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

No. 15-1052

IN RE: DELAWARE RIVERKEEPER NETWORK

**ON PETITION FOR WRIT FOR EMERGENCY STAY OF
FEDERAL ENERGY REGULATORY COMMISSION ORDER**

**RESPONSE IN OPPOSITION OF FEDERAL ENERGY REGULATORY
COMMISSION TO PETITION FOR STAY PENDING REVIEW**

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GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
Delaware Riverkeeper or Riverkeeper	Petitioner Delaware Riverkeeper Network
EA or Environmental Assessment	Environmental Assessment for the Leidy Project, issued August 2014
FERC Letter	March 9, 2015 letter from FERC to Transcontinental Gas Pipe Line Company, approving the request for limited pre-construction tree felling
Leidy Project or Project	Transcontinental Gas Pipe Line Company LLC's proposal to construct and operate approximately 29.97 miles of new pipeline loop, consisting of four pipeline loop segments, and adding 71,900 horsepower at four compressor stations, located in Pennsylvania and New Jersey
NEPA	National Environmental Policy Act, 42 U.S.C. § 4321 <i>et seq.</i>
Order	<i>Transcon. Gas Pipe Line Co., LLC</i> , 149 FERC ¶ 61,258 (December 18, 2014)
Petition or Pet.	Petition of Delaware Riverkeeper Network for Writ, filed March 10, 2015
Stay Denial	<i>Transcontinental Gas Pipe Line Co., LLC</i> , 150 FERC ¶ 61,183 (March 12, 2015)
Transco	Transcontinental Gas Pipe Line Company LLC
Transco Feb. 24 Letter	February 24, 2015 letter from Transco to FERC requesting permission for pre-construction tree clearing

INTRODUCTION

Delaware Riverkeeper Network (Delaware Riverkeeper or Riverkeeper) asks this Court for the extraordinary remedy of indefinitely delaying the construction of an interstate natural gas pipeline that the Federal Energy Regulatory Commission (FERC or Commission) has unanimously determined, in its expert judgment and after thorough consideration and balancing of competing values, is needed to meet the Nation's energy needs.

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

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

comports with statutory requirements, and this Court's recent precedent on segmentation. Additionally, the Commission analyzed – and is continuing to analyze on petitions for agency rehearing of its certificate order – all available information on cumulative environmental impacts, consistent with the requirements in the National Environmental Policy Act (NEPA).

And Riverkeeper's alleged environmental harms are either unsupported by the record or effectively mitigated by conditions imposed by the agency (including after-the-fact monitoring, reporting, and enforcement). The Commission has only authorized limited, non-mechanized tree clearing without ground disturbance. Clearing must take place before April 1 to comply with timing restrictions imposed by the U.S. Fish and Wildlife Service – restrictions that are necessary to protect the endangered Indiana Bat. If clearing cannot be conducted before that date, it cannot resume until November 15 – jeopardizing the Project's completion date.

For these reasons, on March 12, 2015, the Commission denied Riverkeeper's administrative stay request. The Commission found that Riverkeeper could not demonstrate significant environmental impact. Nor could Riverkeeper prove that a stay was in the public interest. Without the immediate tree, under the timetable dictated by another federal agency, clearing necessary to protect the Indiana Bat, the Project would be considerably delayed, denying the delivery of needed gas supplies.

Not surprisingly – given the Commission’s balance of competing values and exercise of its statutory responsibilities – no court of appeals, when presented in recent years with a petition (or motion) for emergency stay of a Commission pipeline (or compressor) decision, has granted such extraordinary relief (*see infra* at 8-9), including:

- *Coal. for Responsible Growth & Res. Conservation v. FERC*, No. 12-566 (2d Cir. Feb. 28, 2012) – denying a motion for stay concerning similar underlying facts; namely the authorization of immediate pre-construction, non-mechanized tree clearing in order to comply with the U.S. Fish and Wildlife Service’s recommended schedule to protect the Indiana Bat;
- *In re Minisink Residents for Pres. of the Env’t & Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012) – holding petitioner failed to demonstrate either irreparable injury or likelihood of success on the merits, even where the challenged FERC order was accompanied by two dissents; and
- *Delaware Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013) – denying a stay based on the same substantive claim; namely improper segmentation for environmental review – even when the petitioners’ substantive claims were later upheld on the merits.

This Court should likewise deny Riverkeeper’s current request for extraordinary relief.

BACKGROUND

On September 28, 2013, Transcontinental Gas Pipe Line Company, LLC (Transco) filed an application to construct and operate its proposed Leidy Southeast Project (Leidy Project or Project). *See Transcon. Pipe Line Co., LLC*, 149 FERC ¶ 61,258, P 1 (Dec. 18, 2014) (Order) (Riverkeeper Ex. 1); *see also*

Transcon. Pipe Line Co., LLC, 150 FERC ¶ 61,183, P 2 (March 12, 2015) (Stay Denial) (Attachment 1); Environmental Assessment for the Leidy Southeast Expansion Project at 1-2 (August 2014) (EA or Environmental Assessment) (Riverkeeper Ex. 6). Transco proposes to construct and operate approximately 29.97 miles of new pipeline loop, consisting of four pipeline loop segments, and adding 71,900 horsepower at four compressor stations, located in Pennsylvania and New Jersey. *See* Order P 4; *see also* Stay Denial P 2. The Project will enable Transco to transport an additional 525,000 dekatherms per day from two existing interconnections in Pennsylvania to various delivery points on Transco's mainline, including as far south as Alabama. *See* Order P 4.

In agency proceedings extending over a year, and resulting in a detailed 200 page (excluding appendices) Environmental Assessment, the Commission thoroughly examined the environmental impacts of the Project. *Id.* PP 33-127 (discussing environmental review). Ultimately, on December 18, 2014, the Commission determined that the Project, upon Transco's satisfaction of numerous environmental conditions and mitigation measures, is consistent with the public convenience and necessity under section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e). *See id.* P 44; *see also* Stay Denial P 3.

On January 16, 2015, Riverkeeper filed for rehearing from the Commission's decision. *See* Stay Denial P 4. On February 12, 2015, Riverkeeper

filed a motion to stay any construction activity and any other land-disturbing activity conducted under the certificate, until agency rehearing of the December 18 Order. *Id.*

On February 23 and 24, 2015, as supplemented on February 26 and March 3, 2015, Transco filed a request to begin limited, non-mechanized tree felling. *See* Feb. 24, 2015 Transco Filing at 1 (Transco Feb. 24 Letter) (Attachment 2). Transco brought its request to comply with the timing imposed by the U.S. Fish and Wildlife Service's recommendations and the Project-specific Indiana Bat Conservation Plan. *Id.* Under the recommendation and Plan, Transco may only fell trees between November 15 and April 1. This is because the Indiana Bat – listed as endangered under the Endangered Species Act – might roost in those trees during the spring and summer months. *Id.*; *see also* Stay Denial P 6.

On March 9, 2015, Commission staff authorized Transco to proceed with limited tree-felling activities. FERC Letter Authorizing Tree-Felling Activities at 1-2 (Mar. 9, 2015) (FERC Letter) (Riverkeeper Ex. 2); *see also* Stay Denial P 8. The Commission granted the authorization “in order for Transco to comply with the U.S. Fish and Wildlife Service's recommendations to fell potential Indiana Bat and Northern long-eared Bat roost trees before April 1.” FERC Letter at 1. Transco tree clearing was limited to felling:

- at or above ground level, using equipment that will not rut soils or damage root systems;

- in a manner so as to avoid watercourse, floodways, or bodies of water;
- with fallen trees left lying in place until construction begins.

See Transco February 24 Letter at 2.

On March 12, 2015, the Commission denied Riverkeeper's request for an administrative stay. *See* Stay Denial P 19. The Commission found that Riverkeeper failed to demonstrate irreparable injury. *Id.* P 13. The Commission had considered the Environmental Assessment and determined that approving the pipeline along the recommended route would not result in significant environmental impact. *Id.* In addition, Transco must comply with 24 environmental conditions and mitigation measures, further limiting any potential harm. *Id.*

The Commission also determined that the public interest does not favor a stay. *Id.* P 17. Transco has a limited window to fell potential Indiana Bat roost trees before the Fish and Wildlife Service's April 1, 2015 cut-off date. *Id.* If Transco could not engage in non-mechanized tree removal before April, it must wait until November, significantly delaying the Project. *Id.* The Commission found that the Project is required by the public convenience and necessity, and any delay would defer delivery of needed gas supplies on a fully utilized expansion Project to residential, industrial, and commercial customers. *Id.* Because a stay

would also contribute to regulatory uncertainty, the Commission denied Riverkeeper's emergency request. *Id.* P 19.

ARGUMENT

Riverkeeper has not justified the extraordinary remedy of a stay. A request for stay, or for a writ of mandamus, under the All Writs Act “is an extraordinary remedy, to be reserved for extraordinary situations” where there is a “clear and indisputable right” to relief. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988); accord *In re Minisink Residents*, No. 12-1390 (D.C. Cir. Oct. 11, 2012) (denying a writ for an emergency stay); see also *Munaf v. Geren*, 553 U.S. 674, 691 (2008) (A stay pending appeal “is an extraordinary and drastic remedy; it is never awarded as of right.”).¹

A petition for a writ must meet the “well established requirements that this court routinely applies to motions for stay pending appeal.” *In re Minisink Residents*, No. 12-1390 (D.C. Cir. Oct. 11, 2012) (quotations omitted). In order to obtain such extraordinary relief, Riverkeeper must establish: (1) a strong showing

¹ Riverkeeper argues it seeks a writ of supersedeas, which it asserts requires a differing standard of proof. See Pet. at 6 n.7. But the writ of superdeas requires the same high standard, namely a “clear case and a decided balance of convenience” in favor of the moving party. *Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (quoting *Magnum Import Co. v. Coty*, 262 U.S. 159, 164 (1923)). More importantly, this Court recently affirmed that a moving party must demonstrate a “clear and indisputable right to the writ” in seeking a writ for emergency stay. *In re Minisink Residents*, No. 12-1390 (D.C. Cir. Oct. 11, 2012) (quoting *Gulfstream*, 485 U.S. at 289).

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

As noted (*see supra* at 3), applying that balance, this and other circuit courts have consistently declined to stay pipeline cases with similar factual and substantive claims. In 2012, the U.S. Court of Appeals for the Second Circuit refused to halt construction of a 39-mile greenfield natural gas pipeline, which required the clearing of hundreds of acres of trees (including 200,000 mature trees from undisturbed forest interiors), and numerous water crossings on public park land to create a new utility pipeline corridor. As here, the petitioner sought a stay of the Commission’s authorization of immediate, non-mechanized tree clearing so that felling could occur before it interfered with the roosting of the endangered Indiana Bat. *Coal. for Responsible Growth*, No. 12-566 (2d Cir. Feb. 28, 2012); *see also Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 Fed. Appx. 472 (2d Cir. June 12, 2012) (denying petition for review on the merits).

And in *Delaware Riverkeeper* – a case heavily relied upon by Petitioner here

– Riverkeeper likewise sought an emergency stay alleging that the Commission improperly segmented the pipeline Project. This Court denied the allegation, holding that “Petitioners have not satisfied the stringent standards for a stay pending court review,” No. 2013-1015 (Feb. 6, 2013 Order) – even though it later granted the petition for review on the merits. *See Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014).²

In this case, the balance of the equities, again, weighs in favor of denying the requested stay. The Commission recognizes the important environmental values Riverkeeper advances – values it thoroughly considered in evaluating the Project. At the urging of Riverkeeper and others, including other responsible agencies, and consistent with the Commission’s statutory duties, the Certificate Order adopted

² In fact, in recent years this Court has denied every request for an emergency stay of a FERC-approved pipeline project. *See Minisink Residents for Env’tl Preservation and Safety v. FERC*, No. 12-1481 (D.C. Cir. Mar. 5, 2013) (denying motion for stay because “Petitioners have not satisfied the stringent standards”); *George Feighner v. FERC*, No. 13-1016 (D.C. Cir. Feb. 8, 2013) (emergency motion for stay of pipeline construction denied because “[p]etitioner has not satisfied the stringent standards for a stay pending court review”); *In re Minisink Residents*, No. 12-1390 (D.C. Cir. Oct. 11, 2012) (holding petitioner failed to demonstrate either irreparable injury or likelihood of success on the merits, even where the challenged FERC order was accompanied by two dissents); *Summit Lake Paiute Indian Tribe and Defenders of Wildlife v. FERC*, Nos. 10-1389 & 10-1407 (D.C. Cir. Jan. 28, 2011 & Feb. 22, 2011) (twice rejecting motion to stay construction of a 40-mile segment of a 675-mile natural gas pipeline that crosses (1) an important ecosystem directly impacting the habitat for two sensitive species, as well as (2) land considered by a Native American tribe to be a traditional cultural property that is sacred for worship and contains unmarked graves). *See generally* Stay Denial P 11 n.18 (collecting cases).

numerous conditions which act to prevent and mitigate any significant environmental impacts of the Project.

So Riverkeeper has not made the requisite strong showing that it is likely to succeed on the merits of its claims that the Commission violated NEPA. *See* 42 U.S.C. § 4321 *et seq.* Nor has Riverkeeper – as the Commission found in denying an administrative stay – demonstrated irreparable injury or that a stay is in the public interest. The Project does not cause significant environmental impacts – particularly with 24 mitigation measures. And the interests of the public in ensuring adequate supplies of natural gas, as conditioned by the Commission, support denying the requested stay.

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

Riverkeeper has not demonstrated a likelihood of success on the merits on appeal, one of the four factors necessary to obtain a stay. *See Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (explaining that “*Winter* at least . . . suggest[s] if not . . . hold[s] ‘that a likelihood of success is an independent, free-standing requirement’”) (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009) (Kavanaugh, J., concurring), and referencing *Winter*, 555 U.S. at 22).

Although Riverkeeper raises other issues – issues that are pending before the Commission on rehearing (*see* Pet. at n.4) – its petition for judicial stay is based on

its claim that the Commission improperly segmented its environmental analysis, or otherwise did not correctly conduct a cumulative analysis, in violation of NEPA. Pet. at 13. In the context of a NEPA claim, this and other courts have suggested that a higher standard – requiring a clear violation of NEPA procedures – applies. *See Cuomo v. NRC*, 772 F.2d 972, 976 (D.C. Cir. 1985) (“The NEPA violation in this case has not been clearly established . . . as should be done in order to justify injunctive relief.”); *see also, e.g., Huntington v. Marsh*, 884 F.2d 648, 653 (2d Cir. 1989) (requiring a violation of NEPA and “substantial danger” to the environment); *accord Sierra Club v. Hennessy*, 695 F.2d 643, 648 (2d Cir. 1982) (“[a] violation of NEPA does not necessarily require a reflexive resort to the drastic remedy of an injunction”).

Actions of administrative agencies taken pursuant to NEPA are entitled to a high degree of deference. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377-78 (1989). “Under NEPA, the court’s role is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.” *Nat’l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (denying appeal of FERC pipeline certificate decision).

A. The Commission’s Environmental Assessment Considered Connected Actions To The Fullest Extent Possible

Riverkeeper suggests that the Commission “avoid[ed] a more rigorous environmental review” by “failing to consider” the impacts of two projects, the Atlantic Sunrise and Diamond East Projects, and by performing a “truncated review” of a third project, the Northeast Supply Link Project. Pet. at 13-24 (alleging FERC improperly segmented its NEPA analysis). Riverkeeper contends that the three projects should have been considered together with the Leidy Project based on the categories articulated in 40 C.F.R. § 1508.25(a)(1) as “connected action,” and otherwise meet the test articulated in *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987) (for segmentation purposes, courts consider “whether the proposed segment (1) has logical termini; (2) has substantial independent utility; [and] (3) does not foreclose the opportunity to consider alternatives”).³ But as described below, the Order addresses each of the three

³ Riverkeeper bases its claim that the Projects are connected action based on the fact that the Projects are proposed by the same pipeline company in the same geographic region. Pet. at 17. Riverkeeper also argues that the Leidy Project forecloses the alternative of leaving the Leidy line system not fully looped. Pet. at 22-24. The Commission rejected this claim based on record evidence that shows that gas velocity will only exceed the designed rate at one point (Order P 30) and that Transco and Commission staff confirmed that gas velocities caused by the Leidy Project will not result in unsafe operating conditions on the Transco system. See Order P 32. Therefore, the Commission rejected Riverkeeper’s allegation that the current Project would require future looping in order to reduce gas velocities. Order P 32.

projects and explains how its environmental analysis addressed them – to the extent possible.

Riverkeeper emphasizes the tests for determining whether actions are “connected.” Yet this Court need look no further than the very recent guidance provided to the Commission on segmentation in this exact context – certificates for new natural gas infrastructure. *See Delaware Riverkeeper*, 753 F.3d at 1304; *see also Minisink Residents for Env’t Pres. and Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014). In *Delaware Riverkeeper*, the Court found that the Commission impermissibly segmented the environmental review in conducting its analysis of the Northeast Project without considering three other connected, closely related, and interdependent projects on the same pipeline system. *Delaware Riverkeeper*, 753 F.3d at 1309. In that case, the Court found a “clear physical, functional and temporal nexus between the projects.” *Id.* at 1308. The pipeline at issue was linear and physically interdependent with no offshoots. *Id.* The upgrade projects were completed in the same general time frame and the Court found that “FERC was aware of the interconnectedness of the projects.” *Id.* at 1309. Essentially, the Court found that the “end result is a new pipeline that functions as a unified whole thanks to the four interdependent upgrades.” *Id.*

Fully cognizant of the Court’s recent holding, here, the Commission explained that the Leidy Project situation is “factually and legally distinguishable

from the earlier *Delaware Riverkeeper* case.” Order P 68. The Commission found that, unlike here, the *Delaware Riverkeeper* case “considered four pipeline upgrades on a single mainline, all of which were either proposed and before the Commission or under construction at the same time.” Order P 68. In sharp contrast, “[t]he Leidy Project is not dependent upon, or physically, functionally, or financially connected with these other proposed projects.” Order P 68. The Commission explained that the Leidy Project can go forward regardless of whether the Atlantic Sunrise Project is authorized by the Commission. Order P 64. The Atlantic Sunrise Project, as with the other projects, serves a significant purpose separate and apart from the other projects. Order P 65. Further, the Commission found no support in the record that the Leidy Project is dependent upon construction of the Diamond East Project. Order P 68.

Riverkeeper also ignores a critical distinction between the facts in this case and *Delaware Riverkeeper* – timing. As this Court explained in *Minisink*, issued just two months after *Delaware Riverkeeper*, the concurrent nature of the projects in *Delaware Riverkeeper* led to the finding of improper segmentation. 762 F.3d at 113 n.11. “In faulting the Commission’s NEPA analysis of the cumulative impacts of the ‘Northeast Project’ under review there, that decision took pains to emphasize that the other three projects were all ‘either under construction or were also

pending before the Commission for environmental review and approval.” *Id.* (quoting *Delaware Riverkeeper*, 753 F.3d at 1308).

But, like *Minisink*, the timing of the projects at issue here are “worlds apart from” *Delaware Riverkeeper*. See *Minisink*, 762 F.3d at 113 n.11 (distinguishing the facts in *Delaware Riverkeeper* and not finding improper segmentation where, at the time of its application for the project under review, the pipeline company had not yet applied for approval of the other project, nor was construction on either project underway). The Northeast Supply Link Project was already constructed and was addressed in detail in the Environmental Assessment’s cumulative impacts analysis. See Order P 51; see also PP 46-60 (discussing cumulative impacts).

The Atlantic Sunrise Project and Diamond East Project, just like the Hancock Project in *Minisink*, were not before the Commission at the time it conducted its environmental review of the Leidy Project. See *Minisink*, 762 F.3d at 113. As of the date of the Order, Transco had not filed an application for the Atlantic Sunrise Project with the Commission; it remains in pre-filing. Order P 64. Moreover, the Diamond East Project is “merely a contemplated project.” *Id.* P 66 (explaining that nothing relative to the Diamond East Project was before the Commission and there are no publicly available, quantifiable details about the project (e.g., exact location or pipeline routes, environmental resources affected, land requirements, etc.)); see also *O’Reilly v. U.S. Army Corps of Engrs.*, 477 F.3d

225, 237 (5th Cir. 2007) (courts in evaluating a segmentation argument are concerned with projects that have reached the proposal stage, not actions that are merely contemplated); *accord Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 146 (1981) (mere contemplation of an action is not a sufficient basis for requiring the preparation of an EIS).

Finally, Riverkeeper asserts that “nowhere does the Commission assert that the Atlantic Sunrise Project could operate, as designed, absent operation of the Leidy Southeast Expansion Project or Northeast Supply Link.” Pet. at 16. Yet again, Riverkeeper ignores this Court’s guidance. As the Court in *Minisink* explained, it is sufficient that, once plans for a later project are “cemented and presented to the Commission for approval under [Natural Gas Act] Section 7,” the Commission can examine that project alongside the earlier project (even if in the midst of development). *See Minisink*, 762 F.3d at 113 n.11. This is exactly what the Commission proposed. “Once an application for [the Atlantic Sunrise Project] is filed for Commission approval under section 7, the Commission will examine any cumulative impact that project may have with the Leidy Project in the NEPA review process for Atlantic Sunrise.” Order P 64. Similarly, if the Diamond East Project materializes, the Commission could examine any cumulative impact that Project may have with the Leidy Project in the NEPA review process for Diamond

East. *See Minisink*, 762 F.3d at 113 n.11. This Court has found this approach satisfies NEPA.

The NEPA process “involves an almost endless series of judgment calls,” including decisions regarding a project’s relation to other activities. *Coal. on Sensible Transp. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987). These “line-drawing decisions” are vested in the agency, not the courts. *Id.* To that end, any additional segmentation arguments raised by Riverkeeper on rehearing will be addressed in a future rehearing order – the appropriate forum for raising such contentions.

B. FERC’s Cumulative Impacts Analysis Satisfies NEPA

Riverkeeper next makes the separate but related claim (Pet. at 18) that the Commission failed to sufficiently analyze the cumulative impacts of the Northeast Supply Link, Atlantic Sunrise and Diamond East Projects. The contents of the Environmental Assessment contradict this claim. The Commission thoroughly examined the cumulative impacts of the Northeast Supply Link Project and Atlantic Sunrise Project, to the greatest extent possible. As explained above, the Diamond East Project was wholly speculative at the time the Leidy Project was being considered. *See* Order PP 55-56; *see also* *Natural Res. Defense Council v. Callaway*, 524 F.2d 79, 90 (2d Cir. 1975) (unknown or speculative projects need not be considered). The Court will not disturb the Commission’s cumulative impacts analysis “absent a showing of arbitrary action.” *Kleppe v. Sierra Club*,

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

A cumulative impact is “the incremental impact of the action [at issue] when added to other past, present, and reasonably foreseeable future actions” 40 C.F.R. § 1508.7. As required, the Environmental Assessment's cumulative impacts section identifies FERC-jurisdictional natural gas pipeline projects that would potentially cause a cumulative impact when considered with the Project. EA at 180-182 (list of projects evaluated for potential cumulative impacts); *see also* EA at 182 (specifically naming the Northeast Supply Link Project and Atlantic Sunrise Project as requiring further consideration for potential cumulative impacts).

As noted, the Northeast Supply Link Project (Docket No. CP12-30-000) was considered as part of the environmental baseline for the Leidy Project because it had already been constructed at the time of environmental review. Order P 51 (stating the project was in-service November 2013) (citing EA at 180.). The Environmental Assessment describes the facilities associated with the Northeast Supply Link Project, discusses the impacts of the project, and assesses the cumulative impact of the Leidy Project and the Northeast Supply Link Project, by resource type. *Id.*; *see also* EA at 183 (describing project), 187-90 (discussing

cumulative impacts on soils), 188 (discussing cumulative impacts on water resources), 190 (discussing cumulative impacts on vegetation and wildlife).

And during the Leidy Project environmental analysis, the Atlantic Sunrise Project was still in the pre-filing stage, with only draft resource reports (project description and alternatives analysis) available for review. *See* Order P 53. Nevertheless, the Commission used all available information to address the cumulative impacts associated with the Atlantic Sunrise Project. *See* EA at 184 (observing that, while detailed information regarding the environmental impacts associated with the Atlantic Sunrise Project is not available, none of the pipeline construction would occur within 20 miles of the Project and that construction schedules would be separated by a minimum of 6 months); *see also* EA at 187-193 (considering the cumulative impacts of the Atlantic Sunrise Project on soils, water resources, vegetation and wildlife, land use, recreation, special interest areas, and visual resources, air quality, and noise).

Although Riverkeeper makes vague assertions that the “truncated review” (Pet. at 13) of the Northeast Supply Link Project was inadequate, other than reference to construction zones,⁴ it does not point to any specific area where the

⁴ Timing of construction of the Leidy Project, Northeast Supply Link Project and Atlantic Sunrise Project is discussed in the Environmental Assessment. *See* EA at 183-184. The Environmental Assessment concludes that the majority of the construction of the Leidy Project would occur approximately 18 months after completion of the Northeast Supply Link project and, based on scope, timing, and

analysis should have been different, or more thorough. Instead, Riverkeeper argues that because the language used in the Environmental Assessment here is similar to language found in the Environmental Assessment at issue in the *Delaware Riverkeeper* case, it must be inadequate. This conclusory assertion is insufficient for a stay.

First, this Court affirmed the Commission's cumulative impacts analysis in *Minisink*, under circumstances similar to these. *See Minisink*, 762 F.3d at 112-13 (affirming adequacy of the Environmental Assessment where it properly identifies two projects to include in the cumulative impacts analysis, and analyzes available details available about the surrounding projects). Here, the Environmental Assessment concluded, as it did in *Minisink*, that the adverse impacts that could occur in conjunction with the Leidy Project would be temporary and minor, and that, overall, the Project would not result in significant cumulative impacts. *See* Order P 50; *see also Minisink*, 762 F.3d at 113 (because the Minisink Project itself was expected to have minimal impacts, no significant cumulative impacts were

distance between major components, would not result in cumulative impacts associated with construction. Similarly, the Atlantic Sunrise Project construction would start at a minimum of 6 months after the Leidy Project construction, and would be geographically separated. Together with adherence to Transco's internal requirements and any environmental mitigation measures required, the Environmental Assessment concludes that there will be no cumulative impacts associated with construction of the projects.

expected to flow from the possible development of future projects, particularly because the construction timelines for the projects would be distinct).

And the Environmental Assessment, in addition to sentences referenced by Riverkeeper that may be repeated for sake of consistency in each environmental analysis, includes thoughtful consideration of the locations of the Northeast Supply Link and Atlantic Sunrise Projects when evaluating cumulative impacts on each of the resources. *See, e.g.*, Environmental Assessment at 188 (noting that Northeast Supply Link does not cross, and Atlantic Sunrise Project is not expected to cross, any of the same waterbodies as the Leidy Project). To the extent Riverkeeper raises more specific deficiencies with the cumulative impacts analysis on rehearing, the Commission can address those specific issues in its rehearing order.

II. The Alleged Harm Is Not Irreparable

A claim of irreparable injury absent a stay must be “both certain and great; it must be actual and not theoretical.” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). An applicant for a stay cannot rely on unsupported assertions to meet this stringent standard, but must instead “justify the court’s exercise of such an extraordinary remedy.” *Cuomo*, 772 F.2d at 978. Where an environmental harm is alleged, “broader injunctive relief is appropriate, of course, where substantial danger to the environment, in addition to a violation of [NEPA] procedural requirements, is established.” *Huntington*, 884 F.2d at 653 (vacating an

injunction for plaintiff's failure to establish some actual or threatened injury even though agency conceded a NEPA violation). As evidenced by the extensive Environmental Assessment – and as re-affirmed by the Commission in denying Riverkeeper's requested stay – the Project, as conditioned by the Order, poses no such threat.

The alleged injury – that, without an immediate stay, tree clearing will result in short term aesthetic harm and long term environmental damage (Pet. at 25-26) – is unsupported by the record. As Riverkeeper notes, the Commission's Environmental Assessment expressed concern with the environmental impacts of tree removal. Pet. at 26 (citing EA at 71-72). Yet the assessment concluded that, subject to the required mitigation measures, the Project's planned tree removal would not significantly impact sensitive ecological resources, because:

- Any impact upon water resources from the loss of vegetative cover and turbidity will be minor and temporary (EA at 55-56);
- The Project minimizes vegetation and tree clearing, as well as the impact on upland forest, by utilizing existing rights-of-way or previously disturbed, non-forested areas where possible (*Id.* at 72-73);
- The impact upon migratory birds is minimal and effects on their habitat are minimized (*Id.* at 83);
- The Project preserves mature or ornamental vegetation to reduce the Project's long-term impact (EA at 109-111); and
- The Project avoids the Sourland Mountains to avoid direct impact on area resources (EA at 137).

And where sensitive ecological resources were identified, the mitigation measures imposed would negate any significant adverse impacts from tree clearing. *See* EA at 42 (soil mitigation); EA at 61 (wetland mitigation); EA at 72-73 (vegetative mitigation, including installing erosion control measures); EA at 82-83 (migratory bird mitigation); EA at 96 (rare plant and wildlife mitigation), Order P 88 (site-specific restoration plan).

Likewise, the record contradicts Riverkeeper's assertion of aesthetic and recreational harm. *See* Pet. at 25. The Commission determined that the Project results in minimal residential impact because of measures such as installing safety fences and restoring landscaping. EA at 109-111. And any impact is almost entirely limited to Transco's existing pipeline right-of-way. *See* Order P 88. Similarly, the Project's effect on recreational areas would be temporary and limited to active construction. EA at 113. Following construction, most open land uses would be able to revert to their former state. *Id.* at 114.

The authorized tree clearing is also limited in both scope and nature. As noted, Transco may only fell trees above ground level in a manner that does not rut soils or damage root systems. Transco Feb. 24 Letter at 2. And trees must be cleared in a manner that avoids all waterways. *Id.* So the current tree felling cannot result in many of the ecological harms cited by Riverkeeper – undercutting the need for an immediate stay. Because there was no substantial environmental

danger – and thus no irreparable harm – the Commission denied Riverkeeper’s request. Stay Denial P 13.

In short, Riverkeeper’s claimed harm falls below that presented to the Second Circuit in *Coal. for Responsible Growth*. There – to protect the Indiana Bat – the Commission authorized the pre-clearing, in certain months only, of hundreds of acres of trees – including 200,000 mature trees from undisturbed forest interiors – for a 39-mile pipeline. Yet the Second Circuit found no irreparable harm and denied a stay. *See Coal. for Responsible Growth*, No. 12-566 (Feb. 28, 2012). Here, the Commission has authorized felling for a smaller pipeline with as little forested tree removal as possible – and mitigation measures where forested trees are removed. *See* March 9 Letter at 1; *see also* EA at 72-73.

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

III. A Stay Will Substantially Injure Other Parties

The Court must also consider whether “a stay would have a serious adverse

effect on other interested persons.” *Va. Petroleum Jobbers Ass’n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). This Court has recognized a substantial interest in continuing with approved construction activities in light of the costly nature of interruptions. *See 3883 Connecticut LLC v. District of Columbia*, 336 F.3d 1068, 1074 (D.C. Cir. 2003) (“the permit holder has a substantial interest in the continued effect of the permit and in proceeding with a Project without delay”).

Transco has all necessary authorizations for the limited tree clearing. *See* March 9 Letter at 1-2; Stay Denial P 16. As noted, if Transco cannot fell potential endangered Indiana Bat roost trees before April 1, 2015, it must delay tree clearing until November. *See id.* P 17. Such a delay would seriously jeopardize the planned December 2015 in-service date for the Project, impeding the delivery of needed gas supplies. *See* EA at 124; *see also* Transco Feb. 24 Letter at 3. Such a delay not only harms Transco. It also harms shippers and customers on a fully utilized expansion Project. *See* Stay Denial P 17. Four of the shippers include natural gas distribution companies that provide service to local customers. *See* Stay Denial P 17. Washington Gas Light Company – the largest subscriber to the expansion – affirmed it needed the Project to meet the growing requirements of over 1 million end-users. *See* Order P 16 (citing Washington Gas Light Company’s August 29, 2014 comments).

IV. The Public Interest Does Not Favor A Stay

The public interest is a “crucial” factor in “litigation involving the administration of regulatory statutes designed to promote the public interest.” *Va. Petroleum Jobbers*, 259 F.2d at 925. The Natural Gas Act charges FERC with regulating the interstate transportation and wholesale sale of natural gas in the public interest. *See Columbia Gas Transmission Corp. v. FERC*, 750 F.3d 105, 112 (D.C. Cir. 1984). Because FERC is the “presumptive[] guardian of the public interest,” its views “indicate[] the direction of the public interest” for purposes of deciding a request for stay pending appeal. *N. Atl. Westbound Freight Ass’n v. Fed. Mar. Comm’n*, 397 F.2d 683, 685 (D.C. Cir. 1968).

Here the Commission found – and affirmed in denying an administrative stay – that a stay of construction would not serve the public interest. In issuing the certificate of public convenience and necessity, the Commission found a strong need for the Project. *See Stay Denial P 17*. As noted, the Project will allow Transco to provide additional needed transportation services. *See Order P 13*. And it will be fully utilized by shippers and provide needed gas supplies to residential, commercial, and industrial natural gas customers. *Id.*

Further, as noted, immediate, non-mechanized clearing was authorized to protect another public interest – the protection of the endangered Indiana Bat. *See Stay Denial P 17*; Transco Feb. 24 Letter at 1. If Transco cannot immediately

commence clearing trees, it cannot start or resume tree clearing until November.

So a stay would, at the least, significantly delay the benefits of this Project.

CONCLUSION

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

Respectfully submitted,

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Solicitor

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March 13, 2015

ATTACHMENT 1

150 FERC ¶ 61,183
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Transcontinental Gas Pipe Line Company, LLC

Docket No. CP13-551-001

ORDER DENYING STAY

(Issued March 12, 2015)

1. On February 12, 2015, Delaware Riverkeeper Network filed a request for stay of the Commission's December 18, 2014 Order¹ granting a certificate of public convenience and necessity to Transcontinental Gas Pipe Line Company, LLC (Transco) to construct the Leidy Southeast Project (Leidy Project). As discussed below, we deny the motion, because we conclude that justice does not require a stay.

I. Background

2. On December 18, 2014, the Commission issued an order for the Leidy Project, authorizing Transco to construct and operate approximately 29.97 miles of new pipeline loop, consisting of four pipeline loops segments, the Dorrance Loop, Franklin Loop, Pleasant Run Loop, and Skillman Loop, and to add a total of 71,900 horsepower at four compressor stations, located in Pennsylvania and New Jersey. The Leidy Project would expand Transco's existing pipeline system capacity, enabling Transco to provide firm transportation service for an additional 525,000 dekatherms per day. The project is fully subscribed.

3. The order concluded that the project, if constructed and operated in accordance with Transco's application, as supplemented, and with the additional environmental conditions imposed by the Commission, would not constitute a major federal action affecting the quality of the human environment.²

¹ *Transcontinental Gas Pipe Line Company, LLC*, 149 FERC ¶ 61,258 (2014) (December 18 Order).

² *Id.* P 44.

4. Delaware Riverkeeper filed a timely request for rehearing on January 16, 2015, as did two other parties. Those requests are pending before the Commission.

5. On February 12, 2015, Delaware Riverkeeper filed a motion to stay any construction activity and any other land-disturbing activity conducted under the certificate, pending rehearing of the December 18 Order on rehearing. Delaware Riverkeeper contends that a stay is appropriate because: (1) it is necessary to avoid irreparable injury; (2) Transco will not be significantly harmed by a stay; (3) a stay is in the public interest; and (4) Delaware Riverkeeper is likely to succeed on the merits of its pending request for rehearing.

6. On February 23 and 24, 2015, as supplemented on February 26 and March 3, 2015, Transco filed a request to begin limited, non-mechanized tree-felling along the Dorrance and Franklin Loops and Compressor Stations 515 and 520 in Luzerne, Monroe, and Lycoming Counties, Pennsylvania, and along segments of the Pleasant Run and Skillman Loops in Mercer, Somerset, and Hunterdon, New Jersey, in order to comply with the U.S. Fish and Wildlife Service's recommendations to fell between November 15 and April 1 trees in which Indiana Bats (which are listed as endangered under the Endangered Species Act) might roost later in the year.³ The company stated that it had received the authorizations necessary for the activities included in the request.

7. On February 23 and 25, 2015, Delaware Riverkeeper filed comments opposing Transco's request, asserting that the Commission should reject the request until such time the Commission rules on Delaware Riverkeeper's request for rehearing and motion for a stay. The Municipality of Princeton, Princeton Ridge Coalition, Stony-Millstone Watershed Association, and some individuals opposed Transco's request. All express concern about wetlands in the tree-felling area and argue that Transco should not be able to begin work until New Jersey Department of Environmental Protection (New Jersey DEP) issues permits for the Leidy Project. New Jersey also filed comments requesting the Commission not approve tree-felling activities until Transco gets all required approvals from New Jersey DEP and until Transco has demonstrated compliance with any pre-construction conditions included in those permits. New Jersey DEP asserts that allowing tree-felling prior to permit issuance may impact available alternatives for project design and mitigation.

8. On March 9, 2015, Commission staff issued a notice authorizing Transco to proceed with limited tree-felling activities, based on staff's verification that Transco had received clearances from the Pennsylvania and New Jersey State Historic Preservation

³ This approval does not include tree-felling for approximately 7.6 acres of proposed additional workspace along the Franklin Loop that Transco excluded from its February 24, 2015 request.

Offices and the Fish and Wildlife Service, and that the U.S. Army Corps of Engineers had confirmed in a January 28, 2015 letter (appended to Transco's February 24, 2015 filing) that tree-felling activities for the Leidy Project in Pennsylvania wetlands, which would not disturb root systems, would not result in a discharge of dredged and/or fill material and therefore do not require a Clean Water Act permit from that agency. Staff also reviewed and found adequate Transco's commitments that tree-felling activities would be monitored by an environmental inspector, that employees would be properly trained, and that approved areas would be clearly marked, as outlined in its March 3, 2015 filing.⁴

II. Discussion

9. The Commission reviews requests for stay under the standard established by the Administrative Procedure Act,⁵ and grants a stay when "justice so requires."⁶ In assessing a request for stay, we consider several factors, which typically include: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.⁷ Our general policy is to refrain from granting stays in order to ensure definiteness and finality in our proceedings.⁸ If the party requesting the stay is

⁴ For appropriate projects, like Leidy, a pipeline company can request authorization to proceed with construction of discrete segments of the overall project once it has complied with all the environmental conditions relevant to that particular section of the approved pipeline route. *See, e.g., Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,103, at P 8 (2011) (*Ruby*). Upon verification that all applicable environmental conditions have been satisfied, Commission staff issues a "notice to proceed" with construction of, as appropriate, all or a portion of the project covered by the request.

⁵ 5 U.S.C. § 705 (2012).

⁶ *See, e.g., Millennium Pipeline Company, L.L.C.*, 141 FERC ¶ 61,022, at P 13 (2012) (*Millennium*); *Ruby*, 134 FERC ¶ 61,103 at P 17; *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 18 (2009) (*AES*); *Columbia Gas Transmission LLC*, 129 FERC ¶ 61,021, at P 6 (2009) (*Columbia Gas*); *Guardian Pipeline, L.L.C.*, 96 FERC ¶ 61,204, at 61,869 (2001) (*Guardian*).

⁷ *Id.*

⁸ *See, e.g., Sea Robin Pipeline Co.*, 92 FERC ¶ 61,217, at 61,710 (2000).

unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.⁹

10. In *Wisconsin Gas Co. v. FERC*,¹⁰ the D.C. Circuit recognized that, although the concept of irreparable harm does not readily lend itself to definition, courts have developed well-known principles to guide a determination, which include that the injury must be both certain and great, it must be actual and not theoretical, and injunctive relief will not be granted with respect to something merely feared as liable to occur at some indefinite time.¹¹ Implicit in these principles is the further requirement that the movant substantiate the claim that irreparable injury is “likely” to occur.¹² Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur.¹³ The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.¹⁴ Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.¹⁵

11. Both the Commission and the courts have denied stays in circumstances similar to those presented here. For example, in *Millennium Pipeline Company, L.L.C. (Millennium)*,¹⁶ the Commission denied a request for stay that was based on claims that tree cutting would cause irreparable harm to local residents, including injury to endangered species and reduced property values. Similarly, in *Ruby Pipeline, L.L.C. (Ruby)*, the Commission found that allegations of environmental and cultural harm did

⁹ See, e.g., *Millennium*, 141 FERC ¶ 61,022 at P 14; *Ruby*, 134 FERC ¶ 61,103 at P 18; *AES*, 129 FERC ¶ 61,245 at P 18; *Columbia Gas*, 129 FERC ¶ 61,021 at P 6; *Guardian*, 96 FERC ¶ 61,204, at 61,869.

¹⁰ 758 F.2d 669 (D.C. Cir. 1985) (*Wisconsin Gas*).

¹¹ *Id.* at 674 (citation omitted).

¹² *Id.* (citation omitted).

¹³ *Id.* (emphasis in original).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Millennium*, 141 FERC ¶ 61,022 (2012).

not support grant of a stay.¹⁷ The court denied requests for judicial stay in these and other pipeline construction cases.¹⁸

12. Delaware Riverkeeper argues that it will suffer irreparable harm in the absence of a stay because “members of [the group] who live in the immediate vicinity of the proposed Project route will suffer irreparable harm, including the irretrievable loss of pristine forest lands, wetlands, and streams in and around which they live, work, and recreate, the permanent alteration of the unique character of their rural community, and the devaluation of their property.”¹⁹ Delaware Riverkeeper cites *Amoco Production Co. v. Village of Gambell*²⁰ for the proposition that where environmental harm can be established, irreparable harm is almost always present because compensation is not a sufficient remedy. Additionally, the group asserts that the public interest heavily favors preventing irreparable harm to the environment.

13. We find that Delaware Riverkeeper has not demonstrated that it will suffer irreparable injury in the absence of a stay. The group has provided only unsupported allegations in the form of generalized environmental assertions about the project. Delaware Riverkeeper includes no analysis incorporating facts or specific information. In approving the Leidy Project, the Commission considered the environmental assessment prepared by Commission staff to analyze the Leidy Project, and determined that, on balance, approving the pipeline along the recommended route is an environmentally acceptable action, the impacts of which would not result in significant impacts to the environment.²¹ Moreover, the December 18 Order requires Transco to

¹⁷ *Ruby*, 134 FERC ¶ 61,103; see also *Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,020 (2011).

¹⁸ See *Minisink Residents for Environmental Preservation and Safety v. FERC*, No. 12-1481 (D.C. Cir. Mar. 5, 2013), order denying motion for stay; *In re Minisink Residents for Environmental Preservation and Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012), order denying petition for stay; *Defenders of Wildlife v. FERC*, No. 10-1407 (D.C. Cir. Feb. 22, 2011), order denying motion for stay; *Summit Lake Paiute Indian Tribe v. FERC*, No. 10-1389 (D.C. Cir. Jan. 28, 2011), order denying motion for stay. See also *Feighner v. FERC*, No. 13-1016 (D.C. Cir. Feb. 8, 2013), order denying motion for stay; *Delaware Riverkeeper v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013), order denying motion for stay; *Coalition for Responsible Growth and resource Conservation v. FERC*, No. 12-566 (2d. Cir. Feb. 28, 2012), order denying motion for stay.

¹⁹ Delaware Riverkeeper’s February 12, 2015 Request for Stay at 10.

²⁰ 480 U.S. 531, 545 (1987).

²¹ December 18 Order, 149 FERC ¶ 61,258 at P 126.

comply with 24 broad-ranging environmental conditions and mitigation measures, protecting the environment against any irreparable harm.

14. As for Delaware Riverkeeper's assertion that its members' property will be devalued, while the Commission recognizes the general potential for property values to be negatively impacted by the construction of nearby energy infrastructure, such potential impacts are indicative of only economic harm, which, without more, is not considered irreparable injury sufficient to support granting the extraordinary remedy of a stay.²² In any event, Delaware Riverkeeper provides no evidence to support its vague claims regarding property values.

15. Delaware Riverkeeper also contends that Transco will not be significantly harmed, or only slightly delayed, by a stay. It cites *Citizen's Alert Regarding the Environment v. U.S. Dep't. of Justice*²³ for the proposition that the potential loss of revenue, jobs, and monetary investment due to project delay does not outweigh permanent destruction to the environment. The group further asserts that Transco cannot begin construction because it has not obtained all required federal authorizations, specifically a Clean Water Act section 404 dredge and fill permit, and a Clean Water Act section 401 water quality certificate.

16. In the March 9, 2015, notice to proceed with limited tree-felling activity, Commission staff determined that Transco had all authorizations necessary for the work it proposed to undertake. As noted, the U.S. Army Corps of Engineers has confirmed that a permit from it is not required. Transco's activities in New Jersey are limited to upland areas that the company has stated are outside of New Jersey DEP-regulated forest areas in which state Clean Water Act authorization is required: the authorized activities do not include tree-felling in forest habitat with riparian or wetland forest or in forest transitional areas.²⁴ In Pennsylvania, non-mechanized tree-felling activities do not require Clean Water Act authorization.²⁵

²² See, e.g., *Wisconsin Gas*, 758 F.2d 669, 674; *Millennium*, 141 FERC ¶ 61,022 at P 17; *Duke Energy Carolinas, LLC*, 124 FERC ¶ 61,254, at P 10 (2008); *FPL Energy Maine Hydro, LLC*, 124 FERC ¶ 61,037, at P19 (2008); *Public Utility District No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166, at P 11 (2005).

²³ 1995 WL 748246, *11 (D.D.C., 1995).

²⁴ See Transco's February 23, 2015 filing.

²⁵ See Pennsylvania Department of Environmental Protection *Timber Harvest Operations: Field Guide for Waterways, Wetlands, and Erosion Control* (pub. 3930-BK-DEP4016).

17. We need not conclude that Transco will be harmed to find that the public interest argues against issuing a stay here. Transco has a small window of opportunity to comply with the Fish and Wildlife Service's recommendations to fell potential Indiana Bat roost trees. It must do so by April 1, 2015, or delay until November.²⁶ The Commission found that the Leidy Project is required by the public convenience and necessity, and any delay in construction could delay delivery of needed gas supplies on the fully-subscribed expansion project, the shippers of which include four local distribution companies that provide service to residential, industrial, and commercial customers. On balance, the public interest favors denying the stay.

18. Delaware Riverkeeper also argues that the Commission should not prejudge the outcome of its request for rehearing by allowing construction to proceed before the issues raised in the rehearing are fully resolved.²⁷ The factors we examine when considering whether to grant a stay, enumerated above, do not include the likelihood of success on the merits.²⁸ We have not yet considered the merits of the petitions on rehearing, and we will not prejudge them in any manner. To the extent that the company elects to proceed with construction, it bears the risk that we will revise or reverse our initial decision or that our orders will be overturned on appeal. If this were to occur, the company might not be able to utilize any new facilities, and could be required to remove them or to undertake further remediation. Given our conclusion that the Leidy Project will not have significant environmental impacts, we do not believe that denying the request for a stay puts the environment at risk.

19. In its stay request, Delaware Riverkeeper also contends that when the procedural harm caused by the Commission's failure to undertake adequate National Environmental Policy Act analysis, as it claims on rehearing, is combined with potential environmental

²⁶ The U.S. Fish and Wildlife Service recommendation calls for tree-felling between November 15 and April 1 in Pennsylvania and between September 30 and April 8 in New Jersey.

²⁷ It cites *Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1987), for the proposition that the purpose of a stay is to preserve the status quo pending the Commission's review of its decision, and that a stay ensures there is the possibility that the agency will change its plans in ways of benefit to the environment.

²⁸ *Millennium*, 141 FERC ¶ 61,022 at P 18; *Ruby Pipeline L.L.C.*, 134 FERC ¶ 61,020 at P 16.

injury, courts are likely to find irreparable injury.²⁹ However, as discussed above, in its stay request Delaware Riverkeeper only asserts generalized environmental harm to its members without identifying specifics. Thus, what is relevant here is that the group has not substantiated its claim of irreparable environmental injury.

20. As a general matter, we do not favor stays, which can result in regulatory uncertainty.³⁰ Given that Delaware Riverkeeper has not demonstrated the likelihood of irreparable injury in the absence of a stay or that justice otherwise requires issuance of a stay, and that the group will have the opportunity to make its case at both the administrative and appellate levels, we conclude that a stay is not required here, and therefore deny the motion for stay.

The Commission orders:

The request for stay filed on February 12, 2015, by Delaware Riverkeeper Network is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁹ Delaware Riverkeeper's February 12, 2015 Request for Stay, citing *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F.2d 1, 24 (D.D.C. 1998); see, e.g. *Fund for Animals v. Clark*, 27 F. 2d 8, 14 (D.D.C. 1998).

³⁰ See *Millennium*, 141 FERC ¶ 61,022 at P 22.

ATTACHMENT 2



Transcontinental Gas Pipe Line Company, LLC

2800 Post Oak Boulevard (77056)

P.O. Box 1396

Houston, Texas 77251-1396

713/215-2000

February 24, 2015

Federal Energy Regulatory Commission

888 First Street, N.E.

Washington, D.C. 20426

Attention: Kimberley D. Bose, Secretary

Reference: Transcontinental Gas Pipe Line Company, LLC ("Transco")
Leidy Southeast Expansion Project
Docket No. CP13-551-000
Request for Partial Notice to Proceed

Ladies and Gentlemen:

The Federal Energy Regulatory Commission (Commission or FERC) issued an Order Issuing Certificate dated December 18, 2014 (Order) under Docket No. CP13-551-000 to Transcontinental Gas Pipe Line Company, LLC (Transco) authorizing the Leidy Southeast Expansion Project (Project). On December 19, 2014, Transco accepted the Commission's Order pursuant to Section 157.20(a) of the Commission's Regulations. On January 26, 2015, Transco filed with the Commission an Implementation Plan. This implementation plan documented how Transco will comply with the Environmental Conditions provided in the Order.

In accordance with U.S. Fish and Wildlife Service (USFWS) recommendations and the project-specific *Indiana Bat Conservation Plan*, Transco must fell potential roost trees located within the workspace required for construction of the proposed Project between November 15 and April 1. These measures are also proposed to minimize potential impacts on migratory birds.

Transco is requesting written authorization ("Notice to Proceed") from the Director of Office of Energy Projects to commence limited, non-mechanized tree felling activities necessary to comply with these conservation measures for the Dorrance and Franklin Loops located in Luzerne and Monroe Counties, PA (with the exception of approximately 7.6 acres of additional workspace proposed on the Franklin Loop; further details regarding the workspace excluded from this request are provided below).

Kimberly D. Bose, Secretary
 Federal Energy Regulatory Commission
 February 24, 2015
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Transco proposes to fell trees and brush, at or above ground level, using equipment that will not rut soils or damage root systems. The contractor will not be allowed to use mechanized clearing methods or heavy equipment. Trees will be felled in a manner so as to avoid watercourse, floodways or bodies of water. Felled trees will be left in place until construction begins, which will be after receipt of all necessary permits and authorizations.

Transco has yet to receive all of the state and federal permits and clearances required for construction of the Dorrance and Franklin Loops. The status of outstanding permits and clearances is summarized in the table below. We have, however, obtained the authorizations necessary for the non-mechanized tree felling activities included in this request. This includes clearances from the USFWS and State Historic Preservation Office (SHPO).

Agency	Outstanding Permit or Clearance	Status
Pennsylvania Historical and Museum Commission (PHMC)	Section 106 Consultation, National Historic Preservation Act (NHPA)	Dorrance Loop approved. Franklin Loop approved, except 7.63 acres (anticipated in March 2015).
Pennsylvania Department of Environmental Protection (PADEP)	Erosion and Sediment Control General Permit (ESCGP-2)	Dorrance Loop approved. Franklin Loop anticipated March 2015.
	Water Obstruction and Enroachment Permit	Anticipated March 2015
	CWA Section 401 Water Quality Certification	Anticipated March 2015
U.S. Army Corps of Engineers (USACE)	Pennsylvania State Programmic General Permit (PASPGP-4)	Anticipated March 2015

The non-mechanized felling of trees, which does not substantially disturb the root system nor involve mechanized pushing, dragging or re-deposition of soil material (as proposed in this request), is not a federally regulated activity under Section 404 of the Clean Water Act (CWA). This activity does not involve substantial earth disturbance or the placement of dredged or fill material in Waters of the United States and therefore does not require a Section 404 permit from the U.S. Army Corps of Engineers. This is consistent with guidance provided by the U.S. Army Corps of Engineers in their January 28, 2011, letter to Tennessee Gas Pipeline regarding similar activities on the proposed 300 Line Project. A copy of this letter is provided as Attachment A. A Section 401 Water Quality Certification is only required for activities that require a federal license or permit to conduct an activity "which may result in any discharge into the navigable waters." As outlined above, the non-mechanized felling of trees does not constitute a discharge that is regulated under Section 404 of the CWA and therefore does not require a Section 401 Water Quality Certificate. Furthermore, the non-mechanized felling of trees proposed in this request is not subject to

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Pennsylvania Chapter 102 or 105 permitting requirements. As outlined in guidance provided by the Pennsylvania Department of Environmental Protection (PADEP) in their *Timber Harvest Operations: Field Guide for Waterways, Wetlands, and Erosion Control* (PADEP pub. 3930-BK-DEP4016), Chapter 102 and 105 "permits are not required to cut timber and other vegetation, including cutting in wetlands."

The Implementation Plan filed with the Commission on January 26, 2015 included copies of the USFWS and SHPO for the Dorrance Loop and Franklin Loop. Please note that the SHPO clearance for the Franklin Loop that was provided in the Implementation Plan did not cover the entire construction footprint; approximately 7.6 acres of additional access road and extra workspace lack SHPO clearance. Maps showing the location of these areas are provided in Attachment B. Transco has requested and anticipates receiving SHPO clearance for these areas prior to construction. The final clearance letter will be submitted to the Commission as part of Transco's request for NTP with construction of the Franklin Loop. Transco understands that SHPO clearance and NTP are required prior to initiating any construction-related activities within this workspace and access road.

Environmental training for the Dorrance and Franklin Loops was completed on February 11, 2015. During the environmental training, all of the workspaces were reviewed as well as the physical barriers and markings proposed for use, as necessary, to signify "no access" to workspaces not yet granted NTP by the Commission.

Transco respectfully requests authorization to begin limited tree felling activities on February 25, 2015 in order to comply with Indiana bat conservation measures and meet the Project in-service date. Transco understands that, if granted, this Notice to Proceed would be limited to the specific activities and facility locations listed in this request.

If you have any questions regarding this filing, please contact Brent Simmons at 713-215-2738 or by email at brent.simmons@williams.com.

Respectfully submitted,

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC



Timothy Powell
Director, Land, GIS & Permits

Attachments:

Attachment A – USACE Letter

Attachment B - Maps of the Franklin Loop

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ATTACHMENT A

USACE Letter



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
BALTIMORE DISTRICT, U.S. ARMY CORPS OF ENGINEERS
P.O. BOX 1715
BALTIMORE, MD 21203-1715

January 28, 2011

Operations Division

Ms. Melissa Dettling
Tennessee Gas Pipeline an El Paso Company
1001 Louisiana Street
P.O. Box 2511
Houston, Texas 77252-2511

Dear Ms. Dettling:

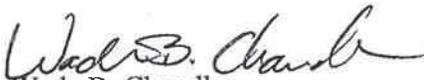
This is in reference to your letter dated January 19, 2011, requesting approval from our office to conduct tree cutting activities within wetland areas in association with Tennessee's 300 Line Project in Potter, Tioga, Bradford, Susquehanna and Wayne Counties in Pennsylvania.

Tennessee is proposing to cut trees and brush, at or above ground level, within wetlands using equipment that will not rut soils or damage root systems. Trees felled within the wetlands would be left for removal, upon receipt of our permit. Timber mats will only be used when needed to span waterbodies. The mats will not be placed within the waterbody banks or in wetlands.

Activities, that involve only the cutting or removing of vegetation above the ground surface (e.g., mowing, rotary cutting, and chain sawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material, are not regulated under Section 404 of the Clean Water Act, as they do not involve a discharge of dredged and/or fill material. As such, a permit from the Corps is not required for the work you described.

If you have questions concerning this matter, please call Mr. Michael Dombroskie of this office at (814) 235-0571.

Sincerely,


Wade B. Chandler
Chief, Pennsylvania Section

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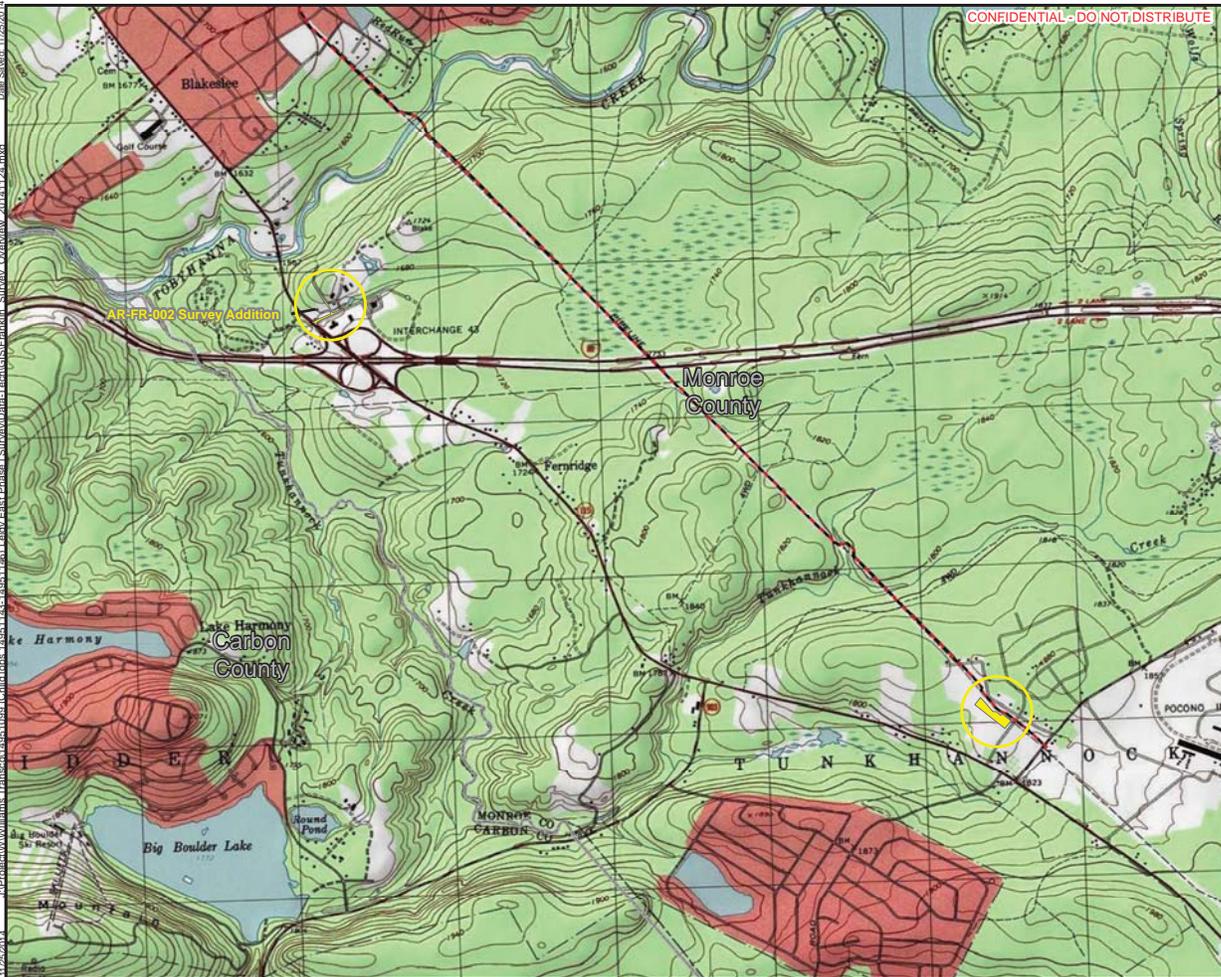
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ATTACHMENT B

Maps of the Franklin Loop

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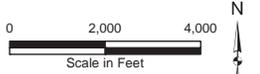
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CONFIDENTIAL - DO NOT DISTRIBUTE



- LEGEND:
- Project Centerline as of 5/1/2014
 - Project Survey Additions
 - Access Road
 - County Line



BASE MAP SOURCE:
 ArcGIS Map Service, NGS_Topo_US_2D
<http://services.arcgisonline.com/v2>

Williams Leidy Southeast Expansion Project

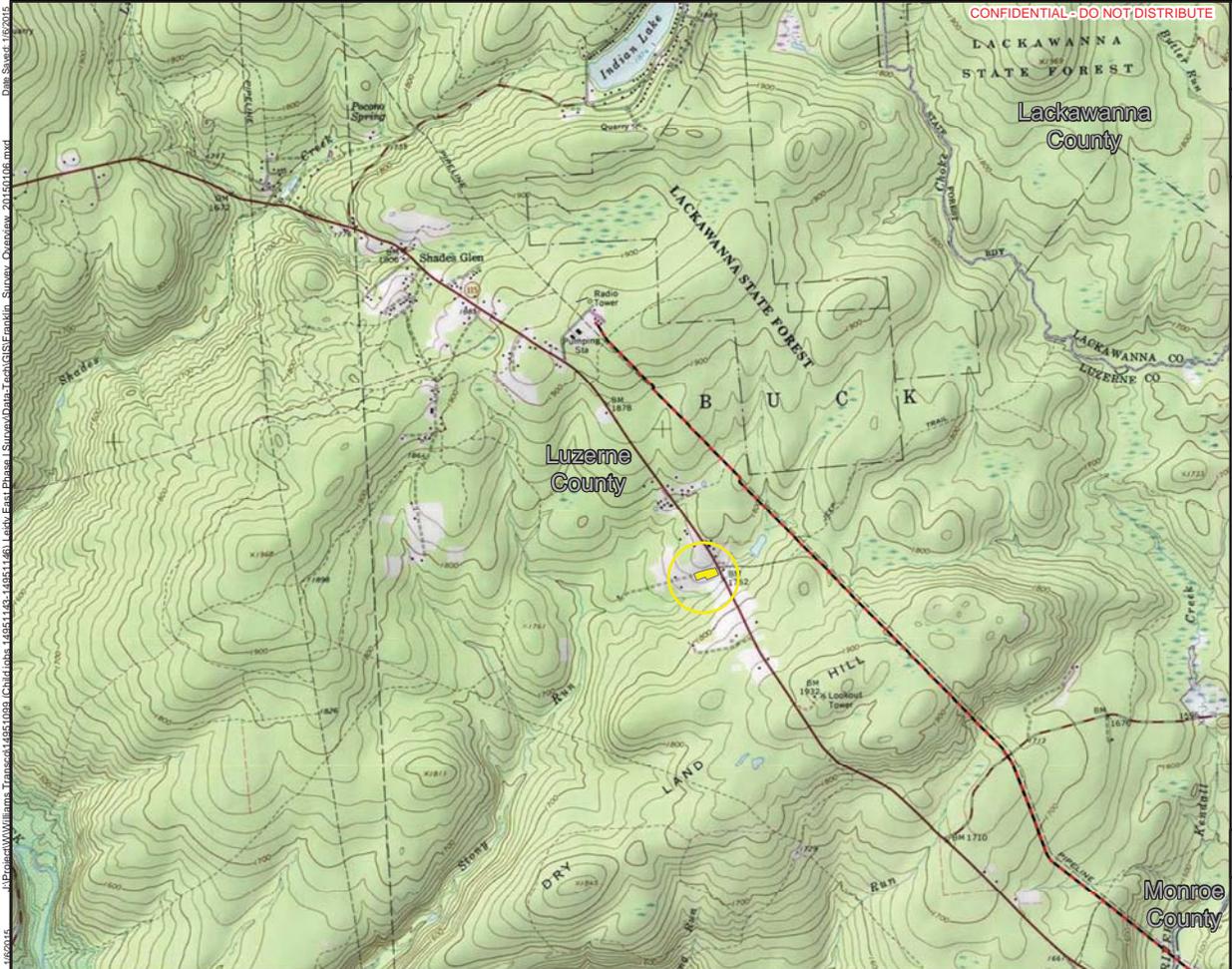
FIGURE 1.1
 OVERVIEW OF ADDITIONAL
 SURVEY COVERAGE
 FRANKLIN LOOP

JOB NO. 14951144

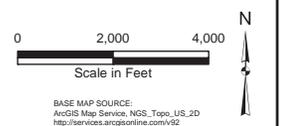


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- LEGEND:
- Project Centerline as of 5/1/2014
 - Project Survey Additions
 - Access Road
 - County Line



Williams Leidy Southeast Expansion Project

FIGURE 1.2
OVERVIEW OF ADDITIONAL
SURVEY COVERAGE
FRANKLIN LOOP

JOB NO. 14951144 **URS**

In re Delaware Riverkeeper
D.C. Cir. No. 15-1052

Docket No. CP13-551

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the Court's Administrative Order Regarding Electronic Case Filing, and the Court's March 11, 2015 order in this case, I hereby certify that I have, this 13th day of March 2015, filed the foregoing with the Court via the Court's CM/ECF system, with the paper copies hand-delivered to the Court by 4:00 p.m. as required by the Court, and served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

Aaron Joseph Stemplewicz
Delaware Riverkeeper Network
925 Canal Street
Suite 3701
Bristol, PA 19007

Email

/s/ Ross R. Fulton
Ross R. Fulton
Attorney

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Commission
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