
ORAL ARGUMENT HAS NOT BEEN SCHEDULED

**In the United States Court of Appeals
for the District of Columbia Circuit****No. 16-1081**

CITY OF BOSTON DELEGATION, *et al.*,
Petitioners,
v.FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

**Consolidated Matter
No. 16-1103**

**MOTION FOR EMERGENCY STAY
OF RIVERKEEPER, INC., AND
JOINT PETITIONERS**

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ORAL ARGUMENT NOT YET SCHEDULED

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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CITY OF BOSTON)	
DELEGATION,)	
)	
and)	
)	
TOWN OF DEDHAM,)	
MASSACHUSETTS)	DOCKET NO. 16-1081
)	consolidated with
and)	16-1098, 16-1103
)	
RIVERKEEPER, INC., et al.)	
)	
<i>Petitioners</i>)	
)	
v.)	
)	
FEDERAL ENERGY REGULATORY)	
COMMISSION,)	
)	
<i>Respondent</i>)	
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RULE 26.1 CORPORATE DISCLOSURE

Pursuant to Local Rule 15 of the D.C. Circuit Rules and Federal Rule of Appellate Procedure 26.1, Petitioners submit this Corporate Disclosure Statement with respect to the petitioners that are corporations or organizational entities.

Riverkeeper, Inc., a not-for-profit corporation organized and existing under the laws of the State of New York, is a member-supported watchdog organization dedicated to protecting the environmental, recreational, and commercial integrity of the Hudson River and its tributaries, and to safeguarding the drinking water supply of nine million New York City and Hudson Valley residents. Riverkeeper, Inc. has no parent companies, and there are no publicly held companies that have a ten percent (10%) or greater ownership interest in Riverkeeper, Inc.

Reynolds Hill, Inc., is a non-profit membership community located in Peekskill and Cortlandt, New York and is directly impacted by the AIM Project. Reynolds Hill is not publicly traded, has no parent companies, and there are no publicly held companies that have a ten percent (10%) or greater ownership interest in Reynolds Hill Inc.

Sierra Club Lower Hudson Chapter is a non-profit organization founded in 1892 with approximately four thousand (4,000) members in Westchester, Putnam and Rockland Counties. Sierra Club Lower Hudson Chapter is not publicly traded, has no parent companies, and there are no publicly held companies that have a ten percent (10%) or greater ownership interest in Sierra Club Lower Hudson Chapter.

Food & Water Watch is a DC-based nonprofit with close to sixty thousand (60,000) supporters in impacted counties. Food & Water Watch is not publicly traded, has no parent companies, and there are no publicly held companies that have a ten percent (10%) or greater ownership interest in Food & Water Watch

Stop the Algonquin Pipeline Expansion (SAPE) is a grassroots, unincorporated affiliation of approximately thirty (30) members in Rockland, Putnam, and Westchester Counties. SAPE is not publicly traded, has no parent companies, and there are no publicly held companies that have a ten percent (10%) or greater ownership interest in SAPE.

Better Future Project is a Cambridge, Massachusetts based nonprofit with 7000 members. Better Project Future is not publicly traded, has no parent companies, and there are no publicly held companies that have a ten percent (10%) or greater ownership interest in Better Future Project.

Charles River Spring Valley Neighborhood Association (CRSV) is an unincorporated association of several hundred homeowners and residents who directly abut, or reside in close proximity to, the West Roxbury Lateral Component of the AIM Project. CRSV is not publicly traded, has no parent companies, and


there are no publicly held companies that have a ten percent (10%) or greater ownership interest in CRSV.

West Roxbury Saves Energy (WRSE) is an unincorporated association comprised of abutters to the West Roxbury portion of the AIM project. WRSE is not publicly traded, has no parent companies, and there are no publicly held companies that have a ten percent (10%) or greater ownership interest in WRSE.

Capitalism vs. the Climate (CvC) is a Connecticut-based unincorporated association with seventeen (17) members impacted by the AIM Project. CvC is not publicly traded, has no parent companies, and there are no publicly held companies that have a ten percent (10%) or greater ownership interest in CvC.

Fossil Free Rhode Island (FFRI) is a thirty (30)-member Rhode Island-based unincorporated association seeking to redress environmental burdens of extreme energy projects. FFRI is not publicly traded, has no parent companies, and there are no publicly held companies that have a ten percent (10%) or greater ownership interest in FFRI.

Respectfully submitted,



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**MOTION FOR EMERGENCY STAY OF FERC ORDERS GRANTING
CERTIFICATE BY PETITIONERS RIVERKEEPER AND VARIOUS
ENVIRONMENTAL AND COMMUNITY ORGANIZATIONS**

Pursuant to Fed. R. App. P. 18(a) and Local Rule 18, several Petitioners¹ move for an emergency stay of the orders of the Federal Energy Regulatory Commission (the Commission) approving the Algonquin Incremental Market (AIM) project, now on review before this Court, and of the construction and placement into service of the AIM project.

Although construction of the AIM project is scheduled to be completed in November 2016, the imminent and irreparable danger to public safety posed by the close proximity of the new larger, higher pressure gas pipeline to the Indian Point Energy Center (“IPEC”) can still be averted by staying the project before it is placed in service. In addition, staying the project will prevent further irreparable harm from the other project segments as well as a further irretrievable commitment of resources to this project and the subsequent segments while this Court is considering Petitioner’s challenges to the Commission’s patently insufficient environmental and safety analyses.²

Petitioners previously moved for a stay from the Commission, on April 2, 2015, because of harm to local landowners that would be caused by the eminent

¹ This stay request is filed by Riverkeeper and various Environmental and Community organizations, who filed the Joint Petition for Review in Docket No. 16-1103.

² See generally Petitioners’ Opening Brief.

domain process, as well as the irreparable environmental harm that would be caused by construction of the project.³ After 9 months of delay, the Commission finally ruled on the stay request, denying it on January 28, 2016 after construction of the AIM project had begun. The Commission concluded that harm from eminent domain is purely economic loss which does not justify a stay and that the alleged environmental harm would be sufficiently remedied by compliance with the mitigation conditions in the Certificate. In contrast, Petitioners now argue that a stay is necessary because, based on compelling evidence, there is an imminent risk that a pipeline accident will have a catastrophic impact on IPEC, causing grave harm to the residents of the Hudson Valley and New York City, including the loss of many lives.⁴ This type of harm cannot be adequately remedied after the fact.

Furthermore, this motion for a stay is also based upon newly emerged evidence that the third party contractor approved by the Commission to perform the environmental review of all three segments of the Algonquin pipeline expansion has a conflict of interest, which lends further support to Petitioners' arguments that the true extent of the environmental and safety impacts of this

³ All of the Petitioners in Docket No. 16-1103, with the exception of Riverkeeper, Inc., joined in this April 2, 2015 motion for a stay at the FERC level.

⁴ The State of New York sought a stay of the AIM project from the Commission on the basis of the public safety risk related to IPEC on March 3, 2016, which was denied by the Commission later that month. Here, the experts in support of Petitioners' request specifically address the flaws with the calculations and the unanswered questions about the proximity issue.

project and the subsequent segments have not yet been analyzed.⁵

Standard of Review

To obtain an emergency stay under Fed. R. App. P. 18, a movant must establish: (i) the likelihood of success on the merits; (ii) irreparable harm to the movant absent a stay; (iii) the possibility of substantial harm to the non-movant if a stay is granted; and (iv) the public interest in granting the stay.⁶ A “sliding scale” applies in evaluating and balancing the four factors, such that an “unusually strong showing on one of the factors” means that the movant “does not necessarily have to make as strong a showing on another factor.”⁷

In *Cuomo v. United States NRC*, this Court stated: “In the ordinary case, ‘when an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance.’”⁸ However, unlike in *Cuomo*, where the Court found that a stay was not justified, here this Court is dealing with the “ordinary case” because Petitioners have asserted that additional environmental

⁵ See Petitioners’ Opening Brief at 34, 67-71.

⁶ *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009).

⁷ *Id.* at 1291-92; *Cuomo v. United States NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985) (“To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or vice versa.”).

⁸ *Cuomo*, 772 F.2d at 976 (quoting *Realty Income Trust v. Eckerd*, 64 F.2d 447, 456 (D.C. Cir. 1977)).

consequences should be considered prior to proceeding further with the AIM project as well as the next two segments of the Algonquin pipeline expansion.

Argument

- I. **Given the catastrophic and irreparable harm to public safety that would result from a pipeline accident next to the IPEC nuclear power plant, this Court should issue a stay of the AIM project until a reliable and independent risk analysis is performed.**

This case is analogous to *Ohio ex rel. Celebrezze v. NRC* where the Sixth Circuit evaluated the State's motion for a stay based on the criteria set forth by this Court in its *Cuomo* decision. The Court held that the State had made a sufficient showing of irreparable harm because although "the likelihood of a nuclear accident is concededly small, the potential severity is enormous. The accident at Chernobyl has demonstrated that the injuries which could result are indisputably irreparable."⁹ In granting the stay, the Sixth Circuit distinguished the *Cuomo* decision, finding that the safety considerations were more significant because it was considering the issuance of a full power license to a nuclear power plant as opposed to the five percent power license considered in *Cuomo*.¹⁰

During the NEPA review, Petitioners' pipeline safety expert, Richard Kuprewicz, and nuclear safety expert, Paul Blanch, filed comments calling attention to serious flaws in the NRC's analysis of placing a larger, higher pressure

⁹ *Ohio ex rel. Celebrezze v. Nuclear Regulatory Com.*, 812 F.2d 288, 290-292 (6th Cir. 1987) (citing *Cuomo*, 772 F.2d at 977).

¹⁰ *Id.* at 292.

gas pipeline in such close proximity to the IPEC nuclear plant.¹¹ The Commission refused to take any steps to verify the NRC's questionable calculations through an independent risk analysis even when strongly urged by numerous government officials to do so.¹²

As Petitioners' experts explain, a reliable analysis that complies with the NRC's regulatory guidance and uses realistic assumptions demonstrates that the magnitude of the harm from a rupture of the AIM pipeline next to IPEC would be catastrophic and irreparable.¹³ The analyses by the NRC, Entergy, and its consultant, Risk Research, Inc., grossly underestimated the blast radius of an explosion of the AIM pipeline by:

- 1) failing to use the methodology approved by the NRC in its regulatory guidance - Regulatory Guide 1.91 (RG 1.91), entitled "Evaluations of Explosions Postulated To Occur At Nearby Facilities And On Transportation Routes Near Nuclear Power Plants",¹⁴
- 2) basing their analyses primarily on their use of EPA's ALOHA computer program,¹⁵ which is prohibited by the EPA user manual for this type of modeling¹⁶ and is not included in RG 1.91 as an acceptable method for

¹¹ Blanch Comments, R.1217; Report, R. 1633, Attachment 2, Kuprewicz Declaration (Exhibit 2).

¹² See Exhibit 3.A, Various governmental letters regarding safety risk analysis; see also <http://www.nytimes.com/2016/02/29/nyregion/plan-to-expand-a-pipeline-at-indian-point-raises-concern.html>

¹³ Unlike in *Cuomo* where the D.C. Circuit emphasized that the petitioners "only vaguely sketch[ed] the contours of [the] asserted harm," *Cuomo*, 722 F.2d at 976, here Petitioners have submitted detailed expert affidavits to support their irreparable harm argument.

¹⁴ Exhibit 1, Blanch Declaration at ¶ 9.

¹⁵ *Id.* at ¶¶ 11, 13.

¹⁶ Exh. 1 - Blanch Declaration at ¶¶ 10, 21.

- analyzing the risk of a pipeline explosion next to a nuclear plant;¹⁷ and
3) using the completely unrealistic assumption that a pipeline rupture could be isolated and terminated by valve closures within 3 minutes.¹⁸

NRC's Regulatory Guide 1.91 provides a simple equation for calculating the blast radius from a pipeline rupture. This equation states that the damaging blast radius is proportional to the amount of gas or energy released during the event, which is calculated by multiplying the gas release flow rates by the amount of time the gas continues to flow before the rupture is isolated.¹⁹

Expert Blanch obtained an NRC internal email stating the flow rates that NRC assumed for gas released from a rupture of the AIM pipeline.²⁰ Using these numbers along with the NRC's assumption that the gas flow will terminate within 3 minutes in the equation approved by NRC's RG 1.91 results in a blast radius of approximately 1,905 feet, which is significantly larger than the blast radius of 1,155 to 1,266 feet calculated by Risk Research using the ALOHA program.²¹ The NRC, Entergy, and Risk Research have never provided a basis for deviating from

¹⁷ *Id.* at ¶10.

¹⁸ *Id.* at ¶ 16; Exh. 2 - Kuprewicz Declaration at ¶¶ 8,9,12.

¹⁹ Exh. 1 - Blanch Declaration at ¶¶ 14,15.

²⁰ Obtained under the Freedom of Information Act (FOIA). *Id.* at ¶ 17.

²¹ *Id.* at ¶¶ 11,13,18. Expert Kuprewicz has explained that the actual gas release rates will be significantly greater than the flow rates assumed by the NRC because this is a 42-inch pipeline that is close to a compressor station. Exh. 2 - Kuprewicz Declaration at ¶ 14. Therefore, the blast radius of an explosion of the AIM pipeline would be even larger than Expert Blanch has calculated.

the only methodology approved by the NRC in RG 1.91.²²

Even in the very unlikely scenario where the pipeline valves could be closed within 3 minutes, expert Kuprewicz explained that “the NRC’s assumption does not consider that gas release even with closed valves will continue at very high rates for a considerable period of time.”²³ When expert Blanch used the same NRC flow rates along with a realistic gas flow termination time of 60 minutes in the RG 1.91 equation, he calculated that the blast radius would be approximately 4,000 feet, encompassing the entire nuclear plant site and resulting in a catastrophic nuclear meltdown.²⁴ Even assuming that the gas release could be isolated and terminated in 30 minutes, the blast radius would still be 3,200 feet, encompassing nuclear reactor units 1 and 3, and most of reactor unit 2.²⁵

A blast radius in this range would likely disable structures, systems and components necessary to prevent core melting and major radioactive releases to the environment and cause a nuclear catastrophe similar to Fukushima.²⁶ According to

²² Exh. 1 - Blanch Declaration at ¶11.

²³ Exh. 2 - Kuprewicz Declaration at ¶ 12.

²⁴ Exh. 1 - Blanch Declaration at ¶ 19. As a direct result of inquiries from Congressional Representatives to the NRC Chairman questioning the NRC’s assumption of a 3-minute valve isolation time, the NRC conducted a “bounding” analysis assuming a gas release for one hour. This bounding analysis used an energy release inconsistent with previous values provided by the NRC and also used the ALOHA program. If the NRC had used its published release rates in its RG 1.91 equation the blast radius after 60 minutes would be 4,000 feet. *Id.* at ¶ 22.

²⁵ *Id.* at ¶ 19.

²⁶ *Id.* at ¶ 20.

expert Blanch, who has worked as a consultant to the Chief Nuclear Officers at IPEC, none of the safety systems at IPEC have been designed or analyzed to withstand the projected blast effects.²⁷

Importantly, the NRC's findings on the safety risk of the AIM pipeline's proximity to IPEC are completely inconsistent with the agency's prior analyses. For example, the NRC used its RG 1.91 equation to properly analyze the safety risk of placing a 22-inch gas line with an operating pressure of 722 PSI next to the Turkey Point nuclear facility in Florida. This analysis projected a blast radius of 3,097 feet. The AIM project's significantly larger pipeline (42 inches) uses a higher design pressure of 850 psi. Yet the NRC projected a blast radius of only about 1,200 feet.²⁸ Another example is a study required by the NRC which analyzed the proposed siting of a nuclear facility in New Mexico 1.8 miles from a 16-inch gas line operating at less than 50 psi. Although that pipeline was only about 1/3 of the diameter of the new AIM pipeline, was operating at a gas pressure 17 times lower than the AIM pipeline, and was located at a significantly greater distance away from the proposed nuclear facility than AIM is from IPEC, the study determined that the risk of a pipeline explosion near the proposed nuclear facility was unacceptable under NRC regulations.²⁹

²⁷ *Id.* at ¶¶ 3,20.

²⁸ Exh. 1 - Blanch Declaration at ¶ 23.

²⁹ *Id.* at ¶ 29.

Under NRC regulations, if the probability of a pipeline event occurs at a frequency of less than 1 in 10 million per year (1×10^{-7} per year), then this risk is acceptable. The NRC's analysis initially states that the failure rate for the AIM pipeline would be 1.5 failures per 1000 years (1.5×10^{-3}) within the proximity of IPEC, a number that exceeds the NRC's acceptable rate by a factor of more than 1000 times.³⁰ However, as expert Blanch explains, although this initial pipeline failure rate is accurate, the NRC then improperly reduced this number by assuming only a 1% probability of a complete pipeline break, a 5% ignition rate, and a further reduction of at least an order of magnitude for an underground pipe. These assumptions are not supported by the NRC's cited references and are otherwise unrealistic and unsupported.³¹ According to expert Kuprewicz, "NRC's analysis ignores the very real possibility that a 42-inch pipeline rupture will occur, and fails to consider the extreme forces associated with such a high pressure large diameter gas transmission pipeline rupture that always, because of pipe rupture mechanics, releases as dual full bore pipeline releases."³²

The area around IPEC is considered to be a high consequence area under the Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations,

³⁰ Exh. 1 - Blanch Declaration at ¶ 27.

³¹ *Id.* at ¶ 28; Exh. 2 - Kuprewicz Declaration at ¶ 15.

³² Exh. 2 - Kuprewicz Declaration at ¶ 15.

and thus within its integrity management program.³³ However, even PHMSA recognizes that this program has not been effective at preventing pipeline ruptures in high consequence areas. PHMSA's recent Notice of Proposed Rulemaking, entitled "Pipeline Safety: Safety of Gas Transmission and Gathering Pipelines", states:

The NTSB noted, in a 2015 study, that IM requirements have reduced the rate of failures due to deterioration of pipe welds, corrosion, and material failures. However, pipeline incidents in high-consequence areas due to other factors increased between 2010 and 2013, and the overall occurrence of gas transmission pipeline incidents in high-consequence areas has remained stable.³⁴

Expert Kuprewicz describes these problems further in his attached Declaration, including explaining that the newness of a pipeline does not guarantee that it is immune from future rupture.³⁵ He also emphasized the ineffectiveness of Entergy's proposed safety enhancement measures for constructing the AIM segment.³⁶

This Court must stay the AIM project in order to protect the public from imminent danger because Petitioners' experts have established that the probability and magnitude of irreparable harm from a pipeline rupture next to IPEC are likely much greater than NRC and the Commission have acknowledged.

³³ Final EIS for AIM at 4-267, 4-278; Exh. 2 - Kuprewicz Declaration at ¶ 19.

³⁴ 81 FR 20722, 20729. *See also* Exh. 2 - Kuprewicz Declaration at ¶¶ 19, 21; Exhibit 5, PHMSA Chart.

³⁵ Exh. 2 - Kuprewicz Declaration at ¶ 20; *see also* Exhibit 5, PHMSA Chart.

³⁶ *See* Exh. 2 - Kuprewicz Declaration at ¶¶ 16, 17.

II. There is also a strong likelihood that construction of the next two segments of the Algonquin pipeline expansion will cause irreparable harm to the environment in the absence of a stay of the AIM project.

The Algonquin pipeline expansion consists of three connected projects – AIM, Atlantic Bridge, and Access Northeast. However, the Commission failed to consider the full environmental and safety consequences of these projects in the EIS for AIM.³⁷ Since the construction of AIM is scheduled to be completed in November 2016, much of the environmental harm has already occurred. However, this Court still has an opportunity to prevent further irreparable harm to the environment by issuing a stay of AIM before construction is complete.

The Commission has continued to violate NEPA since issuing the Certificate for the AIM project. It concluded, without sufficient analysis, that the next segment, Atlantic Bridge, will not have a significant impact. If the three connected projects had been evaluated in a single EIS, the Commission would have been required to address all of the significant environmental impacts. The abbreviated Atlantic Bridge EA cannot substitute for the more thorough EIS analysis required by NEPA, and deprived the public of its right to meaningfully participate in the review process. Further, the conflict of interest of the third party contractor who performed the review of all three segments also supports Petitioners' arguments that the true extent of the environmental impacts of these projects have not yet

³⁷ Petitioners' Opening Brief at 10 - 37.

been analyzed.³⁸

Thus, in the absence of a stay of AIM, construction of the inadequately reviewed next two segments, Atlantic Bridge and Access Northeast, will likely cause further irreparable harm to the environment that has not and will not be taken into account by the Commission in its decision-making process.

III. In the absence of a stay there will also be a further irretrievable commitment of resources to the AIM project as well as to the subsequent segments before this Court rules on Petitioners' claims.

This Court has found that “[t]he purpose of equitable intervention in cases in which federal agencies have failed to comply with NEPA’s requirements is to ensure that such compliance will take place before there has been an irretrievable commitment of resources.”³⁹

Although the Commission has previously acknowledged that it has broad authority under the Natural Gas Act to require a company to take whatever steps are deemed appropriate in the event that a certificate is vacated – including,

³⁸ See Petitioners’ Opening Brief at 34, 67-71.

³⁹ *Jones v. D.C. Redevelopment Land Agency*, 499 F.2d 502, 512 (D.C. Cir. 1974) (internal quotations omitted). “[NEPA’s] purpose is to require consideration of environmental factors before project momentum is irresistible, before options are closed, and before agency commitments are set in concrete.” *Massachusetts v. Watt*, 716 F.2d 946, 953 (1st Cir. 1983) (quoting W. Rodgers, *Environmental Law* § 7.7 at 767 (1977)).

potentially, project removal⁴⁰ - as a practical matter, this relief is more complicated to grant (albeit not insurmountable) once the project is placed in service. For example, Section 7(b) of the Natural Gas Act prohibits a pipeline from abandoning a project without a hearing, while the Commission itself has declined to take a project out of service, even after vacating the certificate, to avoid harm to consumers who have become dependent upon the gas supply.⁴¹

Moreover, once construction of AIM is complete and the gas flows, the balance of equities could change since Algonquin may incur significant contractual obligations, further committing regulatory and financial resources, particularly with respect to the environmental review and construction of the next two project segments.⁴² Since NEPA is meant to influence the decision-making process before a project proceeds, if the gas is already flowing through AIM and the construction of Atlantic Bridge is already underway by the time this Court invalidates the EIS for AIM, it will be more difficult to undo the damage than by Court action at this time.⁴³

⁴⁰ *Millennium Pipeline Co., LLC*, 141 FERC ¶ 61,022, at 17 (October 9, 2012) (disagreeing with petitioners' contention that Commission lacks authority to require project removal as a remedy).

⁴¹ *Hunt Oil Company v. Federal Power Comm.*, 334 F.2d 474, 480 (5th Cir. 1964).

⁴² "Each of these events represents a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues." *Watt*, 716 F.2d at 952 (affirming issuance of a preliminary injunction in a NEPA case).

⁴³ *Id.*

IV. If a stay is issued, the Commission and Algonquin would suffer only economic loss, which does not constitute irreparable harm.

Mere economic loss does not constitute irreparable harm to Algonquin, the Commission, or the public.⁴⁴ Moreover, in a situation analogous to Algonquin's decision to construct a pipeline expansion, the D.C. Circuit held that self-imposed financial risks related to the application for a project "are not properly the subject of inquiry on a motion for stay."⁴⁵

V. The strong public interests in safety as well as compliance with NEPA would be promoted by issuance of a stay.

"Though there is more than one public interest involved here, the most crucial concern is public safety."⁴⁶ Numerous letters and comments sent by the Senators of New York and Massachusetts, the Governor of New York, Congressional representatives, New York State legislators, and various local officials reflect the strong public interest in staying the AIM project until there has been an independent safety risk analysis.⁴⁷ Many government officials have also

⁴⁴ *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Ohio ex rel. Celebrezze*, 812 F.2d at 291-292.

⁴⁵ *Cuomo*, 772 F.2d at 977. See also *Ohio ex rel. Celebrezze*, 812 F.2d at 291-292; *Lee v. Christian Coal. of America*, 160 F. Supp. 2d 14, 33 (D.D.C. 2001); *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997 (8th Cir. 2011).

⁴⁶ *Ohio ex rel. Celebrezze*, 812 F.2d at 292 (citing *Cuomo*, 772 F.2d at 978) ("the safety concern outweighs any economic harm which utility ratepayers may suffer as a result of the delay in licensing [of a nuclear power plant]").

⁴⁷ *Cuomo*, 772 F.2d at 978. See Exhibit 3.A, Government letters and comments regarding safety risk analysis.

been urging the Commission to investigate the conflict of interest issue.⁴⁸ As this Court has stated, “[t]he fact that the present project is currently under construction by no means insulates it from the equity power of a court: The substantial additional costs which would be caused by court-ordered delay may well be justified by the compelling public interest in the enforcement of NEPA.”⁴⁹

VI. Petitioners are likely to succeed on the merits of their NEPA claims because this case is very similar to *Delaware Riverkeeper v. FERC*.

In *Delaware Riverkeeper v. FERC*, 753 F.3d 1304, 1315 (D.C. Cir. 2014), this Court found that the Commission violated NEPA by “(1) segmenting its environmental review of the Northeast Upgrade Project, *i.e.*, failing to consider the Northeast Upgrade Project in conjunction with three other connected, contemporaneous, closely related, and interdependent Tennessee Gas pipeline projects and (2) failing to provide a meaningful analysis of the cumulative impacts of these projects to show that the impacts would be insignificant.”⁵⁰ Because this case presents facts very similar to *Delaware Riverkeeper*, Petitioners are likely to succeed on the merits of their claims.

A. Segmentation

Like the Tennessee Gas Eastern Leg upgrade projects considered by this

⁴⁸ See Exhibit 3.B, Correspondence regarding NRG Conflict of Interest.

⁴⁹ *Realty Income Trust*, 564 F.2d at 456 (D.C. Cir. 1977); see also *Fund for Animals v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993).

⁵⁰ *Delaware Riverkeeper*, 753 F.3d at 1307.

Court in *Delaware Riverkeeper*, the three projects here are connected, closely related and interdependent actions that were required to be considered in a single EIS because that they share a “clear physical, functional and temporal nexus.”⁵¹

With regard to the physical nexus, both the Algonquin pipeline expansion and the Tennessee Gas pipeline projects constitute upgrades of continuous existing pipelines. Moreover, the AIM Project was overbuilt in anticipation of the Atlantic Bridge Project coming online,⁵² and the Atlantic Bridge and Access Northeast segments involve further modifications to the existing Stony Point and Chaplin Compressor Stations that are part of the AIM project.⁵³

Evidence of the connection and interdependence of the projects is also similar to that in *Delaware Riverkeeper*. Algonquin planned and marketed the three projects as a single unit by touting the collective increase in capacity by 150 percent.⁵⁴ There is also an overlap in project shippers between the three segments.⁵⁵ “In other words, even though each project's incremental increase in pipeline capacity was contracted for separately, all of the projects function together seamlessly.”⁵⁶ Together, the three segments of the Algonquin expansion will transport Marcellus Shale gas from the Mid-Atlantic to New England.

⁵¹ *Id.* at 1308.

⁵² Kuprewicz Report, R. 1663 (Attachment 2 to Exh. 2 - Kuprewicz Declaration).

⁵³ Rehearing Order at P.70, R. 2181...

⁵⁴ Riverkeeper Rehearing Request, Ex. 5, R. 1880.

⁵⁵ See Commission Order at P. 75, R. 2181.

⁵⁶ *Delaware Riverkeeper*, 753 F.3d at 1311.

With regard to the temporal nexus, here as in *Delaware Riverkeeper*, the pipeline expansion projects are being reviewed by the Commission and constructed in rapid succession.⁵⁷ Although the review and construction of each of the three segments here will take place over a five year period, in contrast to the five segments of the Tennessee Gas pipeline upgrade which were finished in three years, this two year difference is insignificant in context. Since the Algonquin upgrade involves installation of a larger pipeline (42 inches versus 30 inches) along a 1,129 mile route (which is five times longer than the Tennessee gas pipeline projects) and construction of at least two compressor stations, it requires a longer time frame to complete, but the same type of overlapping schedule of environmental review and construction of the project segments exists here as it did with the Tennessee Gas pipeline projects.⁵⁸

Finally, the selection of the same third party contractor to perform the environmental review for all three segments further corroborates that they were planned and developed as a unit. Together, these factors make this case stronger than the facts presented in *Delaware Riverkeeper*.

B. Cumulative Impacts

As in *Delaware Riverkeeper*, when the AIM DEIS was released on August

⁵⁷ See Exhibit 4 - Timeline of AIM, Atlantic Bridge and Access Northeast Pipeline development (“Timeline”).

⁵⁸ See Exhibit 4, Timeline.

6, 2014, Algonquin was planning serial, interconnected upgrades on the same pipeline system in the same region of influence.⁵⁹ Spectra announced open season for Atlantic Bridge on February 5, 2014, and on June 27, 2014, Spectra outlined its plan for Access Northeast in a letter to the New England States Committee on Electricity (NESCOE).⁶⁰ At this point, the Commission should have evaluated the cumulative impacts of all three projects, but they failed to do so. Instead they offered only abbreviated and conclusory mention of Atlantic Bridge's impacts in the AIM DEIS - exactly the same lack of cumulative impacts analysis that this Court found inadequate in *Delaware Riverkeeper*.⁶¹

C. Conflict of Interest

Courts have shown little tolerance when the contractor exerts improper influence over the agency's decisions.⁶² There is ample evidence of NRG's conflicts and likely influence over the NEPA process -- for example, NRG excluded Atlantic Bridge from the scope of the AIM DEIS, explaining that Atlantic

⁵⁹ See *Delaware Riverkeeper*, 753 F.3d at 1319.

⁶⁰ <http://www.spectraenergy.com/Newsroom/News-Archive/Spectra-Energy-and-Northeast-Utilities-Announce-New-England-Energy-Reliability-Solution/>; Atlantic Bridge Announcement, R. 1882; NESCOE Letter, Coalition Rehearing Request at 12, R.1882.

⁶¹ Petitioners' Opening Br. at 35.

⁶² See, e.g., *Colorado Wild, Inc. v. United States Forest Service*, 523 F. Supp. 2d 1213 (D. Colo. 2007); *Davis v. Minetta*, 302 F.3d 1104, 1112 (10th Cir. 2002). However, failure to require a conflicts disclosure will not necessarily result in reversal of an otherwise above-board process. *Citizens against Burlington v. Busey*, 938 F.2d 190, 202 (D.C. Cir. 1991).

Bridge would not occur at the same time and its impacts were unknown.⁶³ NRG had a vested interest in segmenting the Algonquin expansion in the AIM DEIS and Atlantic Bridge EA so that each subsequent segment would move forward and produce more work for NRG.⁶⁴ Nonetheless, the Commission relied on NRG's finding in rejecting Petitioners' segmentation and cumulative impacts claims.⁶⁵

The appropriate remedy when a NEPA process is compromised is to invalidate the EIS.⁶⁶ Although a contractor's conflict of interest can sometimes be mitigated by adequate supervision by the federal agency responsible for the EIS, here, FERC's reliance on NRG's improper findings suggests that it did not exert such supervision.⁶⁷ Accordingly, Petitioners are likely to succeed on the merits of their claims that NRG must be disqualified, and its FEIS for AIM – along with its NEPA actions for the other projects – must be invalidated and the Certificate withdrawn.

VII. Petitioners are also likely to succeed on the merits of their claim that the Commission failed to independently evaluate NRC's unreliable safety risk analysis.

In *LaFlamme v. FERC*, the Ninth Circuit held that the Commission's

⁶³ DEIS at 4-272, R.865..

⁶⁴ See Petitioners' Opening Brief at 34, 67-71.

⁶⁵ See *e.g.*, FERC Certificate Order, P. 110-112.

⁶⁶ *Am. Wild Horse Pres. Campaign v. Vilsack*, 133 F. Supp. 3d 200, 223 (D.D.C. 2015).

⁶⁷ *Associations Working for Aurora's Residential Environment v. Colorado Dep't of Transportation*, 153 F.3d 1122 (10th Cir.1998).

“verbatim adoption” of a study done by the Forest Service and the license applicant was a violation of its “duty to independently assess the consequences of a project.”⁶⁸ The Court, finding that the Commission also failed to analyze the cumulative impacts, suspended the order granting a license to operate a hydroelectric power plant and remanded the matter for a review consistent with NEPA and the Federal Power Act.⁶⁹ The Commission engaged in similar conduct here by failing to independently verify NRC’s unreliable risk analysis, particularly in the face of such intense criticism by engineers and government officials.

VIII. Conclusion

The balance of the four factors tips heavily in favor of granting Petitioners’ request for an emergency stay of the AIM pipeline project under Rule 18.

Respectfully submitted,

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⁶⁸ 852 F.2d 389, 400 (9th Cir. 1988).

⁶⁹ *Id.*

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Dated: September 21, 2016

CERTIFICATE OF SERVICE

I certify that I have served the foregoing Motion for a Stay by Riverkeeper and the Petitioners in Docket No. 16-1103 on the Federal Energy Regulatory Commission and other parties in this case via the ECF system.

Carolyn Elefant

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