No. 17-1533

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

Petitioners,

v.

SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF ENVIRONMETNAL PROTECTION; PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents,

And

TENNESSEE GAS PIPELINE COMPANY, LLC

Intervenor.

REPLY TO RESPONSE OF PETITIONERS' EMERGENCY MOTION OF FOR A STAY OF FINAL AGENCY ACTION OF THE PENNSYLVANIA DEPARTMENT OF ENVIRONMETNAL PROTECTION

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Petitioners have a statutory right to judicial review of their claims that the Pennsylvania Department of Environmental Protection ("Department") unlawfully issued the two Chapter 105 permits and the Clean Water Act Section 401 permit. *See* 15 U.S.C. § 717r(d)(1). Petitioners have also shown they are likely to succeed on the merits, and that the public interest favors a stay. And while Petitioners make a credible showing of irreparable harm, this case can ultimately be resolved on the basis of whether this Court finds that a violation the Pennsylvania regulations has occurred, because such a violation results in irreparable harm per se.

In this context, both the Department and Tennessee consciously fail to cite a single case from Pennsylvania state courts, Pennsylvania federal courts, or the Pennsylvania Environmental Hearing Board that has found a pipeline project, or any type of linear infrastructure, must be considered "water dependent" pursuant to 25 Pa. Code § 105.18a(a)(2). Neither party even cites to caselaw standing merely for the general principle that a project that does not require water to fulfil its primary function **could** be considered "water dependent." And for good reason, no court, in any jurisdiction has ever come to such a conclusion. Indeed, to the extent this Court adopts the Department's argument that a pipeline could conceivably be considered "water dependent" would turn the entire concept of water dependency on its head, and would be a radical departure from well-established precedent. Indeed, this Court would be the only Court, anywhere, to come to such a

conclusion. Furthermore, this Court need not even reach the issue of whether pipelines are "water dependent," as it is clear that the basic purpose of the Project could be fulfilled without building the pipeline loops through the "exceptional value" wetlands. As such the Department's decision to issue the Chapter 105 permits is arbitrary and a motion for stay for a barely begun project is warranted.

ARGUMENT

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

The Department's finding that the Project is "water dependent" is arbitrary, unreasonable, and not supported by any authority or the record evidence in Tennessee's applications. The single issue before the Court here is whether the proposed Project is "water dependent" in the context of Section 105.18a(a)(2).

The Department's interpretation of Section 105.18a(a)(2) is unreasonable, and its argument that the Court should defer to its interpretation is therefore meritless. Because the Department is unable to cite to Pennsylvania state courts, Pennsylvania federal courts, or the Pennsylvania Environmental Hearing Board of single example where a court found that a linear infrastructure project was "water dependent," the Department is forced to ask this Court to solely rely on the Department's interpretation of this regulation. *See* Dept. Opp., at 9-10. While the Department enjoys a certain degree of deference, it only receives deference when the regulation is ambiguous, and does not receive deference if its interpretation is

"plainly erroneous or inconsistent with the regulation." *Auer v. Robbins* 519 U.S. 452, 461 (1997) (internal quotes and citations omitted). Here, the simple reality is that there is no ambiguity, pipelines do not need access or proximity to water to perform their basic purpose. An applicant's desire to locate its pipeline across wetlands and waterways does not magically transform a pipeline from a non-water dependent activity, to a water dependent activity.

The Department supports its unreasonable interpretation, not with citation to caselaw, guidance documents, or any other point of authority, but instead with the bald assertion that the Department has "long considered linear infrastructure projects to be water-dependent where there is no practicable alternative." Dept. Opp., at 9. When such an assertion is unsupported by any evidence or authority, there is simply no reason it should be given any weight. This is particularly true considering that all of the courts that have addressed the issue of water dependency have come to the **universal conclusion** that linear infrastructure projects, such as pipelines, are not water dependent. *See* Pet. Mot. at 12-13. *See, e.g., 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").

The Department's assertion that its "permitting authority for activities in wetlands and jurisdiction under Chapter 105 is vastly different from Section 404," Dept. Opp., at 12, is **completely undercut** by existing case law interpreting Section 105.18a in the context of Section 404 of the Clean Water Act. Indeed, it has been established that when a court is confronted with interpreting a provision of Section 105.18(a) – the provision at question here – it is appropriate to specifically look to Section 404 Clean Water Act for guidance. *See Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93,109 (Pa.Cmwlth.2004) ("While our research reveals no Pennsylvania cases interpreting the 'basic project purpose' language [contained in Section 105.18a of the Department's regulations, 25 Pa.Code § 105.18a], our interpretation is consistent with federal case law interpreting the Clean Water Act (CWA) and its attendant regulations, which contain similar permitting requirements [regarding] wetlands.") (footnote omitted). Therefore, Petitioners citation to overwhelming federal case law supporting its claims weighs heavily in favor of a finding of a likelihood of success on the merits. *See* Pet. Mot., at 12-13. In light of the collective consensus on water dependency Department's interpretation here is unsupported and unreasonable.

The Court need not even decide whether pipeline projects are "water dependent," as Tennessee has clearly indicated that a viable compression

alternative exists for the Project. As detailed in the description of the compression alternative, Tennessee conducted a highly technical hydraulic modeling of its system and determined that it could move the contracted for volumes of gas through its system, and achieve the basic purpose of the project, by simply adding additional compression to the existing system. *See* Pet. Mot., at 9-10. The Department relies on a vague and conclusory resuscitation of a legal standard for evidence that this alternative was not practical:

> The Project has no available practicable alternatives that would fulfill the purpose of the Project and would not involve a wetland or that would have less effect on EV wetlands, and which would not have other significant adverse effects on the environment.

Dept. Opp., at 11. However, the Department fails to provide any specific demonstration of how or why the compression alternative is not practicable. Indeed, the only record evidence specifically addressing the compression alternative suggests otherwise.

In this context, both the Department and Tennessee also vaguely cite to Section 105.14(b)(7) to support the argument that the compression alternative was not practical. However, this section of the code has little, if any, relevance to Petitioners claims, and to the extent that it is relevant, it only further buttresses Petitioners' arguments. First, it is unclear how, or whether, Section 105.14(b)(7) even applies to 105.18a(a)(2). Section 105.14(b)(7) is specifically designed to be considered by the Department only in the context of "factors to make a

determination of impact," not factors for the department to consider when reviewing Section 105.18a. 25 Pa. Code § 105.14(b).

However, even if this section is relevant, it provides further reason for the Court to find the Department's actions arbitrary. Section 105.14(b)(7) unequivocally states that "[t]he dependency must be based on the **demonstrated unavailability of any alternative location, route or design**…" 25 Pa. Code § 105.14(b)(7). There is simply nothing in the record demonstrating, or even suggesting, the unavailability of the "compression alternative" design for the Project. In fact, the little record evidence that does exist suggests that such an alternative was not only available, but technically feasible and capable of carrying out the basic purpose of the Project.

Indeed, considering the compression alternative was technically feasible, to find otherwise would require the Department, at a bare minimum, to identify the potential specific sites for the "compression alternative," in order to determine the comparative environmental impact. However, conspicuously missing from the application submissions, decisional materials, and Responses by both Tennessee and the Department, are any specific proposed locations for the compression alternative. This is the fundamental piece of information that is necessary to begin any type of analysis of the potential alternative. Indeed without it, it is impossible to know whether the site is in uplands or would cross streams and wetlands, the

quality of those streams and wetlands, whether those resources would be impacted by proposed construction activities, the significance of those impacts, etc. The only thing that is known without a doubt is that Tennessee conducted a technical hydraulic modeling of its system, and determined that the compression alternative was a viable alternative that could fulfil the basic purpose of the Project.

Therefore, even if Section 105.14 applied, the utter lack of any data "demonstrating unavailability" of the compression alternative renders the Department's issuance of the Chapter 105 permits arbitrary and unlawful.

II. Petitioners Suffer Irreparable Harm Per Se, as Well as Traditional Irreparable Harm

Petitioners suffer irreparable harm per se as a result of the violation of Section 105.18a(a)(2). Not only have state courts and the Environmental Hearing Board applied the irreparable harm per se standard for violations of Pennsylvania's regulatory provisions, *see* Pet. Mot., at 18, but federal courts interpreting state laws have also found irreparable harm per se in such circumstances. *See Reynolds v. Rick's Mushroom Service, Inc.*, 2004 WL 620164, at *6 (E.D. Pa., March 29, 2004) (finding irreparable harm *per se* for violations of 25 Pa.Code § 291.201); *see also Council 13, Am. Fed., of State, County and Mun. Employees, AFL-CIO v. Casey*, 141 Pa.Cmwlth. 199, 595 A.2d 670, 674 (Pa.Commw. Ct. 1991) (*citing Pennsylvania Pub. Util. Comm'n v. Israel,* 356 Pa. 400, 52 A.2d 317 (1947)). Additionally, while irreparable harm per se applies as a result of express

violations of specific Pennsylvania regulations, it also applies to the Department's permit review process itself. *See Center for Coalfield Justice and Sierra Club v. Commonwealth of Pennsylvania*, 2017 WL 663900, at * 10 (Pa. Env. Hrg. Bd., February 1, 2017) (finding that a "permit review process that is arbitrary, capricious, unreasonable or inappropriate is injurious to the public" constitutes "irreparable harm per se"). Therefore, to the extent this Court finds a likelihood that Petitioners will prevail on their merits claims, irreparable harm is assumed and a stay is appropriate.

Petitioners also satisfy the traditional element of irreparable harm. 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 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 "variety of critical functions, including providing a habitat for wildlife" of wetlands). Furthermore, these harms are ongoing, as **all construction activity** has been approved and will proceed absent a stay.

Petitioners harms are not limited to tree felling activities, but rather include all types of imminent earth disturbance activities, permanent changes to cover type, and the degradation of wetland functions and values as associated with the Project, and admitted by the project applicant.[1] Indeed, to the extent these harms would not, or are not, occurring Tennessee would not have been required to obtain the two Chapter 105 permits, and would not have been required to submit a detailed mitigation plan.

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

[1] Tennessee's claim that there are only three "exceptional value" wetlands in the project area is flatly contradicted by the Department's statement that there are actually no less than thirteen. Indeed, "exceptional value" wetlands comprise over thirty percent of the impacted wetlands.

December 1, 2017. Tennessee Resp., at 18-21. However, these statements wholly misconstrue the deadlines set forth in the Tennessee's Certificate. 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 strictly protected wetlands.

Furthermore, Tennessee has a right to 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 pursuant to this section of the Natural Gas Act in the D.C. Circuit pursuant to a separate FERC jurisdictional project. *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 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.

Furthermore, Tennessee could easily resolve this clear violation of Section 105.18a(a)(2) by simply committing to horizontally directionally drilling ("HDD") under the thirteen "exceptional value" wetlands identified in the project area. Indeed, for the Sunoco Mariner East II pipeline Project, Sunoco committed to HDD under over **130 wetlands**;[2] here, in contrast, Tennessee does not propose to

[2] *See* http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/Huntingdon/11%20-%20EAF/Encl%20E%20-%20Comp%20Env%20Eval/Part%202%20-%20Resource%20ID%20and%20Proj%20Impacts/PPP-Project-Wide%20Resource%20ID%20and%20Impacts%20120116_FINAL.pdf, at pg. 26.

use the technique **once**. Tennessee could also resolve this issue by moving forward with the compression alternative, which necessarily eliminates encroaching upon "exceptional value" wetlands altogether. Either way, Tennessee has not provided any evidence why they could not meet their stated goals by way of these alternatives.

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 2,586words. 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

/s Aaron Stemplewicz

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