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

No. 12-566

**COALITION FOR RESPONSIBLE GROWTH AND RESOURCE CONSERVATION,
DAMASCUS CITIZENS FOR SUSTAINABILITY, AND SIERRA CLUB,
*Petitioners,***

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent.***

**ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**RESPONDENT'S OPPOSITION TO
EMERGENCY MOTION FOR STAY PENDING REVIEW**

**ROBERT H. SOLOMON
SOLICITOR**

**HOLLY E. CAFER
ATTORNEY**

**KARIN L. LARSON
ATTORNEY**

**FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426**

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TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION	1
BACKGROUND	3
ARGUMENT	4
I. Earthjustice Has Not Shown A Likelihood Of Success On The Merits.....	6
A. FERC’s Finding Of No Significant Impact Complies With NEPA And Is Fully Supported By The Record.....	7
B. FERC’s Cumulative Impacts Analysis Satisfies NEPA.....	10
C. FERC Appropriately Analyzed And Imposed Mitigation Measures	13
II. The Alleged Harm Is Not Irreparable	15
III. A Stay Will Substantially Injure Other Parties	18
IV. The Public Interest Does Not Favor A Stay.....	19
CONCLUSION.....	20

TABLE OF AUTHORITIES

COURT CASES	PAGE
<i>Baltimore Gas & Elec. Co. v. Natural Res. Defense Council, Inc.</i> , 462 U.S. 87 (1983).....	12, 14
<i>Cellular Phone Taskforce v. FCC</i> , 205 F.3d 82 (2d Cir. 2000)	12
<i>Citigroup Global Mkt., Inc. v. VCG Special Opportunities Master Fund Ltd.</i> , 598 F.3d 30 (2d Cir. 2010)	6
<i>CFTC v. British Am. Commodity Options Corp.</i> , 560 F.2d 135 (2d Cir. 1977)	20
<i>Cuomo v. U.S. Nuclear Reg. Comm’n</i> , 772 F.2d 972 (D.C. Cir. 1985).....	6
<i>Envtl. Justice Alliance v. Giuliani</i> , 214 F.3d 65 (2d Cir. 2000)	18
<i>Freedom Holdings, Inc. v. Spitzer</i> , 408 F.3d 112 (2d Cir. 2005)	15
<i>Friends of the Ompompanoosuc v. FERC</i> , 968 F.2d 1549 (2d Cir. 1992)	8-9, 15
<i>Huntington v. Marsh</i> , 884 F.2d 648 (2d Cir. 1989)	6, 15
<i>In re World Trade Ctr. Disaster Site Litig. v. City of New York</i> , 503 F.3d 167 (2d Cir. 2007)	4, 6, 18
<i>Islander East Pipeline Co. v. McCarthy</i> , 525 F.3d 141 (2d Cir. 2008)	19
<i>Kleppe v. Sierra Club</i> , 427 U.S. 390 (1976).....	10

<i>LaFlamme v. FERC</i> , 852 F.2d 389 (9th Cir. 1988)	14
<i>LaFlamme v. FERC</i> , 945 F.2d 1124 (9th Cir. 1991)	14
<i>Marsh v. Oregon Natural Res. Council</i> , 490 U.S. 360 (1989).....	7, 9
<i>Natural Res. Defense Council v. Callaway</i> , 524 F.2d 79 (2d Cir. 1975)	12-13
<i>Natural Res. Defense Council v. United States Dep’t of Agric.</i> , 613 F.3d 76 (2d Cir. 2010)	7
<i>Nat’l Comm. For the New River, Inc. v. FERC</i> , 373 F.3d 1323 (D.C. Cir. 2004).....	10
<i>Nevada v. Dep’t of Energy</i> , 457 F.3d 78 (D.C. Cir. 2006).....	7
<i>Nken v. Holder</i> , 129 S. Ct. 1749 (2009).....	17
<i>N. Plains Res. Council v. Surface Transp. Bd.</i> , 2011 U.S. App. LEXIS 25959 (9th Cir. Dec. 29, 2011)	12-13
<i>Ofosu v. McElroy</i> , 98 F.3d 694 (2d Cir. 1996)	19
<i>Sierra Club v. Hennessy</i> , 695 F.2d 643 (2d Cir. 1982)	6
<i>Thapa v. Gonzales</i> , 460 F.3d 323 (2d Cir. 2006)	4, 5
<i>Town of Orangetown v. Gorsuch</i> , 718 F.2d 29 (2d Cir. 1983)	9

UBS Fin. Servs. v. W. Va. Univ. Hosps., Inc.,
660 F.3d 643 (2d Cir. 2011) 4, 18

U.S. Dep’t of Transp. v. Public Citizen,
541 U.S. 752 (2004)..... 10

ADMINISTRATIVE CASES

Central New York Oil & Gas Co., LLC, 137 FERC ¶ 61,121 (2011)*passim*

Central New York Oil & Gas Co., LLC, 138 FERC ¶ 61,104 (2011)*passim*

Central New York Oil & Gas Co., LLC, unpublished Letter Order
Authorizing Pre-Construction Tree Clearing, Docket No.
CP10-480-000 (Feb. 13, 2012)..... 4, 19

STATUTES

Natural Gas Act

15 U.S.C. § 717f 4

15 U.S.C. § 717r 10, 14, 15

REGULATIONS

40 C.F.R. § 1508.13..... 8

40 C.F.R. § 1508.27..... 8

GLOSSARY

Certificate Order	<i>Central New York Oil & Gas Co., LLC</i> , 137 FERC ¶ 61,121 (2011)
Commission or FERC	Federal Energy Regulatory Commission
Earthjustice	Petitioners, Coalition for Responsible Growth and Resource Conservation, Damascus Citizens for Sustainability, and the Sierra Club.
EA	Environmental Assessment
EIS	Environmental Impact Statement
Marcellus Shale	A black shale formation extending deep underground from Ohio and West Virginia northeast into Pennsylvania and southern New York, containing natural gas which is developed using drilling and hydraulic fracturing techniques.
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
Pipeline Project	Central New York Oil and Gas Company, LLC MARC I Hub Line Project
Rehearing Order	<i>Central New York Oil & Gas Co., LLC</i> , 138 FERC ¶ 61,104 (2012)
Tree Clearing Order	<i>Central New York Oil & Gas Co., LLC</i> , Authorization to Conduct Pre-Construction Tree Clearing, Docket No. CP10-480-000 (Feb.13, 2012)
USFWS	United States Fish and Wildlife Service

INTRODUCTION

The Coalition for Responsible Growth and Resource Conservation, Damascus Citizens for Sustainability, and the Sierra Club, represented by Earthjustice (collectively, “Earthjustice”), ask this Court for the extraordinary remedy of indefinitely delaying the construction of a natural gas pipeline that the Federal Energy Regulatory Commission (“FERC” or “Commission”) has determined, in its expert judgment and after thorough consideration and balancing of competing values, is needed to meet the Nation’s energy needs. Earthjustice’s emergency plea, despite its size, is one-sided; it misrepresents what the Commission actually said and did. Its motion completely ignores one-half of the Commission’s public interest balance – whether the need for, and benefits from, the proposed pipeline outweigh potential adverse impacts. In its narrow focus on potential impacts, Earthjustice entirely fails to address the Commission’s findings of substantial benefits from public access to vital new sources of energy.

As to the one-half of the balance Earthjustice does address, it completely ignores an array of mitigation measures designed to minimize, if not eliminate, environmental impacts. At this point, the Commission has authorized only limited tree clearing. Most construction activities await future federal and state authorizations. In its haste to file for immediate judicial review, and despite hundreds of pages of submissions, Earthjustice fails to mention that the challenged

orders confine tree clearing to hand-cutting, without ground disturbance or any mechanized activities. And Earthjustice fails to explain that tree clearing was authorized at this time in order to comply with timing restrictions, imposed by another federal agency, to protect the endangered Indiana bat.

Consistent with its responsibilities under the Natural Gas Act and the National Environmental Policy Act, the Commission considered all views, in its orders and in its comprehensive environmental assessment that informed those orders. Earthjustice's comments and those of the members of the represented groups – like all views from all parties and all commenters – were considered as part of the Commission's public interest balance. The Commission is, as it must be under the statutes it administers, sensitive to all perspectives, whether economic or environmental in nature. That the Commission did not flat-out reject the pipeline proposal, as Earthjustice implores, or develop a different set of mitigation measures, does not mean that the Commission failed to take a hard look at possible consequences or otherwise failed to carry out its public interest responsibilities. The Commission satisfied all its statutory responsibilities. The requested stay would upset the Commission's public interest balance and imperil the Project; accordingly, it must be denied.

BACKGROUND

This case concerns a proposal by Central New York Oil and Gas Company, LLC (“Pipeline”) to construct the MARC I Hub Line Project (“Project”), a 39-mile-long natural gas pipeline. The Project will connect the Pipeline’s existing Stagecoach Storage Facility in Bradford County, Pennsylvania with the interstate pipeline facilities of Transcontinental Gas Pipe Line Company in Lycoming County, Pennsylvania. *Central New York Oil & Gas Co., LLC*, 137 FERC ¶ 61,121 (2011) (“Certificate Order”), *on reh’g*, 138 FERC ¶ 61,104 (2012) (“Rehearing Order”).

The Project will provide 550,000 Dth/day of open-access firm and interruptible transportation service, and the Pipeline has already executed agreements with shippers for 100 percent of the pipeline design capacity. Certificate Order at P 5. In particular, the Project will provide access to interstate markets for natural gas produced from the Marcellus Shale in northeast Pennsylvania, and expanded transportation and storage options to shippers using interconnected pipelines in both Pennsylvania and New York. *Id.* at PP 8, 16.

In agency proceedings extending over a year, and resulting in an environmental assessment (“EA”) of nearly 300 pages, the Commission thoroughly evaluated potential impacts on environmental, historic, cultural, and other values. Ultimately, the Commission determined that the Project, upon the Pipeline’s

satisfaction of numerous environmental conditions and mitigation measures, is consistent with the public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(e). *Id.* at P 18. As part of the post-certificate process, Commission staff is now reviewing the Pipeline’s requested authorizations to proceed with construction. To date, Commission staff has only authorized the Pipeline to commence limited tree removal activities. *Central New York Oil & Gas Co.*, Docket No. CP10-480-000, Authorization to Conduct Pre-Construction Tree Clearing (Feb. 13, 2012) (“Tree Clearing Order”).

ARGUMENT

Earthjustice has not justified the extraordinary remedy of a stay. An injunction is an extraordinary remedy never awarded as a right. *See UBS Fin. Servs. v. W. Va. Univ. Hosps., Inc.*, 660 F.3d 643 (2d Cir. 2011); *Thapa v. Gonzales*, 460 F.3d 323 (2d Cir. 2006). When considering whether to grant such extraordinary relief, the Court balances the following four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *In re World Trade Ctr. Disaster Site Litig. v. City of New York*, 503 F.3d 167, 170 (2d Cir. 2007).

This Court evaluates the four factors on a sliding scale, such that the necessary level or degree of possibility of success on the merits will vary according to the Court's assessment of the other stay factors. *See Thapa*, 460 F.3d at 334 (citing cases). "Simply stated, more of one excuses less of the other." *Id.* at 334-35.

In this case, the balance of the equities weighs in favor of denying the requested stay. The Commission recognizes the important environmental values Earthjustice advances, and it thoroughly considered impacts on the environment in evaluating the Project. (The Commission also considered other values in determining that the Project, with appropriate conditions, serves the overall public convenience and necessity; Earthjustice concedes (Mem. of Law at 4 n.3) that it is not addressing the agency's broader public interest balance.) At the urging of Earthjustice and others, including other responsible agencies, and consistent with Commission's statutory duties, the Certificate Order adopted numerous conditions which act to prevent and mitigate any significant environmental impacts of the Project. Moreover, Earthjustice has not made the requisite strong showing that it is likely to succeed on the merits of its claims that the Commission violated NEPA. Finally, the interests of the public in ensuring adequate supplies of natural gas and of the Pipeline in developing the Project, as conditioned by the Commission, support denying the requested stay.

I. Earthjustice Has Not Shown A Likelihood Of Success On The Merits

Earthjustice has not demonstrated that it is likely to succeed on the merits of its claims that the Commission failed to satisfy NEPA in evaluating the Project. Movants must make a “strong showing” that they are likely to succeed on the merits. *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d at 170; *see also Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Limited*, 598 F.3d 30, 35 (2d Cir. 2010) (likelihood of success on the merits standard, not lesser fair grounds for litigation standard, applicable to agency action taken in the public interest pursuant to statutory scheme). In the context of a NEPA claim, this Court and other courts have suggested that a higher standard, requiring a clear violation of NEPA procedures, applies. *See Huntington v. Marsh*, 884 F.2d 648, 653 (2d Cir. 1989) (requiring a violation of NEPA and “substantial danger” to the environment); *see also, e.g., 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.”); *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”).

Earthjustice has not made the requisite strong showing that it is likely to succeed on the merits. Actions of administrative agencies taken pursuant to NEPA

are entitled to a high degree of deference. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377-78 (1989). The Court’s “only role in reviewing agency action for compliance with NEPA is to insure that the agency has taken a hard look at environmental consequences.” *Natural Res. Defense Council v. United States Dep’t of Agric.*, 613 F.3d 76, 84 (2d Cir. 2010) (citation omitted).

A. FERC’s Finding Of No Significant Impact Complies With NEPA And Is Fully Supported By The Record

Consistent with NEPA procedures, the Commission prepared a thorough, nearly 300 page EA for the Project in order to determine whether the Project has a significant impact on the environment. The EA addresses a wide range of resources and impacts, including geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, socioeconomics, cumulative impacts, and pipeline route alternatives. *See* Certificate Order at P 54. Earthjustice claims that the EA lacks “details and analysis” (Mem. of Law at 13), and invites this Court to “flyspeck” the Commission’s expert factual analysis. *Nevada v. Dep’t of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006) (“It is well settled that the court will not ‘flyspeck’ an agency’s environmental analysis, looking for any deficiency no matter how minor.”). On merits review, this Court would rightly decline this invitation, and thus Earthjustice cannot prevail on this claim.

NEPA requires preparation of an EIS for major federal actions “significantly affecting the quality of the human environment.” 40 C.F.R. § 1508.13. An assessment of “significance” requires consideration of both “context” and “intensity.” 40 C.F.R. § 1508.27; *see Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1556 (2d Cir. 1992). Earthjustice claims that the relatively undeveloped nature of portions of the Project route, the “unique” attributes of the region, uncertainty regarding impacts, and alleged controversy over the Project demand a finding that the Project has a significant impact on the environment. Mem. of Law at 13-16. But the Commission addressed these concerns in detail and concluded that the Project will not significantly affect the quality of the human environment. Because “[j]udicial review of agency decisions regarding whether an EIS is needed is essentially procedural,” Earthjustice is unlikely to succeed on the merits of this claim. *Ompompanoosuc*, 968 F.2d at 1556.

The Commission reasonably disagreed with Earthjustice’s characterization of the context and intensity of the Project. The Project route “avoids sensitive areas, and does not adversely affect any endangered species’ critical habitat,” and “will have an insignificant footprint” in the Sullivan County and Endless Mountains regions. Certificate Order at P 110; *see also id.* at P 111 (“no unique or sensitive vegetation communities or forested wetlands” are affected). The EA considered impacts to the Endless Mountains and the Pennsylvania Wilds, and

“concluded that any impacts would be limited.” Rehearing Order at P 52. While Earthjustice alleges that “uncertainty” regarding future Marcellus Shale drilling and associated development “weighs in favor of a finding of significance” (Mem. of Law at 15), the Commission explained that preparing an EIS would not “assist in resolving these uncertainties.” Rehearing Order at P 54; *accord Ompompanoosuc*, 968 F.2d at 1556 (NEPA regulations do not prescribe the weight to be given to the “intensity” criteria).

Finally, Earthjustice’s contention that the Project is “highly controversial” fails to recognize that this Court has identified “a difference between ‘controversy’ and ‘opposition.’” *Ompompanoosuc*, 968 F.2d at 1557 (citing *Town of Orangetown v. Gorsuch*, 718 F.2d 29, 39 (2d Cir. 1983) (speculative effects insufficient to render project highly controversial)); *see* Certificate Order at P 115. Earthjustice’s position, that the Commission should have considered the cumulative impacts of Marcellus Shale development activities, is not a “substantial dispute . . . as to the size, nature, or effect” of the Project. *Orangetown*, 718 F.2d at 39 (citation omitted). And, an action is not “highly controversial” merely because parties have raised questions about the effects, or even where there are disputes among experts. Certificate Order at P 115 & n.106 (citing *Marsh*, 490 U.S. at 378 (agency has discretion to rely on the reasonable opinions of its own experts)).

B. FERC’s Cumulative Impacts Analysis Satisfies NEPA

Earthjustice focuses its stay request on the Commission’s decision to exclude the cumulative impacts of Marcellus Shale development activities from the EA. Mem. of Law at 5-10.¹ Because this determination of cumulative impacts “is a task assigned to the special competency of the appropriate agenc[y],” this Court will not disturb the Commission’s analysis “[a]bsent a showing of arbitrary action.” *Kleppe v. Sierra Club*, 427 U.S. 390, 412-14 (1976).

Earthjustice begins with the inaccurate assertion that the Commission has itself conjured a causality requirement for cumulative impacts. Mem. of Law at 6. The Supreme Court has found otherwise. As the Commission explained in the Certificate Order, “NEPA requires a ‘reasonably close causal relationship’ between the environmental effect and the alleged cause.” Certificate Order at P 83 (quoting *U.S. Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004)). In order to merit analysis, an environmental impact must be (1) caused by the proposed action and (2) reasonably foreseeable. Certificate Order at P 83. Tellingly, Earthjustice fails to even *mention* – let alone rebut – the well-established case law upon which

¹ Earthjustice’s attack on the adequacy of the Commission’s cumulative impacts analysis of other pipeline projects (Mem. of Law at 7, 10) in the area was not raised on rehearing before the agency, and is therefore statutorily barred. 15 U.S.C. § 717r(b) (limiting the Court’s jurisdiction to those objections “urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so”); see, e.g., *Nat’l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1332 (D.C. Cir. 2004).

the Commission relies to conclude that an agency may properly limit its cumulative impacts analysis to actions which are sufficiently causally related to the proposed action. *See* Certificate Order at PP 85-90, 97-98 (discussing cases); Rehearing Order at PP 34-39 (same).

Addressing this standard, the Commission examined the purpose of the Project, finding that past, present and future Marcellus Shale development activities are not “an essential predicate” for the Project because “it is not merely a gathering system for delivery” of Marcellus Shale gas, but is a “bi-directional hub line, . . . enabl[ing] gas to flow between three major interstate pipeline systems in response to market demands, and to provide access for all three pipelines to storage assets at Stagecoach.” Certificate Order at P 91. On the other hand, if the Project is not constructed, Marcellus Shale development will continue, and unregulated developers will build gathering lines to serve the shale gas, “with no Commission regulation or NEPA oversight.” *Id.* Thus, the Commission reasonably concluded that Marcellus Shale development activities are not sufficiently causally-related to the Project to warrant consideration of cumulative impacts.

Likewise, the Commission reasonably determined that Marcellus Shale development activities are not “reasonably foreseeable.” Certificate Order at P 95. As of October 2010, the Pennsylvania Department of Environmental Protection had issued 4,510 permits for such activities, and is continuing to issue permits.

Only some of those permits will result in actual drilling, and “it is unknown . . . what the associated infrastructure and related facilities may be for those wells ultimately drilled.” *Id.* at P 96. The Commission reasonably determined that it requires specific information to prepare a “meaningful analysis of when, where and how Marcellus Shale development will ultimately occur” – and that information is “unknowable” at this time. *Id.*; Rehearing Order at P 48. The Commission’s judgment is based upon its expertise and entitled to deference from this Court. *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council*, 462 U.S. 87, 103 (1983); *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90 (2d Cir. 2000).

While Earthjustice is correct that NEPA requires “reasonable forecasting,” (Mem. of Law at 7) (quoting *N. Plains Res. Council v. Surface Transp. Bd.*, 2011 U.S. App. LEXIS 25959, at *21 (9th Cir. Dec. 29, 2011)), it does not require an agency to “engage in speculative analysis” or “to do the impractical, if not enough information is available to permit meaningful consideration.” *N. Plains Res. Council*, 2011 U.S. App. LEXIS 25959, at *21 (citation omitted); *Natural Res. Defense Council v. Callaway*, 524 F.2d 79, 90 (2d Cir. 1975) (holding that an agency need not “consider other projects so far removed in time or distance from its own that the interrelationship, if any, between them is unknown or speculative”). To its detriment, Earthjustice heavily relies upon *N. Plains Resource Council*, for in that case the Ninth Circuit found arbitrary the agency’s

refusal to consider cumulative impacts of related activities where the agency had access to precisely the type of information that the Commission has here found to be unknown. *Id.* at *22.

To the extent that Earthjustice asserts that an agency must consider cumulative impacts arising from related or similar activities pending before the same agency (Mem. of Law at 9), this is exactly what the Commission did. The EA “did consider the cumulative impacts of similar activities, including known interstate pipeline projects in the area.” Rehearing Order at P 45; *see* EA at 96-109; *see also* *Natural Res. Defense Council v. Callaway*, 524 F.2d at 90 (requiring agency’s EIS on a dredging action to consider the cumulative impacts of other dredging actions). But because no specific Marcellus Shale production and gathering activities are tied to the Project, and Pennsylvania – not the Commission – has jurisdiction over those activities, the Commission is not required to include those activities in its cumulative impacts analysis. Rehearing Order at P 43.

C. FERC Appropriately Analyzed And Imposed Mitigation Measures

Earthjustice next claims that the Commission inadequately explained the mitigation measures imposed on Project construction and operation. Mem. of Law at 10-11. But, the Commission reasonably relied upon its own experts in determining that mitigation measures designed to minimize impacts of, e.g., forest fragmentation will succeed. *See, e.g.*, Certificate Order at PP 163-65 (discussing

revegetation and maintenance requirements and likely impacts on wildlife movement and breeding); *see also Baltimore Gas & Elec. Co.*, 462 U.S. at 103 (a court “must generally be at its most deferential” when reviewing factual determinations under NEPA). To the extent that Earthjustice specifically challenges the Commission’s mitigation assessments for forest fragmentation, freshwater mussels, and fisheries (Mem. of Law at 11), it cannot succeed on the merits because these arguments, not raised on rehearing before the Commission, cannot be considered by the Court. *See* 15 U.S.C. § 717r(b); *supra* n.1.

Earthjustice also alleges that the Commission must finalize the details of mitigation plans prior to issuance of an NGA section 7 certificate, or even an EA. Mem. of Law at 11. But Earthjustice did not raise this argument on rehearing before the agency, and, as above, is statutorily precluded from doing so now. In any event, Earthjustice errs in relying on *LaFlamme v. FERC*, 852 F.2d 389, 399-400 (9th Cir. 1988), for the principle that the Commission must finalize mitigation plans prior to making a finding of no significant impact, when the court subsequently and specifically held that the Commission did not err in permitting post-order monitoring and studies of environmental impacts. *See LaFlamme v. FERC*, 945 F.2d 1124, 1130 (9th Cir. 1991).

II. The Alleged Harm Is Not Irreparable

Earthjustice must demonstrate that, absent a stay, it will suffer “an injury that is neither remote nor speculative, but actual and imminent.” *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112 (2d Cir. 2005). Where an environmental harm is alleged, this Court has held “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 (emphasis added) (vacating an injunction for plaintiff’s failure to establish some actual or threatened injury even though agency conceded a NEPA violation). Earthjustice bears the burden to establish some actual or threatened injury, specifically that tree clearing and Project construction will substantially endanger the environment. *Id.* at 654. As evidenced by the extensive EA, the Project, as conditioned by the Certificate Order, poses no such threat.

The alleged injury – that, without an immediate stay of tree clearing and Project construction, “sensitive ecological resources will be destroyed,” (Mem. of Law at 1) – is unsupported by the underlying record. Rather, the record in the Commission proceeding shows that construction of the Project, subject to the required mitigation measures, will not significantly impact sensitive ecological resources. The Commission’s extensive EA found: (1) no unique or sensitive vegetation communities (EA at 44); (2) no expected long-term wildlife impacts

(EA at 47); (3) no designated essential fish habitats and no fisheries of special concern (EA at 39); and (4) except for the Indiana bat, no other federally designated critical habitats, wildlife refuges, wildlife management areas, or significant plant communities (EA at 50).

Where sensitive ecological resources were identified, the mitigation measures imposed on the Pipeline will negate any significant adverse impacts. For example, the Commission identified two sensitive waterbodies within the Project route – the Susquehanna River and Elklick Run. Potential Project impacts will be mitigated by using a route that avoids Elklick Run and its adjacent wetlands and using the horizontal directional drill method for the Susquehanna River crossing. EA at 33-34. Similarly, a variety of migratory bird species are associated with habitats crossed by the Project. EA at 48. In consultation with the United States Fish and Wildlife Services (“USFWS”), the Pipeline has agreed to ten conservation measures to protect migratory birds within the Project area. EA at 49; Feb. 2, 2012 Letter from USFWS to FERC, Docket No. CP10-480-000.

Earthjustice also seeks to justify a stay of construction by arguing that its members, who live in the “vicinity” of the Project route, will suffer from an “irretrievable loss of forest” and “degradation of cold water streams” where they live, work, and recreate; the loss of treasured vistas and landscapes; and the permanent alteration of the unique character of their rural community. Mem. of

Law at 17. Contrary to Earthjustice’s assertions, the Project involves construction in a fairly limited geographic area, with a limited period of impact from the construction activities and minimal, if any, impacts after construction. Certificate Order at P 107. For example, there are over 1.2 million acres of forest in the Project area, but the Project will permanently convert less than 170 acres from forested land to vegetated open land. *Id.* at P 110; EA at 45.

While Earthjustice claims that its injuries are certain and substantial, the Commission’s analysis shows the opposite. Specifically, the Commission found that no portion of the Project would cross or come within the vicinity of designated wilderness and wildlife areas; National Forests, federal or state parks, or other notable landmarks; rivers in the National Wild and Scenic Rivers System; National or State Scenic Byways, or Coastal Zone Management Areas. EA at 63. All recreational areas identified by commenters (including Earthjustice) were analyzed in the EA. And, the Commission concluded that either the recreational areas would not be impacted or, as in the case of the Pennsylvania Wilds (about 2.8 miles or 7.2 percent of the Project), only marginally impacted. EA at 63-65.

Even if the Court finds an irreparable injury, that finding must be balanced against the other factors. “A stay is not a matter of right, even if irreparable injury might otherwise result.” *Nken v. Holder*, 129 S. Ct. 1749, 1760 (2009). Rather, a stay is an exercise of judicial discretion dependent upon the circumstances of the

particular case. *Id.*; see *Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65 (2d Cir. 2000) (despite planned destruction of approximately 600 community gardens, injunction denied where plaintiffs failed to demonstrate a likelihood of success on the merits); see also *UBS Fin. Serv., Inc.*, 660 F.3d at 648 (despite clear showing of irreparable harm, injunction denied for failure to demonstrate a likelihood of success on the merits). 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 public access to new energy resources that would be reduced, if not eliminated altogether as Project economics change, by a stay at this time.

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. *In re World Trade Ctr. Disaster Site Litig*, 503 F.3d at 170. Here, even a short stay would result in a significant delay to the Project because of restrictions on tree clearing imposed under the Migratory Bird Treaty Act and the Endangered Species Act, to protect the endangered Indiana bat.

Pursuant to those statutes, the USFWS has directed that the Pipeline complete tree-clearing activity before April 1, 2012. The Pipeline states that it requires at least 45 days to clear the Project's 39-mile right-of-way if clearing by hand-cutting. If the right-of-way is not cleared before the April 1st deadline, the

Pipeline is prohibited from resuming tree clearing until after August 15, 2012, which would delay construction of the Project until the Fall. The Commission first authorized tree clearing, by hand cutting only, on February 13, 2012, leaving the Pipeline 47 days to clear trees. *See* Tree Clearing Order at 2. The Pipeline states that delaying construction until the Fall would cost it millions of dollars and could jeopardize the future of the Project. *See* Feb. 10, 2012 Urgent Renewed Request for Authorization to Clear Trees filed in Docket No. CP10-480-000. The Pipeline notes that it has spent more than \$75 million in developing the Project based on the July 1, 2012 anticipated in-service date. *Id.*

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. *Ofosu v. McElroy*, 98 F.3d 694, 701-702 (2d Cir. 1996). In *Ofosu*, this Court stated that, in considering whether to stay agency orders, courts give significant weight to the public interest served by the proper operation of the regulatory scheme. *Id.* at 702 (citations omitted). The Natural Gas Act charges FERC with regulating the interstate transportation and wholesale sale of natural gas in the public interest. *See, e.g., Islander East Pipeline Co. v. McCarthy*, 525 F.3d 141, 143 (2d Cir. 2008). Because the Commission is the presumptive guardian of the public interest in this area, its views indicate the direction of the public interest for

purposes of deciding a request for stay pending appeal. *See CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 142 (2d Cir. 1977).

Here, the Commission found that the public interest would not be served by a stay of construction. In issuing a certificate of public convenience and necessity to the Pipeline, the Commission found a strong showing of need for this project. Certificate Order at PP 8, 16, 91, 119, 122; Rehearing Order at P 29. Thus, the Commission, upon balancing the identified environmental impacts with important Project benefits, concluded that authorizing the Project is required by the public convenience and necessity. Certificate Order at PP 17-18; Rehearing Order at PP 9, 22. A stay would, at the least, significantly delay the benefits of this project.

CONCLUSION

For the foregoing reasons, Earthjustice's stay motion should be denied.

Respectfully submitted,

Robert H. Solomon
Solicitor

/s/ Holly E. Cafer
Holly E. Cafer
Attorney

Karin L. Larson
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel: (202) 502-8485
Fax: (202) 273-0901
Holly.Cafer@ferc.gov

February 16, 2012

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CAPTION:

Coalition for Responsible Growth, et al. v.

United States Federal Energy Regulatory

Commission

CERTIFICATE OF SERVICE

Docket Number: 12-566

I, Holly E. Cafer, hereby certify under penalty of perjury that on February 16, 2012, I served a copy of

RESPONDENT'S OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING REVIEW

(list all documents)

by (select all applicable)*

- United States Mail
Federal Express
Overnight Mail
Facsimile
E-mail
Hand delivery

on the following parties (complete all information and add additional pages as necessary):

Table with 5 columns: Name, Address, City, State, Zip Code. Rows include Deborah Goldberg, Esq., Hannah Chang, Esq., and Bridget Mary Lee, Esq.

February 16, 2012
Today's Date

/s/Holly E. Cafer
Signature

*If different methods of service have been used on different parties, please indicate on a separate page, the type of service used for each respective party.