

**BEFORE THE UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION**

<b>Millennium Pipeline Company, LLC</b>	)	
	)	<b>Docket No. CP11-515</b>
<b>Minisink Compressor Station</b>	)	

**REQUEST FOR REHEARING BY THE MINSINK RESIDENTS FOR  
ENVIRONMENTAL PRESERVATION AND SAFETY (MREPS) OF  
COMMISSION ORDER GRANTING APPROVAL TO COMMENCE  
CONSTRUCTION AND DENYING STAY REQUEST**

**I. CONCISE STATEMENT OF ERROR**

On October 9, 2012, the Federal Energy Regulatory Commission (the Commission) denied the Minisink Residents for Environmental Preservation and Safety (MREPS) two motions for stay of construction of Millennium Pipeline Company’s (Millennium) Minisink Compressor Project in the above captioned docket. In doing so, the Commission erred both by (1) concluding that no irreparable harm would result from allowing Millennium to go forward with construction, and (2) allowing Millennium to commence construction to begin with even though Millennium failed to comply with the conditions of the certificate, specifically, in failing to demonstrate progress towards creation of a a conservation easement as required by Condition 18 of the certificate.<sup>1</sup> Accordingly, pursuant to Rule 713 of the

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<sup>1</sup> In addition, there are some questions about the current extent of Millennium’s compliance with Conditions 13 and 14 (relating to plans for design of the compressor station as a barn and replanting of indigenous vegetation. The Town of Minisink disagreed with the need for these conditions, although it is MREPS understanding that Millennium must continue to comply with the Conditions 13 and 14 which have not been modified or challenged.

Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.713, MREPS files this timely rehearing request of the Commission order, and asks the Commission to rescind the September 18, 2012 letter approving commencement of construction or,<sup>2</sup> in the alternative, stay construction of the compressor station until resolution of this matter on rehearing and/or judicial review.

## II. ISSUES ON REHEARING

Pursuant to Commission Rule 713 (c)(2), the Department presents the following statement of issues for rehearing:

**Issue 1: The Commission erred in allowing Millennium to commence and continue construction because Millennium failed to comply with Condition 18 of the Certificate which obligated Millennium to provide the Commission with information on its efforts to develop a conservation easement for the unused portion of the site.”**

Millennium's authority to commence construction under Section A of the Certificate is conditioned on compliance with the Environmental Conditions contained in its Certificate. *See* Certificate, Ordering Paragraph B(3). Environmental Condition No. 18 requires Millennium to “update the Commission on the status of its plans to enter 42.5 acres

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<sup>2</sup> The September 18, 2012 letter did not state that it constituted a final order subject to rehearing and therefore, MREPS did not file a formal rehearing request. Instead, MREPS raised objections to commencement of construction in its August 28 motion for a stay and opposition to commencement of construction. Because these arguments were raised in MREPS' August 28 motion, it expected that they would be addressed by the Commission. However, neither the September 19 letter granting Millennium leave to commence construction, nor the Commission's October 9 ruling denying MREPS motion for a stay were responsive to MREPS' objections and therefore, the Commission should now consider MREPS' objections to the grant of commencement of construction on rehearing, or alternatively, as part of reconsideration or a new challenge to Millennium's compliance.

of the project site into a conservation easement.” Designed as mitigation for the substantial adverse impacts of siting an industrial compressor station in the midst of a rural residential community, the conservation easement would provide important environmental benefits such as preserving existing vegetation and maintaining a sufficient buffer for noise and visual impacts.<sup>3</sup> Yet in spite of the significance of the conservation easement, Millennium did not provide the Commission with any details as to how it will create a conservation easement that is both effective and enforceable under New York law and satisfies the intended mitigation goals of the Condition 18. Because Millennium did not satisfy Condition 18 prior to commencing construction and remains non-compliant, the Commission’s approval to start construction should be rescinded.

**Issue 2: The Commission violated the Administrative Procedure Act, which requires an agency to address all exceptions presented by a party, by failing to address MREPS specific objections to Millennium’s commencement of construction given its non-compliance with Environmental Condition 18.**

Under the Administrative Procedure Act, Section 557(c) the Commission did not respond to MREPS’ objections that Millennium’s submissions were inadequate to satisfy Environmental Condition No. 18. Section 557(c) requires that an agency make, and the record must show, a ruling on *each* [proposed] finding, conclusion, or exception presented [by a Party].<sup>4</sup> Its final decision must include findings and conclusions, and the reasons or

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<sup>3</sup> 140 FERC ¶ 61,045 (2012) (Certificate Order).

<sup>4</sup> 5 U.S.C. § 557(c) (2006).

basis therefore, on all material issues of fact, law, or discretion presented on the record....”<sup>5</sup>

In denying MREPS’ motion for a stay, the Commission did not state why Millennium’s statement of intent to refrain from development of the 42.5 acres, with nothing more, was sufficient to show that Millennium made substantive progress in the creation of a legally effective and enforceable conservation easement under New York law.

**Issue #3: The Commission erred in concluding that Millennium’s commencement of construction will not cause irreparable harm to MREPS and its members and in denying MREP’s stay request.**

The Commission erred in denying MREPS’ stay request, rejecting claims that construction of the compressor station would cause irreparable harm. In so doing, the Commission ignored significant precedent establishing that tree removal, as a matter of law is irreparable harm.<sup>6</sup> In the event that the Commission order is vacated on rehearing or appeal, regrowth of the trees cut down and remediation of the site could take generations until fully restored. Moreover, the round the clock noise that residents are enduring as a result of construction<sup>7</sup> and the time spent to document and report Millennium’s ongoing

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<sup>5</sup> *Id.*

<sup>6</sup> *Parker v. United States*, 309 F.Supp. 593 (D. Colo 1970)(“we cannot give effect to [the interest of the industry, for the cutting of the trees, is as we have noted, too final and conclusive. It must await the processes of law.”); *Canal Authority of Florida v. Callaway*, 489 F.2d 567 (5<sup>th</sup> Cir. 1974)(alleging that flooding of trees would result in irreparable harm to river’s ecology), *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4<sup>th</sup> Cir. 1971)(noting that trees may not regenerate for several generations, so harm from removal is irreparable).

<sup>7</sup> *See* Comments of John P. Odland (Nov. 2, 2012); Comments Leanne Baum (video) (Nov. 3, 2012); Comments of Asha A. Canalos; Comments of Lisa Alliegro (Oct. 28, 2012);

and repeated violations can never be undone even if the compressor station is later removed. Because the harm resulting from construction is irreparable and is continuing, the Commission should grant rehearing or reconsideration of MREPS' stay request.

### III. FACTUAL BACKGROUND

On July 16, 2012, a divided Commission granted Millennium Pipeline's application for a certificate under Section 7 of the Natural Gas Act (NGA) for the Minisink Compressor. The Minisink Compressor would be located in Minisink Valley, in Orange County, New York. Although three Commissioners voted (with one vote as a concurrence) to issue a certificate to Millennium, both Chairman Wellinghoff and Commissioner LaFleur dissented, finding that the Minisink Compressor does not serve the public convenience and necessity under the Commission's *Certificate Policy*,<sup>8</sup> particularly in light of the economically and environmentally preferable Wagoner Alternative. The Wagoner Alternative consists of a smaller compressor station that would be located at a site owned by Millennium that previously housed a compressor station along with replacement of the aging, 24-inch 7.2 mile Neversink pipeline which currently bottlenecks Millennium's entire system and is due for replacement in 2014 according to Millennium's own presentations.

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Protest of Robert Baum (Oct. 24, 2012); Comments of Shawn Cahill (Oct. 20, 2012); Comments of Michael Mojica (Oct. 19, 2012).

<sup>8</sup> 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶61,128, *order on clarification*, 92 FERC ¶61,094 (2000).

Notwithstanding its approval of the certificate, even the majority recognized the substantial harm that would result from siting an enormous industrial facility in a rural residential community. In an effort (albeit imperfect) to mitigate the considerable adverse impacts of the Minisink compressor station, the Commission included Environmental Condition 18, which directs Millennium to enter 42.5 acres of the undeveloped project site into a conservation easement. The Commission found that “a conservation easement would provide important environmental benefits, such as preserving existing vegetation and maintaining a sufficient buffer for noise and visual impacts.”<sup>9</sup> Prior to commencing construction, the condition requires Millennium to update the Commission on its plans to establish a conservation easement.

Millennium did not seek rehearing of the conservation easement requirement. Instead, on July 31, 2012, Millennium accepted the certificate. On August 24, 2012, Millennium filed its plans for complying with the conservation easement requirement which consisted of nothing but a map of the parcel with 42.5 acres marked as land that Millennium stated it agreed not to develop.<sup>10</sup> With this last filing, Millennium stated that it had complied with all of the construction prerequisites contained in the certificate and requested approval to begin construction.

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<sup>9</sup> Certificate Order at ¶ 34.

<sup>10</sup> Compliance with Certificate Order and Implementation Plan and Request for Authorization to Construct by August 29, 2012 of Millennium Pipeline Company, L.L.C., Appendix C, Docket No. CP11-515 (August 24, 2012)(**Appendix C**).

On August 28, 2012, MREPS motioned for a Stay of Construction.<sup>11</sup> In the motion, MREPS raised two major points. First, MREPS argued that Millennium had not satisfied various pre-construction obligations, including Environmental Condition 18 requiring details as to the status of its plans to create a 42.5 acre conservation easement on its property, Second, MREPS argued that even if the Commission found that Millennium satisfied the prerequisites to start construction, it should stay construction of the compressor station pending rehearing and judicial review to avoid irreparable harm and serve the interest of justice. Millennium opposed MREPS' stay request.

On September 18, 2012, the Office of Energy Projects granted Millennium's request to commence construction. The same day MREPS renewed this motion for stay. On October 9, 2012, the Commission issued its order denying MREPS request for a stay, determining that the interests of justice would not require a stay.

#### IV. ARGUMENT

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<sup>11</sup> On August 15, 2012, MREPS also filed a timely request for rehearing of the Commission's order, contending that the Commission's order violates the Natural Gas Act, the Commission's *Certificate Policy* and the National Environmental Policy Act (NEPA) and further, was based on undisclosed confidential and proprietary information that deprived MREPS of its due process rights to comment.

**A. The Commission erred in allowing Millennium to commence construction when it did not comply with Environmental Condition 18.**

Prior to commencing construction, Millennium is required to comply with Environmental Condition No. 18, which requires Millennium to provide the Commission with information on its efforts to develop a conservation easement for the 42.5 acre unused portion of its property. The conservation easement plays a critical part in mitigating at least some (but certainly far from all) the compressor station's considerable adverse impacts on the surrounding rural residential community and as such, compliance with the reporting requirements in Condition 18 are vital to enable the Commission to monitor Millennium's progress in establishing the easement by the time the construction is complete. Yet as detailed below, based on the scant information supplied by Millennium, it has done nothing to show progress towards creation of a legally effective and enforceable conservation easement under New York law or to describe how it intends to implement this requirement.

**1. The Conservation easement is a key component of mitigation.**

The Commission did not intend the conservation easement requirement as mere window dressing. Although MREPS does not believe that the conservation easement even begins to offset the considerable damage wrought by the compressor station (particularly in comparison to the Wagoner Alternative would avoid any damage entirely), the Commission majority viewed the conservation easement as a key component of mitigating the project's adverse impacts. As described in the order:



The OCDP recommends that the Commission require Millennium to finalize plans to reserve 42.5 acres of the project site as a conservation easement. As discussed in the EA, Millennium stated that it would consider such an easement. In general, the Commission believes it is appropriate for applicants to purchase additional land surrounding compressor stations to serve as a buffer between residences and such stations...we believe that such a conservation easement would provide important environmental benefits, such as preserving existing vegetation and maintaining a sufficient buffer for noise and visual impacts. *For these reasons, we have added Environmental Condition 18 to require Millennium to provide the Commission with information on its efforts to develop a conservation easement for the unused portion of its property.*<sup>12</sup>

Thus, the conservation easement is not simply a discretionary “extra” that Millennium can simply disregard but rather, a necessary element of mitigation integral to the EA’s ultimate finding of no significant impact.

Because the conservation easement is a critical part of mitigation, Millennium is expected to demonstrate real progress or at the very least, a good faith effort towards creating a conservation easement to comply with Condition 18. Millennium has done neither.

**2. Millennium’s efforts to setting up a conservation easement fall far short of what New York law requires.**

Millennium claims that it fully complied with Environmental Condition No. 18 by referencing<sup>13</sup> Appendix C of its August 24 filing, which basically contains a shaded map showing a 42.5 acre portion of the site marked as land that Millennium has agreed that it

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<sup>12</sup> Certificate order at ¶ 34 (emphasis added).

<sup>13</sup> Answer of Millennium Pipeline Company, L.L.C. to Motion For Stay and to Opposition to Request To Commence Construction, at 12, Docket No. 11-515 (August 30, 2012)(**Millennium’s Answer**).

will not develop.<sup>14</sup> Yet agreeing to not develop land is not even remotely close to what is required in order to create a conservation easement under New York law.

For starters, under New York law, a valid conservation easement must be created by a written instrument that

“describe[s] the property encumbered by the easement by adequate legal description or by reference to a recorded map showing its boundaries and bearing the seal and signature of a licensed land surveyor, or if the easement encumbers the entire property described in a deed of record, the easement may incorporate by reference the description in such deed, otherwise it shall refer to the liber and page of the deed or deeds of the record owner or owners of the real property burdened by the conservation easement.”<sup>15</sup>

Once created, the easement instrument must then be recorded and indexed in the office of the recording office in the county in which the land is located.<sup>16</sup> Unless properly recorded, a conservation easement has no legal effect. The easement may be held by a public body or a not-for-profit.<sup>17</sup>

While Millennium may have agreed to refrain from developing land in the future, if Millennium has failed to demonstrate any actions towards the development of a legal valid conservation easement under New York law. First, Millennium has not even assented to go through the process of creating an easement. If it had, Appendix C would have stated that

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<sup>14</sup> Appendix C.

<sup>15</sup> *See* N.Y. Env. Law § 49-0305(4); N.Y. Env. Law § 5-703.

<sup>16</sup> *Id.*

<sup>17</sup> N.Y. Env. Law § 49-0305(3)(a).

the marked land was set aside for an easement, as opposed to just not being developed in the future. Moreover, if Millennium intended to create an easement, its compliance filing would have listed the requirements of New York law, described plans to convey the property to the easement and record it. But Millennium has not shown any progress towards creating the easement beyond mere words. A search of the Orange County, New York Title Search reveals that there is no conservation easement on record. Nor has Millennium demonstrated a plan to grant the easement to a public body or a not-for-profit.

Most likely, if Millennium had simply reported that “We haven’t done anything to create the conservation easement,” the Commission would have found Millennium non-compliant with Condition 18 and denied its request to commence construction. Yet as shown, the steps that Millennium *did* take to create a conservation easement – basically shading a 42.5 acres plot on the map and promising not to develop it – essentially amount to nothing under New York law. Moreover, in many ways, what Millennium’s report on its progress towards creating an easement is even *worse* than nothing because it is deceptive, intended to give the impression that Millennium is taking steps to comply with the Commission’s order when in fact, it is not.

Because Millennium did not comply with the spirit or purpose of Condition 18, and further, is unlikely to create a legally effective and enforceable conservation trust under New York law by the time the compressor station is complete, the Commission should rescind its order approving commencement of construction, or alternatively, stay construction at least until Millennium demonstrates bona fide compliance with Condition 18.

**B. The Commission failed to address all issues raised in MREPS' Stay.**

The Administrative Procedures Act (APA) requires that a federal agency must receive or develop, and then consider, evidence to support each factual finding in an adjudicatory decision. APA section 557(c) ensures that:

[P]arties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions (1) proposed findings and conclusions; or (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and (3) supporting reasons for the exceptions or proposed findings or conclusions.”<sup>18</sup>

An agency must make, and the record must show, a “ruling on each [proposed] finding, conclusion, or exception presented [by a Party].”<sup>19</sup> Its final decision must include “...findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law, or discretion presented on the record....”<sup>20</sup> “The purposes of the APA provision requiring specific findings and conclusions are to prevent arbitrary agency decisions, provide parties with a reasoned explanation for those decisions, settle the law for future cases, and furnish a basis for effective judicial review.”<sup>21</sup> The APA is in place to ensure transparency in governmental decision making.

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<sup>18</sup> 5 U.S.C. § 557(c)(2006).

<sup>19</sup> *Id.* (emphasis added).

<sup>20</sup> *Id.*

<sup>21</sup> *Armstrong v. Commodity Futures Trading Commission*, 12 F.3d 401, 403 (3rd Cir. 1993); *see also* *Northeast Broadcasting Inc. v. Federal Communications Commission*, 400 F.2d 749, 758-759 (D.C. Cir. 1968) (internal citations omitted).

In this case, while the Commission did address in-depth the issue of whether the stay should be granted, the Commission does not adequately address the issue MREPS raised about Millennium not complying with Environmental Condition No. 18. As a result, it is unclear as to how the Commission arrived at its conclusion regarding Millennium's compliance with Environmental Condition No. 18. In the denial of MREPS stay motion, the Commission simply stated, without explanation, that Millennium provided the Commission with details regarding its plans to establish a conservation easement covering 42.5 acres of the project site.<sup>22</sup> This statement, without any discussion of MREPS' objections, falls short of the Commission's obligation under the APA to discuss "all findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law, or discretion presented on the record."<sup>23</sup>

To make matters worse, by accepting Millennium's promise to refrain from development as compliance with Condition 18, the Commission has conveyed the impression that Millennium is no longer required to create a bona fide conservation easement. In the future, Millennium would argue that the Commission's acceptance of its promise to refrain from development satisfies the conservation easement requirement of Environmental Condition No. 18 even though that is not the case.

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<sup>22</sup> Order denying stay re Millennium Pipeline Company, L.L.C., Docket No. 11-515 (October 9, 2012).

<sup>23</sup> 5 U.S.C. 557(c)(2006).

Accordingly, the Commission should grant a rehearing to, at least, clarify as to why Millennium’s agreement to not develop the land is sufficient to satisfy Environmental Condition No. 18 and allow construction to begin. By doing so, the Commission would be providing the clarity and transparency required by the Administrative Procedures Act, as well as complying with the requirement that the Commission “make a ruling on *each* [proposed] finding, conclusion, or exception presented [by a Party].”<sup>24</sup>

**C. The Commission erred in concluding that Millennium’s commencement of construction will not cause irreparable harm to MREPS and its members and in denying MREP’s stay request.**

The Commission erred in rejecting MREPS’ claims that construction of the compressor station would cause irreparable harm and denying the stay. In so doing, the Commission ignored significant precedent establishing that tree removal, as a matter of law is irreparable harm.<sup>25</sup> In the event that the Commission order is vacated on rehearing or appeal, re-growth of the trees cut down and remediation of the site could take generations until fully restored.

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<sup>24</sup> *Id.* (emphasis added).

<sup>25</sup> *Parker v. United States*, 309 F.Supp. 593 (D. Colo 1970)(“we cannot give effect to [the interest of the industry, for the cutting of the trees, is as we have noted, too final and conclusive. It must await the processes of law.”); *Canal Authority of Florida v. Callaway*, 489 F.2d 567 (5<sup>th</sup> Cir. 1974)(alleging that flooding of trees would result in irreparable harm to river’s ecology), *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4<sup>th</sup> Cir. 1971)(noting that trees may not regenerate for several generations, so harm from removal is irreparable).

Moreover, since the Commission denied MREPS' stay request, residents have endured other intrusions that will not be remediated even if the order is later reversed. As discussed in the multiple recent filings and complaints, residents are enduring round the clock noise that residents as a result of construction, and intense discomfort.<sup>26</sup> In addition to noise, Millennium has been trespassing on at least one property (owned by Rob and Leanne Baum) across the street from the compressor station. As the photos show, the road is too narrow, so enormous construction trucks plow across the Baum's lawn several times a day.



*Above depicts trucks and workers on property; left, indentation and damage to lawn*

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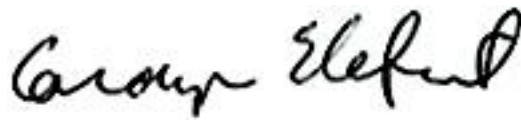
<sup>26</sup> *See* Comments of John P. Odland (ov. 2, 2012); Comments Leanne Baum (video) (Nov. 3, 2012); Comments of Asha A. Canalos; Comments of Lisa Alliegro (Oct. 28, 2012); Protest of Robert Baum (Oct. 24, 2012); Comments of Shawn Cahill (Oct. 20, 2012); Comments of Michael Mojica (Oct. 19, 2012).

Residents have been forced to spend countless hours documenting and reporting Millennium's ongoing and repeated violations. Even if the compressor station is later removed, residents will never be compensated for the intense nuisance and loss of time and resources that they are now experiencing. Because the harm resulting from construction is irreparable and is continuing, the Commission should grant rehearing or reconsideration of MREPS' stay request.

#### V. CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reason, MREPS respectfully requests that the Commission rescind the September 18, 2012 letter approving commencement of construction or, in the alternative, stay construction of the compressor station until resolution of this matter on rehearing and/or judicial review.

Respectfully submitted,



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Dated November 8, 2012