No. 17-1506

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DELAWARE RIVERKEEPER NETWORK; MAYA VAN ROSSUM, the Delaware Riverkeeper,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, and Robert M. Speer, in his official capacity as Secretary of the U.S. Army, and Lieutenant General Todd T. Semonite, in his official capacity as U.S. Army Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers, and Edward E. Bonner, Chief, Regulatory Branch, U.S. Army Corps of Engineers, Philadelphia District, in his Official Capacity,

Respondents.

EMERGENCY MOTION OF PETITIONERS FOR A STAY OF FINAL AGENCY ACTION OF THE UNITED STATES ARMY CORPS OF ENGINEERS UNDER RULE 18

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Dated: March 16, 2017

Counsel for: *Delaware Riverkeeper Network and the Delaware Riverkeeper*

RULE 26.1 DISCLOSURE STATEMENT

The Delaware Riverkeeper Network is a nonprofit 501(c)(3) membership organization that advocates for the protection of the Delaware River, its tributaries, and the communities of its watershed. The Delaware Riverkeeper Network does not have any parent corporation, nor does it issue stock.

Respectfully submitted this 16th day of March 2017,

/s Aaron Stemplewicz

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INTRODUCTION AND FACTS

Petitioners seek an emergency stay of the February 2, 2017, United States Army Corps of Engineers' ("Corps" or "Respondent") issuance of a Clean Water Act Section 404 permit ("Section 404 permit") for Tennessee Gas Pipeline Company LLC's ("Tennessee") proposed Orion Project ("Project"). *See* Section 404 Permit, Ex. 3. All Construction activity was authorized to begin on March 15, 2017, by the Federal Energy Regulatory Commission ("FERC"). *See* Letter Order Granting All Construction Activity, Ex. 17.[1]

On October 9, 2015, Tennessee filed a request to the FERC for a Certificate of Public Convenience and Necessity for the Project. *See* Application for Certificate of Public Convenience and Necessity (Docket No. CP16-4), Ex. 1. Under the Natural Gas Act, FERC is the lead federal agency responsible for authorizing applications to construct and operate interstate natural gas pipeline facilities, and for the Project's review pursuant to the National Environmental Policy Act ("NEPA"). *See* 15 U.S.C. §717f. FERC required Tennessee to obtain a Clean Water Act Section 404 permit from the Corps. *See* FERC Order Granting Certificate for Orion Project, 158 FERC ¶ 61,110, at ¶ 110, Ex. 2. Petitioners

[1] The Delaware Riverkeeper Network filed two motions for stay of any construction related activity related to the Project with FERC. *See* Exs. 10, 11. However, FERC has not ruled on either motion, and instead has authorized all construction activity to begin. *See* Letter Orders Granting Construction Activities, Exs. 12, 17.

challenge the Corps' issuance of the Section 404 permit as arbitrary, capricious, or otherwise not in accordance with law.

The proposed Project involves the construction of approximately 13 miles of pipeline loop[2] along Tennessee's existing pipeline system. *See* Section 404 Permit, Ex. 3. Portions of pipeline facilities would cross Pennsylvania State Game Lands, a wildlife management unit, a federally-designated Appalachian Landscape Conservation Cooperative, five Core Habitat areas, one Pennsylvania-designated Important Bird Area, and three private hunting properties. As explained in more detail below, the wrongly-issued permit promises to inflict significant and irreparable harm on the environment, and irreparable harm on Petitioners, their members, and the public. This harm includes, but is not limited to, the substantial and permanent deforestation of "exceptional value" wetlands, destruction of wetland wildlife habitat, and permanent degradation of the functions and values of those wetlands. *See* Public Notice Section 404 Permit, Ex. 14 (Table 1).

The first step in the Corps' review of a Section 404 permit requires the Corps to make a determination of the basic purpose of the project; this key determination directs the Corps' review of alternatives for the project. If the Corps fails to accurately define the basic purpose of the project, its subsequent review of project alternatives is unlawfully skewed. *See, e.g.*, *Sierra Club v. Antwerp*, 362

[2] Pipeline "loops" are new pipelines sited alongside and adjacent to one or more pre-existing pipelines.

Fed.Appx. 100, 107 (11th Cir. 2010) ("Th[e] procedural failure by the Corps flaws its subsequent determination regarding the availability of practicable alternatives in violation of its own regulations").

Here, the Corps unreasonably narrowly defined the "Basic Project Purpose" for the Orion Project. *See* Statement of Findings, at 4-5, Ex. 15. Specifically, the Corps defined the basic purpose of the Project as requiring the construction of "pipeline loops." *Id*. This overly narrow statement, by definition, fails to consider any alternatives **not** involving the building of pipeline loops. This is a crucial mistake because in documents generated by Tennessee and submitted to FERC, Tennessee expressly admitted that it could accomplish the goals of the Project by simply adding two compressor stations along its existing system. This "compression alternative" would allow for increased volumes of gas in its existing system **without** the need of any additional pipeline construction. Such an alternative would also result in far less environmental harm to the streams and wetlands protected by Section 404 of the Clean Water Act. However, by failing to get step one correct, the Corps violated the governing regulations and set itself on a trajectory for review that failed to appropriately consider the "compression alternative." The Corps' issuance of the Section 404 permit is therefore arbitrary, capricious, or otherwise not in accordance with the law.

JURISDICTION AND STANDING

This Court has jurisdiction to hear this case pursuant to 15 U.S.C. § 717r(d)(1) of the Natural Gas Act ("NGA"). *See* 15 U.S.C. § 717r(d)(1). Section 717r(d)(1) provides that:

> [t]he United States Court of Appeals for the circuit in which a facility subject to . . . section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency . . . acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval . . . required under Federal law.

Id. Because the issuance of the Section 404 permit is an "action" by a "Federal agency" acting "pursuant to Federal law" to issue a "permit," Petitioners meet the standard articulated in Section 717r(d)(1). *See Delaware Riverkeeper Network, et al. v. Secretary Department of Environmental Protection, et al.*, 833 F.3d 360, 370-374 (3d Cir. 2015).

Petitioners are a non-profit organization representing members who reside, work, and recreate in the areas that will be affected by the Project. *See* Declarations, Exs. 5-7. Tennessee's construction and operational activities will cause Petitioners' members concrete, particularized, and imminent harm, which this Court can redress by granting a stay. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Petitioners therefore have standing to assert this claim.

STANDARD OF REVIEW

In order to obtain a stay pending appeal, "the moving party must generally show: (1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured *pendente lite* if relief is not granted to prevent a change in the status quo." *Delaware River Port Auth. v. Transamerican Trailer Transp., Inc.*, 501 F.2d 917, 919–20 (3d Cir. 1974) (*quoting A.L.K. Corp. v. Columbia Pictures Indus., Inc.*, 440 F.2d 761, 763 (3d Cir. 1971)). The Court should also take into account, "(3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." *Id.* at 920 (footnote omitted). Agency action under the NGA is reviewed pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706, whereby courts hold unlawful and set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A).

ARGUMENT

I. Petitioners Demonstrate a High Likelihood of Success of the Merits

a. The Corps' Definition of "Basic Purpose" is Overly Narrow, Unlawful, and Not Supported by the Evidence in Tennessee's Application

The Corps irrationally defined the "basic purpose" for the Orion Project too narrowly by stating that it is to "construct natural gas pipeline loops." *See* Statement of Findings, at 4-5, Ex 15. A review of the record shows that this definition is not only irrational on its face, but is expressly contradicted in the

Corps' own decisional documents. The Corps' issuance of the 404 permit was therefore arbitrary and capricious.

To conform to the requirements of the Clean Water Act, Tennessee and the Corps must clearly demonstrate a lack of "practicable" alternatives under the Section 404(b)(1) Guidelines. *See* 40 C.F.R. § 230.10(a). Practicable alternatives are alternatives that are "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2). Whether an "alternative is 'practicable' depends on how the project purpose is defined." *Alliance For Legal Action v. U.S. Army Corps of Engineers*, 314 F.Supp.2d 534, 548 (M.D. N.C. 2004). The "basic purpose" analysis is therefore "an important first step" in the permitting process for projects considered by the Corps. *Gouger v. U.S. Army Corps of Engineers*, 779 F.Supp.2d 588, 604 (S.D. Tx. 2011).

In this context, the "basic purpose" of a project must be defined in "broad and simple terms." *Town of Abita Springs v. U.S. Army Corps of Engineers*, 153 F.Supp. 3d 894, 920 (E.D. La. 2015) (*citing* 40 C.F.R. § 230.10(a)). Specifically, to make this determination, the Corps:

> must carefully define what it is that the applicant is proposing to do. This process—defining the project purpose is, therefore, a critical first step to the Corps' proper evaluation of practicable alternatives. Initially, the Corps determines a project's 'basic purpose' to assess whether the activity associated with the project is water dependent . . . Where a project's basic purpose is not water dependent, the Corps will

> steer the project toward alternatives that do not involve discharges into wetlands. Indeed, for those projects, the Corps presumes that such alternatives are available. Once the basic purpose is determined, the Corps analyzes practicable alternatives in light of a project's 'overall purpose,' which is more particularized to the applicant's project than is the basic purpose, and reflects the various objectives the applicant is trying to achieve.

Florida Clean Water Network, Inc. v. Grosskruger, 587 F.Supp.2d 1236, 1243 (M.D. Fla. 2008) (citations omitted); *see also Alliance for Legal Action*, 314 F.Supp.2d at 548–49. Additionally, it is well established that even "though the specific project may be highly location-dependent, the broad, location-neutral basic purpose can result in a finding of non-water dependency." *Abita Springs*, 153 F.Supp. 3d at 920.

Federal courts have cautioned the Corps and project applicants from defining a project too narrowly. For example, as one court has explained:

> the definition of a project purpose may not be used by the sponsor as a tool to artificially exclude what would otherwise be practicable alternatives to the project, in other words, the sponsor's project purpose must be 'legitimate.' Thus, the project purpose may not be defined so narrowly that it make[s] what is [a] practicable [alternative] appear impracticable.

Grosskruger, 587 F.Supp.2d at 1244 (citations omitted); *see also Sylvester v. U.S. Army Corps of Eng'rs*, 882 F.2d 407, 409 (9th Cir. 1989) ("an alternative . . . does not have to accommodate components of a project that are merely incidental to the applicant's **basic** purpose") (emphasis original); *Shoreline Assocs. v. Marsh*, 555 F.Supp. 169, 179 (D. Md. 1983) (Court upheld the Corps' denial of a permit,

observing that the boat facilities were merely "incidental" to town house development).

Here, the Corps improperly narrowly defined the "basic purpose" of the Project, and thus precluded the consideration of alternatives that were required to be reviewed prior to the issuance of the Section 404 permit. In the paragraph preceding the Corps' "Basic Project Purpose" determination that the Project required the "construct[ion] of pipeline loops," the Corps specifically found that:

> The stated project purpose in the FERC/Corps Environmental Assessment is to **increase natural gas transportation in order to respond to the needs of three contracted shippers**. The Project would allow TGP to provide an additional 135,000 dekatherms per day (Dth/d) of west to east natural gas capacity on TGP's 300 Line to provide firm transportation service to the Project shippers

See Statement of Findings, at 4-5, Ex. 15 (emphasis added). In light of this statement, the "basic purpose" for this Project could not be clearer; **it is simply to facilitate the transportation of greater volumes of natural gas**. Nowhere is there any mention of a pipeline, or any discussion of the specific need for pipeline loops. As such, a more accurate basic purpose should read something akin to "the transportation of natural gas."

The Corps' fundamental mistake here undermines the rest of its review. By defining the "basic purpose" to specifically require the construction of pipeline loops, the Corps necessarily pre-determined that any alternative not involving the construction of pipeline loops to be outside the scope of its review and

consideration. This pre-determination had significant ramifications in the context of the Corps' review of this Project because Tennessee identified a "compression alternative" to the construction of the pipeline loops. *See* Resource Report 10, at 10-16, Ex. 4.

Specifically, Resource Report 10 detailed that Tennessee could construct "new (greenfield) compressor stations each with approximately 10,000 horsepower of compression equipment" that could transport the 135,000 dekatherms to the desired delivery points along Tennessee existing system. *Id*. This alternative would not require the construction of **any pipeline loops**. Additionally, there was no question that this alternative was logistically and technically feasible, and could also achieve the specific goals of the Project. *Id*. Furthermore, while this alternative would require Tennessee to obtain roughly forty acres per site, even assuming that all of those acres would need to be disturbed by construction (which is highly unlikely), this alternative would still disturb less than a third of what the proposed Project would impact. *See* Orion Environmental Assessment, at 8, Ex. 8 ("The footprint of all Project-related disturbances during construction is estimated at 262.6 acres"). Additionally, because of the non-linear nature of the construction of the "compression alternative," there is a high likelihood that it would impact far fewer waterways and wetlands. However, because of the narrowly defined "basic purpose" determination, the Corps could not, and did not, perform an adequate

analysis related to this alternative. As such, there is no analysis for the "compression alternative" for, among other things: temporary acres disturbed for construction, permanent land disturbance, total wetlands impacted, total streams impacted, trees to be cleared, impacts to state game lands, impacts to preserved lands, etc. There is simply no way the Corps could have reasonably compared the "compression alternative" to the proposed Project.

To the extent that alternative sites or designs exist that would result in less impact to wetlands – such as the "compression alternative" – the Corps is **compelled** to provide specific evidence proving the unavailability of that alternative. *See Korteweg v. Corps of Engineers*, 650 F. Supp. 603, 604 (D. Conn. 1986); *see also Bersani v. EPA*, 850 F.2d 36, 39 n. 2 (2nd Cir. 1988). There is no question the Corps failed to do so here. As such, the Corps was prohibited from approving the Section 404 permit authorizing the construction of pipeline loops until and unless the "compression alternative" was fully evaluated and found not to be "practicable." *See* 40 C.F.R. § 230.10(a)(3).

b. <u>In the Alternative, Pipeline Projects are not "Water Dependent" Projects Pursuant to Section 230.10(a)(3), which Required the Applicant to Prove the "Compression Only" Alternative was not Practical</u>

Even if the "basic purpose" of the Project to "construct natural gas pipeline loops" was accurate, the Corps' decision to issue the permit was still arbitrary and capricious. Pipeline projects are categorically not "water dependent" activities, and

therefore, a rebuttable presumption arose which specifically required the Corps to review the "compression alternative." *See* 40 C.F.R. § 230.10(a)(3). Because the Corps did not appropriately require this evidence, or conduct the necessary review, its decision to issue the Section 404 permit was unlawful.

Federal courts have relied on a United States Army Corps of Engineers' statement of standard operating procedures when interpreting what constitutes a water dependent activity pursuant to the Clean Water Act:

> The basic purpose of the project must be known to determine if a given project is "water dependent." For example, the purpose of a residential development is to provide housing for people. Houses do not have to be located in a special aquatic site to fulfill the basic purpose of the project, i.e., providing shelter. Therefore, a residential development is not water dependent . . . Examples of water dependent projects include, but are not limited to, dams, marinas, mooring facilities, and docks. The basic purpose of these projects is to provide access to the water.

Sierra Club v. Antwerp, 709 F.Supp. 2d 1254, 1261 (S.D. Fla. 2009) (citing Army Corps of Engineers Standard Operating Procedures for the Regulatory Program (October 15, 1999) (updated July 2009)); *see also Grosskruger*, 587 F.Supp.2d 1236.

Here, the basic purpose of a pipeline simply does not require access or proximity to water. As such, the proposed Project is not "water dependent" for the purposes of the Clean Water Act. Federal courts are in universal agreement that linear construction activities similar to pipelines are not water dependent activities,

even where the desired location of those activities required crossings of waterbodies and wetlands. *See, e.g.*, *Northwest Bypass Group v. United States Army Corps of Eng'rs*, 552 F.Supp. 2d 97, 108–109 (D. N.H. 2008) (construction of roadway not water dependent); *Hoosier Envt'l. Council v. United States DOT*, 2007 WL 4302642, at *16 (S.D. Ind., Dec 10, 2007) (construction of highway not water dependent); *Coastal Conservation League v. U.S. Army Corps of Eng'rs*, 2016 WL 6823375, at *13-14 (S.D. Fl., November 18, 2016) (construction of a road not water dependent despite the fact that "expanding and improving the road could not occur without impacting special aquatic sites"); *Bailey v. United States*, 116 Fed. Cl. 310, 313 (2014) (citing Army Corps of Engineers' conclusion that roads are not water dependent); *N. Idaho Cmty. Action Network v. Hofmann*, 2009 WL 1076165, at *4 (D. Idaho, Apr. 21, 2009) (implicitly finding highway non-water dependent). Therefore, a desire to locate a project in a certain area "does not mean that the [project] activity requires siting in wetlands. Housing developers presumably would always choose to build on waterfront property, but that does not make the provision of housing a 'water dependent' activity." *Sierra Club v. Flowers*, 423 F.Supp.2d 1273, fn. 231 (S.D. Fla. 2006) (*reversed on other grounds*).

In contrast to these non-water dependent projects, federal courts have agreed that the type and nature of projects that qualify as "water dependent" are more like

those involving the construction of dams, piers, wharves, and bridges. *See, e.g.*, *Grosskruger*, 587 F.Supp.2d 1236; *see also Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341, 1345-46 (8th Cir. 1994). Because these types of activities require siting in waterbodies to fulfill their basic function, they are fundamentally different from pipelines, which simply do not need to be sited near or in water to operate.

The non-water dependent nature of pipelines therefore required the Corps to presume: (1) practicable alternatives that do not involve special aquatic sites are available, and (2) all practicable alternatives that do not involve a discharge to a special aquatic site have less adverse impact on the aquatic environment. *See* 40 C.F.R. § 230.10(a)(3). Both presumptions are rebuttable in that they apply "**unless clearly demonstrated otherwise**." *Id*. (emphasis added). The Corps may not issue a Section 404 permit unless the applicant, "with independent verification by the [Corps]…provide[s] detailed, clear and convincing information proving…" that an alternative with less adverse impact is "impracticable." *Utahns for Better Transp. v. U.S. Dep't. of Transportation*, 305 F.3d 1152, 1186-87 (10th Cir. 2002); *see also Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1262 n. 12 (10th Cir. 2003).

In this context, the burden shifted to the Corps and Tennessee to rebut these two presumptions, and to clearly prove that less damaging practicable alternatives did not exist. However, not only did Tennessee fail to show that a less damaging

alternative did not exist, the presumption that one did exist **was confirmed by Tennessee** in the submissions it provided to the FERC pursuant to its NEPA review (the "compression alternative") – with which the Corps was a cooperating agency. *See also* 40 C.F.R. § 230.10(a)(4). Therefore, not only is it clear that the Corps failed to lawfully rebut the two presumptions that arose under Section 230.10(a)(3), but it is also clear that Tennessee actually identified the alternative that required additional and detailed analysis by the Corps prior to issuing the Section 404 permit.

Therefore, regardless of how the "basic purpose" of the Project was defined, the Corps was required to review the "compression alternative" and provide a clear explanation as to why this alternative was not "practicable." This is especially true considering the significantly reduced environmental impacts to aquatic ecosystems of the "compression alternative" as compared to the proposed Project. However, no such review could have been undertaken, because such a possibility was excluded at the outset. Even if the Corps could claim that it considered the "compression alternative," which it did not, there is no record evidence proving that such an alternative was impractical, because the detailed information needed to make that determination was neither generated nor reviewed. As such, the Corps' issuance of the permit is arbitrary, capricious, or otherwise not in accordance with the law.

II. Petitioners Will Suffer Irreparable Harm in the Absence of a Stay

The guidelines governing the Corps' issuance of Section 404 permits pronounce a strong, clear, and persuasive presumption against permitting any damage to wetlands. The guidelines declare that "[f]rom a national perspective, the degradation or destruction of . . . wetlands is considered to be among the **most severe environmental impacts,**" and that "[t]he guiding principle should be that degradation or destruction of [wetlands] may represent an **irreversible loss of valuable aquatic resources**." 40 C.F.R. § 230.1(d) (emphasis added). "The cumulative destruction of our nation's wetlands that would result if developers were permitted to artificially constrain the Corps' alternatives analysis by defining the projects' purpose in an overly narrow manner would frustrate the statute and its accompanying regulatory scheme." *Whistler*, 27 F.3d at 1346 (citations omitted).

The Supreme Court has recognized that environmental harm, "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *see also Brady*, 612 F. Supp. 2d at 25 ("[E]nvironmental and aesthetic injuries are irreparable"). Therefore, "[t]he question of irreparable injury does not focus on the **significance** of the injury," but instead on "whether the injury, irrespective of its gravity, is **irreparable**—that is whether there is any adequate remedy at law." *Sierra Club v. Martin*, 933 F. Supp. 1559, 1570-71(N.D. Ga. 1996) (*reversed on other grounds*) (emphasis added); *see also Environmental*

Defense v. U.S. Army Corps of Eng'rs, 2006 WL 1992626 at *8 (D.D.C., July 14, 2006) ("Because of the irremediable nature of many environmental claims, courts have been wary of even relatively modest environmental harm").

It is well established that the clearing of trees **alone** constitutes irreparable harm, let alone the deforestation of "exceptional value" wetlands. *See, e.g.*, *Concerned Citizens of Chappaqua v. U.S. Department of Transportation*, 579 F.Supp.2d 427, 432 (S.D.N.Y. 2008) (the felling of only sixty-one trees warranted a preliminary injunction.); *Lichterman v. Pickwick Pines Marina, Inc.*, 2007 WL 4287586, at *6 (N.D. Miss. Dec. 6, 2007) (finding that clearing trees in a shoreline buffer zone constituted irreparable harm to residents with views of the shore); *Saunders v. Wash. Metro. Area Transit Auth.*, 359 F.Supp. 457, 462 (D. D.C. 1973) (enjoining subway construction because, in addition to procedural harms, "[p]laintiffs would suffer irreparable harm in the removal of trees from their neighborhood"); *Merritt Parkway Conservancy v. Mineta*, 424 F.Supp.2d 396, 425 (D. Conn. 2006) (holding the "felling of mature trees" together with other effects to aesthetic and historic features to be irreparable harm). Additionally, the irreparable harm requirement is satisfied when, as here, the proposed Project will likely irreparably harm Plaintiffs' interests in using, recreating in, and conserving the project area. *See AWR v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011); *See* Declarations, Ex. 5 at ¶¶ 9-19; Ex. 6 at ¶¶ 7-11; Ex. 7 at ¶¶ 8-11.

On March 15, 2017 FERC issued a Letter Order to Tennessee authorizing all construction activity now that the FERC had received all "of the required federal authorizations relevant to the proposed activities." March 15, 2017 Letter Order Granting All Construction Activity, Ex. 17. The construction activity related to the 404 permit includes mechanized clearing and trenching, irreversible deforestation of wetlands, and the permanent loss of wetland functions and values of numerous wetlands located in state gamelands and other public natural areas. *See* Public Notice Section 404 Permit, Ex. 14. Specifically, the Project will result in the permanent deforestation of roughly 5.5 acres of currently-forested wetlands. *See* Statement of Findings, at 16, Ex. 15. By the specific design of the Project, the mature trees in these wetlands will forever cease to exist, and never be permitted to regrow. Furthermore, the Corps has admitted that the construction activity will require Tennessee to "offset the functional losses" of impacted wetlands by the "enhancement" of offsite wetlands. Section 404 Permit, at Condition 25, Ex. 3. This statement is a clear admission of permanent functional degradation of the impacted wetlands. For example, the bird wildlife species that inhabit forested wetlands are simply not the same birds that inhabit non-forested emergent wetlands. The permanent clearing and trenching through these wetlands constitutes irreparable harm to the environment and to the interests of Petitioners' members.

To put the scope of the harm in perspective, the Sunoco Mariner East II pipeline – which is proposed to stretch over 300 miles across Pennsylvania and impact over 500 wetlands – will result in **less than half an acre** of permanent deforestation of wetlands. *See* Sunoco Chapter 105 Permit, at 10, Ex. 9. Here, the Orion Project is roughly **twenty times** smaller than the Mariner East II pipeline project, yet will irreversibly harm **10 times more** forested wetlands. The scope of the harm for the Orion project is therefore greatly disproportionate to the overall size of the Project. Yet, what is more troubling is that had the Corps performed the appropriate analysis as required by the governing regulations, it is possible, even likely, that none of these resources would need to be impacted at all. Petitioners satisfy the irreparable harm factor because not only are the harms significant and irreversible, but they are also immediate and ongoing in nature.

III. A Stay Will Not Cause the Corps or Tennessee Substantial Injury

Courts consider whether the requested injunctive relief would "harm [] other interested persons." *Constructors Ass'n of Western Pennsylvania v. Kreps*, 573 F.2d 811 (3d Cir.1978). However, "[t]he more likely the [movant] is to win, the less heavily [the movant] need[s] the balance of harms weigh in [the movant's] favor." *Karakozova v. University of Pittsburgh*, 2009 WL 1652469, at *3 (W.D. Pa. June 11, 2009) (quoting *NLRB v. Electro–Voice, Inc.*, 83 F.3d 1559, 1568 (7th Cir. 1996)). Also, "[t]he injury a [nonmoving party] might suffer if an injunction

were imposed may be discounted by the fact that the [nonmoving party] brought that injury upon itself." *Novartis Consumer Health Inc v. Johnson & Johnson–Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002); s*ee also Pappan Enterprises, Inc. v. Hardee's Food Systems, Inc.*, 143 F.3d 800, 806 (3d Cir. 1998).

Although Tennessee may allege that delay to its construction schedule will result in economic harm, any such harm must be weighed in light of the fact that Tennessee is ultimately responsible for that delay. Tennessee chose to design and submit a proposed pipeline project that clearly violated the express regulatory provisions of the Clean Water Act. As such, any harm to Tennessee should be considered in the context of the self-inflicted and avoidable nature of the harm.

IV. A Stay Pending Review is in the Public Interest

In cases involving preservation of the environment, the balance of harms generally favors the granting of injunctive relief. *See Amoco Prod. Co*., 480 U.S. at 545 ("If such injury is sufficiently likely . . . the balance of harms will usually favor the issuance of an injunction to protect the environment."). There also is no question that the public has an interest in the protection of "exceptional value" wetlands to the fullest extent of the law. Here, the improper clearing of mature trees and trenching through "exceptional value" wetlands, and the concomitant loss of the ecological services those wetlands provide, are significant environmental

harms, and therefore harm the public's interest in protecting natural resources pursuant to the Clean Water Act.

Any delay to Tennessee's construction schedule from a stay would not outweigh the permanent environmental damages that will occur absent a stay. *See Cronin v. U.S. Dep't of Agriculture*, 919 F.F2d 439, 445 (7th Cir. 1990) (The felling of trees that will not grow back in plaintiff's lifetime outweighs "the time value of the profit component of [the anticipated] revenue[s]" of the project); *see also Citizen's Alert Regarding the Environment v. United States Dept. of Justice*, 1995 WL 748246 at *11 (D. D.C. Dec. 8, 1995) (potential loss of revenue, jobs, caused by delay did not outweigh "permanent destruction of environmental values that, once lost, may never again be replicated"). The costs of complying with the Clean Water Act cannot fairly be characterized as harm, particularly when those costs are the self-inflicted.

CONCLUSION

Petitioners request a temporary stay during the pendency of this Court's consideration of this Emergency Motion for Stay, and for this Emergency Motion for Stay to be granted. Petitioners have no objection to an expedited schedule for resolution of the Emergency Motion for Stay. *See* LAR Rule 27.7.

Respectfully submitted this 16th day of March 2017,

/s Aaron Stemplewicz

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Counsel for: *Petitioners Delaware Riverkeeper Network and the Delaware Riverkeeper*

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2017, the foregoing Emergency Motion for Stay and Exhibits have been served via the Court's CM/ECF system, and via Overnight Mail, upon Respondents in this matter:

Attn: Lieutenant General Todd T. Semonite, Commanding General
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Attn: Robert Speer, Secretary of Army Department of the Army
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Houston, Texas 77002-5089

*Additionally, an electronic courtesy copy of the Motion and related Exhibits has also been provided to counsel representing the parties.

Dated: March 16, 2017

/s Aaron Stemplewicz

Aaron Stemplewicz
Counsel for: *Petitioners Delaware Riverkeeper Network and the Delaware Riverkeeper*

CERTIFICATE OF BAR ADMISSION

Pursuant to Third Circuit Local Appellate Rule 28.3(d) Petitioners hereby certify that Aaron J. Stemplewicz of the Delaware Riverkeeper Network is a member of the bar of this Court.

Dated: March 16, 2017

/s Aaron Stemplewicz

Aaron Stemplewicz
Counsel for: *Petitioners Delaware Riverkeeper Network and the Delaware Riverkeeper*

L.A.R. 31.1 CERTIFICATION

I, Aaron Stemplewicz, pursuant to L.A.R. 31.1. (c), certify that a virus detection program has been run on the files and no virus was detected. The virus detection program used was Microsoft Security Essentials, Version 1.203.1304.0.

Dated: March 16, 2017

s/ Aaron Stemplewicz

Aaron Stemplewicz
Counsel for: *Petitioners Delaware Riverkeeper Network and the Delaware Riverkeeper*