

157 FERC ¶ 61,096  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, and Colette D. Honorable.

Millennium Pipeline Company, L.L.C.

Docket No. CP16-17-000

ORDER DENYING MOTION TO DISMISS  
AND ISSUING CERTIFICATE

(Issued November 9, 2016)

1. On November 13, 2015, Millennium Pipeline Company, L.L.C. (Millennium) filed an application pursuant to section 7(c) of the Natural Gas Act (NGA)<sup>1</sup> and Part 157 of the Commission's regulations<sup>2</sup> requesting certificate authorization to construct and operate 7.8 miles of 16-inch-diameter lateral pipeline and related facilities in Orange County, New York (Valley Lateral Project or Valley Lateral), in order to provide transportation service to the Valley Energy Center in the Town of Wawayanda, New York. As discussed below, the Commission will grant the requested authorization, subject to the conditions herein.

**I. Background and Proposal**

2. Millennium is a natural gas company, as defined by section 2(6) of the NGA,<sup>3</sup> engaged in the transportation of natural gas in interstate commerce and subject to the Commission's jurisdiction. Millennium operates an interstate natural gas pipeline system extending across southern New York that transports natural gas from an interconnection with National Fuel Gas Supply Corporation (National Fuel) in Independence, New York, to an interconnection with Algonquin Gas Transmission, LLC in Ramapo, New York.

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<sup>1</sup> 15 U.S.C. § 717f(c) (2012).

<sup>2</sup> 18 C.F.R. pt.157 (2016).

<sup>3</sup> 15 U.S.C. § 717a(6) (2012).

3. Millennium proposes to construct and operate the Valley Lateral Project to provide 127,200 dekatherms (Dth) per day of incremental firm natural gas transportation service from an interconnect on Millennium's existing mainline in Orange County, New York, to a new meter station on the site of a natural gas combined-cycle electric power generator currently under construction in the Town of Wawayanda, New York (Valley Energy Center).<sup>4</sup> Specifically, the project will include construction of the following facilities: (i) approximately 7.8 miles of new 16-inch-diameter pipeline; (ii) a delivery meter station and associated piping at the proposed Valley Energy Center; (iii) a launcher facility; and (iv) a receiver facility at the proposed Valley Energy Center.

4. Millennium states that it entered into a precedent agreement with the developer of the Valley Energy Center, CPV Valley, LLC (CPV), for the full 127,200 Dth per day of incremental firm transportation service created by the project. Millennium explains that the project shipper elected to receive service under negotiated rates.

5. Millennium estimates that the proposed facilities will cost approximately \$39 million. Millennium proposes to establish initial incremental recourse rates for firm and interruptible transportation service on the Valley Lateral Project under new Rate Schedules LFT (Lateral Firm Transportation) and LIT (Lateral Interruptible Transportation), respectively.

## **II. Procedural Issues**

### **A. Notice, Interventions, and Comments**

6. Notice of Millennium's application was published in the *Federal Register* on December 7, 2015.<sup>5</sup> The parties listed in Appendix A filed timely, unopposed motions

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<sup>4</sup> The State of New York Public Service Commission (New York PSC) issued a certificate of public convenience and necessity authorizing the Valley Energy Center on May 9, 2014. The Valley Energy Center, which is currently under construction, is a natural gas combined-cycle generating facility with a nominal capacity rating of 630 megawatts (MW) and a nameplate generating capacity of 820 MW. New York PSC, Order Granting Certificate of Public Convenience and Necessity, Authorizing Lightened Ratemaking Regulation, and Approving Financing, Case 10-E-501 (2014), <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=10-e-0501>.

<sup>5</sup> 80 Fed. Reg. 76,012.

to intervene. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.<sup>6</sup>

7. Sarah E. Burns and Amanda King (Burns and King),<sup>7</sup> interested landowners, and Eric Rodriguez and Patricia Quinn, residents of the Minisink region, filed late, unopposed motions to intervene. We grant these motions.<sup>8</sup>

8. In their motions to intervene, Burns and King protest Millennium's proposed Valley Lateral Project and raise environmental issues, allege that Millennium trespassed and removed protest signs from their property, and assert that the project is not subject to the Commission's NGA jurisdiction. On January 5, 2016, Millennium filed an answer to their comments. Burns and King filed a reply on January 8, 2016. On March 23, 2016, Burns and King filed a motion requesting that the Commission dismiss Millennium's application for lack of jurisdiction, to which Millennium filed an answer on April 1, 2016. Burns and King filed a reply on July 13, 2016. Millennium filed a second answer on August 18, 2016. Although Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to protests and answers to answers,<sup>9</sup> our rules provide that we may, for good cause, waive this provision.<sup>10</sup> We will admit the above-referenced answers by Millennium and Burns and King because the answers provide information that has assisted us in our decision-making process.<sup>11</sup>

### **III. Discussion**

9. Since Millennium's proposed facilities will be used to transport natural gas in interstate commerce subject to the Commission's jurisdiction, the construction and

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<sup>6</sup> 18 C.F.R. § 385.214 (2016).

<sup>7</sup> Burns and King filed three separate late motions to intervene, on December 22, 2015; March 23, 2016; and March 24, 2016.

<sup>8</sup> 18 C.F.R. § 385.214(d) (2016).

<sup>9</sup> 18 C.F.R. § 385.213(a)(2) (2016).

<sup>10</sup> 18 C.F.R. § 385.101(e) (2016).

<sup>11</sup> Because Rule 213(a)(3) permits answers to any pleadings not specifically prohibited under paragraph (a)(2), it permits Millennium's answer to Burns' and King's Motion to Dismiss. 18 C.F.R. § 385.213(a)(3) (2016).

operation of the facilities are subject to the requirements of subsections (c) and (e) of section 7 of the NGA.<sup>12</sup>

A. **The Commission's Jurisdiction over Millennium's Valley Lateral Project**<sup>13</sup>

**Burns' and King's Arguments**

10. In their March 23, 2016 motion seeking our dismissal of Millennium's application for lack of jurisdiction, Burns and King emphasize that the proposed Valley Lateral will be located entirely within the State of New York and that all gas transported on the lateral would enter it in New York and be delivered to a single end user in New York. They assert that the lateral therefore would not be transporting any gas in interstate commerce for the wholesale market<sup>14</sup> and argue that section 1(b) of the NGA therefore prevents the Commission's jurisdiction from attaching to Millennium's project because section 1(b) states that NGA jurisdiction "shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale ... and the natural-gas companies engaged in such transportation or sale but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution ... ." <sup>15</sup> Burns and King argue that if Millennium persists in its plans to construct the Valley Lateral, it must seek construction authority from the New York Public Service Commission (New York PSC), not this Commission.<sup>16</sup>

11. In its April 1, 2016 reply, Millennium refutes Burns' and King's argument citing *Oklahoma Natural Gas Co. v. FERC (ONG v. FERC)*,<sup>17</sup> which involved a challenge by ONG, a local distribution company (LDC), to the Commission's jurisdiction under the

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<sup>12</sup> 15 U.S.C. §§ 717f(c) and (e) (2012).

<sup>13</sup> Burns' and King's environmental comments are addressed in the environmental assessment for Millennium's proposal and in the environmental section of this order. Their allegations regarding Millennium's conduct on their property also are addressed below.

<sup>14</sup> Burns and King March 23, 2016 Motion to Dismiss at 4.

<sup>15</sup> 15 U.S.C. § 717(b) (2012).

<sup>16</sup> Burns and King March 23, 2016 Motion to Dismiss at 7.

<sup>17</sup> *ONG v. FERC*, 28 F.3d 1281 (D.C. Cir. 1994).

NGA to authorize the construction, entirely within Oklahoma, of a 12.4-mile-long lateral line that Williams Natural Gas Company (Williams), an interstate pipeline, proposed to construct off its mainline to deliver gas to PowerSmith Cogeneration (Powersmith). In reaching its decision, the court considered whether Williams' status as a jurisdictional interstate pipeline and ownership of the lateral would necessarily preclude the lateral from being an NGA-exempt "Hinshaw pipeline," which would make its construction subject to Oklahoma's jurisdiction, not the Commission's.<sup>18</sup> The court ultimately ruled that the Commission had jurisdiction to authorize construction of the lateral and found that the lateral would be operationally integrated with Williams' existing interstate pipeline system.<sup>19</sup> Millennium asserts that *ONG v. FERC* supports the Commission's jurisdiction here because the Valley Lateral, like the lateral at issue in *ONG v. FERC*, will be integrated with the operations of an NGA-jurisdictional pipeline system.<sup>20</sup>

12. In their July 13, 2016 reply, Burns and King renew their argument that, regardless of the jurisdictional status of Millennium's existing pipeline facilities in New York, section 1(b) prevents NGA jurisdiction from attaching to Millennium's proposed 7.8-mile-long Valley Lateral because it will be located entirely in New York and only used to deliver gas to an end user in New York.<sup>21</sup> Burns and King provide two reasons why they do not believe the *ONG v. FERC* decision supports the position that the Commission has jurisdiction to authorize construction of Millennium's Valley Lateral. First, they argue the *ONG v. FERC* decision did not address their argument that

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<sup>18</sup> Section 1(c) of the NGA is referred to as the Hinshaw exemption after the Congressman who introduced the bill amending the NGA to include the exemption. *See ANR Pipeline Co. v. FERC*, 71 F.3d 897, 898 (D.C.1995) (briefly summarizing the history of the Hinshaw exemption).

Section 1(c) operates to exempt:

[A]ny person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission.

<sup>19</sup> *ONG v. FERC*, 28 F.3d at 1287.

<sup>20</sup> Millennium April 1, 2016 Reply at 5-6.

<sup>21</sup> Burns and King July 13, 2016 Reply at 5.

section 1(b) operates to withhold from the Commission's NGA jurisdiction authority to issue a construction certificate that would enable an interstate pipeline "to *take land for the building of a wholly instate pipeline.*"<sup>22</sup> Second, they argue that, whereas the court in *ONG v. FERC* found that the lateral at issue would be integrated operationally with Williams' existing jurisdictional pipeline system, the Valley Lateral will not be integrated operationally with Millennium's existing jurisdictional system. In support of their position, they assert that "[t]here is no evidence that the Valley Lateral will in any way alter the interstate flow of gas from instate New York [i.e., from the lateral's mainline interconnection] in interstate commerce,"<sup>23</sup> and that the "Valley Lateral's only purpose and essential design is to deliver a prescribed volume of gas picked up into the lateral pipeline in-state to an in-state local end-user."<sup>24</sup> Based on these assertions, they believe "Millennium's claim that the Valley Lateral Pipeline is 'integrated' into its interstate pipeline operation ... strains the meaning of that word."<sup>25</sup> Burns and King also cite *City of Fort Morgan v. FERC (Fort Morgan v. FERC)*, discussed below, as support for their position that Millennium's proposed Valley Lateral will not be sufficiently integrated with Millennium's existing NGA-jurisdictional pipeline system to make the lateral subject to the Commission's NGA jurisdiction.<sup>26</sup>

13. Burns and King argue that the court's *ONG v. FERC* decision actually supports their position that the Valley Lateral will qualify as an exempt "Hinshaw" pipeline, even if constructed by an otherwise NGA-jurisdictional interstate pipeline, and that the New York PSC, not this Commission, therefore has the jurisdiction to act on Millennium's application and will act, unless it "is already forced out by FERC's wrongful assertion of jurisdiction, which would function preemptively."<sup>27</sup> They believe that *ONG v. FERC* is consistent with their position that only New York has the authority to decide whether the Valley Lateral is constructed because section 1(b) of the NGA operates to prevent the Commission from granting an interstate pipeline a certificate that will give it the right to

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<sup>22</sup> *Id.* at 6 (emphasis in original).

<sup>23</sup> *Id.* at 11.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 11 (quoting Millennium April 1, 2016 Answer at 4).

<sup>26</sup> 181 F.3d 1155 (10<sup>th</sup> Cir. 1999).

<sup>27</sup> Burns and King July 13, 2016 Reply at 16.

eminent domain for a pipeline that will be located entirely in one state and serve only end users in that state.<sup>28</sup>

### **Commission Response**

14. Burns and King are correct that, at least initially, Millennium's Valley Lateral will not be transporting any gas for the "wholesale market," as it will be delivering gas only to the power plant operated by Valley Energy Center, an end user, which will use the gas as fuel to generate electricity. However, they are incorrect that Millennium's Valley Lateral therefore will not be transporting gas in interstate commerce as contemplated by section 1(b) of the NGA. Although all of Millennium's existing facilities are located in New York, the gas transported on those facilities and to be transported on the Valley Lateral<sup>29</sup> will be received from Millennium's mainline, which receives gas from upstream interconnections with, among others, the interstate pipeline systems operated by National Fuel and Tennessee Gas Pipeline Company (Tennessee Gas), which receive gas at points outside New York. Further, once gas has moved beyond the gathering stage into interstate transmission facilities, section 1(b) of the NGA only operates to prevent the Commission's jurisdiction over the transportation of gas by pipeline in interstate commerce from attaching to transportation as part of qualifying local distribution services.

15. In interpreting the NGA and its legislative history, the courts have consistently held that an interstate pipeline's transportation of natural gas to end-users is not local distribution, and that the Commission therefore has jurisdiction to grant certificates authorizing interstate pipelines' construction of facilities to deliver gas directly to end users.<sup>30</sup> This jurisdiction over interstate pipelines' facilities to serve end users is not

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<sup>28</sup> *Id.* at 24.

<sup>29</sup> Burns and King assert that "[t]his action is not a case about transportation ... of gas" and "there is no facility for any transportation." Burns and King July 13, 2016 Reply at 1 (emphasis in original). However, the Commission's jurisdiction over facilities is dependent upon the use of those facilities for the transportation of gas in interstate commerce.

<sup>30</sup> *See, e.g., Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1420-21 (10<sup>th</sup> Cir.1992) (upholding Commission's orders approving interstate pipeline's construction of a tap on its mainline and meter facilities to deliver gas to two industrial users, rejecting argument that the interstate pipeline's unbundled transportation service would constitute the "functional equivalent" of NGA-exempt local distribution, and explaining that "[l]ocal distribution," as Congress viewed the term, involves two components: the retail sale of natural gas and its local delivery, normally through a network of branch lines designed to supply local consumers."); and *Michigan Consolidated Gas Co. v. Panhandle*

(continued ...)

limited to minor mainline taps and tie-in facilities; it can extend to long lateral pipelines to serve end users in a single state.<sup>31</sup>

16. As discussed above, Burns and King argue that the courts' decisions in *ONG v. FERC* and *Fort Morgan v. FERC* support their position that Millennium's proposed Valley Lateral will be an NGA-exempt Hinshaw pipeline, asserting that it will not be operationally integrated with Millennium's existing NGA-jurisdictional pipeline system, and that the New York PSC, not this Commission, therefore has jurisdiction over whether the lateral is constructed.<sup>32</sup> Burns and King misunderstand the court's order. In *ONG v. FERC*, the non-Oklahoma production purchased by Powersmith would be received into Williams' mainline at a point downstream of the lateral in another state and be delivered to other interstate shippers. While the actual gas transported by the lateral to Powersmith would be Oklahoma production that would never leave Oklahoma, the court affirmed that under longstanding precedent a lateral – like the Valley Lateral – that interconnects with an interstate pipeline's system is transporting gas in interstate commerce because, at the time the gas entered the lateral, it was commingled with other gas indisputably flowing in interstate commerce.<sup>33</sup>

17. Burns and King claim that in *ONG v. FERC* the court found that Williams' lateral would operate as an integrated part of its interstate system as a basis for ruling that construction of the lateral was subject to the Commission's NGA jurisdiction, and further

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*Eastern Pipe Line Co.*, 887 F.2d 1295, 1300-01 (6th Cir. 1989) (rejecting argument that the State of Michigan could prevent interstate pipeline's construction of mainline tap and tie-in facilities to deliver end-user's gas purchased out of state, finding that "the Panhandle–National Steel bypass 'involves merely interstate transportation of natural gas' (which is subject to FERC jurisdiction) and not local distribution."), *cert. denied*, 494 U.S. 1079 (1990).

<sup>31</sup> See *Louisiana Power & Light Co. v. FPC (Louisiana Power v. FPC)*, 483 F.2d 623, at 634 (5th Cir. 1973) (finding extensive facilities, including laterals, receiving gas from interstate pipeline's mainline were NGA jurisdictional, even though the mainline began in Louisiana, the mainline thus far had only received gas produced in Louisiana and had not yet crossed a state line, and the laterals would only serve end users in that state.)

<sup>32</sup> Burns and King July 13, 2016 Reply at 2.

<sup>33</sup> *ONG v. FERC*, 28 F.3d at 1284-85. The fact that the gas ultimately delivered to the end user via the lateral "leaves the interstate stream before it crosses any state border is irrelevant." *Id.* at 1285.

argue that Millennium's proposed Valley Lateral allegedly will not operate as an integrated part of its system, and therefore is not FERC jurisdictional. We do not agree with Burns' and King's characterization that the *ONG v. FERC* court relied on an analysis of how Williams' Powersmith lateral functioned as an integrated part of its existing interstate system to reach its holding that "gas commingled with other gas indisputably flowing in interstate commerce becomes itself interstate gas."<sup>34</sup> Nor do we agree with Burns and King that a finding that Millennium's proposed Valley Lateral will be "integrated" into its interstate pipeline operation "strains the meaning of that word."<sup>35</sup>

18. As discussed above, although all of Millennium's pipeline facilities are located entirely within New York, its system receives gas at upstream interconnections with other interstate pipeline systems that have received some of their transportation volumes from other jurisdictional interstate pipelines at points inside and outside New York.<sup>36</sup> Millennium's downstream delivery points include, in addition to those with non-jurisdictional entities, interconnections with other interstate pipelines which have delivery points that include interconnections with other interstate pipelines at points inside and outside New York.<sup>37</sup> Thus, Millennium is a jurisdictional "natural gas company," as defined in the NGA section 2(6),<sup>38</sup> and it is engaged in the transportation of gas in interstate commerce, as defined in NGA section 2(7).<sup>39</sup>

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<sup>34</sup> *ONG v. FERC*, 28 F.3d at 1285.

<sup>35</sup> Burns and King July 13, 2016 Reply at 11.

<sup>36</sup> In addition to its receipt points with National Fuel and Tennessee Gas on the upstream end of its mainline, Millennium receives gas at intermediate points from jurisdictional pipeline systems including, *inter alia*, Stagecoach Storage Facility. Millennium also receives gas at other points from non-jurisdictional gathering systems.

<sup>37</sup> The points at which Millennium delivers gas to jurisdictional pipeline systems include its interconnections with, *inter alia*, the interstate pipeline systems of Algonquin Gas Transmission, LLC and Columbia Gas Transmission, LLC.

<sup>38</sup> As defined in NGA section 2(6), "Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce such gas for resale."

<sup>39</sup> As defined in NGA section 2(7), "Interstate commerce' means commerce between any point in a State and any point outside thereof . . .", or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States."

19. Millennium's proposed Valley Lateral will enable it to deliver gas transported on its mainline facilities to the Valley Energy Center. Millennium can provide the upstream mainline service either under a separate service agreement with CPV, Valley Energy Center's affiliate that has entered into an agreement for service on the lateral, or under one of its existing service agreements with other shippers, including gas marketers, from whom CPV may purchase gas supplies for Valley Energy Center. Either way, Millennium's construction of the lateral will enable it to use its pipeline system to provide continuity of service in the delivery of CPV's interstate gas supplies to Valley Energy Center. Millennium's interconnections with other jurisdictional and non-jurisdictional pipelines will provide access to many supply sources for the new power plant. Millennium also will be able to use gas received into the mainline for delivery to the power plant for balancing purposes and to meet other shippers' needs. For example, while gas for the power plant will enter the Valley Lateral near the end of the mainline, the mainline has numerous receipt and delivery points. Therefore, depending on where CPV or another mainline shipper puts gas into the mainline for delivery to the power plant, Millennium will be able to use it to provide displacement service for shippers that tender their gas at mainline receipt points that are downstream of their delivery points.<sup>40</sup>

20. The other case cited by Burns and King, *Fort Morgan v. FERC*, is distinguishable. *Fort Morgan v. FERC* involved a four-mile-long pipeline that KN Wattenberg Transmission LLC (KN Wattenberg), an interstate natural gas company, proposed to construct and operate in Colorado to transport gas from another interstate pipeline, Colorado Interstate Gas Company (CIG), to two industrial end users. Those end-users were purchasing marketers' gas which was transported by CIG to Fort Morgan's municipal gas distribution system for redelivery to the end users' industrial sites. As in *ONG v. FERC*, the court in *Fort Morgan v. FERC* questioned whether the Hinshaw exemption and state jurisdiction would apply to KN Wattenberg's proposed pipeline because it was located entirely in Colorado and used solely to transport gas consumed in that state.<sup>41</sup> However, in *Fort Morgan v. FERC*, because the pipeline at issue would not interconnect with KN Wattenberg's own system but rather with the interstate system of CIG, the court found that, to the extent the basis for the Commission's assertion of jurisdiction rested on the view that KN Wattenberg's proposed lateral would be functionally integrated with its existing jurisdictional facilities, the Commission's orders

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<sup>40</sup> We also note that while CPV has a precedent agreement for all of the Valley Lateral's firm capacity, Millennium has also filed a *pro forma* rate schedule for interruptible service on the lateral, and it will be able to offer mainline shippers interruptible service on the lateral during periods that CPV is not using all of the lateral's capacity to have gas delivered to the power plant.

<sup>41</sup> *Fort Morgan v. FERC*, 181 F.3d 1155, 1160-61.

had failed to adequately explain how, and the court therefore remanded to the Commission.<sup>42</sup>

21. Unlike the pipeline facility at issue in *Fort Morgan v. FERC*, Millennium's proposed Valley Lateral will interconnect with and receive gas from Millennium's existing jurisdictional mainline. Further, as explained above, the Valley Lateral will be operationally integrated with and enhance Millennium's ability to use its existing facilities to serve its interstate customers.

22. Finally, we address Burns' and King's assertion that this case presents an issue of first impression in that no court has previously considered a challenge by landowners potentially subject to federal eminent domain as the result of the Commission granting an interstate pipeline certificate authorization to construct a lateral located entirely in one state and used only to provide service to end users in that state. Burns and King assert that issues regarding the Commission's NGA jurisdiction generally have been decided in court decisions deciding "conflicts between instate and interstate gas industry commercial interests and between state and federal regulators" because landowners and environmental and other groups concerned with matters affecting local interests do not have the resources to challenge the Commission's orders approving pipeline projects.<sup>43</sup> They further assert that "[s]o far, this Commission has likely imposed its 'interstate interpretation' for laterals off of interstate lines because the eminent domain issue was not squarely presented."<sup>44</sup>

23. There is no support for Burns' and King's contention that the court that decided *ONG v. FERC* or any other court that has upheld the Commission's jurisdiction over an interstate pipeline's lateral located entirely in a single state arguably might have reached a different decision if the petitioner had raised an argument that the Commission did not have jurisdiction because the interstate pipeline would need to rely on eminent domain

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<sup>42</sup> *Id.* at 1162. On remand, the Commission disclaimed jurisdiction over the pipeline facility at issue in *Fort Morgan v. FERC* after considering additional information submitted by KN Wattenberg that failed to support a finding that the four-mile-long lateral off CIG's system would be sufficiently integrated with KN Wattenberg's own pipeline system to give the Commission jurisdiction over the pipeline. *KN Wattenberg Transmission Limited Liability Co.*, 90 FERC ¶ 61,321, at 62,070-72, *order denying reh'g*, 93 FERC ¶ 61,041 (2000), *further order denying reh'g*, 94 FERC ¶ 61,189 (2001).

<sup>43</sup> Burns and King July 13, 2016 Reply at 21.

<sup>44</sup> *Id.* at 22-23.

for some of the necessary right-of-way.<sup>45</sup> While the extent to which a pipeline company will need to rely on its certificate to invoke the right to exercise eminent domain under section 7(h) of the NGA is one of the factors that the Commission considers in deciding whether its approval of a proposed project is in the public interest, we find no legislative or judicial support for Burns' and King's position that NGA jurisdiction does not apply if an interstate pipeline will need to rely on eminent domain to construct a lateral that will be located entirely within a single state.

### **B. Certificate Policy Statement**

24. The Commission's Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.<sup>46</sup> The Certificate Policy Statement established criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explained that in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

25. Under this policy, the threshold requirement for existing pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new

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<sup>45</sup> While an argument challenging the Commission's jurisdiction based on Williams' need to rely on eminent domain for some necessary right-of-way was not raised on appeal, we note that, following the Commission's certification of Williams' lateral but prior to the court's decision in *ONG v. FERC*, Williams sought and the U.S. Court of Appeals for the Tenth Circuit granted eminent domain in accordance with NGA section 7(h), giving Williams' the right to use right-of-way in Oklahoma City to which ONG had franchise rights under an agreement with the city. *Williams Natural Gas Co.*, 53 FERC ¶ 61,399, at 62,392 (1990).

<sup>46</sup> *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

facilities. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

26. As discussed above, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. The Commission has determined, in general, that where a pipeline proposes to charge incremental rates for new construction, the pipeline satisfies the threshold requirement that the project will not be subsidized by existing shippers.<sup>47</sup> Millennium proposes to charge an initial incremental rate for firm transportation service using the Valley Lateral Project. Accordingly, the project will not be subsidized by existing customers, and the threshold no-subsidy requirement under the Certificate Policy Statement has been met.

27. The Valley Lateral Project will enable Millennium to provide 127,200 Dth per day of firm lateral-only natural gas transportation service to the project shipper, CPV, for the Valley Energy Center. Millennium's customers will not experience any degradation in service, and no existing customers raised any objections to Millennium's proposal. As an incremental project to provide new service to an end-use customer, there will be no adverse effects on other pipelines and their captive customers.

28. With respect to efforts by Millennium to minimize adverse impacts on landowners, we find that Millennium has collocated its project with existing infrastructure to the extent practicable (approximately 23 percent of the route). Millennium has also designed its project such that there are no residences within 100 feet of the proposed facilities. Millennium states it has made efforts to inform and consult with affected landowners, relevant resource agencies, and other interested stakeholders during the early stages of the certificate process,<sup>48</sup> including development of a Public Participation Plan with a designated company contact. Millennium further states that it expects to obtain voluntary easements for the substantial majority of rights-of-way required for the project and will continue its attempts to minimize any use of eminent

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<sup>47</sup> See *Transcontinental Gas Pipe Line Corp.*, 98 FERC ¶ 61,155 (2002).

<sup>48</sup> *Id.*

domain.<sup>49</sup> Accordingly, for purposes of our consideration under the Certificate Policy Statement, we find that Millennium has taken steps to minimize any adverse impacts on landowners and surrounding communities.

29. Landowners Burns and King claim that Millennium allowed its personnel to trespass on their property and deliberately remove signs protesting the proposed pipeline.<sup>50</sup> Burns and King state that these actions render Millennium unfit for certificate authorization and request that the Commission deny Millennium's certificate application.<sup>51</sup>

30. While the Commission expects companies under its jurisdiction to respect the rights of property owners along the paths of their projects (by, e.g., obtaining requisite permission before entering private property along the proposed routes) and to negotiate in good faith for any necessary property rights, the Commission does not play a direct role in oversight of such activities.<sup>52</sup> Accordingly, if landowners are unable to resolve their complaints by speaking directly to Millennium, they may pursue relief with local law enforcement or in the appropriate state or federal court.

31. Millennium has entered into a precedent agreement with CPV for the full capacity of the project to provide transportation of gas supplies to the currently under-construction Valley Energy Center. Based on 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, the Commission finds, consistent with the Certificate Policy Statement and subject to the environmental discussion below, that the public convenience and necessity requires approval of Millennium's proposed Valley Lateral Project, as conditioned in this order.

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<sup>49</sup> Millennium November 13, 2015 Application at 16-17 [hereinafter Application]. We note that the approximately 1,400 feet of project which would be constructed on the parcel of land owned by Burns and King constitutes approximately three percent of total project route.

<sup>50</sup> Burns and King December 21, 2015 filing at 2.

<sup>51</sup> *Id.* at 3.

<sup>52</sup> *See, e.g., Chestnut Ridge Storage LLC*, 128 FERC ¶ 61,210, at P 20 (2009); *East Tennessee Natural Gas Co.*, 102 FERC ¶ 61,225, at PP 69-70 (2003).

## C. Rates

### 1. Initial Recourse Rates

32. Millennium proposes to establish initial incremental recourse rates for firm and interruptible services using the proposed Valley Lateral Project under new Rate Schedules LFT and LIT.<sup>53</sup> Millennium proposes an initial incremental recourse reservation charge under Rate Schedule LFT of \$5.6154 per Dth per month.<sup>54</sup> This charge is based on the annual cost of service of \$8,571,336<sup>55</sup> and annual design determinants of 1,526,400 Dth.<sup>56</sup> In developing the cost of service for the project, Millennium used the cost of service factors approved for Millennium's mainline facilities,<sup>57</sup> and a proposed depreciation rate of 6.67 percent.<sup>58</sup> The Commission approves the proposed initial incremental recourse reservation charge of \$5.6154 per Dth per month for firm transportation service.

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<sup>53</sup> Exhibit P of Millennium's application includes *pro forma* versions of new Rate Schedules LFT and LIT, which will apply respectively to firm and interruptible transportation services performed exclusively on laterals. According to Millennium, LFT and LIT rates, including fuel, apply only to natural gas transportation services over lateral facilities and do not include any transportation service on Millennium's mainline system. Application at 9. Millennium states that, "customers will be separately contracting with Millennium for transportation on its mainline to the point of interconnection with the Valley Lateral." *Id.*

<sup>54</sup> Application, Exhibit P, Schedule 2, and *Pro Forma* Currently Effective Rates, Section 8. LFT Rates.

<sup>55</sup> The demand cost of service of \$8,671,192 has been reduced by \$99,856 to reflect a credit for interruptible transportation service revenues.

<sup>56</sup> Millennium developed its firm reservation rate by dividing the project's annual cost of service of \$8,671,192 by the annual design determinants of 1,526,400 Dth (127,200 Dth per day capacity x 12 months).

<sup>57</sup> *Millennium Pipeline Co., L.L.C.*, 117 FERC ¶ 61,319, at PP 32, and 103 (2006).

<sup>58</sup> Millennium states that the depreciation rate is based on the project shipper's 15-year primary term. For a delivery lateral to a single customer, the Commission has approved a depreciation rate based on contract term. *See Algonquin Gas Transmission Co.*, 59 FERC ¶ 61,134 (1992).

33. Millennium proposes an initial incremental commodity charge under Rate Schedule LFT of \$0.0003 per Dth. This is based on variable costs of \$10,000 and an annual throughput of 37,142,400 Dth.<sup>59</sup> The Commission approves Millennium's proposed commodity charge.

34. Millennium proposes an initial incremental interruptible recourse rate under Rate Schedule LIT of \$0.1849, as well as an LFT overrun charge, each calculated as a 100 percent load factor daily derivative of the proposed Rate Schedule LFT recourse rate. This design methodology is consistent with Commission practice.<sup>60</sup> We also note that deriving the interruptible rate from the reservation charge, which has been reduced due to the previously described interruptible revenue credit, effectively reduces the rates of interruptible shippers paying the recourse rate. We approve the proposed initial Rate Schedule LIT interruptible recourse rate and the LFT overrun charge.

35. When establishing initial rates applicable to new pipelines or laterals, the Commission requires that a pipeline either provide for the crediting of all interruptible revenues, net of variable costs, to shippers paying maximum recourse rates, or that the pipeline allocate volumes and costs to its interruptible service.<sup>61</sup> Millennium's credit of \$99,856 to the cost of service for interruptible revenues satisfies this requirement.

## **2. Fuel and Lost and Unaccounted-For Quantities**

36. Millennium states that it is proposing an initial retainage percentage of zero percent (0.00%) for service on the Valley Lateral because (a) it will not use compression and will therefore not consume any incremental fuel in operating the Valley Lateral Project, and (b) prior to placing the lateral into service, Millennium has no basis for calculating lost and unaccounted-for (LAUF) quantities on the discrete lateral facilities. Millennium asserts that Commission precedent supports approval of an initial retainage percentage of zero in these circumstances.<sup>62</sup> Millennium also states that in its first

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<sup>59</sup> In its June 23, 2016 response to Commission's staff's June 16, 2016 data request, Millennium states that the Energy Center plans to operate its plant at approximately an 80 percent capacity factor (Valley Lateral's total capacity of 127,200 Dth per day, times 365, times 80 percent).

<sup>60</sup> See, e.g., *Sierrita Gas Pipeline, LLC*, 147 FERC ¶ 61,192, at PP 38-39 (2014).

<sup>61</sup> See *Transcontinental Gas Pipe Line Co. LLC*, 130 FERC ¶ 61,019, at P 21 (2010); *Maritimes and Northeast Pipeline L.L.C.*, 80 FERC ¶ 61,136, at 61,475 (1997).

<sup>62</sup> Application at 9 (citing *Eastern Shore Natural Gas Co.*, 145 FERC ¶ 62,153, at PP 5-6 (2013)).

Retainage Adjustment Mechanism filing after placing the Valley Lateral Project into service, it will determine a retainage percentage to assess LAUF quantities for service on the project. Millennium explains that because it is not proposing to install a meter at the interconnection of the Valley Lateral Project with its mainline, Millennium will be unable to directly determine LAUF quantities on the lateral. As such, Millennium states that it will likely allocate LAUF quantities on the basis of throughput or miles of pipe with the objective of not double charging customers for LAUF quantities.

37. The Commission approves Millennium's proposed initial fuel retention rate of 0.00 percent, and its proposed initial LAUF retention rate of 0.00 percent. Section 32 of the General Terms and Conditions (GT&C) in Millennium's tariff sets forth a Retainage Adjustment Mechanism under which Millennium retains in-kind a percentage of receipts for recovery of fuel used in providing transportation service, and as reimbursement for LAUF quantities.<sup>63</sup> The retention percentage is restated and trued up in an annual filing, or at such other time as required by operating or other conditions.

38. Millennium is directed, in its first Retainage Adjustment Mechanism filing after placing the Valley Lateral Project into service, to propose a method for assessing LAUF associated with service exclusively on the lateral. The Commission will not predetermine Millennium's proposed method of allocating LAUF as described above, but will require that LAUF costs be allocated to incremental service under Rate Schedules LFT and LIT.

### **3. Negotiated Rates**

39. Millennium states that it will provide service to the Valley Energy Center under a negotiated rate service agreement in accordance with the negotiated rate authority set forth in section 34 of the GT&C in its tariff. We will require Millennium to file either its negotiated rate agreement with CPV or file tariff records setting forth the essential terms of the agreement in accordance with the Alternative Rate Policy Statement<sup>64</sup> and the Commission's negotiated rate policies,<sup>65</sup> at least 30 days, but not more than 60 days, before the in-service date of the proposed facilities.<sup>66</sup>

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<sup>63</sup> Millennium Pipeline Company, LLC, FERC NGA Gas Tariff, Millennium Tariffs, Gen. Terms and Conditions, Section 32. Retainage, 2.0.0.

<sup>64</sup> *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, *clarification granted*, 74 FERC ¶ 61,194, *reh'g and clarification denied*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066 (1996).

<sup>65</sup> *Natural Gas Pipelines Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification*,

#### 4. Reporting Incremental Costs

40. To ensure that costs are properly allocated between Millennium's existing shippers and the incremental services proposed in this proceeding, the Commission will require Millennium to keep separate books and accounting of costs attributable to the Valley Lateral Project. The books should be maintained with applicable cross-references, as required by section 154.309 of the Commission's regulations.<sup>67</sup> This information must be in sufficient detail so that the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case, and the information must be provided consistent with Order No. 710.<sup>68</sup>

#### 5. Tariff Records

41. Millennium's application includes *pro forma* Rate Schedules LFT and LIT, which will apply respectively to firm and interruptible transportation services performed exclusively on laterals and not on any portion of Millennium's mainline system. The rate schedules incorporate the provisions of Millennium's GT&C. Exhibit P also includes *pro forma* tariff revisions that conform other parts of Millennium's tariff to the new rate schedules.

42. The Commission will approve *pro forma* Rate Schedules LFT and LIT, as well as conforming *pro forma* tariff language filed herein, subject to further revision, as directed below, and require Millennium to file actual tariff records no earlier than 60 days and no later than 30 days prior to the date the Valley Lateral Project is placed in service. When it files actual tariff records, Millennium is directed to revise references to "LFT" and "Lateral Firm Service" which incorrectly appear in *pro forma* Rate Schedule LIT. Millennium is also directed to correct or explain apparently duplicative language regarding segmentation in paragraph 2(d)(i) and (ii) of Rate Schedule LFT.

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114 FERC ¶ 61,042, *reh'g dismissed and clarification denied*, 114 FERC ¶ 61,304 (2006).

<sup>66</sup> Pipelines are required to file any service agreement containing non-conforming provisions and identify any such provision or agreement detailed in a precedent agreement that survives the execution of the service agreement. *See, e.g., Encana Marketing (USA) Inc. v. Rockies Express Pipeline LLC*, 146 FERC ¶ 61,161 (2014) and *Gulf South Pipeline Co., LP*, 135 FERC ¶ 61,119 (2011).

<sup>67</sup> 18 C.F.R. § 154.309 (2016).

<sup>68</sup> *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, FERC Stats. & Regs. ¶ 31,267, at P 23 (2008).

#### **D. Environmental Analysis**

43. On May 19, 2015, Commission staff granted Millennium's request to use the pre-filing review process in Docket No. PF15-23-000. On July 6, 2015, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Planned Valley Lateral Project and Request for Comments on Environmental Issues* (NOI). The NOI was published in the Federal Register<sup>69</sup> and mailed to 188 interested parties including: federal, state, and local government representatives and agencies; elected officials; affected landowners; environmental and public interest groups; potentially interested Native American tribes; other interested parties; and local libraries and newspapers.

44. In response to the NOI and during the pre-filing review process, the Commission received 13 comment letters from individuals, the U.S. Environmental Protection Agency (EPA), the New York State Department of Environmental Conservation (NYSDEC), and the New York State Department of Agriculture and Markets (NYSDAM). Subsequent to Millennium filing its application, eight motions to intervene containing environmental comments were filed by individuals, and eight additional comment letters were filed by individuals, NYSDEC, NYSDAM, and Riverkeeper, Inc.

45. Most of the commentors opposed the project on environmental and safety grounds. In particular, commentors questioned the need for the Valley Energy Center, expressed opposition to fossil fuels in favor of renewable energy, and raised concerns regarding health risks associated with air emissions from the Valley Energy Center, natural gas sourced from hydraulic fracturing, and the cumulative impacts of the Valley Lateral Project and Valley Energy Center. Commentors also expressed concerns about project impacts on surface water and groundwater quality; wetlands; floodplains; wildlife and vegetation; threatened and endangered species; cultural resources and historic structures; soils, including productivity of agricultural land and depth of pipeline cover in agricultural areas; property values; land use; safety, including strains on local emergency services; pollution prevention practices; air quality, including methane leaks; greenhouse gas emissions and climate change; environmental justice; and socioeconomic impacts.

46. Scoping comments were also received regarding routing and alternatives analysis, including the placement of the pipeline in the vicinity of Shannen Park, placement of project facilities near wetlands, and impacts on the viewshed at Venturi Road near milepost 3.0.

47. To satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA),<sup>70</sup> our staff prepared an Environmental Assessment (EA) for Millennium's

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<sup>69</sup> 80 Fed. Reg. 40,058 (July 13, 2015).

<sup>70</sup> 42 U.S.C. §§ 4321 *et seq.* (2012).

proposal. The analysis in the EA addresses 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. All substantive comments received in response to the NOI and during the application review period were addressed in the EA.

48. The project analyzed in the EA reflects modifications to the originally planned project that Millennium incorporated during the pre-filing and application review phases in response to comments from landowners, agencies, project engineers, and Commission staff. The pipeline route and construction procedures were modified to avoid or minimize impacts on sensitive resources, reduce engineering and constructability concerns, and avoid or minimize conflicts with existing land uses. For example, in response to comments from NYSDEC, Millennium revised the crossing method for NYSDEC-regulated forested wetlands to a conventional bore at mileposts (MP) 4.1, 4.6, and 5.3; and Millennium modified its stream crossing methods such that the open-cut crossing method will only be used in streams that have no flow at the time of construction. Per NYSDEC comments, Millennium also revised its Environmental Construction Standards (ECS)<sup>71</sup> to clarify that any bank stabilization on stream banks would use biodegradable materials unless otherwise approved by appropriate agencies; and Millennium identified a native wetland seed mix that would be used in palustrine forested wetlands for revegetation.

49. In response to comments from NYSDAM, Millennium revised its ECS to restrict rock content in backfill soils in cultivated/agricultural lands, limit allowable rutting depth in agricultural areas, require the Environmental Inspector to determine when soils are sufficiently dry to allow for final restoration, and identify specific methods for determining soil compaction and traffic ability. Millennium also incorporated pipeline route realignments per landowner discussions, moved a tap valve to avoid a floodplain, and modified the horizontal directional drill crossing of Catlin Creek at MP 5.6 to avoid impacts on a tributary.

50. The EA was placed into the public record on May 9, 2016, and was issued for a 30-day comment period.

51. The Commission received comments on the EA from the U.S. Fish and Wildlife Service (FWS), EPA, NYSDEC, Lakeridge Associates, three landowners (Melody Brunn,

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<sup>71</sup> See Application, Resource Report 1, Appendix 1B.

Sarah Burns, and Amanda King), one anonymous individual, and Pramilla Malick on behalf of “Stop the Minisink Compressor Station.”<sup>72</sup>

52. The comments on the EA address project purpose and need; NEPA segmentation; preparation of an Environmental Impact Statement (EIS) rather than an EA; groundwater; surface water; wetlands; vegetation; wildlife resources; threatened and endangered species; socioeconomic impacts, including property values; greenhouse gases; safety; cultural resources; consideration of alternatives; the Valley Energy Center, and environmental justice. These comments are discussed in the relevant sections below.

### **1. Purpose and Need**

53. EPA comments that the EA should discuss whether the proposed Valley Lateral Project is fully subscribed and whether the pipeline would be able to provide greater than 130,000 Dth per day of transportation service and be used for other shippers. EPA also states that the EA should more fully discuss the proposed interconnect with Millennium’s Eastern System Upgrade Project (ESU Project), including the purpose of the interconnect and whether the ESU Project requires this interconnect to function.

54. As discussed in the proposal section of this order, the Valley Lateral Project is designed to provide up to 127,200 Dth per day of incremental firm natural gas transportation service and is fully subscribed by CPV, the developer of the Valley Energy Center. We have confirmed that the design of the Valley Lateral cannot provide more firm transportation service than the 127,200 Dth per day shown by Millennium’s flow diagrams filed in this proceeding.<sup>73</sup>

55. Millennium filed its application for the ESU Project on July 29, 2016, in Docket No. CP16-486-000. As noted by EPA, the project would, among other things, include construction of approximately 7.8 miles of new 30- and 36-inch diameter pipeline looping along Millennium’s existing mainline pipeline and an additional interconnect to

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<sup>72</sup> Additionally, a copy of a letter from 18 organizations addressed to Governor Cuomo, Commissioner Seggos, and Ms. Crouse was filed with the Commission on September 9, 2016. The letter expresses environmental concerns and requests the NYSDEC to undertake its own environmental review and refuse to issue any state permits until the project’s environmental impacts are avoided or significantly mitigated. Because the letter does not provide any new information or request anything from the Commission, it is not addressed further.

<sup>73</sup> The EA cites the approximate transportation capacity of the project of 130,000 Dth per day. However, the Valley Lateral is designed to provide only 127,200 Dth per day of firm natural gas transportation service at maximum capacity.

the 16-inch-diameter Valley Lateral. According to Millennium's project description for the ESU Project, the purpose of the additional interconnect is to supply gas to the Valley Lateral Project in the event that Millennium's 24-inch-diameter mainline pipeline is taken out of service.<sup>74</sup> The Commission is currently reviewing the ESU Project, and issues related to the design of that project are appropriately addressed in that proceeding.

## 2. NEPA Segmentation

56. Pramilla Malick comments that the Valley Lateral Project, Minisink Compressor Station,<sup>75</sup> and East Side Expansion Project<sup>76</sup> are "illegally segmented components of the same project." Ms. Malick cites no factual or legal support for this allegation. For the following reasons, we find that we did not impermissibly segment our environmental review of the Valley Lateral Project under NEPA.

57. Council on Environmental Quality (CEQ) regulations require the Commission to include "connected actions," cumulative actions," and "similar actions" in its NEPA analyses.<sup>77</sup> "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration."<sup>78</sup> Connected actions include actions that: (i) automatically trigger other actions, which may require environmental impact statements; (ii) cannot or will

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<sup>74</sup> Pipeline interconnects are commonly installed to provide a backup and/or alternative source of natural gas to ensure an uninterrupted supply of gas to customers during pipeline maintenance activities.

<sup>75</sup> The Minisink Compressor Station involved construction of a natural gas compressor station, including two 6,130 horsepower compressor units. *Millennium Pipeline Co., L.L.C.*, 140 FERC ¶ 61,045 (2012) (Docket No. CP11-515-000)

<sup>76</sup> The East Side Expansion Project consisted of modifications to a meter station in Orange County, New York, associated with construction of 19.1 miles of 20- and 26-inch-diameter pipeline loop. *Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255 (2014) (Docket No. CP14-17-000). The closest distance between the East Side Expansion Project and Valley Lateral is 7.5 miles. EA at 102 (Table B-21).

<sup>77</sup> 40 C.F.R. § 1508.25(a)(1)-(3) (2016).

<sup>78</sup> *Delaware Riverkeeper Network*, 753 F.3d at 1313. Unlike for connected and cumulative actions, for similar actions an agency has some discretion about combining environmental review. *E.g., Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1305-1306 (9th Cir. 2003).

not proceed unless other actions are taken previously or simultaneously; and (iii) are interdependent parts of a larger action and depend on the larger action for their justification.<sup>79</sup>

58. In evaluating whether multiple actions are, in fact, connected actions, courts have employed a “substantial independent utility” test, which the Commission finds useful for determining whether the three criteria for a connected action are met. The test asks “whether one project will serve a significant purpose even if a second related project is not built.”<sup>80</sup> For proposals that connect to or build upon an existing infrastructure network, this standard distinguishes between those proposals that are separately useful from those that are not. While the analogy between the two is not apt in many regards, similar to a highway network, “it is inherent in the very concept of” the interstate pipeline grid “that each segment will facilitate movement in many others; if such mutual benefits compelled aggregation, no project could be said to enjoy independent utility.”<sup>81</sup>

59. In *Delaware Riverkeeper Network*, the court ruled that individual pipeline proposals were interdependent parts of a larger action where four pipeline projects, when taken together, would result in “a single pipeline” that was “linear and physically interdependent” and where those projects were financially interdependent.<sup>82</sup> The court put a particular emphasis on the four projects’ timing, noting that when the Commission reviewed the proposed project, the other projects were either under construction or pending before the Commission.<sup>83</sup> In a later case, the same court indicated that in considering a pipeline application, the Commission need not jointly consider projects that are unrelated and do not depend on each other for their justification.<sup>84</sup>

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<sup>79</sup> 40 C.F.R. § 1508.25(a)(1) (2016).

<sup>80</sup> *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987). See also *O’Reilly v. U.S. Army Corps of Eng’rs*, 477 F.3d 225, 237 (5th Cir. 2007) (defining independent utility as whether one project “can stand alone without requiring construction of the other [projects] either in terms of the facilities required or of profitability.”).

<sup>81</sup> *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d at 69.

<sup>82</sup> *Delaware Riverkeeper Network*, 753 F.3d at 1314.

<sup>83</sup> *Id.*

<sup>84</sup> See *Myersville Citizens for a Rural Cmty. Inc. v. FERC*, 783 F.3d at 1326.

60. We disagree with Ms. Malick's claim that we are improperly segmenting our environmental review of the Valley Lateral Project from the Minisink Compressor Station and the East Side Expansion Project. The Minisink Compressor Station, which is located 0.7 mile downstream from the Valley Lateral Project on Millennium's existing 24-inch-diameter mainline, was placed into service more than two years prior to Millennium filing its application for the Valley Lateral Project.<sup>85</sup> Similarly, the East Side

Expansion Project was placed into service by October 10, 2015,<sup>86</sup> prior to Millennium's November 13, 2015 application. As noted above, courts have made clear that the Commission is not required to consider in its NEPA analysis other projects that are not under construction or pending review when the contested application was filed.<sup>87</sup> Moreover, the Minisink Compressor Station and East Side Expansion Project are not interconnected with the Valley Lateral, nor is there evidence that the Valley Lateral is functionally or financially dependent on these projects. Therefore, we find that the Minisink Compressor Station and East Side Expansion Project were not improperly segmented from the Commission's environmental review of the Valley Lateral Project.

61. Nevertheless, in considering cumulative impacts attributable to Millennium's proposed Valley Lateral Project, the EA identifies the Minisink Compressor Station and the East Side Expansion Project as projects that may, when the impacts are added to those of the proposed action, result in cumulative environmental impacts.<sup>88</sup> The EA analyzed the cumulative impact of these projects on geology and soils, water resources and wetlands, vegetation and wildlife, land use and visual resources, air quality, climate change, and noise.<sup>89</sup> However, the EA concludes that these impacts would be relatively

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<sup>85</sup> June 10, 2013 Notice of Commencement of Service on June 1, 2013, Docket No. CP11-515-000.

<sup>86</sup> Commission staff issued letter orders granting Columbia's requests to place East Side Expansion Project facilities into service on September 1, 2015; September 30, 2015; October 21, 2015; and October 30, 2015.

<sup>87</sup> See *supra* P 59; see also *Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d at 113, n.11 (rejecting segmentation claim finding no temporal nexus where applications for two separate compressor station projects located on the same pipeline were not pending at the same time "nor was construction on either project underway").

<sup>88</sup> EA at 102 (Table B-21).

<sup>89</sup> *Id.* at 100-111 (section B.10).

minor and recommends additional measures to reduce the environmental impacts associated with the project.<sup>90</sup>

### 3. Preparation of an EIS versus an EA

62. Intervenors Burns and King comment that the preparation of an EIS with a cumulative impact analysis is required and that a finding of no significant impact is not supported by the record.<sup>91</sup>

63. Under NEPA, agencies must prepare an EIS for major federal actions that may significantly impact the environment.<sup>92</sup> If, however, an agency determines that a federal action is not likely to have significant adverse effects, it may prepare an EA for compliance with NEPA.<sup>93</sup> In addition, CEQ regulations state that one of the purposes of an EA is to determine whether an EIS is required.<sup>94</sup> Thus, based on the Commission's experience with NEPA implementation for pipeline projects, the Commission's environmental staff determines upfront whether to prepare an EIS or an EA for each new proposed project, pursuant to the Commission's regulations.<sup>95</sup>

64. While CEQ regulations do not define "significant," they do explain that whether an impact is "significant" depends on both "context" and "intensity."<sup>96</sup> Context means that the "significance of an action must be analyzed in several contexts," including "the affected region, the affected interest, and the locality."<sup>97</sup> Intensity is determined by

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<sup>90</sup> *Id.* at 111.

<sup>91</sup> July 13, 2016 Reply at 15.

<sup>92</sup> *See* 42 U.S.C. § 4332(2)(C) (2012); 40 C.F.R. § 1502.4 (2016).

<sup>93</sup> *See* 40 C.F.R. §§ 1501.3-1501.4 (2016). An EA is meant to be a "concise public document ... that serves to ... [b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or finding of no significant impact." *Id.* § 1508.9(a). Pursuant to the Commission's regulations, if an EA is prepared first, "[d]epending on the outcome of the environmental assessment, an [EIS] may or may not be prepared." 18 C.F.R. § 380.6(b) (2016).

<sup>94</sup> 40 C.F.R. § 1501.4(c) (2016).

<sup>95</sup> *See* 18 C.F.R. § 380.6(b) (2016).

<sup>96</sup> 40 C.F.R. § 1508.27 (2016).

<sup>97</sup> *Id.* § 1508.24(a).

considering the unique characteristics of the geographic area, the degree to which the effects are highly controversial or highly uncertain or unknown, the degree to which the action may establish a precedent for future actions, whether the action is related to other actions with insignificant but cumulatively significant impacts, and the degree to which the action may adversely affect threatened and endangered species.<sup>98</sup>

65. Here, Commission staff determined that the Valley Lateral Project, as presented in its application and subsequent filings in response to staff's environmental information requests, would not fall under the "major" category for which an EIS is automatically prepared. The EA confirms Commission staff's initial determination, concluding that approval of the project would not constitute a major federal action significantly affecting the quality of the human environment if the mitigation measures recommended in the EA were implemented.<sup>99</sup> Additionally, the cumulative impacts of the project are appropriately addressed in section B.10 of the EA.<sup>100</sup> We affirm the EA's findings for Millennium's Valley Lateral Project and reject Burns' and King's assertion that an EIS is required.

#### 4. Water Resources

##### a. Groundwater

66. Burns and King assert that the EA fails to apprehend the fragile and important water resources threatened by the preferred route, and state that the Commission's process has failed to provide all the information needed by NYSDEC to adequately complete its water permitting assessment. Burns and King cite page 19 of the Water Master Plan for Orange County, New York,<sup>101</sup> which discusses karst (limestone/dolostone) bedrock terrain and the overlying sand and gravel Wallkill River aquifer in Orange County, and assert that "special planning was needed to protect this particular water resource complex."

67. We believe that the EA appropriately analyzes the nature of and threats to water resources affected by the preferred route. The EA correctly states that the bedrock

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<sup>98</sup> *Id.* § 1508.24(b).

<sup>99</sup> EA at 125.

<sup>100</sup> *Id.* at 100-111.

<sup>101</sup> Orange County Department of Planning, et al., Water Master Plan (August 2010), [http://www.orangecountygov.com/filestorage/124/1362/1460/4304/Supplement\\_2\\_Water\\_Master\\_Plan.pdf](http://www.orangecountygov.com/filestorage/124/1362/1460/4304/Supplement_2_Water_Master_Plan.pdf).

geology along the project route consists of shale with mudstone and sandstone;<sup>102</sup> that these bedrock types are not susceptible to dissolution manifesting into karst with related subsidence issues;<sup>103</sup> acknowledges that the bedrock is overlain by a system of shallow (surficial), unconsolidated valley-fill glacial aquifers;<sup>104</sup> and identifies the principal aquifers that would be crossed by the project.<sup>105</sup>

68. The EA explains that construction of the pipeline will generally require the excavation of a trench between 5 and 15 feet in depth to allow for appropriate soil cover.<sup>106</sup> To avoid or minimize potential impacts to groundwater resources, Millennium will comply with its Spill Prevention and Response Procedures<sup>107</sup> to mitigate any incidental spills of contaminants, and the measures in its ECS<sup>108</sup> to mitigate for minor impacts associated with temporary changes in overland water flow and recharge from clearing, grading, trenching, and backfilling. We agree with the EA's conclusion that if Commission staff's recommended mitigation procedures are implemented, the project would not result in significant long-term or permanent impacts on groundwater resources in the project area.

69. Finally, the EA includes the information necessary to comply with NEPA and inform the Commission's decision whether to grant a certificate of public convenience and necessity under the NGA; if NYSDEC requires additional information for its permitting process, it may request the information directly from Millennium under its own authority.

#### **b. Surface Water**

70. FWS recommends that Millennium use trenchless construction methods to cross all sensitive waterbodies. Trenchless methods such as horizontal directional drilling (HDD) involve installing pipeline segments beneath the ground surface by pulling the

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<sup>102</sup> EA at 27 (section B.1.1).

<sup>103</sup> *Id.* at 30.

<sup>104</sup> *Id.* at 35-36 (section B.2.1).

<sup>105</sup> *Id.* at 36.

<sup>106</sup> *Id.* at 37-38.

<sup>107</sup> *See* Application, Resource Report 1, Appendix D.

<sup>108</sup> *See* Application, Resource Report 1, Appendix 1B.

pipeline through a predrilled borehole. Appendix D of the EA assigns a crossing method for each waterbody based on the methods Millennium proposed in its alignment sheets and workspace configurations. Consistent with the FWS recommendation, Millennium is proposing to cross all fisheries of special concern (trout fisheries) via HDD. Waterbodies crossed by the project using dry ditch (dam and pump or flume) crossing methods do not include trout fisheries. As such, the EA concludes, and we agree, that a dry crossing will be appropriate for these waterbodies.<sup>109</sup>

71. FWS also recommends that Millennium implement measures to protect biota where dry ditch crossings are used and that an environmental monitor be on site during in-stream work. Millennium will implement its ECS, which include the measures in the Commission's Wetland and Waterbody Construction and Mitigation Procedures (Procedures),<sup>110</sup> to minimize impacts on waterbodies during construction. These measures include maintaining waterbody flow rates from upstream to downstream areas and minimizing streambed scour. In addition, Millennium will assign one Environmental Inspector for each construction spread, who will be responsible for inspecting construction activities for compliance with this certificate order and other environmental permit conditions. Furthermore, Commission staff will conduct routine compliance inspections of the project throughout construction and restoration. As with any open-cut crossing of a jurisdictional feature (i.e., wetland or waterbody), Millennium must obtain a permit from the U.S. Army Corps of Engineers and any applicable federally delegated state permits prior to construction.

72. EPA and NYSDEC comment that impacts on water quality from blasting should be assessed. Specifically, NYSDEC recommends that Millennium conduct test bores at stream and wetland crossing locations that will be open-cut to determine if shallow bedrock is present and blasting is necessary. We acknowledge that, should blasting be required for project construction in streams or wetlands, it may result in temporary water-quality impacts due to increased turbidity. In accordance with Environmental Condition No. 9 in Appendix B to this order, Millennium must file documentation that it has received all authorizations required under federal law (or evidence of waiver thereof) prior to construction, which includes certification under Section 401 of the Clean Water Act. Additionally, Millennium will implement section 2.6 (Waterbody Crossing Blasting Procedures) of its Project Blasting Plan provided in Appendix 1B in Resource Report 1 of its project application. Millennium's blasting plan requires that test holes be drilled at stream banks to determine if rock will be encountered during construction.

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<sup>109</sup> EA at 40-42 (section B.2.2).

<sup>110</sup> See Application, Resource Report 1, Attachment B.

73. A comment letter submitted by landowner Melody Brunn included an assessment of the potential for flooding and location of the floodplain along her property. Burns and King also submitted a habitat assessment of their property, including waterbodies and floodplains.<sup>111</sup>

74. Flooding is not expected to impact construction or operation of the project pipeline. Millennium will implement the mitigation procedures in its ECS to minimize impacts on waterbodies during construction. During operation, bank erosion and/or scour from flash flooding could result in exposure of the pipeline or cause the pipeline to become unsupported.<sup>112</sup> All pipeline facilities are required to be constructed in accordance with section 192 of the Code of Federal Regulations,<sup>113</sup> which requires a minimum cover of three feet between the waterbody and the top of the pipeline, except in consolidated rock, where a minimum of two feet of cover would be required. After construction, Millennium will grade all disturbed construction areas back to their original surface contours (except where permanent drainage alteration is required) and will construct permanent erosion controls that are routinely inspected and maintained during the life of the project to prevent bank erosion and scour. We affirm the EA's conclusion that with implementation of Millennium's ECS and compliance with conditions included in this order and applicable permits, impacts on surface waters will not be significant.<sup>114</sup>

**c. Wetlands**

75. FWS recommends that temporary fencing be placed around wetlands near construction areas so that Millennium does not inadvertently encroach on wetlands during construction. As stated in Millennium's ECS and in accordance with the Commission's Upland Erosion Control, Revegetation & Maintenance Plan, the limits of construction workspace and sensitive resource areas (including wetlands) will be marked. The Environmental Inspector will be responsible for verifying that the boundaries of sensitive resource areas are appropriately marked.

76. NYSDEC comments that under its freshwater wetlands statutory authority, it regulates both wetlands and adjacent areas. We recognize NYSDEC's role and

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<sup>111</sup> Both assessments included the entirety of each landowner's property, including areas outside the construction and operation footprint of the project.

<sup>112</sup> EA at 30 (section B.1.1).

<sup>113</sup> 49 C.F.R. § 192 (2016).

<sup>114</sup> See EA at 39-44 (section B.2.2).

acknowledge that NYSDEC's review of wetland impacts associated with the project will include a review of adjacent areas.

77. Melody Brunn and Burns and King state that the EA underestimates impacts on wetlands associated with the project due to the presence of wetlands within unsurveyed areas. They also state that the analysis included in the EA was based upon a review of available desktop data where survey data was not available. Burns and King contend that the EA fails to follow the Commission's procedures for routing along existing rights-of-way and NYSDEC's preference for routing along existing rights-of-way to avoid wetlands. Burns and King also assert that Millennium's preferred route severely threatens high-value wetlands and rare species.

78. We recognize the commentors' documentation of wetlands on their properties and acknowledge that wetlands may occur within the project workspace on the unsurveyed properties. Prior to construction, Millennium is required to complete all outstanding wetland delineation surveys where survey access was denied along the project route. Any wetlands identified will be subject to the commitments included in Millennium's ECS, the Commission's Procedures, and applicable permit conditions. Section VI.A.2 of the Commission's Procedures states that, "if a wetland cannot be avoided or crossed by following an existing right-of-way, route the new pipeline in a manner that minimizes disturbance to wetlands." Millennium has committed to avoiding direct impacts on wetlands by crossing about 650 feet of wetlands using HDD and conventional bore construction methods. For additional wetlands, Millennium will determine the method of pipeline construction within each wetland by assessment of soil stability and saturation at the time of construction. Based on this assessment, wetlands will be crossed via conventional bore, HDD, or open-cut methods.

79. Ms. Brunn comments that Millennium lacks essential regulatory approval for the project because approval under the Clean Water Act is pending. Environmental Condition No. 9, included in Appendix B to this order, requires Millennium to obtain the necessary permits from the U.S. Army Corps of Engineers, as well as any applicable federally-delegated state permits, prior to the Commission granting approval to begin construction. The EA concludes,<sup>115</sup> and we agree, that wetland impacts associated with the construction and operation of the project will not be significant and these resources will be adequately protected during construction.

80. One comment from an individual stakeholder expresses concern that the proposed pigging facilities, located between wetlands, could become a source of contamination in the event of an accident or spill, and should be relocated. The pigging facility is sited outside of wetlands. In the unlikely event of a pipeline leak during operation, natural gas

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<sup>115</sup> EA at sections 44-48 (section B.2.3).

would dissipate into the atmosphere, and therefore would not have any direct impacts on wetlands in the region. In the event of a spill or leak of other hazardous materials during operation, Millennium will be subject to state and federal reporting requirements. During construction, Millennium will implement its Spill Prevention and Response Procedures, which specifies cleanup procedures in the event of an inadvertent leak or spill.<sup>116</sup> We conclude that these procedures are appropriate to minimize the risk of contamination to adjacent wetlands.

## 5. Vegetation

81. Burns and King submitted a habitat assessment of their property, including the vegetation communities present on their property. FWS recommends that Millennium identify and incorporate best management practices to limit the spread of invasive species, and that Millennium's Invasive Species Management Plan should be provided for review. FWS also recommends removal and proper disposal of invasive plants prior to construction to limit their potential spread. EPA recommends that the right-of-way should be cleared of invasive species during annual maintenance events.

82. As stated in section B.3.1 of the EA,<sup>117</sup> Millennium has committed to implementing the measures contained in its Invasive Species Management Plan<sup>118</sup> and ECS in accordance with the Commission's Upland Erosion Control, Revegetation, and Maintenance Plan in order to control the spread of invasive species. We affirm the EA's conclusion that based on the types and amounts of vegetation affected by the project and Millennium's proposed avoidance, minimization, and mitigation measures to limit project impacts, the project's impacts on vegetation will not be significant.

83. FWS and EPA contend that there is no analysis of the extent of forest fragmentation or impacts on forest interiors caused by the Valley Lateral Project, and recommend that the EA should provide such an analysis. The project vicinity is characterized by a mosaic of agricultural and open land, forested land, and developed areas. Of the 105.3 acres of vegetation that will be affected by project construction, 24.9 acres will be in forested land, including 0.1 acre of forested wetlands. Contiguous areas of forest crossed by the Project are separated by other land cover types, and the surrounding landscape is already fragmented primarily by agricultural lands. The project will result in a minor increase of forested habitat fragmentation in these areas.

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<sup>116</sup> *See id.* at 37-38.

<sup>117</sup> *Id.* at 48-53.

<sup>118</sup> The Invasive Species Management Plan is provided as Appendix 3B to Millennium's application.

Millennium would reduce the total impacts on forested land by using HDD construction to cross three segments of contiguous forested habitat, and 23 percent of the project is collocated with existing rights-of-way to minimize fragmentation. Therefore, we agree with the EA's conclusion that the project will result in a minimal increase in forest fragmentation and that impacts on vegetation will not be significant.<sup>119</sup>

84. FWS recommends that vegetation cleared from the right-of-way should not be burned, and requests a discussion of the disposition of vegetation cleared from the right-of-way. Section 7.1 of the EA<sup>120</sup> states that vegetation cleared during construction will be burned, chipped (except in wetlands), or otherwise handled per individual landowner agreements. Millennium committed to disposing of vegetation in accordance with applicable regulations and ordinances. The Commission is not a party in right-of-way agreements with landowners or the stipulations contained in state or local burn permits. We have reviewed Millennium's commitments regarding disposition of cleared vegetation and find them to be acceptable.

## **6. Wildlife Resources**

85. FWS recommends that Millennium avoid working at night, if feasible, and implement appropriate measures to control noise, dust, and emissions to minimize impacts on wildlife. Millennium has committed to reduce fugitive emissions through the application of dust suppressants (such as water) to disturbed work areas. Emissions associated with construction-related activities will be temporary in nature, and the EA concludes they will not cause, or significantly contribute to, a violation of any applicable ambient air quality standard.<sup>121</sup> Millennium states that, with the exception of HDD construction activities, nighttime construction is not planned. To ensure that the nearest noise sensitive areas to the HDD sites are not exposed to excessive noise during nighttime HDD operations, we are including Environmental Condition No. 16 in Appendix B to this order. Based on the analyses conducted, Millennium's proposed mitigation measures, and Environmental Condition No. 16, the EA concludes,<sup>122</sup> and we agree, that construction of the project will not result in significant sound level impacts.

86. Regarding comments from NYSDEC that the EA incorrectly identifies the closest state-managed land to the project as Huckleberry Ridge State Forest (4.9 miles from the

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<sup>119</sup> EA at 48-53.

<sup>120</sup> *Id.* at 76-77.

<sup>121</sup> *Id.* at 79-86 (section B.8.1).

<sup>122</sup> *Id.* at 89-91 (section B.8.2).

project), we acknowledge that the EA erred in omitting the Pochuck State Forest (4.5 miles from the Project) and Wallkill River National Wildlife Refuge (3.3 miles from the Project). Because these areas will be avoided by project construction, we find that this new information does not change the EA's conclusion regarding wildlife impacts.

## 7. Threatened and Endangered Species

87. Sarah Burns alleges that the Commission has violated the Endangered Species Act of 1973 (ESA)<sup>123</sup> by failing to engage in formal section 7 consultation with the FWS regarding impacts of the Valley Lateral Project on ESA-listed species and designated critical habitats in the project area. Ms. Burns asserts that ESA regulations require that formal consultation be undertaken "at the earliest possible time," and therefore, the Commission "is in violation of the ESA and will remain so until and unless formal consultation is completed and the FWS has issued a Biological Opinion." Melody Brunn comments that Millennium lacks essential regulatory approval for the project because consultation with the FWS regarding federally listed bog turtles is ongoing. Ms. Brunn's comment letter includes an evaluation of bog turtle habitat, and Burns and King submitted an assessment of biodiversity and rare, threatened, and endangered species on their respective properties.<sup>124</sup>

88. Section 7(a)(2) of the ESA requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of federally listed threatened and endangered species, or result in the destruction or adverse modification of their designated critical habitat.<sup>125</sup> To fulfill the section 7 consultation requirement, the agency or its designated non-federal representative (action agency) must first send a written request to the FWS for a list of any listed or proposed species or designated or proposed critical habitat that may be present in the geographic area affected by the project (action area).<sup>126</sup> Based on this correspondence, the action agency may request

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<sup>123</sup> 16 U.S.C. §§ 1531 *et seq.* (2012).

<sup>124</sup> As stated above, each assessment includes the entirety of each landowner's property and is not limited to the construction and operation footprint for the project.

<sup>125</sup> 16 U.S.C. § 1536(a) (2012).

<sup>126</sup> "Action area" is defined as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02 (2016). The determination of the scope of an action area requires application of scientific methodology and, as such, is within the action agency's discretion. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 902 (9th Cir. 2002) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976)).

formal consultation or it may proceed under the optional process of informal consultation.<sup>127</sup>

89. If FWS indicates that listed species may be present within the action area, then the action agency must begin the formal consultation process unless, as a result of the preparation of a biological assessment or as a result of informal consultation, the action agency determines, with the written concurrence of the FWS, that the proposed action is not likely to adversely affect any listed species or critical habitat.<sup>128</sup> The ESA implementing regulations for formal consultation mandate that “[e]ach federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.”<sup>129</sup> Formal consultation is complete when the FWS issues its biological opinion or, if during any stage of consultation, the action agency determines, and the FWS concurs, that the proposed action is “not likely to adversely affect” listed species or critical habits.<sup>130</sup>

90. Informal consultation is an optional process designed to assist the action agency in determining whether formal consultation is required. If during informal consultation it is determined that the action is “not likely to adversely affect” listed species or critical habitat, and the FWS concurs, the consultation process is terminated, and no further action is necessary.<sup>131</sup>

91. As explained in the EA, the ESA consultation for this project has followed the informal consultation procedures. Therefore, neither a biological assessment nor a biological opinion is required. Informal consultation began when Millennium, as the Commission’s non-federal representative for ESA purposes, consulted with FWS to determine whether any federally or state listed threatened or endangered species, federal species of concern, or designated critical habitats occur in the action area.<sup>132</sup> Five listed species were identified as potentially occurring in the project area: the dwarf wedgemussel, small whorled pagonia, northern long-eared bat, Indiana bat, and bog

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<sup>127</sup> 50 C.F.R. § 402.12(c) (2016).

<sup>128</sup> *Id.* § 402.12.

<sup>129</sup> *Id.* § 402.14.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* § 402.13.

<sup>132</sup> EA at section 4.

turtle.<sup>133</sup> Accordingly, Commission staff made determinations of effect for each of these species in the EA.

92. The EA concluded that the Valley Lateral Project would not affect the dwarf wedgemussel and small whorled pogonia,<sup>134</sup> and FWS comments that no further consultation is required for these species.<sup>135</sup> In addition, FWS concurs with the EA's determination that the project may affect, but is not likely to adversely affect, the northern long-eared bat.<sup>136</sup> Environmental Condition No. 14, as recommended in the EA, is modified in Appendix B of this order to reflect the completed consultation regarding the northern long-eared bat.

93. FWS recommends that the Commission continue consultation regarding the Indiana bat and provide additional information regarding the effects of habitat loss within documented maternity colony home ranges.<sup>137</sup> We agree, and Environmental Condition No. 13 in Appendix B to this order requires Millennium to further consult with FWS regarding mitigation for habitat loss within the occupied range of the Indiana bat. Further, in accordance with Environmental Condition No. 14, Millennium shall not begin construction of the proposed project until Commission staff completes consultation under Section 7 of the ESA with the FWS for the Indiana bat.

94. FWS states that the bog turtle, a federally listed threatened species, is known to occur in the project area. NYSDEC states that since portions of NYSDEC-regulated wetland MD-23 were determined to be potential bog turtle habitat, it considers the entire contiguous wetland complex to be potential bog turtle habitat, and does not limit the habitat to the locations identified just outside of the project corridor. NYSDEC therefore requests an evaluation of impacts on potential bog turtle habitat in wetland MD-23 (corresponding to Wetland ID W-AG at milepost 7.6) and that it receive the results of pending bog turtle surveys for review.

95. As explained in the EA, no potential bog turtle habitat was identified during Phase I habitat surveys for the species within the construction right-of-way; however,

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<sup>133</sup> *Id.* at section 4, Table B-8.

<sup>134</sup> *Id.*

<sup>135</sup> FWS June 6, 2016 filing at 4.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 3-4.

some right-of-way areas have not been surveyed due to lack of access.<sup>138</sup> We note that suitable bog turtle habitat is located within wetland MD-23 but outside the project workspace, and that this wetland will be crossed via HDD to avoid direct impacts. In accordance with Environmental Condition No. 14, Millennium shall not begin construction of the proposed project until bog turtle surveys are completed for all wetlands within the 300-foot survey corridor for the project, survey concurrence from FWS and NYSDEC is filed with the Commission, and Commission staff completes its ESA section 7 consultation.

96. We disagree with Sarah Burns' claim that the Commission is in violation of the ESA because it has not yet initiated formal consultation with FWS. Although each federal agency is directed to "review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat," it is only when such a determination is made that formal consultation is required.<sup>139</sup> The ESA requires that consultation be completed before construction begins,<sup>140</sup> and that while construction is pending, "the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives..."<sup>141</sup> Courts have made clear that conditional authorization of projects pending completion of consultation satisfies these requirements.<sup>142</sup>

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<sup>138</sup> EA at section 4.2 and Table B-8.

<sup>139</sup> 50 C.F.R. § 402.14(a).

<sup>140</sup> 16 U.S.C. § 1536(c)(1) (2012) ("Such assessment shall be completed . . . before any contract for construction is entered into and before construction is begun with respect to such actions."). *See also* 50 C.F.R. § 402.12(b)(2) (2016).

<sup>141</sup> 16 U.S.C. § 1536(d).

<sup>142</sup> *See, e.g., Idaho v. Interstate Commerce Comm'n*, 35 F.3d 585, 598 (D.C. Cir. 1994). The Interstate Commerce Commission authorized a railroad company to abandon and salvage a portion of track on the condition that the railroad company first comply with the ESA. The court noted that through the condition the agency had retained a later, final approval such that the agency would itself ultimately determine the project's likely impact on listed species, thus satisfying the ESA's requirements. Even an automatic authorization, if conditioned on compliance with the ESA, satisfies the statute. *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 511 (10th Cir. 1985) (addressing an Army Corps of Engineers' nationwide permit for dredge and fill activities).

97. As described above, Environmental Condition Nos. 13 and 14 require that section 7 consultation be completed for the Indian bat and bog turtle prior to Millennium commencing construction of the Valley Lateral Project. Moreover, Condition No. 14 requires that Millennium obtain written notification from the Director of the Commission's Office of Energy Projects that construction and/or use of mitigation measures may begin. Thus, Melody Brunn is correct that Millennium lacks "essential regulatory approval" for the project at this time. However, because the aforementioned conditions require that Millennium comply with the ESA before construction begins, Millennium cannot "make any irreversible or irretrievable commitment of resources" that would foreclose "the formulation or implementation of any reasonable and prudent alternative measures," and therefore this order is consistent with the ESA.

98. NYSDEC states that it should be consulted in the event that a new bald eagle nest is identified, and that its review of impacts on the Indiana bat is pending. We recognize NYSDEC's role and acknowledge that a permit pursuant to NYSDEC regulations may be required in the event that NYSDEC staff determines that the project will result in the taking of a state-listed threatened or endangered species.

99. NYSDEC also expresses concern regarding the potential impacts of hydrostatic test water discharge on wetlands containing bog turtle habitat. The EA describes mitigation measures in Millennium's ECS to avoid, reduce, and minimize hydrostatic discharge scour and off site impacts.<sup>143</sup> We find that these measures are acceptable to minimize impacts on wetlands and waterbodies.

## **8. Socioeconomic Impacts**

100. Lakeridge Associates, the developer of the Weatley Road subdivision, which is adjacent to the project, expresses concern regarding the impact of the project on property values, but stipulates that impacts would be minimized if the proposed pipeline is buried. Burns and King contend that the EA ignores and dismisses key land use and property values that could be avoided with alternatives utilizing existing rights-of-way.

101. The proposed pipeline will be buried to meet the U.S. Department of Transportation (DOT) safety standards.<sup>144</sup> Further, section B.6.5 of the EA discusses the potential impact of a pipeline on property values, noting that the potential impact of a pipeline on the value of a property is related to many property-specific variables, including the size, current value of the land, available utilities and services, current land use, and value of adjacent properties. While we acknowledge that the presence of a

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<sup>143</sup> EA at 43-44 (section B.2.2).

<sup>144</sup> *Id.* at 11 (section B.7)

pipeline, and the restrictions associated with a pipeline easement, could influence any specific potential buyer's decision to purchase a property, a potential purchaser's decision on whether to purchase land would be based on his or her planned use of the property.<sup>145</sup> As we have stated previously, with so many variables exerting impact, it is difficult to separate the effect, if any, a pipeline may have on property values.<sup>146</sup> In addition, the proposed project route was selected in part to avoid residences in close proximity to the project over other potential system and/or route alternatives.<sup>147</sup>

## 9. Greenhouse Gases

102. EPA comments that the EA does not describe measures to reduce greenhouse gas (GHG) emissions associated with the project, including reasonable alternatives or other practicable mitigation opportunities, nor disclose the estimated GHG reductions associated with such measures.

103. The EA discloses GHG emissions that will result from the construction and operation of the project.<sup>148</sup> With respect to emissions associated with construction activities, the EA discusses measures that Millennium would take to reduce these emissions, including using buses or vans to transport workers, limiting use of construction equipment to an as-needed basis, and operating vehicles in a manner consistent with EPA mobile source emission regulations.<sup>149</sup> Because operational emissions from the Valley Lateral Project would be limited to minor fugitive emissions from the pipeline and maintenance activities over the lifetime of the project, and thus would be virtually identical regardless of where the pipeline is located, the EA does not discuss in depth the GHG emissions of reasonable alternatives or mitigation measures beyond those associated with construction-related emissions. We find this analysis to be reasonable.

104. Burns and King contend that the EA does not include a good faith assessment of the pipeline's operational GHG emissions, asserting that potential methane leakage must be assessed according to both 20 year and 100 year impact, and that higher values should be used for the global warming potential (GWP) of methane. The EA estimates that

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<sup>145</sup> *Id.* at 75 (section B.6.5).

<sup>146</sup> *See Columbia Gas Transmission, LLC*, 156 FERC ¶ 61,125 (2016).

<sup>147</sup> *See id.* at 113-116 (sections C.2 and C.3).

<sup>148</sup> *Id.* at 84 (Table B-13).

<sup>149</sup> *Id.* at section B.8.1.

operational emissions for the proposed project would be 7.8 tons per year of carbon dioxide equivalent over the lifetime of the project and notes that no air permitting actions are required for the project, as the project does not include new or modified compressor stations.<sup>150</sup> Commission staff's analysis used a GWP value for methane of 25 over a 100-year period, which is the value that EPA established for reporting GHG emissions. EPA supported the 100-year time period over the 20-year period in its summary of comments and responses in the final rulemaking, *2013 Revisions to the Greenhouse Gas Reporting Rule and Final Confidentiality Determinations for New or Substantially Revised Data Elements*.<sup>151</sup> Accordingly, we find that the EA appropriately discloses the GHG emissions resulting from construction and operation of the project.

## 10. Safety

105. Ms. Brunn indicates that significant floodplains surround her property and expresses concern that Millennium's ability to service the pipeline in an emergency would be weather dependent. The EA states that DOT prescribes the minimum standards for operating and maintaining pipeline facilities, including requirements to establish an emergency plan.<sup>152</sup> Key elements of the required emergency plan include identifying and classifying emergency events, including natural disasters, and making personnel, equipment, tools, and materials available at the scene of an emergency. The EA also states that Millennium will employ qualified emergency response personnel to be dispatched during any emergency.<sup>153</sup> Millennium's emergency plan will apply to the entire pipeline and take into consideration the associated resources along the route in order to handle emergencies appropriately and safely. The Commission does not impose additional safety standards other than DOT's standards.

106. An anonymous individual comments on the blast radius for the pipeline and questions the adequacy of the calculation in the EA to determine the effects of the blast radius. The EA identifies the calculation for a pipeline's potential impact radius pursuant to the methodology established by DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA) under its pipeline safety regulations for operating natural gas pipelines.<sup>154</sup> PHMSA has determined that the potential failure of a pipeline could have

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<sup>150</sup> *Id.* at 86.

<sup>151</sup> 78 Fed. Reg. 71,904.

<sup>152</sup> EA at 92-96 (section B.9.1).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 94 nn.8, 9.

significant impacts on people or property within a potential impact radius under this methodology. Millennium is required to comply with PHMSA's safety design standards for the protection of people and property from pipeline hazards. A disagreement with the potential impact radius calculation methodology is more appropriately addressed to PHMSA, the agency having jurisdiction over gas pipeline safety.

107. The same individual also suggests that the pipeline include concrete walls on both sides of the pipeline to mitigate the impacts during a potential pipeline explosion. The EA explains<sup>155</sup> that the pipeline aboveground facilities must be designed, constructed, operated, and maintained in accordance with the DOT Minimum Federal Safety Standards<sup>156</sup> that are intended to ensure adequate protection for the public and prevent natural gas facility accidents and failures. The EA concludes that the risk of a significant incident associated with the project is low. We concur.

108. The individual also comments that noise associated with pipeline explosions is not included in the EA and inquires about the noise level of an explosion and whether such noise would result in adverse impacts such as deafness or impaired sense of balance in children or seniors. Many factors influence the nature of any potential pipeline incident and the effect on people near or far from an incident. Sections B.9.2 and B.9.3 of the EA include an extensive analysis of the project impacts on public safety, including the probabilistic level of risk of an incident.<sup>157</sup> We agree with the EA's conclusion that the risk of a significant incident associated with the project is low and do not find it necessary to analyze the noise impact of such an incident.

## 11. Cultural Resources

109. Burns and King contend that the EA fails to meaningfully acknowledge and assess the archeological and cultural impacts of the Valley Lateral Project. As indicated in the EA,<sup>158</sup> Millennium conducted a cultural resources survey within a 300-foot-wide study corridor for all parcels to which they had access (96 percent of the parcels). The survey identified one new archaeological site and 23 isolated finds. Millennium concluded, and the State Historic Preservation Officer concurred, that the site and isolated finds are not eligible for listing in the National Register of Historic Places. We agree. We have included Environmental Condition No. 15 in Appendix B to this order to ensure that the

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<sup>155</sup> *Id.* at 11-15 (section A.7).

<sup>156</sup> 49 C.F.R. § 192 (2016).

<sup>157</sup> EA at 96-100.

<sup>158</sup> *Id.* at 76-79 (section B.7).

remaining surveys and consultation are completed in a manner that is consistent with the National Historic Preservation Act of 1966.<sup>159</sup>

110. Commission staff and Millennium also consulted with Indian tribes potentially affected by the project.<sup>160</sup> Millennium wrote to the three federally recognized Delaware Indian tribes on April 29, 2015: the Delaware Tribe of Indians, the Delaware Nation and the Stockbridge Munsee Band of Mohicans. The Delaware Tribe of Indians and the Stockbridge Munsee Band of Mohicans requested reports and project information. In November 2015, Millennium provided the two tribes with the requested information. The Stockbridge Munsee Band of Mohicans indicated they were satisfied with the survey report. No response has been received from the Delaware Tribe of Indians. Commission staff sent letters requesting comments to the same tribes on August 19, 2015, but has not received any responses to date. We find that the EA, combined with the Environmental Condition No. 15, adequately take into consideration the archeological and cultural impacts of the project.

## 12. Alternatives

111. Several commentors<sup>161</sup> contend that the EA included an inadequate alternatives analysis. These commentors assert that the EA does not sufficiently address collocation alternatives, including those alternatives that would collocate the project pipeline along existing road (including Interstate 84) or railroad easements.

112. NEPA requires the Commission to identify and analyze reasonable alternatives during its review of a proposed action.<sup>162</sup> NEPA does not define what constitutes a “reasonable alternative;” however, CEQ provides that “a reasonable range of alternatives depends on the nature of the proposal and the facts in each case.”<sup>163</sup> The Commission is

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<sup>159</sup> 54 U.S.C. § 306108, Pub. L. No. 113-287, 128 Stat. 3188 (2014). The National Historic Preservation Act was recodified in Title 54 in December 2014.

<sup>160</sup> See EA at 78 (section B.7.3).

<sup>161</sup> Comments of EPA, NYSDEC, Melody Brunn, Burns and King, and an individual stakeholder.

<sup>162</sup> See 42 U.S.C. § 4332(2)(C) (2012); 40 C.F.R. §§ 1502.1, 1502.14, and 1502.16 (2016). See also *Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d at 102.

<sup>163</sup> *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (1981).

not required to consider alternatives that are not consistent with the purpose and need of the proposed project.<sup>164</sup>

113. In accordance with NEPA and Commission policy, Commission staff evaluated alternatives to the Valley Lateral Project to determine whether they would be reasonable and environmentally preferable to the proposed project while meeting the project's stated objective.<sup>165</sup> The purpose of Millennium's project is to provide 127,200 Dth per day of firm natural gas transportation service to the Valley Energy Center as contracted by CPV.<sup>166</sup> The EA considered the no-action alternative, system alternatives, major route alternatives, minor route variations, and aboveground facility alternatives.<sup>167</sup> The EA ultimately concludes that no reasonable alternative would provide significant environmental advantages and accomplish the project's objective.

114. EPA contends that the Orange and Rockland alternatives offer an environmental advantage over the proposed route because they have fewer environmental impacts on wetlands, forest, and waterbodies. The Commission considers several factors in addition to wetland and waterbody crossings and vegetation in its assessment of alternatives. As discussed in the EA, the Orange and Rockland System Alternatives 1 and 2 would be within 50 feet of 65 and 47 residential structures, respectively; the proposed route is not within 50 feet of any residential structures.<sup>168</sup> Additional facilities, such as construction of pipeline loops or new compression facilities would be required for the Orange and Rockland alternatives to meet the capacity needs for the Valley Energy Center.

115. EPA also contends that System Alternative 2 should be evaluated further. As stated in the EA, Alternative 2 would be within 50 feet of 6 residences, while the proposed route would not be within 50 feet of any residences.<sup>169</sup> Alternative 2 would also cross a major waterbody (none would be crossed by the proposed route) and 0.6 additional mile of terrain with shallow depth to bedrock, which could increase the

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<sup>164</sup> See, e.g., *Pacific Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1100 (9th Cir. 2012).

<sup>165</sup> EA at 112-124 (section C).

<sup>166</sup> *Id.* at 2 (section A.2).

<sup>167</sup> *Id.* at 112-124.

<sup>168</sup> *Id.* at 115 (Table C-1).

<sup>169</sup> *Id.*

potential that blasting is required for the alternative route.<sup>170</sup> The EA concludes that this alternative would not offer a significant environmental advantage, and we concur.

116. NYSDEC contends that an analysis of indirect impacts from forest loss on Indiana bats is incomplete and should be considered in the evaluation of collocation alternatives. The EA considers impacts on forested habitat in its comparison of alternative routes, in addition to other factors. As stated above, Environmental Condition Nos. 13 and 14, included in Appendix B to this order, require further consultation for potential project impacts on the Indiana bat.

117. The EA likewise concludes that the Interstate 84 collocation alternative does not offer a significant environmental advantage over the proposed pipeline route. The Interstate 84 alternative would result in greater impacts on wetlands and forested land; would require crossing of a major waterbody; and would necessitate increased side-slope construction, thus increasing the additional temporary workspace required during construction.<sup>171</sup>

118. Regarding comments from NYSDEC that the EA incorrectly identifies the number of NYSDEC wetlands crossed by the proposed route in table C-3 of the EA, we acknowledge that the EA erred in counting W-AI (NYSDEC Regulated MD-29), and W-V (NYSDEC Regulated MD-26) as a single wetland crossing. However, we find this does not change the EA's conclusion regarding alternatives.

### 13. Valley Energy Center

119. As noted above, the Valley Lateral is designed to provide transportation service to the Valley Energy Center, located in the Town of Wawayanda, New York. The Valley Energy Center, which is currently under construction, is a non-jurisdictional natural gas combined-cycle electric power generation facility with a nominal capacity rating of 630 MW and a nameplate generating capacity of 820 MW. The New York PSC issued a certificate of public convenience and necessity authorizing the project on May 9, 2014.<sup>172</sup>

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 120-123.

<sup>172</sup> New York PSC, Order Granting Certificate of Public Convenience and Necessity, Authorizing Lightened Ratemaking Regulation, and Approving Financing, Case 10-E-501 (2014), <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=10-e-0501>.

120. Pramilla Malick asserts that the environmental reviews of the Valley Lateral Project and Valley Energy Center were improperly segmented. We disagree. As discussed in the EA, the Valley Energy Center is not subject to the Commission's jurisdiction.<sup>173</sup> Therefore, it does not qualify as a "federal action" for NEPA purposes,<sup>174</sup> and the Commission is not required to prepare an EA for the Valley Lateral Project.

121. Nevertheless, in considering cumulative impacts attributable to Millennium's Valley Lateral Project, the EA identifies the Valley Energy Center as a project that may, when its impacts are added to those of the proposed action, result in cumulative environmental impacts.<sup>175</sup> Commission staff examined the cumulative impacts of the Valley Lateral and Valley Energy Center on geology and soils, water resources and wetlands, vegetation and wildlife, land use and visual resources, air quality, and noise. These impacts are summarized below.

122. The Town of Wawayanda also prepared a Draft<sup>176</sup> and Final Environmental Impact Statement (FEIS)<sup>177</sup> for the Valley Energy Center in accordance with the New York State Environmental Quality Review Act. The FEIS was accepted and issued by the Town of Wawayanda Planning Board, as lead agency for the project, on February 12, 2012. The Town of Wawayanda's FEIS responds to public comments and evaluates environmental impacts on land and land use, visual resources, air quality, noise, wetlands and water resources, socioeconomics, traffic, cultural resources, soils, geology, seismology, and wildlife.

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<sup>173</sup> EA at 24-25 (section A.8).

<sup>174</sup> See 40 C.F.R. § 1508.18 (2016) (defining major federal action); see also *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 50 (D.C. Cir. 2015) (holding that the CEQ "connected action" regulation does not dictate that an agency's NEPA review encompass private, non-federal actions).

<sup>175</sup> EA at 102 (Table B-21).

<sup>176</sup> Town of Wawayanda Planning Board, Draft Environmental Impact Statement, CPV Valley Energy Center (February 2009) [hereinafter Valley Energy Center DEIS], <http://www.cpvvalley.com/pdfs/approvalprocess/Volume%20I/CPVValleyDEISSections1thru19.pdf>.

<sup>177</sup> Town of Wawayanda Planning Board, Final Environmental Impact Statement, CPV Valley Energy Center (February 2012) [hereinafter Valley Energy Center FEIS], <http://www.cpvvalley.com/feis.html>.

123. Commission staff determined that the Valley Energy Center is within the Valley Lateral Project's region of influence for geology and soils where the lateral terminates at the Valley Energy Center's meter station. However, because the geologic setting of the projects poses minimal geologic hazards, and because CPV is employing best management practices and implementing NYSDAM guidelines for agricultural soil removal and restoration during construction, the EA finds that impacts on geology and soil would be limited.<sup>178</sup> Permanent impacts to soil would occur only where soils are encumbered by Valley Energy Center facilities.<sup>179</sup> Moreover, Millennium is required to minimize incremental impacts on soils through its ECS. The EA concludes that cumulative impacts on geology and soils would be minor and short term.<sup>180</sup>

124. The Valley Energy Center is located in the same subwatershed that will be crossed by the Valley Lateral, which may result in some cumulative impacts on water resources and wetlands. But impacts on surface waters, including sedimentation from construction areas, would be temporary. The Town of Wawayanda concluded that the Valley Energy Center would not result in significant impacts on wetlands.<sup>181</sup> Because the incremental impacts from the Valley Lateral and Valley Energy Center on water resources would be temporary and minor, and because both projects must comply with mitigation requirements and conditions contained in their respective Clean Water Act section 401 and 404 permits for any permanent wetland impacts, the EA concludes that cumulative impacts would not be significant.<sup>182</sup>

125. With respect to vegetation and wildlife resources, including threatened and endangered species, the EA concludes that cumulative impacts would not be significant.<sup>183</sup> The EA explains that the Valley Energy Center is currently resulting in combined temporary and permanent impacts on 27.8 acres of open and agricultural land, 4.1 acres of forest, and 2.9 acres of wetland. The Valley Energy Center and Valley Lateral combined would affect a total of about 140.1 acres of vegetation during construction and 76.3 acres during operation. Millennium will minimize impacts on

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<sup>178</sup> EA at 104 (section B.10.1).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Valley Energy Center DEIS at 14-47-49, Appendix 14-H; Valley Energy Center FEIS at Appendix 2.

<sup>182</sup> EA at 104-105 (section B.10.2).

<sup>183</sup> *Id.* at 105-106 (section B.10.3).

vegetation and wildlife habitat by collocating the Valley Lateral with existing rights-of-way where practicable and by implementing the measures in its ECS. Finally, as described more fully above, the continuing ESA consultation process would minimize any impacts on federally and state listed threatened and endangered species.

126. Pramilla Malick asserts that the project sponsor for the Valley Energy Center, CPV, has violated the ESA by destroying protected species habitat, including but not limited to habitats for the Indiana bat, long-eared bat, and bog turtle. Ms. Malick comments that the existing and likely future habitat destruction from the Valley Energy Center and other related components should be considered in the cumulative impacts analysis for the project. As summarized in the preceding paragraph, cumulative impacts to vegetation and wildlife, including threatened and endangered species within the defined region of influence, are discussed in section B.10.3 of the EA. Section B.10.3 includes discussion of impacts from construction of the Valley Energy Center. We agree with Commission staff's analysis as summarized in the preceding paragraph.

127. The Valley Energy Center will result in the conversion of open, agricultural, and forest land to developed land. However, the Town of Wawayanda determined that the Valley Energy Center is compatible with its Comprehensive Plan and land use zoning of the area for mixed commercial use.<sup>184</sup> The EA finds that the Valley Energy Center and Valley Lateral would have some minor long-term and permanent cumulative impacts on visual resources.<sup>185</sup> These impacts would be greatest in areas of forest conversion where the changes in vegetative cover would be more noticeable from a greater distance. However, the EA concludes that cumulative impacts on land and visual resources would not be significant.<sup>186</sup>

128. Cumulative construction emissions from the Valley Energy Center and Valley Lateral would not exceed applicable general conformity thresholds or violate applicable ambient air quality standards.<sup>187</sup> Any potential cumulative impacts from construction would be limited to the duration of the construction period, and would be temporary and minor.<sup>188</sup>

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<sup>184</sup> Valley Energy Center DEIS at section 3.4.1.

<sup>185</sup> EA at 106-107 (section B.10.4).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 108 (Table B-22).

<sup>188</sup> *Id.* at 107-109 (section B.10.5).

129. The Valley Energy Center, as a new major stationary source, is subject to Prevention of Significant Deterioration regulations for emissions of pollutants greater than 100 tons per year.<sup>189</sup> Additionally, due to the location of the Valley Energy Center within a designated non-attainment area for ozone, it is subject to non-attainment New Source Review regulations for emissions of nitrogen oxides and volatile organic compounds (VOCs), and is required to obtain offsets for those pollutants.<sup>190</sup> The Valley Energy Center is also required to demonstrate compliance with national ambient air quality standards.<sup>191</sup> Because operational emissions from the Valley Lateral would be limited to fugitive emissions of carbon dioxide equivalents and VOCs, and all other projects in the region, including the Valley Energy Center, would be required to meet all applicable federal and state air quality standards, the EA concludes that the Valley Lateral would not result in significant cumulative impacts on regional air quality.<sup>192</sup>

130. Burns and King assert that the EA should account for methane emissions from the Valley Energy Center, citing in support a June 3, 2016 final rulemaking by EPA.<sup>193</sup> In short, the cited rulemaking revises regulations applicable to permitting of stationary sources of air pollution under the New Source Review and title V programs in the Clean Air Act (CAA) for sources in the oil and natural gas sector. As explained above and in the EA,<sup>194</sup> the Valley Energy Center is not subject to the Commission's jurisdiction, and thus the Commission has no responsibility to prepare its own environmental analysis for the project. However, the EA includes the Valley Energy Center in its air quality cumulative impact analysis.<sup>195</sup> Additionally, the Town of Wawayanda's environmental analysis contains a comprehensive GHG analysis of the Valley Energy Center, including discussion of the Kyoto Protocol and Regional Greenhouse Gas Initiative; the Valley Energy Center's emissions of GHG on an hourly, yearly, and 30-year basis; comparison to state, national, and global emissions; and the importance of emissions from the project

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<sup>189</sup> *Id.* at 107-109; Valley Energy Center DEIS at section 9, Appendix 3; Valley Energy Center DEIS at section 3.3, Appendix 3.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> EA at 107-109 (section B.10.5).

<sup>193</sup> Source Determination for Certain Emission Units in the Oil and Natural Gas Sector, 81 Fed. Reg. 35,622 (June 3, 2016).

<sup>194</sup> EA at 24-25 (section A.8).

<sup>195</sup> *Id.* at 107-109.

in relation to the common good.<sup>196</sup> As explained in the FEIS, the Valley Energy Center's emissions are subject to Prevention of Significant Deterioration regulations under the CAA, which require determination of the Best Available Control Technology (BACT) for GHG emissions.<sup>197</sup> Appendix 3B to the FEIS demonstrates that the Valley Energy Center will comply with all requirements of the CAA, including the BACT analysis for GHG emissions. Additionally, the Valley Energy Center DEIS noted that trace amounts of methane would be emitted, but would be negligible compared to the total CO<sub>2</sub> emissions resulting from combustion.<sup>198</sup>

#### **14. Environmental Justice**

131. On October 24, 2016, Pramilla Malick filed comments stating that the environmental justice analysis in the EA relied on outdated data. Ms. Malick contends that NYSDEC and the Commission should not issue permits or approve the Valley Lateral Project until further analysis of potential environmental justice impacts is completed using current data.

132. The Environmental Justice analysis in the EA<sup>199</sup> was based on mapping accessed in 2015 from the New York State Office of Environmental Justice, which was based on U.S. Census data from 2000. The data sets used in the EA were appropriate and consistent with data used by the State of New York. The same data set was used in the analysis for the Valley Energy Center, which was permitted and licensed by the State of New York. Based on these data, the EA identified the nearest potential environmental justice area to be approximately 1 mile northeast of the proposed Valley Lateral Project. Even using the updated data provided by Ms. Malick, which identifies a potential environmental justice area approximately 0.4 mile from the proposed Valley Lateral Project, the EA's conclusion regarding impacts on potential environmental justice areas would not change. We find that the Valley Lateral Project would not disproportionately affect minority or low income populations and was appropriately sited to meet the project purpose and need to provide natural gas to the Valley Energy Center.

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<sup>196</sup> CO<sub>2</sub> annual emissions from the Valley Energy Center were estimated to be about 1.98 million metric tons of CO<sub>2</sub> per year (539,938 metric tons carbon per year) per Valley Energy Center DEIS, at section 9.6.8.2.

<sup>197</sup> Valley Energy Center FEIS at section 3.3.2.

<sup>198</sup> Valley Energy Center DEIS at section 9.6.8.2.

<sup>199</sup> EA at 75-76 (section B.6.6).

### **E. Conclusion**

133. Based on the analysis in the EA, and as supplemented herein, we conclude that if constructed and operated in accordance with Millennium's application and supplements, and in compliance with the environmental conditions in Appendix B to this Order, our approval of this proposal will not constitute a major federal action significantly affecting the quality of the human environment.

134. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, 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.<sup>200</sup>

135. The Commission on its own motion received and made part of the record in this proceeding all evidence, including the application, as supplemented, and exhibits thereto, and all comments submitted herein, and upon consideration of the record,

#### The Commission orders:

(A) 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.

(B) The certificate authority issued to Millennium in ordering paragraph (A) is conditioned on the following:

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<sup>200</sup> See 15 U.S.C. § 717r(d) (2012) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); see also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted) and *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

- (1) completion of construction of the proposed facilities and making them available for service within one year of the date of this order pursuant to section 157.20(b) of the Commission's regulations;
- (2) compliance with all applicable Commission regulations including, but not limited to, Parts 154, 157, and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations;
- (3) compliance with the environmental conditions listed in Appendix B to this order;
- (4) execution of firm service agreements equal to the level of service and in accordance with the terms of service represented in its precedent agreement prior to commencing construction.

(C) Millennium's proposed initial recourse rates for transportation service under Rate Schedules LFT and LIT are approved, subject to condition as discussed herein.

(D) Millennium is directed to file, no earlier than 60 days and no later than 30 days prior to the date the project facilities go into service, actual tariff records implementing Rate Schedules LFT and LIT and related tariff revisions filed on a *pro forma* basis in Millennium's application. Millennium is also directed to revise Rate Schedule LIT as described in the body of this order.

(E) Millennium shall keep separate books and accounting of costs attributable to the proposed incremental services, as described in the body of this order.

(F) As discussed in the body of this order, Millennium shall either file the negotiated rate agreement with CPV or tariff records setting forth the essential terms of the agreement at least 30 days, but not more than 60 days, before the proposed effective date of such rates.

(G) Millennium Pipeline Company, LLC (Millennium) shall notify the Commission's environmental staff by telephone, e-mail, and/or facsimile of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Millennium. Millennium shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

(H) Burns' and King's Motion to Dismiss is denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

## **Appendix A**

### **Timely, Unopposed Motions to Intervene**

- New York State Department of Environmental Conservation
- Shawn Cahill
- NJR Energy Services Company
- New Jersey Natural Gas Company
- Natural Grid Gas Delivery Companies
- Ernest F. Stonick
- Richard F. Walker
- Bonnie Walker
- Elizabeth Gottlieb
- Melanie Gold
- Pamilla Malik
- Consolidated Edison Company of New York, Inc.
- Jena Elston
- Melody Brunn, individually, and as Trustee of the Stanley Brunn Living Trust
- Joan Sichterman
- Peter Smith

## Appendix B

### Environmental Conditions

As recommended in the environmental assessment (EA) and modified by the Order, this authorization includes the following conditions:

1. Millennium Pipeline Company, LLC (Millennium) shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EA, unless modified by the Order. Millennium must:
  - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
  - b. justify each modification relative to site-specific conditions;
  - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
  - d. receive approval in writing from the Director of the Office of Energy Projects (OEP) **before using that modification.**
2. The Director of OEP has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project. This authority shall allow:
  - a. the modification of conditions of the Order; and
  - b. the design and implementation of any additional measures deemed necessary (including stop-work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from project construction and operation.
3. **Prior to any construction**, Millennium shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, Environmental Inspectors (EIs), and contractor personnel will be informed of the EIs' authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.
4. The authorized facility locations shall be as shown in the EA, as supplemented by filed alignment sheets. **As soon as they are available, and before the start of construction**, Millennium shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

Millennium's exercise of eminent domain authority granted under Natural Gas Act Section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Millennium's right of eminent domain granted under Natural Gas Act Section 7(h) does not authorize it to increase the size of its natural gas pipelines or aboveground facilities to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. Millennium shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipeyards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP **before construction in or near that area.**

This requirement does not apply to extra workspace allowed by the FERC *Upland Erosion Control, Revegetation, and Maintenance Plan*, and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

- a. implementation of cultural resources mitigation measures;
  - b. implementation of endangered, threatened, or special concern species mitigation measures;
  - c. recommendations by state regulatory authorities; and
  - d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.
6. **Within 60 days of the acceptance of the Certificate and before construction begins**, Millennium shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP. Millennium must file revisions to the plan as schedules change. The plan shall identify:
    - a. how Millennium will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;

- b. how Millennium will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
  - c. the number of EIs assigned, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
  - d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
  - e. the location and dates of the environmental compliance training and instructions Millennium will give to all personnel involved with construction and restoration (initial and refresher training as the project progresses and personnel change);
  - f. the company personnel and specific portion of Millennium's organization having responsibility for compliance;
  - g. the procedures (including use of contract penalties) Millennium will follow if noncompliance occurs; and
  - h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
    - (1) completion of all required surveys and reports;
    - (2) the environmental compliance training of onsite personnel;
    - (3) the start of construction; and
    - (4) the start and completion of restoration.
7. Millennium shall employ at least one Environmental Inspector per construction spread. The EIs shall be:
- a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;
  - b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
  - c. empowered to order the correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
  - d. a full-time position, separate from all other activity inspectors;
  - e. responsible for documenting compliance with the environmental conditions of that Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
  - f. responsible for maintaining status reports.
8. Beginning with the filing of its Implementation Plan, Millennium shall file updated status reports with the Secretary on a **biweekly basis until all construction and restoration activities are complete**. On request, these status

reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:

- a. an update on Millennium's efforts to obtain the necessary federal authorizations;
  - b. the construction status of the project, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas;
  - c. a listing of all problems encountered and each instance of noncompliance observed by the Environmental Inspector during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
  - d. a description of the corrective actions implemented in response to all instances of noncompliance, and their cost;
  - e. the effectiveness of all corrective actions implemented;
  - f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
  - g. copies of any correspondence received by Millennium from other federal, state, or local permitting agencies concerning instances of noncompliance, and Millennium's response.
9. **Prior to receiving written authorization from the Director of OEP to commence construction of any project facilities**, Millennium shall file with the Secretary documentation that it has received all authorizations required under federal law (or evidence of waiver thereof).
10. Millennium must receive written authorization from the Director of OEP **before placing the project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the project are proceeding satisfactorily.
11. **Within 30 days of placing the authorized facilities in service**, Millennium shall file an affirmative statement with the Secretary, certified by a senior company official:
- a. that the facilities have been constructed and installed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
  - b. identifying which of the conditions in the Order Millennium has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.

12. **Prior to construction**, Millennium shall file with the Secretary, for review and written approval by the Director of OEP, revised plan and profile drawings for the pipeline crossings of Indigot Creek (milepost 2.6) and Catlin Creek (milepost 3.9), that demonstrate maintenance of the U.S. Department of Transportation minimum regulatory burial depth (49 CFR § 195.248) below the estimated scour depth for these waterbodies.
13. **Prior to construction**, Millennium shall file with the Secretary documentation of its U.S. Fish and Wildlife Service (FWS) consultation to determine the need to identify potential Indiana bat roost trees and any agreed upon mitigation for habitat loss within the known, occupied range of the Indiana bat.
14. Millennium **shall not begin construction** of the proposed project **until**:
  - a. Phase 1, and any applicable Phase 2, bog turtle surveys have been completed for all wetlands within the 300-foot survey corridor and survey concurrence from the FWS and New York State Department of Environmental Conservation has been filed with the Secretary;
  - b. the FERC staff completes Endangered Species Act Section 7 consultation with the FWS for the Indiana bat and bog turtles; and
  - c. Millennium has received written notification from the Director of OEP that construction and/or use of mitigation (including implementation of conservation measures) may begin.
15. Millennium **shall not begin construction** of facilities and/or use of staging, storage, or temporary work areas and new or to-be-improved access roads **until**:
  - a. Millennium files with the Secretary remaining cultural resources survey reports(s); site evaluation report(s); and avoidance/treatment plan(s), as required; and comments on the cultural resources reports and plans from the State Historic Preservation Office;
  - b. the Advisory Council on Historic Preservation is afforded an opportunity to comment if historic properties would be adversely affected; and
  - c. the FERC staff reviews and the Director of OEP approves the cultural resources reports and plans, and notifies Millennium in writing that treatment plans/mitigation measures (including archaeological data recovery) may be implemented and/or construction may proceed.

All materials filed with the FERC containing **location, character, and ownership information** about cultural resources must have the cover and any relevant pages therein clearly labeled in bold lettering: **“CONTAINS PRIVILEGED INFORMATION – DO NOT RELEASE.”**
16. Millennium shall file the following in the biweekly construction status reports for all horizontal directional drill (HDD) operations:

- a. the noise measurements at the nearest noise sensitive area (NSA), obtained at the start of the HDD operations;
  - b. the noise mitigation that Millennium implemented at the start of drilling operations; and
  - c. any additional mitigation measures that Millennium would implement if the initial noise measurements exceeded an day-night sound level ( $L_{dn}$ ) of 55 decibels on the A-weighted scale (dBA) at the nearest NSA and/or increased noise is over ambient conditions greater than 10 decibels.
17. Millennium **shall not begin construction** of any HDD crossing where the intersect method will be used **until** Millennium files with the Secretary a revised noise analysis and mitigation plan for the review and written approval of the Director of OEP. During drilling operations, Millennium shall implement the approved plan, monitor noise levels, and make all reasonable efforts to restrict the noise attributable to the drilling operations to no more than an  $L_{dn}$  of 55 dBA at the NSAs for the drill entry sites.