No. 17-3895

ORAL ARGUMENT NOT YET SCHEDULED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, BASIL SEGGOS, ACTING COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, JOHN FERGUSON, CHIEF PERMIT ADMINISTRATOR OF THE NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents,

MILLENNIUM PIPELINE COMPANY, L.L.C.,

Intervenor.

DRN'S REPLY TO MILLENNIUM PIPELINE COMPANY'S CROSS-MOTION TO DISMISS AND OPPOSITION TO PETITIONERS' STAY MOTION

Aaron Stemplewicz
Senior Attorney
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19007

Phone: 215.369.1188
Fax: 215.369.1181

Dated: January 2, 2018

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

ARGUMENT

I. DRN'S PETITION IS TIMELY

The Delaware Riverkeeper Network's ("DRN") Petition for Review under Section 717r(d)(1) of the Natural Gas Act is timely. Millennium mistakenly argues that under state law "[w]ith the August 30 mailing of the DEC letter confirming coverage, Delaware Riverkeeper's petition for review would have been due on Monday, October 30. It did not petition for review until December 4 – 35 days late." Millennium Cross-Motion, at 6 (citing N.Y. Envtl. Conservation Law § 17-0909(2)). However, as Millennium is well-aware, Section 17-0909(s) simply does not apply to appeals of actions by NYSDEC pursuant to a Federal Energy Regulatory Commission ("Commission") jurisdictional pipeline project. *See* 15 U.S.C. § 717r(d)(1).

Simply put, this appeal is not operating under state law. DRN has brought its claim pursuant to Section 717r(d)(1) of the Natural Gas Act, *see* DRN's Petition for Review, at 1, which has no time bar limitations. *See* 15 U.S.C. § 717r(d)(1). Indeed, courts have concluded that Section 717r(d)(1) has no statutory time bar. *See, e.g.*, *Delaware Riverkeeper Network v. Secretary of Pennsylvania Department of Environmental Protection*, 870 F.3d 171, 179 (3d Cir. 2017) ("For appeals from . . . state agencies . . . the statute provides no limitation. *See id*. § 717r(d)(1)"). As such, Millennium's argument is entirely meritless.

Furthermore, Millennium's statements only further illustrate the fundamental injustice regarding the way in which NYSDEC authorized the SPDES permit for the Project. Millennium claims that DRN had sixty days to bring its claim. *See* Millennium Cross-motion, at 6. Assuming arguendo that there was a sixty day time bar, Millennium provides no explanation as to how DRN could possibly be expected to comply with such a time bar if DRN were never provided public notice or opportunity to comment. Legal scholars examining this exact issue have similarly noted the irony of the type of argument Millennium offers here.[1]

II. DRN IS ENTITLED TO A STAY

a. DRN Is Likely To Succeed On The Merits

i. DRN's Suit Is Not An Out Of Time Attack On The General Permit

Millennium contends that DRN is "not attacking Millennium's receipt of coverage, but the General Permit itself." *See* Millennium Cross-Motion, at 8. However, Millennium baldly miscasts what DRN challenges in this litigation.

[1] *See, e.g.*, Jennifer Seidenberg, *Texas Independent Producers & Royalty Owners Ass'n v. Environmental Protection Agency: Redefining the Role of Public Participation in the Clean Water Act*, 33 Ecology L.Q. 699, 711 (2006) (finding that this argument "lends legitimacy to environmental organizations' larger objections to the general permit system. **It is difficult to imagine how citizens could bring enforcement actions without access to NOIs.** Indeed, the value of citizen input at all stages of the permitting process as a means to check industry and government activities and hold both to high standards of accountability has been a key method of enforcing the Clean Water Act's provisions since its inception.")

DRN does not challenge NYSDEC's formulation of the SPDES general permit that took place in 2015; rather, DRN specifically challenges NYSDEC's authorization of SPDES permit coverage for Millennium's Pipeline Project. *See* DRN's Petition for Review, at 1. Millennium further states that DRN "critiques the General Permit's failure to require individual notice and opportunity to comment," however, again, Millennium misrepresents DRN's challenge. The general permit does not include any provision that prevents, or even addresses, the public participation requirements of the CWA. As such, there is nothing in the SPDES general permit preventing NYSDEC from complying with the public participation requirements of the CWA, and therefore there is nothing specific to the SPDES general permit to contest.

Instead, DRN's appeal intentionally focuses on NYSDEC's implementation of its SPDES permit coverage for this Project, and specifically challenges NYSDEC's failure to provide public participation opportunities as required by the Clean Water Act for the NOI for the Project. *See* DRN's Motion for Emergency Stay, at 7-17. Had NYSDEC merely followed the requirements of the Clean Water Act and provided the appropriate public participation opportunities for the NOI, DRN would have no reason to bring this case. Furthermore, even if DRN was challenging the general permit itself, which it is not, as described above, DRN's

challenge would still be timely because there is no statutory time bar for appeals of state action under Section 717r(d)(1) of the Natural Gas Act. *See supra*, at 1.

ii. The Clean Water Act Requires Public Participation Opportunities for General Permits

Millennium claims that DRN's merits arguments are "on the wrong side of a weak 2-1 split." Millennium Cross-Motion, at 11. However, Millennium is factually and legally mistaken. There are only three circuit courts who have addressed whether general permits are subject to the public participation requirements of the CWA, and two of those cases support DRN's argument.[2] Of those three circuit court decisions, Millennium only addresses two of them and conspicuously ignores this Circuit's decision in *Waterkeeper Alliance v. E.P.A.*, which clearly aligned this Court with the 9th Circuit's decision in *EDC*. These three circuit court cases demonstrate that, if anything, there is a federal 2-1 split **in favor of Petitioners' position**. A closer examination of these cases demonstrates that DRN is likely to succeed on the merits.

In *EDC*, the Ninth Circuit considered requirements under the Clean Water Act for notice and comment upon NOIs issued for municipal sewage systems. *See generally EDC*, 344 F.3d 832. In *EDC*, the court reviewed the EPA's decision to

[2] These three cases are as follows: *Envtl. Def. Ctr. v. E.P.A.*, 344 F.3d 832 (9th Cir. 2003) ("EDC"); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005); *Texas Ind. Producers & Royalty Owners Assn v. Environmental Protection Agency,* 410 F .3d 964 (7th Cir. 2005). The first two listed cases support DRN's claims.

not require notice and comment on NOIs under the *Chevron* test. *EDC*, 344 F.3d at 856-857. The court found that under the first prong of the *Chevron* test congressional intent was clear because "NOIs are functionally equivalent to the permit applications Congress envisioned when it created the Clean Water Act's public availability and public hearing requirements." *EDC*, 344 F.3d at 857. Specifically, the Court concluded, "clear Congressional intent requires that NOIs be subject to the Clean Water Act's public availability and public hearings requirements." *Id*. at 856; *see also* DRN's Emergency Motion, at 9.

In coming to this conclusion, the Ninth Circuit considered the development of the CWA. Examining the CWA's varying modes of public participation over the years, the Court reached the holding that modern NOIs should be deemed the functional equivalent of the permit applications developed before them. *Id*. at 856-858. This functional analysis addressed both the real world enforcement outcomes of processes affecting public participation and congressional intent regarding the permit application. *Id*.

This Court also addressed the issue of public participation requirements for general permits issued pursuant to the CWA in *Waterkeeper*. *See generally Waterkeeper*, 399 F.3d 486 (2d Cir. 2005), *see also* DRN's Emergency Motion, at 9-10. In *Waterkeeper*, the Court evaluated the regulation of water pollutants contained in the runoff from concentrated animal feeding operations ("CAFOs")

and followed the Ninth Circuit's decision. *See Waterkeeper*, 399 F.3d at 497. Paralleling the Ninth Circuit's functional analysis of NOIs under the general permit system, the Court held that nutrient management plans must be subject to public participation requirements of the CWA. *Id*. at 503-504.

Importantly, the Court in *Waterkeeper* made an even stronger argument than the Ninth Circuit's opinion in *EDC* that the government's exclusion of public participation not only violated the clear intent of the Clean Water Act, but also substantively damaged EPA's ability to enforce regulations. *Id*. Citing the legislative history of the CWA, the court emphasized the importance of public participation as an enforcement tool, critiquing the government's methods: "citizens would be limited to enforcing the mere requirement to develop a nutrient management plan, but would be without means to enforce the terms of the nutrient management plans because they lack access to those terms. This is unacceptable." *Id*. Instead of protecting public participation merely to fulfill the mandates of the CWA, the Court found that public notice and comment are central to meaningful enforcement. *Id*. at 503. In this sense, the Second Circuit's holding took the functional analysis of the Ninth Circuit one-step further in recognizing the practical effects of a restrained public voice in storm water regulation and enforcement. *See also Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 660

N.W.2d 427, 435 (Minn. Ct. App. 2003) (holding that a general permit violated "the public participation requirements of the Clean Water Act").

In *Texas Independent Producers*, the petitioners presented a procedural challenge to a general permit's failure to provide the public with access to the NOI, as well as failure to allow the public to engage in a fair hearing. *Texas Ind. Producers*, 410 F .3d at 967. Like in *EDC*, the Seventh Circuit applied a *Chevron* analysis to determine whether the statute had been properly interpreted. *Id*. at 978. In the first step of the *Chevron* test, determining whether congressional intent regarding public participation in permitting is clear from statutory language, the Court found that because the CWA did not specifically mention NOIs, but rather only "permits" and "permit applications," the intent of Congress remained unclear as to these documents. *Id*.

By deciding that the terms were "at best" ambiguous, the court essentially collapsed the two-part *Chevron* test into a single analysis by accepting EPA's linguistic distinction between NOIs as opposed to traditional permits. *Id*. The Court could have easily found, as the Ninth Circuit did under its "functional analysis," that Congress was clearly referencing just the type of permitting occurring under the general permit scheme when it required public participation in permits and permit applications. Instead, the Court gave so much deference to the EPA that the agency's understanding also informed the court's interpretation of the statute's

language in step one. Thus, the court cut off an essential, deeper inquiry into the legislative history of the CWA and the central role of public participation in CWA enforcement. Such a deeper inquiry would have weighed heavily in favor of the Ninth Circuit and Second Circuit's interpretation. *See e.g.*, *Costle v. Pacific Legal Found.,* 445 U.S. 198, 216 (1980) (citing the "general policy of encouraging public participation is applicable to the administration of the NPDES permit program").[3] The cursory analysis of the Seventh Circuit in *Texas Independent Producers* is poorly reasoned compared to *EDC* and *Waterkeeper*, and DRN submits that case is wrongly decided.[4] Therefore, it is Millennium not DRN that is "on the wrong side of a weak 2-1 split."

Furthermore, the EPA has implemented the Ninth Circuit and Second Circuit's holdings through guidance documents. *See* DRN's Emergency Motion, at 10-11 (citing EPA's April 2004 guidance document). Millennium does not contest that the EPA's current interpretation of the law requires public participation for

[3] Millennium notes the New York Court of Appeals decision in *Natural Resources Defense Council, Inc. v. New York State Dept. of Environmental Conservation*, 25 N.Y.3d 373 (N.Y., 2015) in support of its position; however, that case lends little, if any, support to Millennium's argument. There, the Court specifically stated that "we obviously may not engage in *Chevron* analysis to review EPA's interpretation" regarding "whether EPA has permissibly interpreted the Clean Water Act to mean that an NOI is not a 'permit application.'" *Id*., at 793-794. Because the court did not even engage in the essential analysis, it is of no value.

[4] The Seventh Circuit in *Texas Independent Producers*, "ignored the larger implications of scaling back public participation in favor of deference to the agency." Seidenberg, 33 Ecology L.Q. 699, 711.

general permits. Additionally, Millennium has no answer for the fact that Section 122.34(d)(1) of the EPA's 1999 regulations state that a "permit application" specifically includes "either a notice of intent for coverage under a general permit or an individual permit application." 40 C.F.R. 122.34(d)(1) (1999); *see also* DRN's Emergency Motion, at 9.[5]

NYSDEC's failure to provide public participation opportunities is particularly harmful here. DRN has provided testimony identifying numerous issues with the NOI for this specific Project and even called into question whether the Project qualifies for coverage under the general permit or instead requires an individual permit. *See* DRN's Emergency Motion, at 12-13 (citing Silldorff Affidavit and van Rossum Affidavit). In light of the foregoing, DRN is likely to succeed on the merits.

b. DRN Will Suffer Irreparable Harm

Millennium contends that the destruction of mature trees is somehow not irreparable because of unspecified "mitigation" measures Millennium has proposed for that destructive activity. *See* Millennium Cross-Motion, at 11-12. However, Millennium's sole out-of-context citation to a single out-of-circuit case in support

[5] The court in *Natural Resources Defense Council* further acknowledged the limitation of its holding when it noted that "it is the task of the federal courts, not this Court, to figure out whether section 122.34(d)(1) or anything else in EPA's 1999 regulations is inconsistent" with the holding in "*Texas Ind. Producers.*" *Natural Resources Defense Council, Inc.*, 25 N.Y.3d at fn. 15.

of its position is wholly unavailing. *See* Millennium's Cross-Motion, at 11 (citing *Chaplaincy of Full Gospel Churches* v. *England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). In *Chaplaincy of Full Gospel Churches*, the issue before the court involved "the Navy's allegedly unlawful practice of retaining Catholic chaplains." *Id*. at 298. This case was not an environmental case and certainly does not stand for the position that the permanent destruction of trees and habitat can be mitigated to a level that is not irreparable. Millennium's self-serving – and ultimately inaccurate – selective quoting from this case misrepresents that court's holding, and provides no support for Millennium's position. Indeed, Millennium points to no case law from any court that has held cutting mature trees, and thus irreversibly impacting the local environment and one's enjoyment of that environment, can be mitigated such that it is not irreparable. *Compare with* DRN's Emergency Motion, at 20 (citing numerous cases holding that destruction of mature trees is "irreparable").

c. A Stay Pending Review is in the Public Interest

Millennium claims that it and the public will be harmed by a stay but provides no substantive support for its assertion. For example, Millennium states that the Commission has 'found that the Eastern System Upgrade Project is required for "public convenience and necessity."' Millennium Cross-Motion, at 12. However, the Commission's finding is specifically predicated on Millennium

lawfully obtaining all the necessary federal permits, including the SPDES permit here. Because the issuance of one of the requisite permits for the Project was fundamentally flawed, the Commission's public interest determination is inapposite.

Millennium further asserts that "delay in construction will jeopardize Millennium's ability to complete the project in time to meet customer needs." Millennium Cross-Motion, at 13. However, this statement is unsupported by any factual allegation via an affidavit or otherwise and merely represents an assertion offered by Millennium's counsel.

Lastly, Millennium states that "nine municipal and local gas distribution companies require the Eastern System Upgrade Project in order to provide consistent, reliable natural-gas service to their residential, commercial, and industrial customers." *Id*. However, the record-documents Millennium cites to in support of this statement provide no evidence or attestations that natural-gas service would stop, be interrupted, or otherwise would be impacted by a delay in Project construction.

CONCLUSION

For the foregoing reasons, Millennium's Cross-Motion should be denied. Furthermore, DRN's Emergency Motion for Stay should be granted.

Respectfully submitted this 2nd day of January 2018,

/s/ Aaron Stemplewicz

Aaron Stemplewicz
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19107
Phone: 215.369.1188
Fax: 215.369.1181
aaron@delawareriverkeeper.org

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

CERTIFICATE OF COMPLIANCE

The undersigned attorney, Aaron Stemplewicz, hereby certifies:

1. This document complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2). According to the word processing system used in this office, this document, exclusive of the sections excluded by Fed. R. App. P. 32(f), contains 2,569 words.
2. This document 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 document has been prepared in a proportionally spaced typeface in 14-point Time New Roman font.

Dated: January 2, 2018

/s/ Aaron Stemplewicz

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

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2018, the foregoing has been served via the Court's CM/ECF system, via email upon Respondents and Intervenor in this matter:

Dated: January 2, 2018

/s/ Aaron Stemplewicz

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