2000) (citation omitted).

### B. The Department Has Not Demonstrated Imminent, Irreparable Harm To New York's Waterways.

The Department also has not shown that it will suffer irreparable harm if a stay is not granted.

*First*, the Court requires that "irreparable harm must be shown to be actual and imminent, not remote or speculative." *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002). "[T]he 'burden of proof and persuasion rest[s] squarely' on the party" seeking equitable relief "to show that irreparable harm is likely." *JBR, Inc. v. Keurig Green Mountain, Inc.*, 618 F. App'x 31, 34 (2d Cir. 2015) (quoting *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 67-68 (2d Cir. 2007)) (second alteration in original).

The Department's motion and the supporting affidavit are most notable for what they do *not* include: a single allegation that environmental harm *will* occur if Millennium proceeds with construction of the Valley Lateral Project in compliance with FERC's extensive environmental conditions. The Department's arguments are instead riddled with what-ifs. Mot. 14-18; *accord* Gaidasz Aff. ¶¶ 8-9. The

Department hypothesizes that construction "*could* cause permanent damage to water quality in the area." Mot. 15 (emphasis added). It speculates that blasting "*might* be necessary" *if* "bedrock is encountered." *Id.*; Gaidasz Aff. ¶ 6 (emphasis added). It suggests that clearing vegetation "*could* destabilize stream banks . . . and increase[e] water temperatures," which "*can* adversely impact native aquatic life." Mot. 15 (emphases added). The Department concedes that trenchless drilling techniques like Millennium is using can mitigate these problems, but points out that even those techniques "*pose risk* to water quality, because drilling fluids *could* inadvertently be released into wetlands and waterbodies." Gadaisz Aff. ¶ 8 (emphases added). Such speculation upon speculation does not warrant a stay. *See New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745, 756 (2d Cir. 1977) (denying equitable relief when the party had not shown "any but the most remote of possibilities" that environmental harm would result).

*Second*, the Department has not proved its alleged harms. *See Grand River*, 481 F.3d at 67-68. The Department's only irreparable-harm evidence is an 8-page affidavit from one of its own administrators, which does not cite a single environmental survey, study, or other document that identifies the basis for the affiant's conclusions. *See* Gadaisz Aff. The Department is essentially asking the Court to take its word for it.

The Court should decline. After all, FERC already considered each of the Department's environmental concerns during its extensive environmental review of the Valley Lateral Project and concluded the Project "would not constitute a major federal action significantly affecting the quality of the human environment." Crounse Decl. Ex. F, at P 133. With regard to blasting, FERC concluded that any water-quality impacts would be "temporary." *Id.* P 72. On the stream-crossings issue, FERC noted that "in response to comments from [the Department], Millennium revised the crossing method[s]" to mitigate the Department's concerns. *Id.* P 48. FERC further assigned a specific "crossing method for each waterbody" and recommended "trenchless construction methods to cross all sensitive waterbodies." *Id.* P 70. FERC concluded that, so long as Millennium complied with the certificate's environmental conditions, "impacts on surface waters will not be significant." *Id.* P 74. Similarly, FERC determined that "wetlands impacts associated with construction and operation of the project will not be significant and these resources will be adequately protected during construction." *Id.* P 79. FERC even considered the possibility of inadvertent leaks or spills during construction, finding that Millennium had adopted "procedures . . . appropriate to minimize the risk of contamination to adjacent wetlands." *Id.* P 80. In the environmental conditions attached to the certificate, FERC provided for extensive environmental oversight throughout the construction process, requiring

Millennium to "employ at least one Environmental Inspector per construction spread" and file "updated status reports with [FERC] on a biweekly basis until all construction and restoration activities are complete." *Id.* at 55.

*Third*, the Department's claims of imminent environmental harm are further undermined by its evolving rationales for why the Project should be stopped. *Cf. Cicero v. Borg-Warner Automotive, Inc.*, 280 F.3d 579, 592 (6th Cir. 2002) ("Shifting justifications over time calls the credibility of those justifications into question."). In its letter purporting to deny Millennium a Section 401 certification, the Department did not raise any water-quality or wildlife concerns. Crounse Decl. Ex. I. Instead, the Department contended that the Project's *greenhouse-gas* impacts had been inadequately analyzed. *See id.* at 2. Yet now the Department's harm allegations do not say one word about greenhouse gases. *See* Mot. 14-18. The Department cannot get its story straight.

*Finally*, the Department's claim of harm to its "sovereign interests" (Mot 16-17) begs the question. States make their Clean Water Act certifications pursuant to the Act's cooperative-federalism model. 33 U.S.C. § 1341(a)(1). But Congress understood that States might through "sheer inactivity . . . frustrate the federal application," so it provided that the State would lose its authority if it tarried for more than one year. *See* H.R. Rep. 91-940 (1980). The Department's alleged sovereign-interests harm thus is "inextricably linked with the merits of the case."

*Serono Labs. v. Shalala*, 158 F.3d 1313, 1326 (D.C. Cir. 1998). Because the Department is not likely to show that FERC violated Section 401 (*supra* pp. 12-15), "public interest considerations weigh against an injunction." *Id.*

**C. A Stay Would Harm Millennium, CPV, And The Public.**

The balance of harms further weighs against a stay. Start with the harms to Millennium. Millennium received its FERC certificate for the Valley Lateral Project in November 2016. *See* Crounse Decl. Ex. F. Since then, however, Millennium has been unable to commence construction for want of a Section 401 certification from the Department, which in turn has prompted the related, protracted litigation before the D.C. Circuit, FERC, and now in this Court. A further stay would delay the Project even more, even though FERC has found that "the public convenience and necessity requires approval of" the Project because of "the benefits the project will provide to the market, the lack of adverse effects on existing customers, other pipelines and their captive customers, and the minimal adverse effects on landowners and communities." *Id.* P 31; *see also* Crounse Decl. Ex. B, at P 22 (FERC finding the public interest did not favor a stay because "the project is required by the public convenience and necessity").

The Department argues that a stay would not hurt Millennium because a stay pending judicial review would only "temporarily delay construction." Mot. 24. The Department knows that any delay is likely to be lengthy due to FERC's

stringent environmental-mitigation measures, which permit Millennium to build during only certain periods. *See* Crounse Decl. Ex. D, at 59; Zimmer Decl. ¶¶ 3-4. A stay, then, could force Millennium to either obtain an incidental-take permit or delay construction until November 2018, when the construction window reopens. *Id.* ¶ 7.

The Valley Energy Center cannot wait that long. The Energy Center represents a $900 million investment, is 95% complete, and is scheduled to go into service in February or March 2018. Nugent Decl. ¶¶ 15, 17. Without the Valley Lateral Project, the Valley Energy Center will not have a supply of natural gas and will be forced to rely on costlier, dirtier fuel oil to generate electricity. *Id.* ¶ 20. But fuel oil is not a viable or even long-term solution. The Energy Center's air permits allow it to burn fuel oil for no more than an equivalent of 720 hours per year. *Id.* Because of these restrictions and fuel oil's higher cost, the Energy Center will not be able to generate electricity economically or at its full rated capacity. *Id.*

If the Valley Energy Center cannot obtain natural gas from the Valley Lateral Project soon, it may go bankrupt. If the Energy Center is not supplied by natural gas by August 2018, CPV's lenders could declare CPV in default on its loans. *Id.* ¶ 23. That would allow CPV's lenders—if they so chose—to push CPV into bankruptcy. *Id.* And even if CPV is not forced under, every month of delay in

the Project costs CPV $4.9 million in additional out-of-pocket costs and financing charges. *Id.* ¶ 21. On top of that, every month the Energy Center operates without natural gas is another $5.6 million in lost revenue to CPV. *Id.* ¶ 22. And if a stay causes completion to be delayed until November 2018, CPV will lose a total of $73 million. *Id.*

Worst of all, a delay will harm New York electricity consumers and the environment. The Energy Center will displace older generators currently on the wholesale market, and will save New York ratepayers a total of $730 million a year in wholesale energy costs. *Id.* ¶ 24. The Energy Center will also produce electricity with less fuel, less water, and higher efficiency than New York's current generators. *Id.* ¶ 25. That translates to half-a-million tons less carbon-dioxide emissions a year, and less natural-gas imported into the State. *Id.* By any measure, the Valley Energy Center is a benefit for New York—as the State and the Department found in approving the Center. But the Valley Energy Center requires the Project to live up to its potential; the Court should not stay its construction.

The Department dismisses all of this as "temporary" economic loss that is "far outweighed by the *potential* irreparable harm to the State's environment and sovereignty." Mot. 24 (emphasis added). The complete loss of a business is not merely monetary harm; it is irreparable injury. *Tom Doherty Assocs., Inc. v. Saban Ent't, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995). Bankruptcy to CPV aside, the money

that Millennium and CPV lose to delays will be lost for good; New York's sovereign immunity means that Millennium and CPV have no way to recoup their losses once they prevail. *See Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 422 (2d Cir. 2013). And the monetary and environmental harms to Millennium, CPV, and New York ratepayers are real while—by even the Departments own lights—the harm to the Department is speculative. The balance of harms tilts against a stay.

## II. THE COURT SHOULD DENY THE DEPARTMENT'S PETITION ON OR BEFORE DECEMBER 6, 2017.

It is not enough for the Court to merely deny the Department's motion: It should do so on or before December 6, 2017. As we have explained, the unoccupied eagle's nest in Millennium's project area means that Millennium must complete work within 660 feet of the nest by December 31, 2017. *Supra* pp. 10-11. The absolute latest that work can begin and be guaranteed to be complete by December 31 is December 7. Zimmer. Decl. ¶ 6. Any further delay could require Millennium either to go through the burden and expense of obtaining an incidental-take permit for the eagle—a harm to the environment unto itself—or delay construction for the better part of a year. *See id.* ¶ 7. A delay, in other words, would effectively give the Department the relief it seeks—stopping the project.

Millennium is prepared to take any steps the Court may require in order to receive a decision on or before December 6, including appearing for a hearing

earlier than December 5 if the Court's calendar permits. The Court should expeditiously deny the motion and dissolve its administrative stay.

## CONCLUSION

For all of the foregoing reasons, the Department's motion should be denied on or before December 6, 2017.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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## CERTIFICATE OF SERVICE

I certify that on November 20, 2017, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Catherine E. Stetson
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