No. 17-1533
ORAL ARGUMENT NOT YET SCHEDULED

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 ENVIRONMENTAL PROTECTION; PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent,

and,

TENNESSEE GAS PIPE LINE COMPANY LLC,

Intervenor.

REPLY BRIEF IN SUPPORT OF PETITIONERS' PETITION FOR REVIEW

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GLOSSARY

Department/PADEP	Pennsylvania Department of Environmental Protection
FERC	Federal Energy Regulatory Commission
Petitioners	Delaware Riverkeeper Network, and the Delaware Riverkeeper
Project	Orion Project
Section 404 Permit	Clean Water Act Section 404 Permit for the Orion Project
Tennessee	Tennessee Gas Pipeline Company, LLC

SUMMARY OF THE ARGUMENT

The Department's entire argument is premised on an elementary and inexcusable misunderstanding of the basic facts of this case. Specifically, the Department contends that the compression alternative is twice as big as it actually is, insisting – against all evidence to the contrary – that the compression alternative requires the construction of two compressor stations over 80 acres of land. This fundamental failure of the Department to develop a basic grasp of the scope of the compression alternative during the review process alone demands this Court grant the Petitioners' request for a remand or rescission of the Chapter 105 permits and the corresponding Clean Water Act Section 401 water quality certification. This is particularly true considering that the Department repeatedly relies on the argument that the compression alternative was appropriately discarded because it involved more permanent impacts than the proposed Project.

The Department's reliance on this argument illustrates a second fundamental flaw in the Department's defense. The question before this Court is whether the written finding of the Department regarding Section 105.18a(a)(2) sufficiently demonstrates that the Project is water dependent. The question is not which alternative involves more or fewer environmental impacts. The undeniable facts of this case show that the compression alternative meets the purpose and need of the Project, is technically feasible, and would not involve any impacts to a single water

resource. Because the compression alternative is available and would not impact a Departmental-jurisdictional resource, the proposed looping Project cannot be considered water dependent. Additionally, even if the compression alternative did not exist, there is not a single court in any jurisdiction that has ever considered a pipeline to be water dependent. Pipelines simply do not require water or depend on water for performing their basic function of transporting natural gas from one location to another.

Additionally, not only does the Department misapprehend the scope of the compression alternative and fail to address the correct legal standard, the Department also ignores the plain facts of this case which show that the compression alternative is clearly environmentally preferable to the proposed looping Project. The Department's argument that a project that would not even require a Chapter 105 permit is somehow more environmentally harmful than a project that impacts hundreds of acres of land, permanently deforested numerous wetlands, and cuts through over 65 streams is entire without merit. As such, even on its own terms, the Department's arguments fail.

The Department's approval of the Section 105 permits for the Project specifically violates Section 105.18a(a)(2) of the Pennsylvania Code, and requires a remand to the Department for further review consistent with their legal obligations, or an outright rescission of the permits.

ARGUMENT

I. The Department Based Its Review Of The Compression Alternative On A Fundamental Misunderstanding Of The Size And Scope Of The Impacts

The Department bases its entire defense on an unjustifiable misidentification of the true size and scope of the project. *See* PADEP Resp., at 23-27. Leaving aside the point that the Department incorrectly premises much of its argument on the wrong legal standard in this section,[1] the Department also makes the even more fundamental error of getting the basic facts of this case badly incorrect. Specifically, the Department grossly misrepresents the scope of the impacts related to the compression alternative. The Department's failure here undermines its credibility regarding the rest of its review, and provides clear and convincing evidence of the arbitrary and capricious nature of the Department's decision making in this matter.

As justification for rejecting the compression alternative the Department repeatedly states that the compression alternative requires the construction of two separate compressor stations each requiring 40 acre sites, for a total disturbance of 80 acres. *See, e.g.*, PADEP Resp., at 23, 24, 25. For example, the Department states that the compression "alternative . . . involves the use of two compressor stations." *Id*. at 23. The Department later contends that the compression alternative

[1] *See infra*, at Section III.

requires the "acquisition of two 40-acre sites (a total of 80 acres) to construct two compressor stations." *Id*. at 24. And the Department also provides that the compression alternative would require "the clearing of two green ways to accommodate two new compressor stations." *Id*., at 25. The Department then characterizes Petitioners' argument as contesting that "the alternative which involves the use of two compressor stations is the least environmentally detrimental alternative." *Id*. These statements are all incorrect.

First, the Department misrepresents what Petitioners' argue in their brief. Petitioners clearly state that:

> Tennessee found that there are "two compressor options," **either one of which** could move the necessary capacity of gas to the destination points along Tennessee's mainline . . . In other words, Tennessee found that a **single compressor station** could meet the needs of the Project, and identified **two potential general sites** that would be hydraulically optimal for its location.

Pet. Br., at 30 (emphasis added). As such, it is Petitioners' position that the compression alternative only requires the use of a single site and forty acres of land, not two sites and 80 acres as stated by the Department.

In addition to misrepresenting what Petitioners' argue, the Department also gets the basic facts of the compression alternative wrong. Indeed, there is no doubt that the compression alternative **does not, and has never**, required construction on eighty acres over two sites as repeatedly stated and relied upon by the Department; rather, the facts clearly show that the compression alternative only requires the

construction of a single compressor station at one site involving 40 acres of land. *See* JA317-318.

The Department's mischaracterization is evident based on the documents the Department itself cites. *See* PADEP Resp., at 24 (citing DEP007014). The project application states that "[c]ompression options for projects involve either the addition of more compressor horsepower at an existing compressor station or the construction of **a** new compressor station." JA318. The application further states that "[u]sing an iterative process of locating **the new station** at various points downstream, Tennessee then selects **the location** which results in the least amount of horsepower." *Id*. (emphasis added). These representations clearly contemplate a single compressor station being built at a single site. Perhaps the Department was confused by the fact that two **potential sites** for the single compressor station were discussed in the application; however, this does not excuse the Department from conducting a careful reading of the application, after which it should have been crystal clear that only one compressor station was necessary. Indeed, if anything, this mistake demonstrates the sloppy review conducted here by the Department.

Additionally, from a logistical perspective, the construction of two separate 10,000 horsepower compressor stations (totaling 20,000 horsepower) would far exceed what is necessary to move 135,000 dekatherms of natural gas. For example, a comparable project recently added compression to a similarly sized interstate

natural gas pipeline that only used slightly more horsepower to transport nearly 100,000 more dekatherms of natural gas. *See Minisink Residents for Environmental Preservation v. Federal Energy Regulatory Commission*, 762 F.3d 97, 102 (D.C. Cir. 2014) (natural gas project adding 12,260 horsepower of compression used to transport 225,000 dekatherms of natural gas). As such, it does not take a pipeline engineering expert to understand that using two compressor stations and 20,000 horsepower to move only 135,000 dekatherms of gas would be a massive and unnecessary overbuild of the project.

Furthermore, in separate litigation the Army Corps of Engineers has agreed with Petitioners that the "compression alternative would involve the development of **a new compressor station requiring approximately 40 acres of new greenfield construction**." *See* AD009 (United States Army Corps of Engineers Resp., at 29). In that matter, the Army Corps of Engineers reviewed the Orion Project application materials for the purpose of issuing a Section 404 Clean Water Act permit for the Project, and specifically conceded during the pendency of the litigation that the Orion Project only requires the construction of a single compressor station. *Id*.

Additionally, a Draft Environmental Assessment that was generated by the Federal Energy Regulatory Commission for the Orion Project clearly states:

> To achieve the Project objectives, we identified a possible compression alternative, which would involve development of **a new**

> **compressor station** requiring approximately **40 acres of new greenfield construction**. Two potential sites were identified.

AD005 (Draft Environmental Assessment Orion Project). The document further clarifies that "[c]onstruction would require permanent land use conversion of the 40-acre area." AD007. Also, a table is provided in the document which shows the individual impacts from all of the potential alternatives, and lists the two sites as two potential separate individual alternatives, not a single combined alternative. The statements in the Draft Environmental Assessment, and the table irrefutably corroborates what Petitioners state in their principle brief.

Counsel for Petitioners contacted counsel for the Department on May 4, 2017, to voluntarily alert counsel of the existence of the Draft Environmental Assessment and its contents, and to assure that Department's counsel was specifically aware of the Draft Environmental Assessment's details regarding the compression alternative. *See* AD015. Counsel for Petitioners even cited the relevant pages in the document showing that the compression alternative only required a single compressor station and an impact to only 40 acres. *Id.*[2] Despite

[2] Counsel for Department likely has an ethical responsibility to correct the record and representations made to the Court regarding the facts of the case. *See* Model Rules of Prof'l Conduct 3.3 (a) (1) (2006) ("A lawyer shall not knowingly . . . make a false statement of fact . . . to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer").

having this clear notice, the Department still represented to this Court an inaccurate and false accounting of the scope of the compression alternative.[3]

The clear facts contained in the Draft Environmental Assessment and the statements provided by the Army Corps of Engineers regarding the compression alternative may be considered by the Court because they correct factual mistakes asserted by the Department and Tennessee, and provide important background factual context regarding the Commission's review of the compression alternative. *See Copar Pumice Co., Inc. v. Tidwell*, 603 F.3d 780, 791 n.3 (10th Cir. 2010) (although judicial review of agency action is generally limited to the administrative record, a court may take judicial notice of background information that informs the court's understanding of the factual context of the case); *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (supplemental evidence properly admitted where it provides background information that aids Court in determining whether the agency considered all relevant factors); *Theodore*

[3] Perhaps even more disconcerting than the Department's misunderstanding of the compression alternative is Tennessee's statements regarding the scope of the impacts involved in an alternative that it was responsible for developing. *See, e.g.*, Tennessee Resp., at 52 ("the compression alternative involves constructing ***two*** compressor stations, each of which would require Tennessee to obtain 40 acres of land, for a total of ***80 acres*** of land"). Prior to drafting its brief in this matter, counsel for Tennessee was well aware that the Draft Environmental Assessment existed, and that the Army Corps of Engineers agreed that the compression alternative only required a single additional compressor station over 40 acres. Tennessee's failure to even acknowledge that it was aware of these clearly contradictory facts is particularly troubling.

Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497, 514-515 (D.C. Cir. 2010) (acknowledging supplemental evidence may be properly admitted where needed to evaluate deficiency of record).

Indeed, the fact that the Department cannot accurately describe the compression alternative begs the question, how could the Department possibly conduct a competent and reasonable review of the compression alternative if the Department does not even understand the most basic details involved in its construction and operation? The startling and troubling misapprehension of the scope of the impacts related to the compression alternative alone requires a remand to the Department for further review.

II. It Is Uncontested That No Court In Any Jurisdiction Has Ever Found Linear Infrastructure or Pipelines To Be Water Dependent, And Even If Such A Determination Could Be Made, This Specific Project Is Not Water Dependent

As conceded by the Department, the Department must make a written finding regarding the water dependency of the Project. *See* PADEP Resp., at 12. It is this specific written statement that this Court must examine to determine whether the Department complied with Section 105.18a(a)(2). *See* 25 Pa. Code § 105.18a. The Department's regulations also state that "[a] project is water-dependent when the project requires access or proximity to or siting within the wetland to fulfill the basic purposes of the project." 25 Pa. Code § 105.18a(a)(2). A separate regulation provides that "[t]he [water] dependency must be based on the

demonstrated unavailability of any alternative location, route or design and the use of location, route or design to avoid or minimize the adverse impact of the dam, water obstruction or encroachment upon the environment and protect the public natural resources of this Commonwealth." 25 Pa. Code§ 105.14(b)(7).

Based on these standards, the proposed Project cannot be considered water dependent for two separate reasons. First, linear infrastructure projects, including pipelines, have never been considered to be water dependent by any court in any jurisdiction. Second, even if pipeline projects could be considered water dependent, this specific Project is not because the Department failed to show the "demonstrated unavailability" of the compression alternative.

a. The Court Should Interpret The Water Dependency Language Of Section 105.18a Similarly To How Federal Courts Interpret Parallel Provisions of the Clean Water Act Section 404 Guidelines

The Department concedes Petitioners' argument that there is no existing Pennsylvania case law interpreting Section 105.18a with regard to pipelines specifically, or with regard to linear infrastructure generally. *See* PADEP Resp., at 18. As noted by Petitioners, Pennsylvania courts have looked to the Clean Water Act for guidance in interpreting parallel provisions of Section 105.18a where there is no existing case law. *See* Pet. Br., at 18-19 (citing *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93,109 (Pa. Commw. 2004)). In *Pennsylvania Trout*, the court specifically looked to the Clean Water Act to

interpret the term "basic project purpose" pursuant to Chapter 105.18a. *Id*. The court did so because both Chapter 105.18a and the Clean Water Act Section 404 Guidelines contain parallel provisions referencing that term. *Id*.

Here, the term "water dependent" also appears in both Chapter 105.18a and the Clean Water Act, and considering there is a similar dearth of Pennsylvania case law interpreting the term "water dependent," it is appropriate for this Court to look to the federal courts for guidance. The Department contends that because *Pennsylvania Trout* was considering a "different" subchapter of Chapter 105.18a, that *Pennsylvania Trout* is not relevant. *See* PADEP Resp., at 22 (comparing Section 105.18a(a) and Section 105.18a(b)). The Department offers only conclusory support for this argument by merely stating that such a comparison is inappropriate "because of the material differences between Federal and State law requirements." *Id*. However, the Department never identifies what specific "material differences" are so significant as to have this Court ignore the well-developed line of federal case law finding that linear infrastructure of any type is not "water dependent," or why courts should look to the Section 404 Guidelines to interpret provisions of Section 105.18a(b), but not provisions in Section 105.18a(a).

Additionally, the Department actually makes Petitioners' case for us. The Department erroneously states that Petitioners "fail[] to recognize the differences

between Pennsylvania's regulations" and the Clean Water Act. *See* PADEP Resp., at 22. The Department's only evidence supporting this contention is that "**[u]nlike Pennsylvania law**, practicable alternatives are presumed to exist under the Federal regulations when a project is not water-dependent." *Id*. However, the Department inexplicably overlooks the fact that Section 105.18a itself contains a provision providing **exactly this presumption**. Specifically, the Pennsylvania Code states that "[i]t shall be a rebuttable presumption that there is a practicable alternative, not involving a wetland, to a nonwater-dependent project, and that the alternative would have less adverse impact on the wetland." *See* 25 Pa. Code 105.18a(b)(3)(i), *compare with* 40 C.F.R. § 230.10(a) ("practicable alternatives . . . are presumed to be available" and "are presumed to have less adverse impact on the aquatic ecosystem"). Therefore, in this singular subchapter of Section 105.18a there exist two regulatory presumptions that arise for non-water dependent projects that have exact parallels in the Clean Water Act Section 404 Guidelines. Considering that Chapter 105.18a has such a close analogue in Section 230.10(a) of the Section 404 Clean Water Act Guidelines, it is more than appropriate for this Court to interpret parallel provisions and terms similarly. *See* Pet. Br., at 20-22.

In a second attempt to differentiate Section 105.18a from the Section 404 Guidelines, both the Department and Tennessee contend that a water-dependency determination under Section 105.18a(a)(2) is different because it is evaluated on a

"case-by-case basis." *See* PADEP Resp., at 15; *see also* Tennessee Resp., at 42 (water dependency is a "project-specific analysis that focuses on whether the basic purposes of a particular project can only be achieved"). However, this project specific analysis is no different than what is demanded, and what takes place, pursuant to the Section 404 Guidelines. For example, the Section 404 Guidelines require a "particularized" review that "reflects the various objectives the applicant is trying to achieve," which includes a consideration of the applicant's needs of a "desired geographic area of development" and the "type of project being proposed." *Florida Clean Water Network, Inc. v. Grosskruger*, 587 F.Supp.2d 1236, 1243 (M.D. Fla. 2008) (citations omitted). Yet, despite these project specific considerations, no federal court has ever found a pipeline, or any type of linear infrastructure, to be water dependent pursuant to the Section 404 Guidelines. *See* Pet. Br., at 14. Just because the Department performs a case-by-case analysis does not dictate that certain classes of activities are simply prohibited by the Chapter 105 regulations.

The inter-related nature of the Section 404 Guidelines and Chapter 105.18a is further illustrated by the fact that pipeline companies submit a joint application for a Chapter 105 permit from the Department and a Section 404 permit from the Army Corps of Engineers. Indeed, on January Tennessee submitted its *Joint Application for Pennsylvania Water Obstruction and Encroachment Permit and*

U.S. Army Corps of Engineers Section 404 Permit for the Orion Project. *See* Tennessee Resp., at 21.

Considering the close parallels between Section 105.18a and the Section 404 Guidelines, and that no court has ever found that the construction of a pipeline – which by definition does not need to be placed in an aquatic zone to fulfill its basic purpose – to be water dependent, this Court should similarly find that the looping pipeline Project is not water dependent pursuant to Section 105.18a(a)(2).

b. The Department's Written Finding Does Not Support A Finding Of Water Dependency

The Department's written finding pursuant to Section 105.18a(a)(2) does not address the standard for water dependency found in 105.14(b)(7). Pursuant to 105.14(b)(7), water dependency must be "based on the demonstrated unavailability of any alternative location, route or design and the use of location, route or design to avoid or minimize the adverse impact of the dam, water obstruction or encroachment upon the environment." 25 Pa. Code§ 105.14(b)(7). The Department contends that its written finding regarding Section 105.18a(a)(2) is sufficient, PADEP Resp., at 14, which states that "[t]he project is water dependent in that the pipeline needs to cross the wetland areas to access land on either side of the wetland system as there are no other practicable crossing alternatives to avoid the crossing." *Id*. This statement focuses only on "other practicable crossing alternatives," such as re-routing or hydraulic directional drilling crossing methods,

and therefore fails to address alternatives that eliminate the need for any crossings, such as the compression alternative.

Additionally, the Department's written finding does not establish or even address the standard requiring a "demonstrated unavailability" of the compression alternative. *See* 25 Pa. Code§ 105.14(b)(7). Indeed, no such specific showing or written finding is provided. Importantly, neither the Department nor Tennessee contest, and they thereby concede, that the term "unavailability" must mean something broader than impracticability. *See* Pet. Br., at 37-38. Therefore, a "water dependent" project need only be generally "available" outside a consideration of the factors considered in a practicability analysis under Section 105.18a(a)(3), which includes costs, existing technology, and logistics.[4] There can be no doubt that the compression alternative is "available," as it meets the purpose and need for the Project, is technically feasible, and involves far fewer total environmental impacts than the proposed looping Project. *See* Pet. Br., at 25, 30, 33, 34-35. The Department and Tennessee do not contest the technical feasibility of the compression alternative or that the compression alternative can meet the purpose and need of the Project. Nor could either party contest these issues, as these conclusions are clear from the record, *see* JA318, and have been further

[4] It should be noted that neither the Department nor Tennessee assert that the compression alternative is not practicable based on costs, existing technology, or logistics.

corroborated by the Draft Environmental Assessment. AD001-007. Specifically, the Draft Environmental Assessment states that the compression alternative would meet the "purpose and need" of the project, was "technically feasible." *Id*. This document also concludes that the compression alternative would eliminate the need for the new pipeline looping and "all waterbody crossings" (including the approximately 10,000 feet of wetland crossings). *Id.* Considering these realities, the Department has not established what exactly renders the compression alternative "unavailable." Indeed, while this standard is cited by the Department, the Department conspicuously fails to specifically apply it to the facts.

The Department does explicitly attempt to argue that the pipeline looping Project would be environmentally preferable to the proposed Project. *See* PADEP Resp., at 27-29. Specifically, the Department states that "Petitioners fail to establish that PADEP's determination that the compression alternative is a less environmentally harmful alternative than the chosen co-location alternative is arbitrary or capricious." *Id.*, at 27. However, this argument is entirely meritless for several reasons: 1) a determination regarding the least environmentally harmful alternative is not part of the standard under Section 105.18a(a)(2), 2) even if such a determination were relevant, the Department does not even accurately represent to the Court the true size and scope of the compression alternative in order to make a

reasonable comparison of impacts, and 3) the clear and uncontested facts relating to environmental impacts directly contradict the Department's statement.

Leaving aside that the Department's argument is factually inaccurate, it is also meaningless in the context of Petitioners' challenge, as Petitioners do not have to prove that the chosen alternative is more or less environmentally harmful than the compression alternative. That simply is not the standard. *See* Pet. Br., 26-29. The only questions this Court must answer is whether or not pipelines can be considered water dependent pursuant to Section 105.18a(a)(2), or in the alternative, whether the Department demonstrated that the compression alternative is "unavailable." *See* 25 Pa. Code § 105.14 (b)(7).

However, even if such an environmental comparison were germane to a determination under Section 105.18a(a)(2), the Department does not even accurately represent the impacts of the compression alternative to provide a reasonable comparison. *See supra*, at Section I. Indeed, the Department has been operating under the mistaken assumption that the compression alternative is twice as big as it actually is. *Id*. Such a significant mistake renders any conclusions drawn by the Department regarding the compression alternative arbitrary.

To support its claim that the looping Project is environmentally preferable the Department cites to vaguely described "permanent impacts," including vegetation clearing for various facilities related to the compression alternative, as

compared to the "temporary" impacts of the proposed looping Project. *See* PADEP Resp., at 24-25. However, this argument is unpersuasive. The Department fails to address Petitioners' statement that such "impacts are generalized common impacts" that are unquantified and "would be true for any number of different construction activities," including the pipeline looping Project. *See* Pet. Br., at 37. To the extent permanent or long-term vegetation clearing is considered relevant, the proposed Project will result in the deforestation of at least 47 acres of upland forests,[5] and the deforestation of roughly six acres of wetlands. JA318; AD009-10. Therefore, even controlling for the singular issue of long term upland deforestation, the compression alternative involves fewer impacts even assuming all 40 acres for the compressor station site will need to be cleared.[6] Furthermore, the Department and Tennessee necessarily find themselves in the untenable position of arguing that the looping pipeline Project, which impacts 31 streams, 65 wetlands (13 of which are "exceptional value"), 15 acres of water resources, permanently deforests roughly 6 acres of forested wetlands, and disturbs over 200 more acres of land is somehow environmentally preferable to an alternative that would not even require a single Chapter 105 permit **because no water resources**

[5] It is unclear how or why the Department classifies the deforestation of mature trees as "temporary" considering that it will take 30-50 years for those trees to regrow.

[6] The Draft Environmental Assessment makes clear that only 28-38 acres need to be cleared for the compression alternative. *See* AD006.

would be impacted by the compression alternative. AD003. Such an unreasonable position is clearly arbitrary. *See* PADEP Resp. Br., at 13.

Because the Department cannot reasonably rely on the contention that the compression alternative results in greater environmental impacts to wetlands, streams, and forests, the Department and Tennessee must instead rely on the singular fact that the compression alternative may result in some undefined higher degree of light, air, or noise pollution. *See* PADEP Resp., at 25; Tennessee Resp., at 53. However, the record shows that the level of light, air, or noise pollution was never quantified, or even qualitatively described, in any way such that a reasonable conclusion could be drawn regarding the significance of those impacts. Furthermore, both parties fail to cite to any case law, regulations, or guidance documents suggesting that such a vaguely described and speculative increase in these potential impacts could be interpreted to result in the compression alternative being "unavailable." Additionally, light, noise, and air impacts are considerations that are wholly unrelated to Pennsylvania's water quality standards that are the resources under consideration pursuant to Chapter 105, and therefore have little to no relevance to this inquiry. *See* Pet. Br., at 36-37.

III. The Department's Primary Arguments Fail To Address The Appropriate Legal Standard, But Nevertheless Fail On Their Own Terms

Petitioners devote an entire section of its principle brief to an explanation of how and why a consideration of practicable alternatives is irrelevant to this Court's inquiry with regard to the Department's compliance with Section 105.18a(a)(2). *See* Pet. Br., 26-29. The Department and Tennessee fail to address any of these arguments, or explain how Tennessee's statements regarding practicability are relevant or even related to a determination pursuant to Section 105.18a(a)(2), or Section 105.14(b)(7).

The Department expressly relies on a statement to prove water dependency pursuant to Section 105.18a(a)(2) that only speaks to Tennessee's compliance with Section 105.18a(a)(3). Specifically, the Department states "[t]he Project is considered to be water-dependent **because there is no other practicable alternative to the proposed pipeline** that does not involve crossing streams and wetlands." JA321 (emphasis added).[7] However, a determination that no practicable alternative exists merely addresses the conditions of Section 105.18(a)(3), and has no bearing on Tennessee's compliance with Section 105.18a(a)(2). *See* Pet. Br., 27-28. The Department has no answer as to why it relied on information that speaks only to Section 105.18a(a)(3) to also satisfy the requirements of Section 105.18a(a)(2). *Id*., at 28-29. To conflate these two provisions would be to read out

[7] Similarly Tennessee contends that the compression alternative was rightly discarded because "PADEP concluded that the 'compression alternative' was not a practicable alternative." *See* Tennessee Resp., at 42-43.

the purpose of the higher degree of protection afforded to "exceptional value" wetlands as contemplated by Section 105.18a(a)(2).

Because the Department failed to "demonstrate[]" the "unavailability" of the compression alternative pursuant to Section 105.14(b)(7) – in fact the record shows that it was undeniably available – the Project is water dependent; and therefore, the Department was prohibited from issuing the permit. In other words, to the extent the compression alternative is available, any inquiry into the requirements of Section 105.18a(a)(3) is unnecessary. Indeed, there is no mention of practicability in Section 105.18a(a)(2), or Section 105.14(b)(7). Instead, the practicability analysis is strictly limited to Section 105.18a(a)(3). *See* Pet. Br., at 37-38. Petitioners' argument here is unrebutted by both the Department and Tennessee. However, even if practicability was a necessary element of the Section 105.18a(a)(2) or Section 105.14(b)(7) analysis, the compression alternative is practicable. *See* Pet. Br., at 29-35. This is particularly true considering that the Department was required to review the compression alternative under the presumption that it was practicable, and to "demonstrate with reliable and convincing evidence and documentation" that the presumption is rebutted. *See* Pet. Br., at 33-34 (citing 25 Pa. Code § 105.18a(b)(3)(ii)). The Department and Tennessee do not contest that this presumption arose, nor does either party cite to any evidence showing that this it was overcome.

IV. The Pennsylvania Environmental Hearing Board's Statement Is Of No Moment

The Pennsylvania Environmental Hearing Board's ("PAEHB") non-binding ruling from the bench is of little import. First, the project at issue in that matter is easily distinguishable from the proposed Project, as the project before the PAEHB does not have a recognized alternative that meets the purpose and need of the project, is technically feasible, and would not impact a single water resource such as the compression alternative. Additionally, the statement is only preliminary as petitioners in that matter have yet to have the opportunity to fully brief the issue of water dependency on a motion for summary judgment.

Furthermore, in line with federal courts the PAEHB recognized that linear infrastructure such as pipelines do "not use water" and do "not depend on water." *See* PADEP Resp., at Addendum (AD000066). However, the PAEHB then articulated a position that has been roundly rejected by all courts that have considered it with regard to water dependency, which is that "the project could not have possibly been built within reason without encroaching upon exceptional value wetlands." *Id*. Both the Department and Tennessee glom on to the concept that because the desired location for the pipeline looping Project crosses wetlands and waterways that the project is therefore water dependent pursuant to Section 105.18a(a)(2). *See* PADEP Resp., at 14-15, 19; Tennessee Resp., at 41-42. However, as described in Petitioners' principle brief, this logic has been

resoundingly rejected by every federal court that has considered it. *See* Pet. Br., at 21-22.

For example, *Coastal Conservation League v. U.S. Army Corps of Eng'rs* is particularly instructive on this issue. *See Coastal Conservation League v. U.S. Army Corps of Eng'rs*, 2016 WL 6823375, at *13-14 (S.D. Fl., November 18, 2016). In that matter, the Corps found that expanding and improving a road could not occur without impacting wetlands or waterways; yet, the Corps found that the desire to locate such infrastructure across water resources does not render the road construction project "water dependent." *Id*. The Court agreed that the infrastructure was not water dependent despite its crossing of water resources, as the basic purpose of a road does not use or depend on water. *Id*.[8] The same principle applies in the instant matter. Section 105.18a(a)(2) was specifically designed to protect and preserve Pennsylvania's most sensitive and ecologically important wetlands – exceptional value wetlands – and prevent projects from being located in these irreplaceable resources when location therein is not necessary to fulfil their basic

[8] The Department cites to a 1991 comment response document to suggest that roads may or may not be considered water dependent. *See* PADEP Resp., at 15-16. However, the Department fails to cite a single court that has adopted the Department's rationale that a road could theoretically be water dependent. Furthermore, even if a road could be found to be water dependent, roads are fundamentally different from pipelines. Whereas pipelines can be constructed via hydraulic direction drilling under water resources, thus not impacting the resource, roads cannot and instead require fill in the wetlands. As such, the Department's reliance on the 1991 comment response document is wholly unpersuasive.

function. *See* Pet. Br., at 21. Here, there is no doubt that pipeline projects simply do not require access or proximity to water resources to perform their basic function, which is to transport natural gas from one location to another.

V. Petitioners Did Not Forfeit Their Claim That The Department Failed To Comply With Section 105.18a(a)(2)

As stated by Tennessee, there is a long standing doctrine that a flaw in an agency's analysis "might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *Department of Transportation, et al. v. Public Citizen, et al.*, 541 U.S. 752, 765 (2009) (internal citation omitted). The "so obvious" standard is interpreted by whether the agency had "independent knowledge" of the issue that concerned the plaintiffs. *See Friends of Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000). Here, the Department had independent knowledge that the compression alternative existed, was technically feasible, met the purpose and need of the Project, and would not result in **any impacts to Department-jurisdictional resources**. *See* JA318. As such, the Department had clear independent knowledge that the Project was not water dependent pursuant to Section 105.18a(a)(2) and Section 105.18 (b)(7). Considering the clear environmental advantages of the compression alternative combined with its admitted technical feasibility and ability to meet the purpose and need of the Project, the issue of whether the Department was

prohibited from issuing the Section 105 permit for the looping pipeline project could not have been any more obvious.

Additionally, Petitioners clearly stated in a comment letter to the Department that the project was not water dependent, and that the proposed Project specifically did not comply with Section 105.18a(a)(2). JA018-19. Where an agency is apprised of the issues and has a fair opportunity to address them, they are not waived. *See Portland General Electric Co. v. Bonneville Power Administration*, 501 F.3d 1009, 1025 (9th Cir. 2007). Where a party raises policy and legal issues before an agency, it is entitled to further argue the facts concerning those issues in court. *See generally id.* at 1024-25, 1035 (describing legal and policy objections raised in the administrative proceeding, then analyzing and deciding based on detailed factual arguments); *Nat'l. Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1139-1140 (D.C. Cir. 2002) (noting that although comments did not specifically mention the cold-start portion of the Federal Test Procedure, they did "raise the underlying issue of poor performance at certain temperatures," and consequently the comments were "close enough to have put the EPA on notice that it had to defend the performance of the NOx absorbers at all relevant temperatures and conditions…"). Here, Petitioners' comment letter fairly raised the issue of water dependency and specifically put the Department on notice that it would have to defend its determination that the Project complied with Section 105.18a(a)(2).

As such, Petitioners did not forfeit any of its claims related to Section 105.18a(a)(2).

VI. FERC's Environmental Assessment and Certificate Is Irrelevant To The A Determination As To Whether The Project Complies With Pennsylvania's Water Quality Standards

To the extent the proposed Project violates one of Pennsylvania's water quality standards, such as Section 105.18a(a)(2), it is fully within Pennsylvania's authority to deny the Project application pursuant to its rights under the Clean Water Act. As such, the Federal Energy Regulatory Commission's approvals and orders under the Natural Gas Act are irrelevant. See Tennessee Resp., at 49-54.

Section 401(d) of the Clean Water Act states that any Section 401 certification may include "any other appropriate requirement of State law set forth in such certification and shall become a condition on any Federal license or permit, subject to the provisions of this section." 33 U.S.C. § 1341(d); *see also PUD No. 1 of Jefferson County*, 511 U.S. 700, 707-708, 711 (1994) (explaining that Section 401(d) "expands the state's authority to impose conditions on the certification of a project," including "appropriate state law requirements"). Section 401 water quality certifications therefore ensure that federal permits meet state water quality standards after a site specific environmental review. *American Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997); *see also S.D. Warren Co. v. Maine Bd. of Env't. Protection*, 547 U.S. 370, 386 (2006). The Department exercises delegated

authority to issue federal Section 401 water quality certifications, and conditions their approval on an applicant receiving the appropriate substantive state water quality permits such as the Chapter 105 permits. *See* 25 Pa. Code 105.15(b); *see also Tennessee Gas Pipeline L.L.C. v. Delaware Riverkeeper Network*, 921 F.Supp.2d 381, 390 (M.D. Pa. 2013). Therefore, the Department is the state administrative agency that is charged by the Clean Water Act to issue, condition, or deny water quality certifications and their underlying permits. Pennsylvania's water quality standards and implementing regulations are located in 25 Pa. Code § 93; 25 Pa. Code § 96; and 25 Pa. Code § 105.

Any Section 401 water quality certification Pennsylvania issues must comply with the substantive requirements of Pennsylvania's water quality standards. The Section 105 permits at issue here specifically codify these water quality standards with respect to wetlands, and are required to be complied with for an approval of the Section 401 certification. To the extent that any of the substantive portions of Chapter 105's water quality standards – such as Section 105.18a(a)(2) – are not met, the Department is prohibited from issuing Section 105 permits, and the Section 401 certification is correspondingly not valid. Therefore, because the proposed Project violates one of Pennsylvania's water quality standards, the Department was prohibited from issuing the Section 105 permits. FERC's determinations and approvals under the Natural Gas Act are separate and

apart from the approvals required by the Clean Water Act, such as the delegated Section 401 certifications and underlying state permits as contested in this case.

CONCLUSION

The Department unlawfully issued Chapter 105 permits for a Project that is expressly prohibited by Section 105.18a(a)(2) of the Pennsylvania Code. Petitioners respectfully request that the Chapter 105 permits be rescinded or remanded, and any other relief the Court deems just and equitable.

Respectfully submitted this 6th day of June, 2017.

s/ Aaron Stemplewicz

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 6,404 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(ii).

2. This Brief 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) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 Point Times New Roman.

Dated: June 6, 2017

s/ Aaron Stemplewicz

Aaron Stemplewicz
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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: June 6, 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 the text of the electronic brief is identical to text in the paper copies. I also 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: June 6, 2017

s/ Aaron Stemplewicz

Aaron Stemplewicz
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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2017, the foregoing has been filed and served electronically through the Court's CM/ECF system on all registered counsel.

Dated: June 6, 2017

s/ Aaron Stemplewicz

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