No. 17-3895

ORAL ARGUMENT SCHEDULED FOR JANUARY 9, 2018

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 NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S CROSS-MOTION TO DISMISS AND OPPOSITION TO PETITIONERS' STAY MOTION

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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. The New York Department of Environmental Conservation ("NYSDEC") erroneously argues, "under New York law, a challenge to any SPDES permit—general or individual—must be brought within 60 days of the permit's issuance. E.C.L. § 17-0909(2)." NYSDEC Cross-Motion, at 10. However, as NYSDEC is well-aware, Section 17-0909 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)"). NYSDEC noticeably fails to argue that Section 717r(d)(1) has any time bar limitation. As such, NYSDEC's argument is entirely meritless.

NYSDEC also claims that DRN's challenge is actually a "collateral attack" on the SPDES general permit. *See* NYSDEC Opp., at 11. However, this argument also completely misses the mark. 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.

NYSDEC contends that the SPDES general permit's "streamlined process was itself publicly noticed, reviewed, and commented upon by industry and environmental interests before its adoption." *See* NYSDEC Opp., at 11. However, the general permit does not include any provision that excludes the public participation requirements of the Clean Water Act ("CWA"), nor does NYSDEC even attempt to identify one. As such, there is nothing in the SPDES general permit preventing NYSDEC from complying with the public participation requirements of the CWA, and correspondingly there is nothing specific to the SPDES general permit itself to contest. Indeed, had DRN commented on the formulation of the 2015 general permit, DRN would have had no reason to predict that NYSDEC would in the future fail to comply with the CWA's public participation requirements based on the proposed text of the SPDES general permit.

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 CWA for the NOI for the Project. *See* DRN's Motion for Emergency Stay, at 7-17. Had NYSDEC merely followed the requirements of the CWA and provided the minimal appropriate public participation opportunities for the NOI, DRN would have no reason to bring this case.

II. This Court Has Subject Matter Jurisdiction

NYSDEC makes the remarkable and unsupported claim that any authorization of coverage pursuant to the SPDES general permit for a Commission jurisdictional project cannot be reviewed by this Court, or therefore, any court. *See* NYSDE Opp., at 13-20. Specifically, the Department contends that "acknowledging receipt of a notice of intent notice" or "the absence of intervention by the Department following its receipt of such a notice" does not constitute an "action" by the Department to "to issue, condition or deny any permit license, concurrence or approval" pursuant to the Natural Gas Act. NYSDEC Opp., at 13. NYSDEC points to no case law which holds, or even suggests, that the an agency's authorization of coverage under a general permit – which authorizes specific types of construction activity – is not an "action" subject to judicial review pursuant to Section 717r(d)(1) of the Natural Gas Act.

The language contained in the SPDES general permit clearly demonstrates an approval under that permit is an action of NYSDEC. The "NOI Acknowledgement Letter" issued by NYSDEC for Millennium's Eastern System Upgrade Project "documents the owner's or operator's authorization to discharge in accordance with the general permit for stormwater discharges from *construction activity*." *See* 2015 SPDES General Permit, Appendix A (emphasis in original). The authorization of coverage goes into effect five days after the Department issues the NOI Acknowledgement letter. *Id*. at II.B.3.a.i. The SPDES general permit further states that "[a]n *owner or operator* shall not *commence construction activity* until their authorization to *discharge* under this permit goes into effect." *Id.* at Part II.B.1 (emphasis in original).

The NOI Acknowledgement Letter provided to Millennium specifically memorializes NYSDEC's issuance of coverage under the SPDES general permit for this Project, thereby notifying the pipeline company of its "authorization" to begin certain activities. *See* NOI Acknowledgement Letter (describing the NOI as an "authorization"). NYSDEC's unsupported contention that the authorization is not an "action" is therefore belied by the language in, and operational effect of, the NOI Acknowledgement Letter and SPDES general permit. As such, the issuance of the NOI Acknowledgement Letter and/or the automatic authorization under the SPDES general permit is clearly an "action of a . . . State administrative agency

acting pursuant to Federal law to issue, condition or deny any permit license, concurrence or approval . . . required under federal law." 15 U.S.C. § 717r(d)(l).

Additionally, NYSDEC's statements only further illustrate the fundamental injustice regarding the way in which NYSDEC authorized the SPDES permit for the Project. NYSDEC claims that DRN had sixty days to bring its claim. *See* NYSDEC Cross-motion, at 10. Assuming that there was a sixty-day time bar, NYSDEC provides no explanation as to how DRN, or the public, could possibly be expected to comply with such a time bar when they 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 NYSDEC perfunctorily offers here.[1]

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

There are only three circuit courts who have addressed whether general permits are subject to the public participation requirements of the CWA, and two

[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 NYSDEC's 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")

of those cases specifically support DRN's position.[2] Of those three circuit court decisions, NYSDEC only cites two of them and conspicuously ignores this Circuit's decision in *Waterkeeper Alliance v. E.P.A.*, which aligned this Court with the Ninth Circuit's decision in *EDC*. A careful reading of these cases demonstrates a strong likelihood that DRN will likely prevail on the merits.[3]

NYSDEC fails to address, distinguish, or even mention this Court's decision in *Waterkeeper Alliance*. There, the Court addressed the issue of public participation requirements for general permits issued pursuant to the CWA. *See generally* *Waterkeeper Alliance*, 399 F.3d 486 (2d Cir. 2005), *see also* DRN's Emergency Motion, at 9-10. In *Waterkeeper Alliance*, the Court evaluated the regulation of water pollutants contained in the runoff from concentrated animal feeding operations and followed the Ninth Circuit's rationale. *See* *Waterkeeper Alliance*, 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

[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.

[3] DRN provided an in-depth analysis of both the *EDC* and *Texas Ind. Producers* cases in its Reply to Millennium's Cross-Motion, and for the sake of brevity will not repeat those same statements here. *See* DRN's Reply to Millennium's Cross-Motion to Dismiss, at 4-9.

plans must be subject to public participation requirements of the CWA. *Id*. at 503-504.

Importantly, the Court in *Waterkeeper Alliance* 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. Incredibly, NYSDEC does not even cite this case let alone attempt to distinguish it.

As a result of the *Waterkeeper Alliance* holding, the EPA amended its regulations to require opportunities for public input prior to the approval of discharges through notices of intent and permits. *See* Revised National Pollutant

Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision, 73 Fed. Reg. 70,418 (Nov. 20, 2008) (codified at 40 C.F.R. pts. 9, 122, 412). As such, DRN's position therefore not only supported by the holdings in the Second and Ninth Circuits, but also by the EPA itself.

Similarly, *Sierra Club Mackinac Chapter v. Department of Environmental Quality* involved a challenge to the public participation opportunities provided in a state-administered NPDES permitting program. *See Sierra Club Mackinac Chapter v. Department of Environmental Quality*, 747 N.W.2d 321, 334-35 (Mich. Ct. App. 2008) (challenging public participation under Michigan's CAFO regulations); *see also* Terence J. Centner, *Courts and the EPA Interpret NPDES General Permit Requirements for CAFOs*, 38 Envtl. L. 1215, 1228-29 (2008) (analyzing the *Sierra Club Mackinac Chapter*, including the issue of inadequate public participation). The court found Michigan's permit program deficient because it did not provide public participation as required by federal statutory requirements. *Sierra Club Mackinac Chapter*, 747 N.W.2d at 334-35; *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").

NYSDEC relies almost exclusively on a state court opinion for the argument that Millennium's Notice of Intent "was not a permit application requiring public notice and comment." *See* NYSDEC Opp., at 14-15. However, NYSDEC's heavy reliance on *Natural Resources Defense Council, Inc. v. N.Y.S. Dep't of Envtl. Conservation*, 34 N.E.3d 782 (NY Ct. App. 2015)(hereinafter "NRDC"), is misplaced. 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; *see also* NYSDEC Opp., at 15 (noting that the court "declined to address that federal circuit split").

Additionally, the court in *NRDC* further acknowledged the limitation of its holding when it noted that EPA's regulations "do[] not appear facially consistent" with the position that NOIs are not applications, and 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 conclusion that an NOI is not an application. *NRDC*, 34 N.E.3d at fn. 15. In a powerful dissent, Judge Rivera correctly notes that "[t]his inconsistency alone undermines the State's argument that the NOI is something other than a permit or permit application." *Id*. at 813. In consideration of the foregoing, the *NRDC* case is either inapposite or provides further support for DRN's position.

Lastly, NYSDEC has no answer for a situation where a landowner who has a stream running through his/her back yard would have no notice or opportunity to engage with NYSDEC regarding the SPDES permit **prior** to NYSDEC's authorization of a potential withdrawal from or a discharge to that landowner's stream. *See* DRN Emergency Motion, 14. The NYSDEC's interpretation would leave this Court with no ability to review any authorizations issued by the NYSDEC for SPDES general permits pursuant to a Commission jurisdictional project prior to construction or operation. NYSDEC's half-baked speculation that a landowner could sue after the activity takes place ignores that the discharge and harm will have already occurred by that point. Furthermore, citizen suits can only be successful if people have sufficient information to learn about violations. *See, e.g.*, Pamela H. Bucy, *Private Justice*, 76 S. Cal. L. Rev. 1, 42 (2002) (noting that knowledge of violations often depends on having access to reports and the physical surveillance of discharge sources). As DRN has made clear, DRN had no notice of when the NOI was submitted, what was in the NOI, when the NYSDEC considered the NOI complete, and therefore whether the NOI met the substantive criteria for coverage under the SPDES permit. *See* DRN's Emergency Motion, at 7-17. This is simply not how the CWA's public participation provisions were designed to operate.

IV. DRN Will Suffer Irreparable Harm

NYSDEC contends that the destruction of mature trees is somehow not irreparable because DRN's "environmental interests are amply protected." *See* NYSDEC Opp., at 23. This statement is utter nonsense. NYSDEC 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. Nor does NYSDEC attempt to distinguish any of the numerous cases holding that the destruction of mature trees constitutes irreparable harm. *Compare with* DRN's Emergency Motion, at 20 (citing numerous cases holding that destruction of mature trees is "irreparable").

V. A Stay Pending Review is in the Public Interest

NYSDEC claims that "the public interest is best served by denying the stay." *See* NYSDEC Opp., at 23-24. Specifically, NYSDEC claims that the "full-fledged public notice and comment process before adopting the underlying 2015 General Permit" entitles the agency to a presumption that it has acted in the public's interest. *Id*. at 24. However, as described above, there is no part of the SPDES general permit that precludes or otherwise addresses the public participation rights as endowed by the CWA. *See supra* at 2-3. NYSDEC would ask this Court to believe that the public should have had the divining clairvoyance to predict that NYSDEC would not follow the CWA's mandates in future NOIs under the SPDES

general permit in its implementation of the program. This is not what the CWA demands, and therefore is not in the public's interest.

CONCLUSION

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

Respectfully submitted this 3rd day of January 2018,

/s/ Aaron Stemplewicz

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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 2,579 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 3, 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 3, 2018, the foregoing has been served via the Court's CM/ECF system, via email upon Respondents and Intervenor in this matter:

Dated: January 3, 2018

/s/ Aaron Stemplewicz

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