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 Individual and Official Capacity,

Respondents,

And

Tennessee Gas Pipeline Company, LLC,

Intervenor.

PETITIONERS' REPLY TO UNITED STATES ARMY CORPS OF ENGINEERS' RESPONSE TO PETITIONERS' EMERGENCY MOTION FOR A STAY

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Dated: March 22, 2017

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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 22nd day of March 2017,

/s Aaron Stemplewicz

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Petitioners have a statutory right to judicial review of their claim that the U.S. Army Corps of Engineers ("Corps") unlawfully issued the Section 404 permit. *See* 15 U.S.C. § 717r(d)(1). Petitioners have also shown they are likely to succeed on the merits, and that public interest favors a stay. Additionally, in the absence of a stay, a substantial portion of project construction, if not the construction of the entire project, will be completed prior to judicial resolution of the case. Allowing construction activities to proceed prior to Petitioners' getting their day in court guarantees irreparable harm to Petitioners' aesthetic, recreational, and environmental interests. This is especially true considering that Petitioners' claims call into question the necessity of the proposed pipeline loops as a whole. Additionally, Petitioners specifically aver that imminent mechanized tree clearing, which easily falls under the scope of activities subject to a Section 404 permit, result in the alleged harms to Petitioners interests.

The Corps' arbitrary decision is highlighted by the fact that neither Tennessee nor the Corps provides a **single citation** to support the conclusion that the compression alternative was impractical, this is because the necessary data to do so is completely missing from the record. Additionally, the Corps' representation to this Court that it expressly relied on and deferred to the Federal Energy Regulatory Commission ("FERC") for analysis of pipeline alternatives is an admission that it did not evaluate the compression alternative. This is true

because FERC clearly admits that did not review the compression alternative in the Environmental Assessment ("EA") for the Project.

The Corps is left exclusively relying on a mere three paragraph summary of the compression alternative for demonstrating compliance with its Section 404 Guidelines. However, this truncated document does not contain the specifics necessary to "provide detailed, clear and convincing evidence" that the presumptions pursuant to Section 230.10(a)(3) have been overcome, and the compression alternative is "impracticable." *Utahns for Better Transp. v. U.S. Dep't. of Transportation*, 305 F.3d 1152, 1186-87 (10th Cir. 2002).

ARGUMENT

I. Petitioners Make a Strong Showing of Likelihood of Success on the Merits

The Corps admits that it did not decide whether the Project was "water dependent" as required by its regulations, and therefore also did not make a decision as to whether the accompanying presumptions pursuant to Section 230.10(a)(3) arose in this matter. *See* 40 C.F.R. § 230.10(a)(3). Instead, the Corps simply argues that the Corps' analysis of this Project ultimately overcomes those presumptions, so they are "irrelevant." *See* Corps Resp. at 13. The Corps' arguments do not hold water.

The Corps attempts to respond to Petitioners claim that the "Basic Project Purpose" of building pipeline loops necessarily precluded the appropriate review

of alternatives **not** involving pipeline loops, *see* Pet. Mot. At 8, by describing the backwards review process undertaken by the Corps. *See* Corps Resp., at 13-16. The Corps' first concedes that the stated "Basic Project Purpose" of the Project was to "build natural gas pipeline loops." Corps Resp., at 15, n. 8. But then contends that the "overall project purpose" was to "increase[] natural gas transportation in order to respond to the needs of three contracted for shippers." Corps Resp., at 14. Therefore, the Corps essentially went from a very narrow "basic purpose" to a broader "overall project purpose" during its review; which is the exact opposite sequence of a proper Section 404 review as prescribed by law and the 404 Guidelines. *See* Pet. Mot., at 6-7. This process outlined by the Corps demonstrates the foundation from which the Corps' arbitrary review proceeded, and suggests that the Corps' arguments here are merely *post hoc* rationalizations of the Corps' actions. Such *post hoc* rationalizations are "incompatible with the orderly functioning of the process of judicial review." *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 169 (1962).

In this context, the Corps primarily relies on the specious argument that this disordered process "did not function to restrict consideration of alternatives." Corps Resp., at 15. However, this position is entirely undermined by the Corps' express reliance on the FERC's Environmental Assessment for its alternatives analysis, and specifically, FERC's "expertise regarding pipeline alternatives."

Corps Resp., at 18. FERC's alternatives analysis, as adopted by the Corps, provides a plain admission that the Corps never appropriately evaluated the compression alternative.

The Corps stated to FERC that it "will need to concur on the range of alternatives retained for detailed study in the NEPA document" for compliance with its 404 Guidelines. *See* Corps Letter to FERC, January 27, 2017, at 1, Ex. 1. FERC's alternatives analysis provides the full scope of FERC's review of potential alternatives, and states that, "**we did not evaluate any aboveground facility site alternatives**." Orion Environmental Assessment, at 89, Ex. 2. The "compression alternative" requires "aboveground facilities" (*i.e.* the compressor stations), therefore, because the Corps relied on the limited range of alternatives retained for study by FERC, it must also be true that the Corps never appropriately evaluated or came to any reasonable conclusions regarding this alternative. Indeed, the EA does not even describe the compression alternative, let alone reach any conclusions regarding its practicality. The Corps' representation to this Court that it expressly relied on and deferred to FERC for analysis of pipeline alternatives can only be interpreted as an admission that it did not appropriately evaluate the compression alternative, and that it certainly did not require evidence sufficient to rebut the "very strong" presumptions pursuant Section 230.10(a)(3). *See Buttrey v. United States*, 690 F.2d 1170, 1180 (5th Cir.1982).

Because there is nothing in the final EA that supports the conclusion that the Corps adequately evaluated the compression alternative, the Corps is left relying on Tennessee's statements in a three paragraph summary of the compression alternative contained in a preliminary report before a different agency. *See* Corps Resp., at 18-20. The Corps distorts the contents of this report and overstates its conclusions in an attempt to demonstrate a modicum of compliance with the 404 Guidelines. *Id.* For example, the Corps contends that the report supports the conclusion that a number of factors were evaluated in the context of the compression alternative, including a consideration of "environmental resources, engineering and constructability constraints, landowner impacts, and costs." Corps Resp., at 19. However, **none** of these factors **except costs** are even mentioned in the context of the "compression alternative" analysis. Instead, each of these other factors relate to the "system and routing alternatives" as mentioned earlier in the paragraph cited by the Corps. *See* Corps Resp., Ex. 1, 10-12 through 10-15. And with regard to costs, there is nothing in the report, the EA, or any other document, stating that costs rendered the "compression alternative" impracticable. Indeed, the three paragraphs in the report do not even provide a rudimentary comparison of the costs of the compression alternative and the proposed Project; these "higher costs" could amount to as little as a single dollar. This type of information is the bare

minimum of what is required to address, and rebut, the "very strong" presumptions in Section 230.10(a)(3).

The Corps next attempts to justify its decision by stating that the "compression alternative" would require Tennessee to obtain eighty acres of land. *See* Corps Resp., at 19.The Corps inexplicably ignores its own guidance on this issue which states that the Corps can consider "an area not presently owned by the applicant which could reasonably be obtained" for a practicable alternative. *See* 40 C.F.R. § 230.10(a)(2). Again, because no specifics were provided in the report, this analysis could not be done. For example, neither Tennessee nor the Corps can point to any specific sites that were investigated pursuant to the compression alternative to determine whether they could be reasonably obtained. Similarly, the report briefly mentions that construction would cause other vegetation clearing and impacts to the environment, but because no sites were ever identified, none of these impacts were ever reviewed, quantified, or compared to the proposed Project. It is entirely possible that Tennessee could have re-purposed existing brownfield sites that would result in little or no environmental impacts; however, we simply do not, and cannot know because the Corps failed to undertake that investigation. Considering that the total disturbance of the compression alternative would be, at most, a third as much disturbance as the proposed Project, it is highly unlikely that the harms would be greater than the pipeline loops.

Furthermore, the report does not specifically state that the compression alternative is not feasible, or would involve significant environmental harms, or would not accomplish the basic or overall purpose of the Project. And importantly, it also does not conclude that the compression alternative was impracticable. The Corps' failure to obtain and independently verify this type of information writ-large is especially egregious considering the Corps is duty-bound to seek such information where the alternatives analysis of a separate agency does not provide sufficient detail for the Corps to comply with its Section 404 Guidelines. *See* 40 C.F.R. § 230.10(a)(4).

The utter lack of specifics in the three paragraph report, combined with the admission that there was no reasonable evaluation of the compression alternative in the EA, shows that the Corps did not provide the requisite "detailed, clear and convincing information **proving** impracticability." *Utahns*, 305 F.3d at 1186 (emphasis original).

II. Petitioners Will Suffer Irreparable Harm Absent a Stay

Respondents bootstrap their merits defense in arguing that Petitioners cannot show irreparable harm because the Project will not substantially endanger the environment as a result of the Corps' mitigation requirements. Corps Resp., at 22-23. This misstates the applicable standard and ignores the necessarily subjective element of the irreparable harm test focusing on Petitioners' interests. *See Winter*

v. Nat. Res. Def. Council, 557 U.S. 7, 20-22 (2008). The Supreme Court has been clear that it is the harm to the **petitioner** that is the touchstone for determining irreparable harm. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (The "relevant showing" for irreparable injury "is not injury to the environment but injury to the plaintiff"). Therefore, the Court's focus must be on the way in which Petitioners are harmed.

Petitioners assert that they visit and plan to visit in the future specific areas impacted by imminent and ongoing Project construction activities, including, but not limited to: Upper Delaware Scenic River's Important Bird Areas, State Game Lands 116, the Lackawaxen River, several unnamed tributaries to the Lackawaxen, Lord's Creek, and several unnamed tributaries to Lord's Creek. *See e.g.*, Pet. Mot., Declaration of Maya van Rossum, at ¶ 12. An element of Petitioners' harm here is the irreversible loss of the "use and enjoyment" of these natural areas as a result of wetland functional degradation and permanent deforestation and clearing. *Id.*; *see also U.S. v. Malibu Beach, Inc.*, 711 F.Supp. 1301, 1313 (D.N.J. 1989) (finding irreparable harm for degradation of a "variety of critical functions, including providing a habitat for wildlife" of wetlands). Petitioners have made clear that they have personally visited these resources and enjoy activities such as hiking, nature walks, and wildlife observation, which would be "adversely affected by the future operational impacts of the Project, including the permanent conversion of

exceptional value wetlands from forested wetlands to emergent wetlands." Pet. Mot., at Declaration of Maya van Rossum, at ¶ 12. Furthermore, these harms are ongoing, as all construction activity has been approved and will proceed absent a stay. *See* Notice of Commencement of Construction, March 16, 2017, Ex. 3.

Petitioners agree that tree felling activities by hand outside of waterways and wetlands may not implicate Section 404 authority, which is why Petitioners filed their emergency motion at the point in time when Tennessee received full permission to proceed with all construction activity. The Corps recognizes that activities such as mechanized tree clearing are implicated by its Section 404 authority. *See* U.S. Army Corps Letter to Tennessee Gas, January 28, 2011, Ex. 5 (activities that disturb "root systems" or involve "mechanized pushing, dragging, or other similar activities" in wetlands and waterways are regulated under Section 404). It is exactly these types of activities, as opposed to hand cutting of trees in uplands, that are subject to Section 404 regulation and are now authorized, and by which Petitioners will be harmed. Therefore, Petitioners' request of a stay of any imminent construction activities, including, but not limited to mechanized tree clearing, is appropriate.

Additionally, the proposed off-site mitigation plan designed to compensate for these irreversible harms resulting from the Project is not a location that Petitioner has in the past, or plans in the future, to visit. *See* Declaration of Maya

van Rossum (March 22, 2017), at ¶ 2, Ex. 3. Nor is it clear whether Petitioners could visit the site even if they wanted to, as the wetland mitigation sites are typically not located on public property. Therefore, the existence of the off-site mitigation plan in no way addresses or mitigates the specific harms suffered by Petitioners.

III. A Stay Will Not Cause Tennessee Substantial Injury and is in the Public's Interest

Tennessee repeatedly complains that it must commence construction immediately in order to complete construction by the "in-service" date of December 1, 2017. Tennessee Resp., at 18-21. However, these statements wholly misconstrue the deadlines set forth in the Tennessee's Certificate.[1] The Certificate does not in any way compel a December 1, 2017 service commencement date; instead, it merely provides for the "completion of construction of the proposed facilities and making them available for service within two years of the date of this order." *See* FERC Certificate, at 48, ¶ B(1), Ex. 4. Thus, the actual FERC-imposed deadline for completing construction and placing the facilities in service is February 2, 2019. *Id*. Therefore, Tennessee's harm is limited to the loss of the time value of money, which simply does not outweigh the permanent degradation of some of Pennsylvania's most protected and pristine wetlands.

[1] Notably, Tennessee does not provided any evidence, outside of a vague and unsupported affidavit, that sustains its claims of economic harm – for example, the relevant portions of the shipper contracts.

Furthermore, Tennessee can mitigate any harm resulting from a delay of its project. Specifically, Tennessee has the option to file a motion to expedite the proceedings pursuant to 15 U.S.C. §717r(d)(5). Tennessee is well aware of this option, as it requested and was granted an expedited appeal in similar circumstances. *See Tennessee Gas Pipeline Company, LLC v. Paul, et al.*, D.C. Circuit, Docket No. 17-1048, *Per Curiam* Order (February 17, 2017). As such, the potential expedited nature of this appeal further mitigates whatever monetary harm is alleged by Tennessee.

In comparison, absent a stay it is likely that the majority, if not the entirety, of construction for the Project will be completed before this court can render an opinion pursuant to Petitioners' claims – even under expedited review. Petitioners here seek to avoid the outcome from *Delaware Riverkeeper Network, et al. v. FERC*, where the Delaware Riverkeeper Network was denied an emergency motion for stay, and the Project was completed and in-service by the time the court issued its Order in favor of petitioners. *See Delaware Riverkeeper Network, et al. v. FERC*, 753 F.3d 1304, 1320 (D.C. Cir. 2014). Petitioners' and the public's interest in preserving the status quo of a barely begun project so as to resolve these legal claims prior to the Project being completed outweighs Tennessee's monetary interests.

CONCLUSION

For the foregoing reasons, Petitioners request for this Emergency Motion for Stay to be granted.

Respectfully submitted this 22nd day of March 2017,

/s Aaron Stemplewicz

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CERTIFICATE OF SERVICE

I certify that on March 22, I filed the foregoing Reply using the Court's CM/ECF system. All participants in this case are registered to receive service with that system and will receive a copy of this Opposition upon its filing.

Dated: March 22, 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 22, 2017

/s Aaron Stemplewicz

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

CERTIFICATE OF COMPLIANCE

I certify that this response to a motion complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 27(a)(2)(B), this response contains 2,570 words. This response to a motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6).

Dated: March 22, 2017

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