



For Immediate Release:

1/21/2020

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Amicus Brief Filed to Challenge FERC's use of Tolling Orders

Washington, D.C. - On January 17, the Delaware Riverkeeper Network, PennFuture and other environmental organizations, represented by Earthjustice, filed an amicus brief with the United States Court of Appeals for the District of Columbia Circuit to challenge the Federal Energy Regulatory Commission's (FERC) use of tolling orders.

"Tolling orders" are decisions issued by FERC that neither grant nor deny the rehearing requests, thereby placing challengers in what the amicus brief refers to as legal limbo. The use of tolling orders is undermining the rights of people to get their day in court before their property rights are taken and irreplaceable ecosystems are destroyed. Under current law and practice, FERC has 30 days to respond to a rehearing request, but uses tolling orders to extend the time period to consider a rehearing request indefinitely, often for years.

"The use of tolling orders to place challengers in legal limbo while pipeline companies use the power of eminent domain to take property rights and get permission from FERC to inflict irreparable harm on the environment, for example by cutting large swaths of forest, is now routine practice by FERC," **said Maya van Rossum, the Delaware Riverkeeper and leader of the Delaware Riverkeeper Network.** "The end result is that by the time we get our day in court, it is simply too late, the damage is done and there is no meaningful remedy. The fact that the courts have given FERC legal authority to rob people of their rights in this way is unconscionable – it is time for the courts to reconsider the precedent they have set on this issue and to stop the abuse of tolling orders by FERC."

Alice R. Baker, Senior Attorney at PennFuture noted that "as Pennsylvanians have seen pipelines crisscross the state blasting through bedrock, trenching through rivers, and threatening the health of vulnerable communities, the systemic use of this delay tactic improperly deprives Pennsylvanians and groups like ours the right to seek judicial review of FERC's decisions before substantial irreparable harm occurs. We are glad the D.C. Circuit Court

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of Appeals is taking up this important issue and eager to be able to provide the Court our perspective through this amicus brief.”

“This is an access to justice issue. We can ensure that impacted communities have their day in court *before* they are harmed by the construction of unnecessary fracked gas pipelines or impacted by rules that favor fossil fuel plants, to the detriment of clean energy,” said **Aaron Stemplewicz, Staff Attorney, Earthjustice.**

Through the use of tolling orders, by the time FERC issues a decision on the rehearing request, the pipeline project has often progressed too far for any harm to be prevented. For example, in the case of Delaware Riverkeeper Network v. FERC, 753 F.3d 1304 (D.C. Cir. 2014), FERC’s use of a tolling order prevented any sort of real remedy even where a court ruled that FERC had violated the National Environmental Policy Act in allowing the use of segmentation and failing to consider cumulative impacts in its review and approval of the TGP Northeast Upgrade pipeline project. The seven months of legal limbo meant that by the time the Delaware Riverkeeper Network secured the court ruling that FERC had in fact violated federal law in their review and approval of the TGP NEUP pipeline, the project was fully constructed and in operation.

The oral argument for this case is scheduled for March 31, 2020.

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